



## THE LEGAL INSIDER

of Mr. Alain P. Lecours

### **Inheritance Law in the Canadian Province of Québec**

Canada is a federal state composed of ten (10) provinces, which have the exclusive jurisdiction to legislate in matters of private law within their respective territory. The whole of Canada is governed by the *Common Law* of English origin, the sole exception being the Province of Québec, heir to French civil law and inspired by the Napoleonic Code.

Following the British conquest of New France, French-Canadians became subjects of the British crown. However, they remained attached to French law and obtained its continuing application under British rule. With time, certain more liberal principles of English law were integrated within the Province's French-based law. During British colonial times, numerous notions of English succession law became part of Québec law and continued to evolve therein. This French law and these adopted principles of English law were first codified within the *Civil Code of Lower-Canada* of 1865. One import from English law of particular note is the freedom to test, i.e. a person's right to make a will so as to dispose of her possession as she wishes at the moment of her death. This freedom was initially absolute.

In 1994, the *Civil Code of Lower-Canada* was replaced by the *Civil Code of Québec* (C.C.Q.). This reform led to the apparition of a few, but nonetheless important, derogations to the absolute freedom to test. Indeed, a person may still dispose of her possessions as she desires, but now subject to certain reserves regarding close kin. The law now provides a protection for the surviving spouse as well as the children, through the institution of the family patrimony and through the survival of the obligation to provide support. Despite these few restrictions created in recent years, the freedom to test remains an essential principle of Québec succession law.

A succession is governed by the laws of the deceased's last domicile. It shall be opened in Québec, and Québec law shall find application, when the deceased was domiciled in this province at the time of his death. The validity of any will shall thus be appraised under Québec law. However, in the absence of a will, the partition of the succession is defined by law.

### **Intestate Successions**

When the deceased has not collected his last will in a testament, the liquidation of the succession is governed by the *Civil Code of Québec* (hereinafter designated the "C.C.Q."). Such successions are called intestate (without testament).

In such cases, the C.C.Q. provides the modalities for partitioning the deceased's patrimony. The legal devolution of successions favours successors in function of their degree of relationship with the deceased. Only persons with ties of blood or of adoption with the deceased are concerned. The surviving married or civil union spouse can also claim rights to an intestate succession, as opposed to a common law spouse. Indeed, a common law spouse has no status as a legal heir under the C.C.Q. Thus, if a person desires her common law spouse to inherit, she must provide legacies in a will, so as to avoid the consequences of the legal devolution. If a person deceases without drafting a will, her succession shall be partitioned between her legal heirs (children or mother and father, brothers and sisters, etc.), as described by the table hereinafter.

The directive lines of the legal devolution of successions are highlighted in the following table. This table constitutes a brief overview of the patrimony partitioning executed under civil law. Only the governing principle is laid out, being understood that exceptions and particular cases may lead to a different partition. It is necessary to consult a notary or lawyer to obtain pertinent information for any specific case.

Relation-ship	<b>Descendants: sons, daughters</b>	<b>Surviving spouse</b>	Privileged ascendants: mother, father	Privileged collaterals: brother, sister	Descendants of privileged collaterals: nephews, nieces	Ordinary ascendants et collaterals: grandparents, forefathers, uncles, cousins
Article of the C.C.Q.						
666	<b>2/3</b>	<b>1/3</b>	0	0	0	0
667/668/669	<b>100%</b>	†	0	0	0	0
672	†	2/3	1/3	0	0	0
673	†	2/3	†	1/3	0	0
671	†	100%	†	†	0	0
674	†	†	1/2	1/2	0	0
674/675	†	†	100%	†	0	0
678 (1) / (2)	†	†	†	†	1/2	1/2

†: Does not exist

0: No right to the succession

In an intestate succession, the law favours the deceased's descendants. Indeed, when the spouse is also deceased or renounces the succession, the descendants receive the entirety of the succession. Moreover, even if the surviving spouse participates in the succession, more than half thereof devolves to the descendants.

If the deceased had no descendants, the partition shall be shared between the surviving spouse and the privileged ascendants (mother and father) or, failing which, the privileged collaterals (brothers and sisters). In both cases, the greater portion devolves to the spouse.

### **Rules Governing Testamentary Successions**

In the partition of her patrimony, a person can easily set aside the legal devolution following through the exercise of her right to make a will. The principle of freedom to test is an essential aspect of property rights, which provide that a person may freely dispose of her property. Adopted by Québec law from English law, this principle is enshrined in Article 703 of the C.C.Q. Thus, a testator may make a will to transfer, by legacy, his property to whomever he desires, nigh without restriction.

However, not all people may make a will. Indeed, a valid will requires that the testator be legally capable at the moment he makes his will. If such is the case, the will shall remain valid even if the testator eventually becomes incapable at the time of his death. Under this rule, the will of a minor is deemed null of absolute nullity. The will of a person of full age under protective supervision is also deemed null, but of relative nullity only—its validity can solely be contested by those who have a legitimate interest in doing so.

Three (3) forms of will are recognized under Québec law:

- 1) *Notarial Will*: Made before a notary and at least one (1) witness. This form of will is governed by strict formal requirements executed before a notary acting in his capacity as a public officer. As a result, it constitutes a nigh-incontrovertible proof of the testator's intention. This document is very difficult to contest. It is deemed an authentic act, exempted from the formalities of probate it. Its veracity need not be verified as it is established by its very nature.
- 2) *Holograph Will*: Handwritten entirely by the testator and signed by him, with no other formal requirements. Thus, the conditions of form for this document are extremely simple. The will must unequivocal of the testator's intention. This is a condition to the validity of this will. This subjective quality shall be appreciated by the judge during the probate of the will.
- 3) *Will Made in the Presence of Witnesses*: So-called "will following the form derived from the laws of England", must be signed by the testator before a minimum of two (2) witnesses of full legal age, which must also sign the will. It is not required that the will be written by the testator himself; it can be drafted by another person. The essential condition is that the testator declares in the presence of the witnesses that the document effectively constitutes his will.

If it does not respect the formal requirements provided by the law, a will shall be struck null.

In Québec, a will made abroad can be declared valid if it respects the formal requirements either:

- of the law of where the will was made;
- of the law of the state of the testator's nationality;
- of the law of the testator's domicile;

And this either:

- at the time of the will was made;
- at the time of the testator's death.

### **Modification & Revocation of Wills**

A will may be modified or revoked at any moment before the testator's death, expressly or tacitly, or even by right. The sole exceptions to this rule are gifts *mortis causa* made by contract of marriage. Indeed, as long as the parties remain married, a *mortis causa* gift may not be revoked by the donor, unless the donee grants consent and the revocation is set down in a notarial act.

### **Patrimony Repartition by Will and its Consequences for Heirs and Legatees**

In his will, a testator can bequeath, at his discretion, the property within his patrimony. He can freely bequeath any property to any persons he chooses. A disposition as to the transfer of property contained in a will is called a legacy. There are three (3) categories of legacies:

- 1) *Universal Legacy* (art. 732 C.C.Q.): A legacy entitling one or several persons to take the entire succession, excepting any property being bequeathed by particular title. *Example*: "I leave all my property to my children, in equal part between themselves, and establish them as my sole universal legatees in absolute ownership."
- 2) *Legacy by General Title* (art. 733 C.C.Q.): A legacy entitling one or several person to take the ownership of an aliquot share of the succession or a dismemberment of the right of ownership of the whole or of an aliquot share of the succession. *Example*: "I leave to my daughter Claire all the immovable property I own at the time of my death."
- 3) *Legacy by Particular Title* (art. 732 C.C.Q.): Any legacy that is neither an universal legacy or a legacy by universal title. *Example*: "I leave by particular title to my son Anthony my immovable property located at (city, street, number), free of all hypothec and of all other debts."

A legatee (be he universal, by universal title, or by particular title) is entitled to the bequeathed property in the state it was in at the time of death. He is also entitled to any accessory property.

A universal legacy and a legacy by universal title create obligations for the legatee who accepts the legacy. Indeed, he becomes responsible of the debts relative to the property. Universal legatees and legatees by universal title receive the property but must also assume the attending debts (hypotheque, credit, etc.).

On the contrary, a legatee by particular title acquires the bequeathed property free of debts unless otherwise provided by the will. When a legacy designates a given property, to be left to a given person (as an example: "I leave my house located at 33 Maple St. to my daughter Claire"), that property shall be transferred unburdened by the hypothec. The universal legatees shall then be responsible of the hypothec.

A legacy lapses and becomes invalid when the legatee dies before the legator, when the legatee is unworthy to receive it, or when he refuses it.

### **Restrictions to the Freedom to Test**

Although at first glance the freedom to test appears absolute in Québec, some restrictions were imposed through the years in order to protect the family patrimony and to ensure the financial support of the family in case of death. The three (3) types of restrictions found in Québec civil law are as the following:

- 1) The survival of the obligation to provide support;
- 2) The partition of the family patrimony; and
- 3) The compensatory allowance.

#### 1) *Survival of the Obligation to Provide Support*

Because an obligation to provide support survives the death of the provider, the person to whom it is owed may claim it from the succession. The following persons may claim support: a spouse, an ex-spouse, and parents of the first degree in direct line (mother, father, and children of the deceased). Any sums granted as support are deducted from the succession before its partition. However, it must be noted that there are limits to the amounts that may be received from the succession as support.

*Example:* Mark is divorced from Claire. They had two children together, Mary and John. As part of the divorce judgment, the tribunal ordered Mark to pay an alimentary pension as support to Claire and the two children. After a few years, Mark remarries with Suzan; their son Albert is born. Still a few years later, Mark dies.

Claire and her two children Mary and John may claim from Mark's succession the alimentary pension due to them. Suzan and Albert also hold a claim for support against the succession. Once their respective claims are paid from the succession, the remaining patrimony is partitioned as provided by Albert's will or, failing which, by the legal devolution.

#### 2) *Family Patrimony*

In 1989, the new institution of the *family patrimony* was incorporated in Québec civil law. This concept aims to compensate for economical inequalities between the man and the woman in a marriage. Certain specific properties, owned by either or both spouses, constitute the family patrimony. Roughly summarized, this limitative list includes the following properties: the residences of the family, the movable property with which they are furnished and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan.

Both spouses retain an equal right to the net value of the family patrimony, irrespective of the actual ownership of the properties therein. At the dissolution of the marriage (including following one spouse's death), the net value of the family patrimony is partitioned between the spouses.

The dispositions of the C.C.Q. governing the partition of the family patrimony are of public order, and the spouses may not renounce to that partition as part of their contract of marriage or of their will. It must be noted that the family patrimony exists only within a marriage or a civil union, and thus does not apply to a couple in a common law relationship.

### 3) *Compensatory Allowance*

A third restriction is the compensatory allowance, which is payable to one spouse by the other, at the Court's order following the dissolution of a marriage or civil union (including by death), as a compensation for one spouse's contribution, in property or services, to the enrichment of the other spouse's patrimony. This payment may be an award of a sum of money, payable in cash or by instalment, or an award of rights in certain property.

*Example:* Betty has worked for Mark's business throughout their married life, but has never received pay for that work. Upon Mark's death, Betty could claim a compensatory allowance from Mark's succession, inasmuch as her un-remunerated work has contributed to the success of Mark's business, and thus to the enrichment of his patrimony.

A spouse claiming a compensatory allowance has the burden of proof for her contribution to the enrichment of her spouse's patrimony. The tribunal appraising the allowance to be paid takes into account the situation globally, including the partition of the family patrimony. A claim to a compensatory allowance becomes prescribed one (1) year after the dissolution of the marriage or civil union.

## **Key Principles of Québec Succession Law**

While the deceased had the full faculty to choose the manner in which his succession will devolve, certain legal principles govern to the partition process itself. These rules apply to all parties to the succession as well as all third parties, regardless of whether the deceased left a will or not.

One such fundamental principle in Québec law is that the heirs' personal liability remains limited regarding the deceased's debts, even when they accept the succession. It is indeed the succession itself that is directly responsible for the debts.

Another such principle of Québec succession law is the right of option. An heir has the free choice of accepting or refusing the succession. If he refuses, he is freed from any liability. In such a case, the descendants of that heir lose all rights in the succession. (Indeed, as will be further discussed hereinafter, an heir's descendants may receive that heir's rights in the succession, when he becomes dies or unworthy to inherit.)

Lastly, the third principle of Québec succession law that will be exposed concerns the fiscal questions regarding successions. As opposed to many states, there exists no special tax on successions in Québec. Any other outstanding fiscal debts of the succession are paid directly by the succession before partition, in the same fashion as debts of other natures; the heirs are not personally responsible for paying such taxes.

### 1) *Limited Liability of the Heirs*

The limited liability of the heirs and the separate nature of patrimonies are important ground rules with significant consequences. The limited liability rule provides that an heir that accepts the succession is only held liable for the debts up to the value of the succession's property. The succession's assets thus serve to pay the debts. If the assets are insufficient to cover the debts, the heir shall not be held personally accountable and could not be forced to pay these debts from his own patrimony. The separation of patrimonies is the corollary of that first ground rule: until such time as the succession has been liquidated, its patrimony and those of the heirs remain distinct.

### 2) *Right of Option*

A person holding a potential right to inherit is designated a successor. A successor is called upon to inherit, but may exercise his right of option: he may choose to accept or to renounce the succession. If he accepts, whether tacitly, expressly, or by law, the successor becomes an heir. Acceptation of a

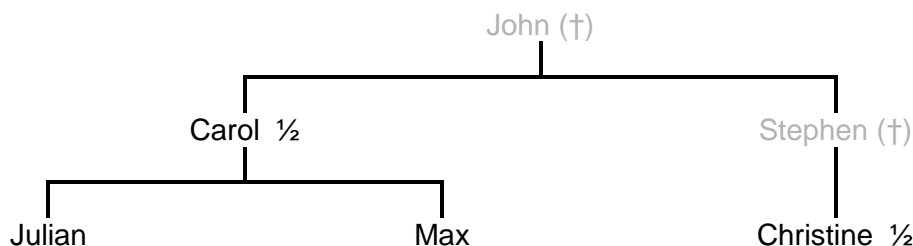
succession may not be revoked. Should he renounce the succession, he is deemed never to have been a successor. As of that moment, he is not responsible for the deceased's debts.

In certain cases, the C.C.Q. makes provisions for "forced acceptance" of the succession. Notably, such is the case when the successor would mingle the property of the succession with his own property, or when he neglects to act following the liquidator's failure to make the inventory of the succession. Moreover, in these cases, the law provides that the heir may exceptionally be held liable for the succession's debts beyond the value of the property he receives.

However, the creditors of a person renouncing the succession, to the detriment of their rights, have a remedy at their disposal. Within one (1) year of the renunciation, the creditors may apply to the court to declare that the renunciation may not be set up against them, and accept the succession in lieu of their debtor. In such a case, this acceptance has effect only in favour of the creditors who applied for it, and only up to the amount of their claim. It has no effect in favour of the person who renounced.

Furthermore, Québec civil law recognizes the principle of representation in an intestate or testamentary succession. This principle allows a relative to be called to a succession which his ascendant would have taken but is unable to take himself, having deceased previously or having been declared unworthy.

*Example:* John has two children, Carol and Stephen. Stephen deceases some time before his father John, leaving his daughter Christine. At the time of her father John's death, Caroline is still alive and a mother of two sons: Julian and Max.

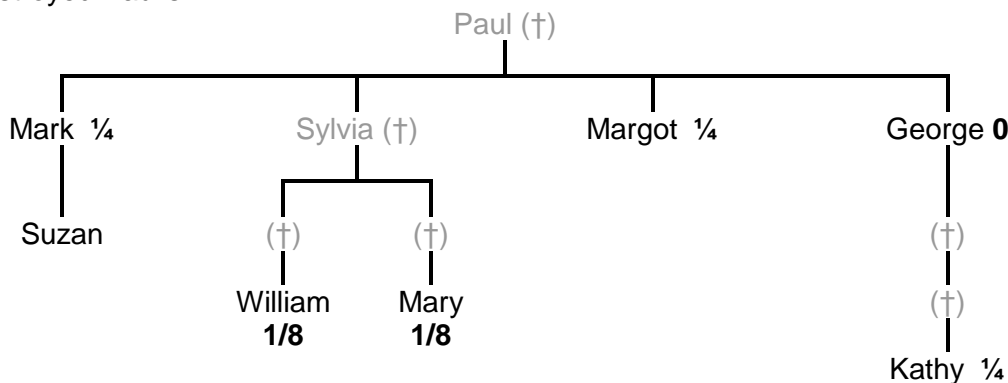


The application of the principle of representation allows the descendant (Christine) to take the part of the succession that would have devolved to her ascendant (Stephen) if he had not died before John.

There is no limit, in term of degree, to representation in the direct line of descent. Representation does not take place in favour of ascendants. However, a renunciation to the succession by a successor bars any possibility of representation for his descendants. A testator may also prevent representation for his heirs by an express stipulation to this effect in his will.

*Example:*

- Paul has four (4) children: Mark, Sylvia, Margot, and George.
- Mark is the father of Suzan.
- Sylvia died in the same car accident as her two children.
- William and Mary are Sylvia's grandchildren.
- Margot is single and has no child.
- George's only surviving descendant is his great-granddaughter Kathy.
- Furthermore, George has been declared unworthy to inherit from his father because he destroyed Paul's will.



Called to the succession are: Mark, William & Mary (as representing Sylvia), Margot, and Kathy (as representing George).

As Paul had four (4) children, the succession is partitioned in four quarters. Mark and Margot both receive a part equal to  $1/4^{\text{th}}$  of the succession. William and Mary share equally between themselves the part that would have devolved to the ascendant they represent, Sylvia. They thus each receive a part equal to  $1/8^{\text{th}}$  of the succession. As George has been declared legally unworthy to succeed following his destruction of Paul's will, representation allows George's great-granddaughter Kathy to claim his  $1/4^{\text{th}}$  part of the succession. In this instance, representation has not been stopped for any descendant by a successor renouncing the succession.

### 3) *Fiscal Implications*

In Québec, the heirs do not pay, strictly speaking, taxes on the succession's estate. Indeed, when the heirs receive their inheritance, it is already net of taxes. In fact, the liquidator pays the deceased's fiscal obligations from the succession's assets, before the partition is executed. The underlying fiscal interpretation is as follows: the deceased is deemed to have disposed of his property at the time of his death. Thus, the deceased shall be taxed on the capital gain realized following this (fictive) disposition of assets. Capital gain is calculated as the difference between an asset's value at the time of the disposition minus its value at the time of acquisition. 50% of the capital gain is added to the deceased's other revenues for the year; the succession is taxed based upon that total income.

The liquidator is responsible for paying the income tax owed by the deceased. This constitutes an important responsibility, as the liquidator may be held personally liable for any outstanding fiscal debts. Hence, it is strongly recommended that the liquidator obtain a certificate from the fiscal authorities confirming that all of the deceased's fiscal obligations have been paid in full.

It has been stated above that the deceased's income tax must be paid from the succession's assets before its partition to the heirs. When the total worth of the succession is not very high, this process should be relatively straightforward. However, when the deceased possessed an estate of high value, the payment of the fiscal debts from the succession's assets can become problematic. As a case in point, take the following example:

The deceased held the shares to the family business. Through the years, these shares have increased in value by \$5,000,000. It will be hard for the deceased's heirs to take up the family business, knowing that the succession must pay the income tax levied against the \$5,000,000 capital gain. In such a case, it likely will be required that the family business be sold, so as to pay the income tax.

To avoid situations such as the above, it is highly recommended to plan one's succession so as to diminish the fiscal consequences of one's death.

One of the most frequent methods of resolving the problematic surrounding the payment of the capital gain tax with the succession's assets is to create an estate freeze. This relatively simple process consists in the transfer of the testator's assets within his lifetime. To continue the preceding example:

The deceased could have transferred (sold) his shares of the business to his children a few years before his retirement. Thus, by selling the shares, the father can benefit from a retirement income, while by acquiring the shares before their father's death, the children can continue to operate the family business after their father's death without concern for the payment of the capital gain tax on their inheritance. Furthermore, by selling his shares at an earlier date, the father pays less income tax for the sale, as the capital gain realized at that time is lower.

## Conclusion

Québec is the sole Canadian province to possess its own civil law regime derived from French law. However, the testamentary rules provided by the *Civil Code of Québec* were also profoundly influenced by English law.

In Québec as in the other Canadian provinces, a person enjoys a very broad freedom to test, subject to very few restrictions. So as to protect the financial security of spouses, the legislator has instituted three (3) legal mechanisms of public order: 1) the survival of the obligation to provide support beyond the debtor's death; 2) the family patrimony, which must be partitioned with the deceased's spouse; and 3) the compensatory allowance, which allows the deceased's spouse to claim a sum of money when he/she has contributed *pro bono* to the enrichment of the deceased's patrimony.

In the absence of a will (intestate succession), the C.C.Q. sets out the principles of legal devolution, i.e. the manner in which the succession's property must be partitioned. Essentially, the property shall be partitioned in function of the successors' degree of relationship with the deceased.

Both the intestate succession and the testamentary succession are subject to the principle of representation. Representation intervenes whenever a successor has died previously to the deceased or is declared unworthy. In these cases, his own descendants may inherit in his stead.

When the succession is opened and they are called upon to succeed, the successors may decide to accept or renounce the succession. In the absence of a successor's explicit intention, the C.C.Q. provides that he is presumed to have accepted the succession subject to inventory (under reserve of knowing the state of the deceased's assets and liabilities).

When an heir accepts a succession that includes debts, he is not responsible for the payment of such debts beyond the value of the property he would receive from the succession. Indeed, the succession's patrimony remains separate from the heir's until the succession has been liquidated.

The task of paying the succession's debts rests with the liquidator. Hence, he is responsible for the payment of the taxes owed by the deceased before partitioning the property between the heirs. The taxes owed by the deceased are calculated at the time of his death and include the following legal fiction: the deceased is deemed to have disposed of his property at their market value at the time of his death. The deceased tax debt thus includes the capital gain tax owed on the realization of these assets and must be paid from the succession's property.

This presumed disposition may lead to important consequences for the heirs, as the succession may have to sell the deceased's property to pay the fiscal debts. In the case of a family business, the heirs may have to relinquish their ambitions to continue the business' operations if financial resources are inadequate. In such cases, the deceased would have been well served by planning the fiscal aspects of his succession, including the implementation of an estate freeze.

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The present article has been prepared by [Mr. Alain P. Lecours](#), lawyer and member of the Québec Bar and [Mrs. Alexandra Billet](#), student of the law faculty of the Université Lumière Lyon 2 and intern with the law firm of Lecours, Hébert Lawyers Inc. The English translation of the present article has been prepared by [Mr. Louis-René Hébert](#), lawyer and member of the Québec Bar.

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*Mr. Alain P. Lecours*  
LECOURS, HÉBERT LAWYERS INC.  
354, rue Notre-Dame Ouest  
Bureau 100  
Montréal, QC Canada H2Y 1T9  
Téléphone : (514) 344-8784  
Télécopieur: (514) 344-9790  
[Lecours@LecoursHebert.com](mailto:Lecours@LecoursHebert.com)

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