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## FAMILY PATRIMONY

On the occasion of the impending release of the first annotated version of the Quebec Family Patrimony legislation, which was prepared by the lawyers of our firm's Family and Personal Law group in cooperation with Carswell, we thought it appropriate to summarize in this Bulletin the provisions of the Act and their implications.

The first part deals with the consequences of family patrimony for the spouses. The second deals with the effects of family patrimony on creditors and in the case of bankruptcy.

### PART I - CONSEQUENCES FOR THE SPOUSES

#### PURPOSE OF THE ACT TO AMEND THE CIVIL CODE OF QUÉBEC AND OTHER LEGISLATION IN ORDER TO FAVOUR ECONOMIC EQUALITY BETWEEN SPOUSES (BILL 146 RESPECTING FAMILY PATRIMONY)

The object of this Act, which came into force on July 1<sup>st</sup>, 1989, is to favour economic equality between spouses, through the establishment of a family patrimony. The family patrimony shall be equally divided between the spouses in the event of separation from bed and board or the dissolution or nullity of the marriage.

Spouses married prior to July 1<sup>st</sup>, 1989 were entitled to elect until December 31<sup>st</sup>, 1990, to be exempted in whole or

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in part from the application of the Act, either by notarial deed or by a joint judicial declaration. This exemption option was not available to spouses married after July 1<sup>st</sup>, 1989.

By way of exception, spouses who had ceased living together before May 15, 1989 and had settled the consequences of their separation and organized their lives independently were not subject to the Act, provided they had entered into an agreement with respect to all the consequences of their separation or divorce.

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### **EFFECTS OF THE MARRIAGE CONTRACT AND MATRIMONIAL REGIME**

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Family patrimony is a direct consequence of marriage, regardless of the matrimonial regime elected by the spouses, and it applies to all persons legally married and domiciled in Quebec at the time the right to partition arises.

The provisions governing family patrimony are a matter of public order, and the spouses may not waive same during marriage. It is only upon separation from bed and board or nullity or dissolution of marriage that one of the spouses or both may renounce their rights to partition of the family patrimony.

The renunciation, in the course of judicial proceedings or by notarial deed, shall be entered in the register of personal and movable real rights, within a period of one year from the time when the right to partition arose.

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### **COMPOSITION OF THE FAMILY PATRIMONY**

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The family patrimony is composed of the following property:

- the residences of the family or the rights which confer use of them;
- the movable property with which they are furnished or decorated and which serves for the use of the household (including paintings and works of art, but not collections);
- the motor vehicles used for family travel;
- benefits accrued during the marriage under a retirement plan, including registered earnings, during the marriage, in the name of each spouse pursuant to the *Act respecting the Québec Pension Plan* or to similar plans (except for the registered earnings and accrued benefits under a retirement plan governed or established by an Act which grants a right to death benefits to the surviving spouse, where the marriage is dissolved as a result of death).

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### **DEDUCTIONS AND EXCLUSIONS**

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Property devolved to one of the spouses by succession or gift before or during the marriage is excluded from the family patrimony. The increase in value of such property during marriage is proportionately deducted. Similarly, the contribution made by one of the spouses during the marriage for the acquisition or improvement of property included in the family patrimony, where the contribution was made out of property devolved by succession or gift, or its reinvestment, is deducted from the net value of the family patrimony.

The net value of the family patrimony will be partitioned between the spouses, regardless of which of them holds a right

of ownership in the property forming part of the patrimony. The net value of the family patrimony is established by the deduction or exclusion of certain property devolved by succession or gift or its reinvestment, and any increase in value thereof.

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### **RIGHTS CONFERRED UPON THE NON-OWNER SPOUSE OF THE PROPERTY AND TERMS OF PARTITION**

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The non-owner spouse has a personal right in, and claim to, the property comprising the family patrimony which is registered in the name of his or her spouse. No undivided real right is conferred by law to the non-owner, subject to an out-of-court or judicial award of such real right.

For instance, the Court may award the exclusive ownership of certain property or an undivided portion thereof to one of the spouses in satisfaction of his or her claim. In certain circumstances, the Court may order the debtor spouse to perform his or her obligation by way of instalments spread over a period of up to ten years, with or without interest.

Security may also be granted to guarantee the performance of the partition obligations by the debtor spouse.

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### **PROTECTION OF THE NON-OWNER AGAINST THE ALIENATION OF PROPERTY BY THE OTHER SPOUSE**

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The Act embodies certain protective measures to govern the case where property included in the family patrimony was alienated or misappropriated, if the other spouse would have benefited from their inclusion in the patrimony.

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### **UNEQUAL PARTITION**

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In certain circumstances, the general application of the Act could result in an injustice for either spouse. To avoid such injustice, the Court may, on application therefor, order an unequal partition of the value of the property comprising the family patrimony and/or decide that there will be no partition of earnings registered pursuant to the *Act respecting the Québec Pension Plan* or similar plans.

To obtain an unequal partition, the injured spouse must show to the Court that equal partition would result in an injustice considering, in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them.

Spouses who settle amicably the consequences of their divorce or separation may provide for an unequal partition of the value of the property comprising the family patrimony.

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### **PENSION CREDITS**

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In no case may the partition of accrued pension benefits deprive the original holder of such benefits of over one-half of the total value of the benefits accrued to him or her before or during the marriage, or confer more benefits on the beneficiary of the right to partition than the original holder of these benefits has under the plan.

Between the spouses or for their benefit, accrued pension benefits are transferable and seizable for the purposes of partition of the family patrimony.

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## THE SITUATION UPON DEATH

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Since the family patrimony is to be partitioned in the event of death, the surviving spouse shall proceed to partition the value of the family patrimony with the heirs of the deceased, *except* for the portion of the patrimony which consists of the earnings registered during the marriage in the name of each spouse pursuant to the Québec Pension Plan or similar plans and for the exclusion of accrued benefits under a retirement plan governed or established by an Act which grants a right to death benefits to the surviving spouse.

A spouse may bequeath by will all his or her rights in the family patrimony, to the surviving spouse only.

Under their marriage contract or by notarial deed amending same, the spouses may provide that each of them will irrevocably donate to the other all his or her rights in the family patrimony in the event of death.

This is the only way for one to ensure that, upon death of one of the spouses, the surviving consort will not have to negotiate the partition of the family patrimony with the heirs of the deceased. The surviving spouse is also protected in that he or she may not be deprived, by will or otherwise, from a portion of the property comprised in the family patrimony.

## PART II - CREDITORS AND BANKRUPTCY

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### FAMILY PATRIMONY AND CREDITORS

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During the marriage, a spouse is not prevented by the provisions concerning the family patrimony from alienating or giving as security property comprising that

patrimony, subject to other provisions of the *Civil Code of Québec* regarding the protection of the family assets.

Thus, creditors may enforce their rights against property comprised in the family patrimony and may dispose of their debtor's property in accordance with the law without being hindered by the family patrimony partition rules, as these do not affect the rights and obligations of the spouses during the marriage.

In particular, creditors may validly obtain any security on the property of their debtor, within the limits set by law.

In the event of property transfers between spouses, the usual recourses are available to creditors for the review of transactions which are detrimental to their interests, including having them declared unenforceable against them.

Creditors cannot seize the claim of their debtors in the family patrimony, because the right to partition of the family patrimony is a right which is personal to the spouse and may only be exercised by instituting proceedings following the breakdown of the marriage or the death of either spouse. Therefore, creditors could not resort to an oblique action to force their debtors to provoke an action to effect a partition of the family patrimony.

It is unlikely that there are any additional precautions to be taken by secured creditors, such as hypothecary creditors, during the marriage of their debtors by reason of the provisions governing the partition of family patrimony.

These provisions do not confer upon the Court any power to cancel securities which were validly granted by the owner spouse, and therefore, no prejudice can be sustained by a creditor whose claim was already secured prior to the partition.

Other creditors, namely ordinary or unsecured creditors, would be well advised in obtaining a guarantee for their claim or an undertaking in their favour by both spouses, not only the debtor spouse, in order to avoid being placed in a difficult situation as a result of a partition which would prove unfavourable to the debtor spouse.

Once the claim of a spouse in the family patrimony has been liquidated by judgment or by agreement, that claim is the common pledge of creditors and may be seized in satisfaction of a judgment or may be transferred by the owner.

However, if that claim was not liquidated by a final judgment upon the breakdown of the marriage but remains to be liquidated by a practitioner or pursuant to a later action, creditors will probably be entitled to seize the claim pending its liquidation by partition or by judgment, since the claim will then be part of their debtor's patrimony.

Moreover, until the property of their debtor is finally awarded to the other spouse as a result of partition, creditors can count this property as part of their common pledge.

Once the partition is effected and the ownership of certain property is transferred to the other spouse pursuant to the partition, the property so transferred is no longer part of the common pledge of the debtor spouse's creditors. Except where the two spouses are jointly and severally responsible for a debt, the partition may operate so as to remove from the debtor's patrimony certain assets, more interesting to the creditor than others. The creditors cannot complain about that situation, unless they establish that the partition fraudulently deprives them of their rights, which would only be

possible in connection with a partition by mutual agreement (as opposed to a partition ordered by the Court).

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## **FAMILY PATRIMONY AND BANKRUPTCY**

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- **Prior to the time when the right to partition arises**

In case of bankruptcy, all the assets of the bankrupt spouse, including the property comprised in the family patrimony, will form part of the bankrupt's estate.

The trustee may deal with same in accordance with the provisions of the *Bankruptcy and Insolvency Act*, and even the registration of a declaration of family residence prior to the bankruptcy will not prevent him from selling the principal residence of the family.

The spouse of the bankrupt cannot apply for the partition of the family patrimony based only on the bankruptcy, and he or she has no provable claim in the bankruptcy of the other spouse.

The bankruptcy of the non-owner spouse will have no impact on the solvent spouse, who will retain the ownership of all his or her assets. The trustee cannot exercise any of the bankrupt's recourses under the rules governing family patrimony, because the bankrupt's right to partition has not yet arisen. The contingent right to partition is a personal right of the bankrupt which cannot be transferred to the trustee.

- **After the right to partition arose**

Where the right to partition of the family patrimony arose before the assignment in bankruptcy, the solvent spouse will have a provable claim in bankruptcy with respect to the partition of family patrimony property owed by the bankrupt spouse.

As a rule, the solvent spouse will not qualify as a secured creditor within the meaning of the *Bankruptcy and Insolvency Act*, nor be entitled to be treated as a preferred creditor. The solvent spouse is an ordinary creditor of the bankrupt for the partition of his or her rights in the family patrimony.

The trustee will be seized of all the bankrupt's property, including the assets which he or she owned at the time of the bankruptcy and which form part of the family patrimony.

If the bankrupt does not own the property comprised in the family patrimony or any part thereof, his or her claim in the partition of the patrimony will be part of the estate in bankruptcy, because the bankrupt's claim is no longer contingent but real.

As a rule, trustees will prefer to buy out a claim rather than being awarded the ownership of certain property. The solvent spouse might then attempt to negotiate a better settlement of the value of that portion of the patrimony which is payable to the trustee.

- **After the partition of the family patrimony**

The bankrupt will then own specific assets or liquidated claims, which will be administered by the trustee for the benefit of his or her creditors.

A partition of the family patrimony effected within twelve (12) months of the bankruptcy may be challenged by the trustee under the provisions of the *Bankruptcy and Insolvency Act* dealing with reviewable transactions between related parties. The contestation of a partition effected by the Court is more difficult than that of a partition agreed upon between the spouses and sanctioned by judgment.

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