

Recent Developments in Secured Financing by Way of Instalment Sale, Leasing and Lease

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Abstract

Instalment sales contracts, leasing (*crédit-bail*) and leases are frequently used in secured financings in the Province of Quebec. Until recently, rights of vendors and lessors did not need to be registered in order to be enforceable as against third parties. Recent legislative changes to the *Civil Code of Quebec* require registration of rights of secured creditors relating to leasing contracts and certain instalment sales contracts and long term leases. This article briefly reviews the regime prior to such legislative changes. The specific provisions of such modifications concerning instalment sales contracts, leasing and leases, as well as assignment, are then analysed. Finally, the transitional rules are examined. If the regime applicable to a movable hypothec without delivery is taken as a benchmark, certain important issues in the area of secured financing by way of instalment sales contracts, leasing and leases are not addressed by the modifications to the *Civil Code of Quebec*. The reform has also introduced a number of uncertainties.

Résumé

Les contrats de vente à tempérament, crédit-bail et bail sont fréquemment utilisés au Québec en matière de financement. Jusqu'à récemment, les droits des vendeurs, crédit-bailleurs et locataires n'avaient pas à être inscrits afin d'être opposables aux tiers. Suite aux récents amendements apportés au *Code civil du Québec*, certains des droits de ces créanciers relativement aux contrats de vente à tempérament, crédit-bail et bail à long terme doivent être inscrits. Cet article passe en revue brièvement le régime en vigueur avant que les amendements au *Code civil du*

Québec n'entrent en vigueur. Les amendements ayant trait aux contrats de vente à tempérament, crédit-bail et bail, ainsi qu'à leur cession, sont ensuite analysés. Enfin, les règles transitoires sont également analysées. En adoptant le régime applicable à l'hypothèque mobilière sans dépossession comme point de comparaison, il appert que plusieurs questions importantes relatives à l'utilisation à titre de sûreté des contrats de vente à tempérament, crédit-bail et bail sont laissées sans réponse par les récents amendements au *Code civil du Québec*. La réforme a aussi introduit un certain nombre d'incertitudes.

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1- INTRODUCTION

Title manipulation is widely used in the Province of Quebec as a method for providing creditors with security. Retaining title to the subject property is generally regarded as a security *par excellence*. Recognizing this practice, the *Office de révision du Code civil* had recommended that certain types of consensual title manipulation arrangements come within the scope of the general provisions on hypothecs by introducing the notion of a presumption of hypothec. The legislator did not accept this suggestion in adopting the *Civil Code of Québec* (the “*Civil Code*” or “*CCQ*”). The Minister of Justice, in his commentary to the *Civil Code*,² stated the following:

Ainsi, le code n’a pas retenu la présomption d’hypothèque dont l’effet aurait été d’assimiler à une hypothèque toute convention qui procurait au créancier un avantage dans la réalisation de sa créance.

L’introduction d’une telle présomption risquait d’aller à l’encontre de la conception civiliste du droit des obligations et des sûretés. Elle aurait entraîné également une incertitude juridique considérable en raison des litiges que ne manquerait pas de soulever la difficulté de qualifier certaines conventions...

La solution retenue a consisté plutôt à apporter, dans d’autres dispositions du code, un tempérament aux difficultés dénoncées relativement aux conventions qui procurent au créancier un avantage sur les autres créanciers.

The provisions concerning instalment sales in Article 1745 et seq. of the *Civil Code* and leasing (*crédit-bail*) in Article 1842 et seq. of the *Civil Code* were adopted in light of the legislator’s decision to reject the presumption of hypothec.

An important element of the reform concerning movable security in the *Civil Code* was the introduction of a requirement for registration of the rights of creditors under certain consensual security devices, including title manipulation, in order for such rights to be opposable to third parties. Various provisions of *An Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 (the “*Implementation Act*”) appeared to suspend

2. *Commentaires du ministre de la Justice* (Quebec: Ministère de la Justice, Les Publications du Québec, 1993) (the “Minister’s Commentary”) at 1654.

the requirement for registration of certain instalment sales, sales with a right of redemption and leasing contracts until official notice that the *Register of personal and movable real rights* (the “Register”) was fully operational.³

An Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery, S.Q. 1998, c. 5 (“Bill 181”) was introduced in the National Assembly on November 28, 1997 and received assent on April 16, 1998. Although certain provisions came into force on July 1, 1998, the sections concerning instalment sales, leasing and leases came into force September 17, 1999. Bill 181 represents the legislator’s initiative to conform secured financing by way of instalment sales, leasing and leases with the principles which motivated the initial reform on adoption of the *Civil Code*.

The purpose of this article is to set out briefly certain elements of the regime prior to September 17, 1999 for secured financing by way of instalment sales, leasing and leases. Particularly, issues concerning the rules of accession, the right of the vendor or lessor to proceeds, the requirement of registration, realization and assignment will be canvassed. The specific provisions of Bill 181 concerning these security devices and assignments will then be analyzed using the themes previously considered. Finally, the transitional rules of Bill 181 are examined.

2- PRE-BILL 181 REGIME

a) Definition; Constitution

Instalment sale, leasing and lease are respectively defined as follows:

ARTICLE 1745 CCQ

An instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price.	La vente à tempérament est une vente à terme par laquelle le vendeur se réserve la propriété du bien jusqu’au paiement total du prix de vente.
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3. See, for example, *Implementation Act*, Articles 98, 107 and 162 prior to September 17, 1999. See also the discussion, *infra* at 14 et seq.

ARTICLE 1842 CCQ

Leasing is a contract by which a person, the lessor, puts movable property at the disposal of another person, the lessee, for a fixed term and in return for payment.

Le crédit-bail est le contrat par lequel une personne, le crédit-bailleur, met un meuble à la disposition d'une autre personne, le crédit-preneur, pendant une période de temps déterminée et moyennant une contrepartie.

The lessor acquires the property that is the subject of the leasing from a third person, at the demand and in accordance with the instructions of the lessee.

Le bien qui fait l'objet du crédit-bail est acquis d'un tiers par le crédit-bailleur, à la demande du crédit-preneur et conformément aux instructions de ce dernier.

Leasing may be entered into for business purposes only.

Le crédit-bail ne peut être consenti qu'à des fins d'entreprise.

ARTICLE 1851 CCQ

Lease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of a movable or immovable property for a certain time.

Le louage, aussi appelé bail, est le contrat par lequel une personne, le locateur, s'engage envers une autre personne, le locataire, à lui procurer, moyennant un loyer, la jouissance d'un bien, meuble ou immeuble, pendant un certain temps.

The term of a lease is fixed or indeterminate.

Le bail est à durée fixe ou indéterminée.

It should be noted that only movable property may be subject to a leasing contract. Although instalment sales and leases may relate to movable or immovable property, this article will only treat these contracts as they relate to movable property. Further, this article deals mainly with instalment sales, leasing and leases in a commercial context and does not specifically treat the provi-

sions of the *Consumer Protection Act*, R.S.Q., c. P-40.1 (the “*Consumer Protection Act*”) that deal with instalment sales and long term leases, except as the *Consumer Protection Act* provisions are useful in understanding instalment sales and leases in a commercial context.⁴

Instalment sales, leasing and leases have long been used as methods of providing creditors with security.⁵ Recent cases demonstrate that Quebec courts are also conscious of the fact that instalment sales and leasing are frequently used in secured financing.⁶

The characterization by Mr. Justice Lachapelle in *Destefano* of a leasing contract as a loan does not always correspond to the way in which other judges will view secured financing techniques. The Court of Appeal, in *Banque nationale du Canada v. Sous-ministre du revenu du Québec* (1997), REJB 98-2365 (C.A.), in determining if instalment sales could be considered to be loans and advances for purposes of Section 1138 (1) of the *Taxation Act*, R.S.Q., c. I-3, stated:

Les sommes dues sont donc un solde de prix de vente. Or, un solde de prix de vente doit se distinguer d'un prêt ou d'une avance, où la

4. Leasing may only be entered into for “business” purposes, in accordance with the third paragraph of Article 1842 of the *Civil Code*. The French version of this text speaks of enterprise. For a definition of enterprise, see the third paragraph of Article 1525 of the *Civil Code*.
5. For a general discussion of the pre-Bill 181 regime, see: A. Grenon, “Le crédit-bail et la vente à tempérament dans le *Code civil du Québec*” (1994) 25 R.G.D. 217; P.-G. Jobin & J. Deslauriers, “La vente dans le *Code civil* et la Loi sur la protection du consommateur” in *Obligations et Contrats*, vol. 5, (Montreal: Barreau du Québec, 1998) at 149; K. Smyth, “Equipment Financing” in *Financing Business: A hands-on seminar* (Conference McGill University Faculty of Law, Montreal, May 5 and 6, 1995) and R.P. Godin, “Le crédit-bail” in *La Réforme du Code Civil*, vol. 2 (Quebec: Presses de l'Université Laval, 1993) 679. For a discussion in respect of leasing under the pre-1994 law, see R. Demers, *Le financement de l'entreprise aspects juridiques* (Sherbrooke: Éditions Revue de droit Université de Sherbrooke, 1985) at 287. In light of the importance of title manipulation as a means of providing security to a creditor, Quebec doctrine sometimes characterizes these as *quasi-sûretés* or *sûretés-propriétés*, see, for example, J. Auger, “Problèmes actuels de sûretés réelles” (1997) 31 R.J.T. 619. For a discussion of the application of the private international law rules to *quasi-sûretés* on movable property, see J.A. Talpis & C. Troulis, “Conflict of Laws Rules under the Civil Code of Quebec Relating to Security”, in *Développements récents sur l'hypothèque* (1997) (Cowansville: Éditions Yvon Blais, 1997) 187 at 196 et seq.
6. See, for example, *Société générale Beaver Inc. v. Destefano* (1996), J.E. 96-1193 (C.Q.) [hereinafter *Destefano*]; *Location Tiffany Leasing Inc. v. 3088-6022 Québec Inc.* (1998), J.E. 98-1485 (C.Q.) and *Banque nationale du Canada v. Nadeau* (1998), J.E. 98-994 (C.Q.) (on appeal C.A.Q. 200-09-002005-988).

relation juridique entre les parties en est une de prêteur-emprunteur. De plus, les sommes en jeu ne peuvent constituer un prêt, la condition essentielle de la tradition d'une somme entre le prêteur et l'emprunteur étant absente en l'espèce. Le premier juge a donc qualifié avec exactitude les contrats intervenus comme des contrats de vente à tempérament comportant un solde de prix de vente.

J'estime qu'on ne peut dénaturer la forme de la relation contractuelle existante afin d'ajuster après coup ces prétentions aux contraintes fiscales.⁷

Even though some courts have adopted what appears to be a functional approach to the interpretation of particular debtor-creditor relationships, it is important to emphasize that the *Civil Code* establishes separate regimes applicable to instalment sales, leasing, leases and hypothecs. Quebec civil law allows creditors the latitude to exploit other title manipulation devices in order to obtain security, such as trusts, consignments, sales with a right of redemption, loans for use and others. Although these particular mechanisms may be attractive in certain circumstances, they will not be treated in this article.⁸

It is particularly important to note that reservation of title in sales as a security mechanism has not necessarily been fully covered by Article 1745 of the *Civil Code*. The definition of an instalment sale in such article requires that the seller reserve ownership of the property until *full* payment of the sale price. This definition should be compared to the definition of an instalment sale appearing in the *Consumer Protection Act* s. 132, as modified by Bill 181, where an instalment sale is defined as a contract involving credit whereby a merchant selling goods to a consumer reserves ownership of the goods until the consumer's performance of *all or part of his obligations*. An instalment sale where the seller reserves ownership of the property until payment of less than the

7. This decision may be contrasted to the earlier decision of the Quebec Court of Appeal in *General Motors Acceptance Corporation of Canada Ltd v. Sous-ministre du revenu du Québec* (1994), [1994] R.D.F.Q. 7 (C.A.), where, for purposes of determining whether GMAC was a "corporation de prêts", the Court of Appeal adopted a functional approach and stated that the use of instalment sales was simply a technique to obtain security for purposes of recovering funds advanced. Hence, for the Court of Appeal, GMAC was in fact a "corporation de prêts" as such term was used under the applicable provisions of the provincial taxation statute. See also *Gagné v. Tremblay* (1999), J.E. 99-418 (C.A.).

8. For a discussion of some of these devices, see J.B. Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (Cowansville: Éditions Yvon Blais, 1994) and L. Payette, *Les sûretés dans le Code civil du Québec* (Cowansville: Éditions Yvon Blais, 1994) at 37 et seq.

full sale price would therefore not technically be an instalment sale under Article 1745 of the *Civil Code* but could be an instalment sale under the *Consumer Protection Act*. Additionally, a sale where the seller reserves ownership of the property until a condition, other than full payment of the sale price of the sold property, occurs would not be an instalment sale under Article 1745 of the *Civil Code*. Hence, a vendor would be able to reserve ownership of the property until the purchaser satisfies some non-monetary obligation or pays less than, but not all of, the purchase price. It is therefore possible to structure an arrangement using sale and reservation of ownership of the property such that it will not constitute an instalment sale as defined in Article 1745 of the *Civil Code* thus avoiding any need to register for opposability and the need to follow the realization regime applicable to hypothecary creditors.

b) Accession

Even if a creditor employs an instalment sale contract, leasing or lease in order to continue to have ownership of the subject property, it is possible that such property may undergo modifications or may be used in conjunction with an immovable.

For movable hypothecs, various articles of the *Civil Code* provide protection to the hypothecary creditor in the event of modifications to the charged property. Article 2671 of the *Civil Code* states that a hypothec extends to everything united to the property by accession. Articles 2673 and 2953 of the *Civil Code* permit a hypothec to subsist on a new movable resulting from the transformation of charged property and resulting from the mixture or combination of several movables. The person acquiring ownership of such new property, for instance by application of the rules of movable accession, is also bound by such hypothec. Registrations may be required at the Register.

No particular provision in respect of instalment sales, leasing or leases deals with the applicability of movable accession. The general provisions outlined in Articles 971 et seq. of the *Civil Code* will therefore apply. A recent interesting example of movable accession arose in *Location Fortier Inc. v. Pacheco* (1997), J.E. 98-197 (C.S.) (Motion to appeal dismissed C.A.M. 500-09-005961-974) [hereinafter *Pacheco*]. In this case, a leased truck was modified, without the consent of the lessor, by the installation by the lessee of towing equipment which was under loan from a third party. In accordance with the evidence before the court, it

was not possible to separate, without deterioration or excessive labour and cost, the truck and the towing equipment. The Court applied the principles in Article 971 of the *Civil Code* so that the lessor became the owner of the truck and the towing equipment. The Court also required the lessor to pay the sum of \$6,000 to the owner of the towing equipment.

The application of the principles of movable accession will give comfort to certain vendors and lessors who, in their underlying contract, state that their rights of ownership will extend to other property that may be incorporated into the subject property. This protects the owner where the value of the original subject property exceeds the value of the added property or the value of the work involved in such addition. For example, if large equipment is subject to an instalment sale, a leasing or a lease, the principles of movable accession will operate such that most replacement parts become the property of the vendor or lessor, as the case may be.

Movable accession may be more problematic if title manipulation is used in inventory financing. For example, if a vendor under an instalment sales contract sells raw materials to a purchaser and such purchaser uses such materials by transforming, mixing or combining them with other property to form a new movable and such raw materials do not contribute the most to such new movable, the vendor will lose its real rights in the resulting property. Such vendor would be unable to preserve a real right in such property, unlike the position of a hypothecary creditor under Articles 2673 and 2953 of the *Civil Code*, and may only have a claim for reimbursement or damages against the owner of the resulting property.

Conversely, assume that the property subject to the instalment sales contract contributes most to the value of the resulting movable and hence, the vendor acquires, by movable accession, ownership in the resulting movable. If the original raw materials are combined with movables owned by third parties, the vendor may have an obligation to reimburse such third parties.⁹ Additionally, if such other movable property is subject to a hypothec granted by the purchaser, the vendor, even though acquiring own-

9. See Articles 973 and 975 of the *Civil Code* and *Pacheco*. Note that under Article 973 of the *Civil Code* undivided co-ownership may result if it is impossible to determine who contributed most to the new movable.

ership to the new movable, will be bound by the hypothec granted by the purchaser.¹⁰

Insofar as attachment to an immovable is concerned, the principles in Article 1843 of the *Civil Code* and Article 48 of the *Implementation Act* are useful. For a leasing contract, Article 1843 of the *Civil Code* specifically states that property which is the subject of a leasing, even if attached or joined to an immovable, retains its movable nature for as long as the contract lasts, provided it does not lose its individuality. Furthermore, the principles in Article 48 of the *Implementation Act* are applicable to instalment sales, leasing and leases so that movables subject to such contracts which are in an immovable and are used for the operation of an enterprise or the pursuit of activities will remain movable. Article 571 of the *Code of Civil Procedure* also provides a mechanism for the vendor or lessor to be able to realize on its property. If the property has become immovable by operation of Article 903 of the *Civil Code*, such property may be seized separately from the immovable since it does not belong to the owner of the immovable. This is similar to the rule for a movable hypothec without delivery, since movables charged with a hypothec which are permanently physically attached or joined to an immovable without losing their individuality and without being incorporated with the immovable are deemed, for enforcement purposes, to retain their movable character as long as the hypothec subsists.¹¹

If, however, the movable property subject to the instalment sale, the leasing or the lease, is incorporated into an immovable and loses its individuality, it becomes immovable property.¹² The vendor or lessor will lose any real right to such movable property and may only have a personal claim for reimbursement or damages. This should be contrasted with the rights of a hypothecary creditor under a movable hypothec who may, by registration at the applicable land register, have the movable hypothec subsist as an immovable hypothec.¹³

10. See Article 2673 *in fine* of the *Civil Code*.

11. See Article 2672 of the *Civil Code*. Article 48 of the *Implementation Act* is also useful in this context, since only movables which insure the utility of the immovable are to be considered as immovable property if they meet the other conditions in Article 903 of the *Civil Code*. Furthermore, under such provision of the *Implementation Act*, any movables which, in the immovable, are used for the operation of an enterprise or the pursuit of activities, remain movable.

12. See Articles 901 and 954 et seq. of the *Civil Code*.

13. See Articles 2796 and 2951 of the *Civil Code*.

c) Proceeds

Of importance in inventory financing is the ability of the secured creditor to have its security extend not only to the subject property but also to all proceeds, whether such be corporeal or incorporeal property. The Supreme Court of Canada in *Grondin v. Lefaiivre* (1931), [1931] S.C.R. 102 stated that, in accordance with the general principles applicable in the Province of Quebec, there is no real right or right to follow property (*droit de suite*) extending to money or proceeds of sold property. The court cited Articles 1994 and 2005a of the *Civil Code of Lower Canada* as exceptions. In spite of this decision, various cases under the pre-1994 regime held that the rights of ownership of a vendor under an instalment sales contract extended to tangible trade-ins, the claims resulting from a sale of such property and other proceeds, even if there was no specific mandate granted by the vendor to the purchaser under the relevant contract.¹⁴

The specific text upon which the Supreme Court of Canada relied to find a real right in proceeds has not been reproduced in the *Civil Code*.

For hypothecary creditors, Article 2674 of the *Civil Code* provides for real subrogation. A hypothec on a universality of property may subsist and extend to property of the same nature which replaces property alienated in the ordinary course of business of an enterprise. A hypothec on specific property will need to be registered in order to subsist on replacement property. If there is no replacement property, the hypothec subsists and extends to the proceeds of alienation provided these may be identified. No similar text is applicable to instalment sales, leasing or leases. Nevertheless, it is possible that a court will be sympathetic to the position of a vendor under an instalment sale in light of the cases interpreting the pre-1994 regime and the treatment in common law jurisdictions.¹⁵ It is difficult to see, however, what specific text may be invoked by the vendor or the lessor in order to justify a

14. See *Banque Royale du Canada v. Borg-Warner Acceptance Canada Ltée* (1987), [1987] R.J.Q. 2148 (C.S.) (settlement out of court 1991-11-12 C.A.Q. 200-09-000511-870); *Banque Toronto-Dominion v. General Motors Acceptance Corporation du Canada Ltée* (1987), [1987] R.L. 393 (C.A.); *In re Morin G.M.C. Ltée* (1985), J.E. 85-448 (C.A.); *Crédit Chrysler Canada Ltée v. Caisse populaire Laurier* (1994), J.E. 94-1326 (C.S.) and the discussion in Payette, *supra*, note 8 at 133 et seq.

15. See for example *Personal Property Security Act*, R.S.O., c. P-10, s. 25 [hereinafter PPSA].

finding that such vendor or lessor has a right in the trade-ins, the claims or other proceeds even if identifiable.¹⁶

Assuming that the previous jurisprudence is followed by the courts in their interpretation of the rights of ownership under the *Civil Code*, if such rights of ownership are on individual property that is subject to an instalment sale, leasing or lease and such property is sold in the ordinary course of an enterprise, no registration would be necessary in respect of replacement property in order for the rights of ownership of the applicable vendor or lessor to extend thereto. This should be contrasted to the requirement for registration, on replacement property, of a hypothec which charges individual property under the second paragraph of Article 2674 of the *Civil Code* in similar circumstances.¹⁷

d) Registration

The second paragraph of Article 1745 of the *Civil Code* stated, prior to September 17, 1999, that the reservation of ownership of property acquired for the service or carrying on of an enterprise may not be set up against third persons unless it is published. Similarly, Article 1847 of the *Civil Code* stated that the rights of ownership of the lessor may be set up against third persons only if they have been published. Article 1852 of the *Civil Code* permitted rights resulting from a lease to be published, but did not require them to be published in order to be set up against third persons.

Since the coming into force of the *Civil Code*, there has been some confusion as to the requirement for registration, as set out in the pre-Bill 181 Articles 1745 and 1847 of the *Civil Code*, of the relevant reservation of ownership under instalment sales and rights of ownership under leasing contracts in order to render such rights opposable to third parties. Two decisions seemed to confirm the necessity of registration for opposability.¹⁸ These two decisions did not, however, analyze the application of the *Implementa-*

16. Payette, *supra*, note 8 at 135 suggests that mandate may be used as a mechanism in order to preserve a real right in proceeds that are identifiable. See also *Yachting & Sports Pigeon Inc.* (1995), 2 C.B.R. (4th) 236 (Que. S.C.).

17. See *infra*, note 65, for the discussion of the current controversy in respect of the applicability of Article 2674 of the *Civil Code* to sales in the ordinary course of business of inventory *versus* equipment.

18. See *Fibro Design (1994) Ltée* (1997), B.E. 97BE-581 (C.S.) and *Banque Canadienne Impériale de Commerce v. Harris* (1998), J.E. 98-2116 (C.Q.) (Désistement de jugement du 15 septembre 1998 (C.Q.M. 500-22-021950-988) et désistement d'appel, 1998-11-20 (C.A.M. 500-09007155-989)).

tion Act and specifically Articles 98, 107 and 162, as such articles applied at that time. These provisions addressed the opposability of the reservation of ownership of a vendor under instalment sales and rights of ownership of a lessor under leasing contracts. Unfortunately, in accordance with a certain interpretation, the text of these provisions, only covered those instalment sales and leasing contracts entered into prior to 1994 and which continued in force.¹⁹ It should be noted that the administrative interpretation of these particular provisions, which appeared in the *Manuel de l'inscription et de la consultation des droits personnels et réels mobiliers*²⁰ at p. 16, prior to the May 19, 1998 revision, and appeared on all certified statements issued after registration of a right at the Register until recently, is that the reservation of ownership under instalment sales and the rights of ownership of the lessor under leasing contracts entered into since January 1, 1994 and prior to September 17, 1999 did not need to be registered in order to be opposable to third parties. Hence, even if a form was tendered for registration at the Register in order to attempt to render these rights opposable to third parties, a vendor or a lessor was unable to have their specific rights accepted for registration. Recent cases have confirmed that registration was not necessary in order to render the applicable rights opposable to third parties.²¹ The explanatory notes to Bill 181 also serve to confirm the intention of the legislator that reservations of ownership under certain instalment sales and rights of ownership under leasing contracts, even for contracts entered into since January 1, 1994, did not need to be registered, prior to September 17, 1999, in order to be opposable to third parties. This has now changed since the relevant provisions of Bill 181 are now in force.

19. See for example R. Godin, "Baux commerciaux et crédit-bail" in *Développements récents en droit commercial (1996)* (Cowansville: Éditions Yvon Blais, 1996) 103 at 114, where the author suggests that there is a serious doubt as to the opposability of the rights of ownership of a lessor arising under contracts of leasing entered into since January 1, 1994.

20. (Quebec: Les Publications du Québec, 1994) (the "User's Guide").

21. See *Poliquin v. Fiducie Desjardins Inc.* (1997), J.E. 1997-1512 (C.S.); *Talbot Équipement Ltée v. 2866-8192 Québec Inc.* (1998), J.E. 98-2221 (C.S.); *Wegoma Machinery & Fabrication Systems Inc. v. 9022-9394 Québec Inc.* (1998), J.E. 98-2222 (C.S.) and *Pétrolière Impériale v. Poirier* (1998), REJB 98-8618 (C.Q.). In fact, the Minister's Commentary concerning Article 162 of the *Implementation Act* seems to be clearer than was the text of such article: [*cet article suspend provisoirement l'application de la loi nouvelle, lorsque celle-ci, contrairement à l'ancienne, soumet certaines conventions à la publicité comme c'est le cas en matière de vente avec réserve de propriété ou faculté de rachat, de crédit bail...* Minister's Commentary, *supra*, note 2, Tome III at 136.

It is common practice to have some form of a master agreement whereby a vendor and a purchaser agree that certain movable property will be sold from time to time subject to a reservation of ownership. Cases prior to 1994 seemed to validate a reservation of ownership in a universality of property that could be sold from time to time.²² Professor Grenon has suggested that it would be possible to exploit Article 2987 of the *Civil Code* in order to provide for a single registration in respect of instalment sales that occur from time to time between the same vendor and purchaser pursuant to a master agreement.²³ Unfortunately, the article on which Professor Grenon bases this argument deals with registration by way of presentation of a summary. The second paragraph of Article 2982 of the *Civil Code* allows applications for registration in land registers by way of summary of a document, whereas Article 2983 of the *Civil Code*, in respect of registration at the Register, speaks of a notice unless otherwise provided by law or regulations. Therefore, there would seem to have existed some doubt as to the possibility of one single registration for various instalment sales of movable property between the same vendor and purchaser by way of a summary at the Register.²⁴

e) Realization

In respect of leasing and leases, no article restricts the rights of the lessor to use specific remedies in the case of realization. The full contractual and legal remedies not contrary to public order are therefore available.²⁵

In respect of instalment sales, Article 1748 of the *Civil Code* stated that if the purchaser fails to pay the purchase price in accordance with the specific contract, the seller may require immediate payment of the instalments due or take back the sold property. If the contract contains an acceleration clause, the seller may instead require payment of the remaining purchase price. Claxton characterized these remedies for instalment sales as pro-

22. See Payette, *supra*, note 8 at 222 and *In re Distribution Omnibus Inc.* (1986), [1986] R.J.Q. 2286 (C.A.).

23. See Grenon, *supra*, note 5 at 223-224.

24. Payette, *supra*, note 8 at 222 appears to be of the opinion that, under the pre-Bill 181 regime, no single registration was possible. Since the cases resolved the confusion as to the requirement of registration and the relevant provisions of Bill 181 are now in force, the possibility of a single registration under the pre-Bill 181 regime is a moot point.

25. See Claxton, *supra*, note 8 at 201 and 204.

viding for the right of either seizing or suing.²⁶ Article 1749 of the *Civil Code* required, if the reservation of ownership was published, that a seller who elects to take back the sold property make a demand on the buyer and any subsequent acquirer, if any, and follow the provisions applicable to the hypothecary recourse of taking in payment.

In the absence of the possibility to register reservations of ownership under an instalment sale, there was some doubt as to the applicability of Article 1749 of the *Civil Code*. Recent cases hold that the formalities set out or referred to in Article 1749 of the *Civil Code* were not applicable.²⁷

A vendor under an instalment sales contract may be able to use other rights available generally to sellers under the *Civil Code*. The right to stoppage *in transitu* set out in the second paragraph of Article 1740 of the *Civil Code* is available to the vendor.²⁸ This right may be particularly useful if it appears that the purchaser is experiencing financial difficulties and will be unable to perform a substantial portion of its obligations. Note that the right under the first paragraph of Article 1740 of the *Civil Code* is probably not applicable since payment of the purchase price under an instalment sales contract is, by the very terms of such contract, at a date later than delivery of the subject property.

The right of resolution under Article 1741 of the *Civil Code* is also not available to a vendor under an instalment sale. One of the conditions for applicability of this right of resolution is that the sale is not with a term.²⁹

26. Claxton, *supra*, note 8 at 189 where he states that this rule appears to be of public order. The case of *Crédit Ford du Canada Ltée v. Placements C.F.G.L.M. Provost Inc.* (1996), [1996] R.J.Q. 3111 (C.Q.) seems to confirm this.

27. See the cases cited, *supra*, note 21, *Ordinateurs Hypocrat Inc. v. Marché L.I.T.G. Express Distribution Inc.* (1994), J.E. 94-1196 (C.S.) and *Ateliers d'usinage Malcor Inc. v. Soniplastics Inc.* (1996), B.E. 97BE-357 (C.S.) (on appeal C.A.M. 500-09-00344-965; incidental appeal discontinued).

28. See also Article 1721 of the *Civil Code*.

29. A sale "net thirty days" has been held to be with a term, see *Les Alcools de commerce Inc. v. La Corporation de produits chimiques de Valleyfield Ltée* (1985), [1985] C.A. 686; *Fiducie du Québec v. Fabrication Précision Inc.* (1978), [1978] C.A. 255 and *Landry v. Gauthier* (1996), J.E. 96-429 (C.Q.). Courts have held that, if the conditions for Article 1741 of the *Civil Code* are not fulfilled, the general right of resolution is applicable, see *166606 Canada Inc. v. Bashtanik* (1996), J.E. 96-1556 (C.S.) and *Major et Cie v. Papadopoulos* (1997), B.E. 97BE-402 (C.Q.). The issue as to whether the general right of resolution is available for instalment sales is beyond the scope of this article.

Vendors may also invoke rights under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “*Bankruptcy and Insolvency Act*”). In particular, Section 81.1 of this act provides vendors with a right to repossess the goods sold and recently delivered to the purchaser.³⁰

f) Assignments

It is common place that the rights of a vendor under instalment sales are assigned absolutely to a third party.³¹ In certain industries, the vendor will sell to a related financing company all of the vendor’s interest in such instalment sales. In fact, certain standard form documents provide for such an assignment in the actual instalment sales contract. These assignments are intended to be absolute assignments and not as collateral.³²

Since certain of the rights arising under instalment sales contracts, leasing and leases constitute claims or other rights of actions, their assignment would be governed by Article 1637 et seq. of the *Civil Code*. In particular, in order for the assignment to be opposable to third parties, the formalities set out in the *Civil Code* must be fulfilled. Article 1642 of the *Civil Code* is applicable to an assignment of a universality of claims, present or future. Opposability to the vast majority of third parties, including a trustee in bankruptcy, would result from registration of an assignment of a universality of claims at the Register.

A number of difficulties arise in respect of assignments. In the first instance, note that there must be one registration per assignment of a universality of claims. Hence, it is not possible to have a single registration in respect of a master agreement which

30. For a discussion of this particular remedy, see L.W. Houlden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (Toronto: Carswell, 1998) at 3-192.16 et seq. Note that Section 81.1(1)(a) requires a notice to be sent within thirty days after delivery of the goods to the purchaser. Recent case law has allowed, in certain circumstances, the notice to be sent outside of this delay, see, *In re Rizzo Shoes (1989) Ltd* (1994), 29 C.B.R. (3rd) 270 (Ont. Gen. Div. (Bankruptcy)) and *In re Gestion J.F. Sports Inc.* (20 November 1995), Montreal 500-11-001599-956 (Sup. Ct). Vendors and lessors would also be able to invoke their rights under Section 81 of the *Bankruptcy and Insolvency Act*.

31. See, for example, the structure set out in some of the cases, *supra*, note 14 and *Compagnie Trust Royal v. Crédit Ford du Canada* (1989), [1989] R.J.Q. 856 (C.A.).

32. For a discussion on the distinction between an absolute and a collateral assignment, see S.H. Dietze, “Some Applications of the Implementation Act to Movable Security” (1997) 57 *R. du B.* 1 at 10 et seq.

provides for various assignments from time to time between the same assignor and assignee. Additionally, determining what is a universality is a difficult task.³³

It should be noted that, in respect of registered hypothecs, Article 3003 of the *Civil Code* provides that an assignment which is not registered at the applicable register and notified to the account debtor, is not opposable to a subsequent assignee that conforms with the relevant formalities. No equivalent provision applied prior to September 17, 1999 to the assignment of the reservation of ownership under instalment sales, the rights of ownership under leasing or rights resulting from leases.³⁴

3- WHY A REFORM?

As previously outlined, when the *Civil Code* was adopted, the legislator envisaged that the Register would serve for registration of certain rights that were commonly employed in secured financing in order that such rights be opposable to third parties. The *Implementation Act* suspended this application until the Register became fully operational. The adoption of Bill 181 clearly signaled that the legislator intended to render the Register fully operational within a short period of time.

Over the course of the last few years, various sectors of the economy have expressed the desire that certain rights associated with instalment sales and leases be required to be registered even if not arising in a commercial context. This is particularly true in respect of vehicle financing.³⁵ In addition, the purpose of the reform is to lift the suspension of the requirement for publication in respect of the reservation of ownership under certain instalment sales and the rights of ownership under leasing contracts and to require registration of rights resulting from certain long term leases. It was also felt that the recourses of a vendor under a commercial instalment sales contract should be the same as those

33. See the controversial decision addressing the notion of “universality” in *Automobile Maillot Inc.* (1996), J.E. 96-1843 (C.S.) where it was held that where 95 % of the claims of an assignor were from one account debtor, the assignment of all such claims was not an assignment of a universality. For a further discussion, see Dietze, *id* at 13.

34. Smyth, *supra*, note 5 at 6 suggests that Article 2939 of the *Civil Code* would require such registration.

35. See the remarks of Serge Ménard, the then Minister of Justice, in his presentation of Bill 181 to the National Assembly at Quebec, National Assembly, *Debates of the National Assembly* (10 December 1997) and available at www.si2.rdpqm.gouv.qc.ca.

available to hypothecary creditors. Another important measure is to permit physical persons not carrying on an enterprise to grant movable hypothecs without delivery. The following discussion focuses on the provisions of Bill 181 as they relate to instalment sales, leasing and leases.³⁶

4- INSTALMENT SALES

a) Definition

Bill 181 modifies the second paragraph of Article 1745 of the *Civil Code* in respect of the requirement for registration of reservations of ownership. It is important to note that there is no modification to the definition of an instalment sale. Therefore, the reservations of ownership that require registration are those arising under instalment sales contracts as defined in the first paragraph of Article 1745 of the *Civil Code* and not all reservations of ownership. Hence, as was the case under the pre-Bill 181 regime, it will be possible to structure a sale where the vendor retains title to the purchased property in such a fashion that it will not constitute an instalment sale for purposes of Article 1745 of the *Civil Code* and therefore will not require registration in order to be opposable to third parties.

b) Proceeds

By enacting Bill 181, the legislator has not modified any of the provisions applicable to instalment sales such that there would be a right in or to the proceeds of the sale of the subject property. Doubt remains therefore as to the right of the vendor to proceeds in the absence of a specific mandate entitling the purchaser to sell the subject property and requiring it to render account of the proceeds.³⁷

In light of this uncertainty, vendors may wish to require purchasers to grant a movable hypothec without delivery over the proceeds arising from the subject property. If the hypothec is set out in the deed of acquisition, the vendor may benefit from the provisions of Article 2954 of the *Civil Code* and obtain priority over a

36. Bill 181 also requires registration of rights of redemption under certain sales with a right of redemption but does not deal at all with consignment. This seems to be a curious choice by the legislator since, in the author's experience, consignment is much more frequently used than sale with right of redemption as a security mechanism. For a discussion of Bill 181 and sales with a right of redemption, see F. Duquette & L. Payette, "Influence de la loi 181 dans la pratique des juristes" (Conférence Regiscom, Montreal, May 27, 1998) [hereinafter Duquette & Payette] at 13 et seq.

37. See *supra*, note 16.

general hypothec, provided that the vendor's rights are registered within 15 days of the sale. The vendor's hypothec would also benefit from the real subrogation set out in Article 2674 of the *Civil Code*. Presumably, the super priority would extend to proceeds of alienation provided such proceeds are identifiable.³⁸

In certain circumstances, the vendor may decide that an attempt to protect rights in the proceeds is a theoretical rather than a practical concern. For equipment financing, for example, it is possible that the secured creditor views the tangible equipment as the only security rather than the equipment and the proceeds. For inventory financing, the practical difficulty may be identifying the specific proceeds since, in many circumstances, these will be mingled with the funds of the purchaser in any event.³⁹

c) Registration and Priority

i) Subject Property

The reservation of ownership under instalment sales of the following property now need to be registered in order to be opposable to third parties: (a) road vehicle determined by regulation, (b) other movable property determined by regulation, and (c) any movable property acquired for the service or operation of an enterprise. Any road vehicle or other movable property as determined by regulation⁴⁰, whether acquired for the service or operation of an enterprise or not, if subject to a reservation of ownership under an instalment sale, as defined in Article 1745 of the *Civil Code*, will need to be registered in order to be opposable to third parties.

The specific road vehicles set out in the regulation are some of those for which a descriptive file may be opened at the Register pursuant to the Regulation s. 15.⁴¹ The specific road vehicles are a

38. See *infra*, at 27 et seq. for discussion of the use of a vendor's hypothec in the event of multiple sales between the same vendor and purchaser.

39. See Payette, *supra*, note 8 at 139.

40. The regulation is in the form of an amendment to the *Regulation respecting the register of personal and movable real rights* G.O.Q. 1993.II.8058 (as previously amended, the "Regulation"). The regulation was published in the *Gazette officielle du Québec*, Part 2 on August 18, 1999 at 2719 (the "Amendment").

41. These are a passenger vehicle, motorcycle, taxi, emergency vehicle, bus, minibus and commercial vehicle, as defined in section 4 of the *Highway Safety Code*, R.S.Q., c. C-24.2, a trailer or semi-trailer whose net weight exceeds 900 kg, motor home and snowmobile of a model year more recent than 1988, as defined in section 2 of the *Regulation respecting road vehicle registration*, G.O.Q. 1991.II.5881 and a motorized all terrain vehicle equipped with handlebars and at least two wheels, that is designed to be straddled and whose net weight does not exceed 600 kg.

passenger vehicle, a motorcycle, a motor home, a snowmobile of a model year more recent than 1988 and a motorized all-terrain vehicle equipped with handlebars and at least two wheels, that is designed to be straddled and whose net weight does not exceed 600 kg. The other movable property consists of a caravan or a fifth-wheel, a mobile home, a boat, a personal watercraft and an aircraft.⁴²

The advantage of being able to register against vehicles at the Register is that a descriptive file under the specific vehicle identification number will be established upon an initial registration.⁴³ Hence, registrations and searches may be undertaken against the vehicle identification number, as well as against the particular grantor. This will permit an increased level of protection for those creditors who make specific registrations against such vehicles by vehicle identification number.

The third category of property requiring registration is movable property acquired for the service or operation of an enterprise. Given the expansive definition of enterprise in the *Civil Code*, and the uncertainty as to whether the movable property is acquired for the service or operation of an enterprise, it will be prudent to register in circumstances where any doubt arises.

Assume for a moment that a practitioner is unsure if the property subject to the instalment sale falls into one of the three above-mentioned categories. As a precaution, the practitioner registers the vendor's reservation of ownership at the Register. Would such a registration preclude the practitioner from subsequently taking the position that the reservation of ownership under such instalment sale is not required to be registered?

Under the PPSA ss. 46(5)(b), a registration pursuant to such legislation does not in and of itself create a presumption that the PPSA applies to the underlying transaction. No similar provision exists in the *Civil Code* in respect of instalment sales. Instead, Articles 2943 and 2944 of the *Civil Code* establish that registration of a right in the Register carries certain simple presumptions.

42. Amendment, *supra*, note 40 adding a new section 15.01 to the Regulation.

43. The Amendment requires a 17 character vehicle identification number that must be verified by a control algorithm prior to establishing a descriptive file for certain of the road vehicles. See amendment, *supra*, note 40, amending section 20 of the Regulation.

These simple presumptions may be rebutted, however, by evidence to the contrary.⁴⁴ It would seem, therefore, that the registration of such rights would not preclude a finding that such reservation of ownership does not require registration in order to be enforceable as against third parties.⁴⁵

An additional difficulty will arise in interpreting “acquired”. Is this a subjective or an objective test? Is it one of intention on the part of the purchaser at the moment of acquisition? If the property is initially acquired for purposes other than for the service or operation of an enterprise, can its change of use have an effect upon the requirement for registration? These questions will need to be addressed by the courts; however, until such time, the prudent approach is to register in all circumstances.

ii) Opposability

If the reservation of ownership under the applicable instalment sales contract is published within 15 days of the date of the sale, these rights will be opposable to third parties from such earlier date. This delay is similar to the delay applicable to the vendor’s hypothec of Article 2954 of the *Civil Code*. Note however, that for a vendor’s hypothec, such hypothec must be in a written act of acquisition.⁴⁶ An instalment sale need not be in writing in order to have effect between the parties.⁴⁷

If the reservation of ownership under the applicable instalment sales contract is not registered within 15 days of the date of the sale, Article 1749 of the *Civil Code*, as modified by Bill 181, sets out a method to determine the priority of such rights *vis-à-vis* the rights of third parties. Hence, if the reservation of ownership was not registered as required, the seller may take back the property only if it is in the hands of the original purchaser and subject to rights and charges which such purchaser may have granted on such property. If the reservation of ownership was published after

44. See Article 2847 of the *Civil Code*.

45. This reasoning may also apply to reservations of ownership that arise out of a sale contract that does not fall within the definition of an instalment sale set out in Article 1745 of the *Civil Code*. A practitioner may wish to register pursuant to Article 1745 of the *Civil Code* but later argue that the realization regime is inapplicable since the particular reservation of ownership did not require registration in the first instance in order to be opposable to third parties.

46. See Article 2696 of the *Civil Code*.

47. See Article 1385 of the *Civil Code*, *Fiducie du Québec v. Équipement de bureau J.R.D Inc.* (1985), J.E. 85-306 (C.A.) and Duquette & Payette, *supra*, note 36 at 6.

15 days from the date of the sale, again the seller may only take the property back if it is in the hands of the original purchaser unless such reservation of ownership was registered before the sale of the property by the original purchaser in which event the original reservation of ownership is opposable to the subsequent acquirer. In these cases, the seller may take the property back subject only to such rights and charges which the original purchaser may have granted and which were duly published prior to the registration of the reservation of ownership.

An example of this rule may be useful. Assume that a particular potential purchaser has previously granted to a financial institution a movable hypothec without delivery on all present and future movable property and that this hypothec was granted and registered prior to entering into an instalment sale. Assume further that the reservation of ownership of the vendor under the instalment sale was registered more than 15 days after the date of sale. As between the financial institution and the vendor, the rights of the financial institution will have priority. This would also apply if the reservation of ownership of such vendor were not registered at all.

In circumstances where the rights of a hypothecary creditor would rank prior to those of a vendor under an instalment sale, how could such vendor reacquire a first ranking position? If the vendor benefited from a vendor's hypothec which had been registered after 15 days from the sale, the vendor could attempt to obtain and, relying upon Article 2956 of the *Civil Code*, register a cession of rank. The text of Article 2956 of the *Civil Code* does not contemplate (nor does Bill 181 modify it to provide) the ability of a vendor under an instalment sale to register a cession of rank in order to re-obtain a first rank on the sold property *vis-à-vis* the hypothecary creditor. It would appear that a cession of rank between the vendor and the hypothecary creditor may not be registered. The vendor may therefore have to be satisfied with the undertaking of the financial institution to subordinate its security to the vendor's security.⁴⁸ It is possible that this agreement may not be opposable to the trustee in bankruptcy of the purchaser. In

48. See D. Desjardins, "Les conventions de priorité et de subordination ou au-delà de la simple cession de rang" in *Finance Commerciale et Crédits Syndiqués* (Montreal: McGill University Faculty of Law, October 31 and November 1, 1997) in respect of subordination and priority agreements.

practice, this may not be a concern if the financial institution is solvent.

iii) Diminishing of Ownership Rights

If the reservation of ownership of a vendor under an instalment sale is not registered or is registered outside of the 15 day period, such vendor runs the risk of losing or having its rights diminished *vis-à-vis* third parties. This result seems to run contrary to the traditional civil law respect for title and ownership. Certain commentators have in fact stated that the registration requirement diminishes ownership rights since the purchaser seems to be able to give greater rights to third parties than such purchaser may have.⁴⁹ In the author's opinion, this assertion does not take into account important considerations.

In adopting the *Civil Code*, the legislator modified the provisions concerning sale of the property of another. The circumstances when the sale of the property of another remains valid are more restricted than they were in the former legislation.⁵⁰ Therefore, under Quebec civil law, it has always been possible for a vendor to give greater rights than it has in property pursuant to the provisions applicable to the sale of the property of another.

For those secured creditors carrying on business in common law jurisdictions in Canada which have a regime similar to the PPSA, it will come as no surprise that a secured party or a trustee in bankruptcy may have greater rights than those the debtor has in the subject property. In the recent Supreme Court of Canada decision *Re Giffen* (1998), [1998] 1 S.C.R. 91 [hereinafter *Giffen*], it was held that, since the lease had not been properly perfected by registration or possession under the applicable provisions of the British Columbia legislation, a trustee in bankruptcy could end up with full rights in a leased car even if the bankrupt only had a right of use and possession.

Under current Quebec civil law, there is a possibility that non-consensual security, which prior to 1994 was a landlord's privilege and is now a legal hypothec, charge the property of third parties on the premises. Hence, by operation of law, a landlord

49. See Duquette & Payette, *supra*, note 36 at 7 et seq.

50. See Article 1713 et seq. of the *Civil Code* and Article 1487 et seq. of the *Civil Code of Lower Canada*.

benefiting from a legal hypothec would be able to have greater rights than those of the tenant since the landlord's legal hypothec would extend to property subject to an instalment sale, leasing, lease or other title manipulation device.⁵¹

For those practitioners familiar with secured transactions under the pre-1994 regime, it will be remembered that a consensual security by way of commercial pledge on property subject to an instalment sales contract was held to give to the secured party greater rights than the grantor.⁵² The Court of Appeal relied upon the provisions in the *Civil Code of Lower Canada* concerning the pledge of property of another in order to validate the commercial pledge. In light of the foregoing, it should not come as a surprise that by application of certain provisions of Bill 181 a grantor may give greater rights to a secured creditor or subsequent purchaser than such grantor has in the subject property.

iv) Single Registration

One of the most useful reforms introduced by Bill 181 is the notion of a single registration for reservations of ownership under certain instalment sales, rights of ownership under leasing contracts and rights under certain leases in respect of a universality of movable property of the same kind that is involved in such sales, leasing or leases in the ordinary course of business between persons operating enterprises.⁵³ This reform will definitely facilitate financing arrangements in the commercial context between two parties that may enter into master agreements and subsequent instalment sales, leasing or leases on a regular basis. If such rights are registered pursuant to Article 2961.1 of the *Civil*

51. See for example *Azzaria v. 2875781 Canada Inc.* (1995), J.E. 95-863 (C.S.).

52. See M. Goulet, *Le nantissement commercial* (Montreal: Wilson & Lafleur, 1990) at 21 et seq.; *Bo-Less Inc. v. Boily* (27 December 1979), Quebec 200-09-000192-770 (C.A.) (reproduced at Annexe 1 of Goulet) and Y. Goldstein, "A Bird's Eye View of Conflicting Claims" in *New Developments in Commercial Lending Meredith Memorial Lectures 1981* (Montreal: Richard De Boo, 1982) 88 at 101 et seq.

53. Article 2961.1 of the *Civil Code* speaks about reservation of ownership. Since the only reservations of ownership that require registration in order to be opposable to third parties are those under instalment sales, as defined in Article 1745 of the *Civil Code*, presumably Article 2961.1 of the *Civil Code* only applies to these reservations of ownership. The expression "of the same kind" or *de même nature* as used in Article 2961.1 of the *Civil Code* may be held to be equivalent to "of the same nature" or *de même nature* in Article 2674 of the *Civil Code*. Practitioners will need to determine what constitutes a universality of movable property of the same kind.

Code, they will not, however, be opposable to a third party who acquires the subject property in the ordinary course of business of the seller to such third party.⁵⁴ The reform does not apply to the vendor's hypothec which will not benefit from a single registration under Article 2961.1 of the *Civil Code*. Hence, it will be necessary, if the vendor's hypothec is used as security, to continue to register such a hypothec after each act of acquisition and within 15 days of the sale in order to benefit from the super-priority.⁵⁵

There are definite advantages to choosing instalment sales as a mechanism for secured financing over a hypothec, including a vendor's hypothec.⁵⁶ No written contract is necessary in order for the instalment sale to be enforceable⁵⁷ whereas for a conventional movable hypothec without delivery the absence of a written contract is cause for absolute nullity.⁵⁸ Furthermore, the deed of hypothec must contain a sufficient description of the hypothecated property or an indication of the nature of the universality of the charged property.⁵⁹ There is no requirement that the registration of reservations of ownership indicate a specific sum up to which the vendor will have rights in the subject property. This result should be compared to Article 2689 of the *Civil Code* where an act constituting a hypothec must indicate the specific sum for which it is granted. The Minister's Commentary in respect of this article would seem to indicate that this provision is an important mechanism in order to inform third parties of the extent of the security of a hypothecary creditor.⁶⁰ It is more properly the registration of the rights of the hypothecary creditor in the Register and the indication thereof of the specific sum which informs third parties of the amount of the charge and not the amount in the deed itself. Such policy choice seems to be key to the provisions concern-

54. Note the discrepancy in the English and French versions of the first paragraph of Article 2961.1 where "*son vendeur*" has been translated as the seller's.

55. See Payette, *supra*, note 8 at 199.

56. Table A appearing at the end of this article summarizes some of the advantages and disadvantages of employing movable hypothec without delivery, instalment sale, leasing and lease for inventory financing (Part I) and equipment financing (Part II).

57. See, *supra*, note 47.

58. See Article 2696 of the *Civil Code*.

59. See Article 2697 of the *Civil Code*. This may not represent a substantial difference, since, under the general rules applicable to obligations, the sold property must at least be determinate as to kind and determinable as to quantity. See Article 1374 of the *Civil Code*.

60. Minister's Commentary, *supra*, note 2 at 1684 where he states: "*La seule exigence de l'article est d'indiquer la somme pour laquelle l'hypothèque est consentie, de manière à informer les tiers de l'étendue de la garantie.*"

ing security by way of hypothec. It is therefore curious that such policy choice was not reflected in any of the modifications set out in Bill 181. Creditors consulting the Register will be unable to know the extent of the security of certain vendors and lessors unlike the charge of a hypothecary creditor.⁶¹

For reservations of ownership under instalment sales registered pursuant to Article 1745 of the *Civil Code* but not registered pursuant to Article 2961.1 of the *Civil Code*, no further registration is required in order for such rights to be opposable to third parties in the event of a sale of such property in the ordinary course of business.⁶²

As is the case for a movable hypothec without delivery, a single registration pursuant to Article 2961.1 of the *Civil Code* must be renewed prior to the expiration of a 10-year period in order to preserve opposability.⁶³

An obvious advantage for instalment sales contracts over movable hypothecs without delivery is that, if the reservation of ownership is appropriately registered, the vendor will not be out-ranked by a creditor benefiting from a prior claim, including a prior claim of the State for amounts due under fiscal laws.⁶⁴ Registration of the reservation of ownership preserves the effect of such right and consequently the subject property never enters into the patrimony of the purchaser and creditors benefiting from prior

61. The administrative practice prior to September 17, 1999, in respect of rights resulting from a lease was to permit, but not require, an indication of the periodic rent payable. See User's Guide, *supra*, note 20 at the previous 199. Note that Section 18 of the PPSA provides certain creditors with a right to receive information from a secured party. The *Civil Code* does not contain such a right nor does Bill 181 introduce such a right to compensate for the lack of an indication of a charging amount in registrations pursuant to Article 2961.1 of the *Civil Code*.

62. See Payette, *supra*, note 8 at 218 and Article 1714 of the *Civil Code*.

63. See Article 2798 of the *Civil Code*. Registrations of reservations of ownership under instalment sales and rights of ownership under leasing contracts, other than under Article 2961.1 of the *Civil Code*, will need to indicate the date after which the registration ceases to be effective. See Article 2983 of the *Civil Code*. Unlike a registration pursuant to Article 2961.1 of the *Civil Code* or in respect of movable hypothecs without delivery, this may be for a period of time exceeding 10 years. See the User's Guide, *ibid* at 74.3. No specific text in Bill 181 would permit renewal beyond the initially indicated date for those instalment sales, leasing and leases not registered pursuant to Article 2961.1 of the *Civil Code*. This is possible, however, under the general provisions of Articles 2937 and 2942 of the *Civil Code*.

64. See Article 2651 of the *Civil Code*.

claims would not be able to validly institute proceedings to cause such property to be seized and sold.

The final sentence of the first paragraph of Article 2961.1 of the *Civil Code* states that the reservation of ownership will not follow property sold in the ordinary course of business. There is a current debate as to whether property sold in the ordinary course covers not only inventory but also equipment.⁶⁵ Since instalment sales may be used for both inventory and equipment financing this debate also applies to the interpretation of Article 2961.1 of the *Civil Code*.

Financing by way of instalment sale has some disadvantages compared to secured financing by way of hypothec. We have already canvassed the uncertainty as to whether an instalment sale will extend to proceeds. In addition, the difficulties with movable and immovable accession remain for instalment sales and have not been dealt with by Bill 181.

There is no provision in Bill 181 or in the *Civil Code* analogous to Article 2700 or 2701 of the *Civil Code* for instalment sales. If movable property subject to an instalment sale requiring registration is sold out of the ordinary course of business, no additional registration is required in order for such instalment sale to continue to be opposable to third parties even if the vendor-owner has been informed or consented to such sale. Presumably purchasers in such circumstances will require that the purchaser-debtor under the particular instalment sale obtain a reduction of the vendor-owner's rights on such particular property.⁶⁶

If the particular purchaser from the debtor under the instalment sale is assuming the instalment sale, how does one deal with this assumption? It would seem that registration thereof should be required if the Register is to reflect accurately security charging particular assets. Neither Bill 181 nor the *Civil Code* specifically requires a subsequent registration in order to inform third parties of the charge on such assets now being held by the pur-

65. See D. Pratte, "Le droit de suite et l'hypothèque mobilière" (1997) 57 *R. du B.* 413, the doctrine and cases cited in such article and *Legault & Frères v. 2751-5717 Québec Inc.* (1997), [1997] R.J.Q. 2336 (C.Q.).

66. Although this may appear to be an advantage to financing by way of instalment sale, vendor's may want to have a mechanism to inform other parties of their continuing security as is the case for hypothecary creditors under Article 2700 of the *Civil Code*. If the hypothec or the instalment sale is registered against the vehicle identification number, no further registration is necessary.

chaser. The third paragraph of Article 2938 of the *Civil Code* states that the modification of a published right must also be published. Is this provision applicable to the sale out of the ordinary course of business of property subject to reservations of ownership? Would this also apply to the assumption of the obligation of the debtor under the instalment sale by the purchaser? If the purchaser is assuming obligations under a master agreement, a new registration pursuant to Article 2961.1 of the *Civil Code* will render opposable subsequent reservations of ownership under instalment sales but it is unclear how this protects the vendor's priority for prior assumed instalment sales.⁶⁷

v) **PMSI**

The advent of the single registration pursuant to Article 2961.1 of the *Civil Code* has prompted some commentators to see a resemblance between this mechanism and the purchase money security interest («PMSI») under the PPSA.⁶⁸ Although it is tempting to see a parallel between these two mechanisms, there are still significant differences.

A PMSI is defined under the PPSA as (a) a security interest taken or reserved in collateral to secure payment of all or part of its price, or (b) a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral to the extent that the value is applied to acquire the rights. The PPSA excludes from its scope a transaction of sale by and lease-back to the seller. A security interest is broadly defined under the PPSA and would include the security known under Quebec law as a movable hypothec, an instalment sale, a pledge, lease or consignment, that secures payment or performance of an obligation. In light of this extended list and the definition of a PMSI, more creditors may benefit directly from this security than vendors under instalment sales registering pursuant to Article 2961.1 of the *Civil Code*. In particular, a lender who finances the purchase of property may benefit from a PMSI; however, unless a mechanism such as assignment or subrogation is used,

67. See the discussion *infra* at 49 et seq. in respect of the possible scope of application of a registration pursuant to Article 2961.6 of the *Civil Code* as it relates to subsisting contracts.

68. See Duquette & Payette, *supra*, note 36 at 23 and F. Duquette, "Bill 181 and its Impact on Banking and Commercial Practices", Desjardins Ducharme Stein Monast, October 1998 at www.ddsm.ca.

such lender would be unable to benefit from a registration under Article 2961.1 of the *Civil Code*.⁶⁹

Section 33 of the PPSA establishes a super-priority for a PMSI over any other security interest in the same collateral given by the same debtor. The purpose of Article 2961.1 of the *Civil Code* is to facilitate a single registration for various instalment sales, leasing and leases entered into between two parties. This registration gives a super-priority to those creditors but only because of the combined effect of Article 2961.1 of the *Civil Code* and registration under, for example, Article 1745 of the *Civil Code*. Hence, the effect of Article 2961.1 of the *Civil Code* is much more analogous to the PPSA, s. 45(4) which permits a single registration to perfect various security interests subsequently granted by the debtor to the secured party.⁷⁰

The PPSA distinguishes between a PMSI in inventory and its proceeds and a PMSI in other types of personal property. In contrast, no distinction is made under Article 2961.1 of the *Civil Code*. In order for a PMSI in inventory and proceeds to have priority over any other security interest, (i) the PMSI must be perfected at the time the debtor obtained possession of the inventory or a third party at the request of the debtor obtained or held possession of the inventory, whichever is earlier, (ii) before the debtor receives possession of the inventory, the secured party gives notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by such secured party, and (iii) such notice states that the person giving it has or expects to acquire a PMSI in inventory and describes such inventory by item or type. There is no requirement in Bill 181 or the *Civil Code* for notice to other registered creditors in order for a registration under Article 2961.1 of the *Civil Code* to have the effect of giving it a super-priority. Furthermore, the registration under Article 2961.1 of the *Civil Code* is not at all linked to the debtor receiv-

69. See A. Grenon, "Major Differences between PPSA Legislation and Security over Movables in Quebec under the new *Civil Code*" (1995) 26 C.B.L.J. 391 at 400 et seq. Note, however, that lessors may benefit from a registration pursuant to Article 2961.1 of the *Civil Code*.

70. Pursuant to the PPSA, s. 45(4) not only subsequent PMSIs may benefit from an initial registration but most other security interests as well. Article 2961.1 of the *Civil Code* seems to correspond to the restricted and controversial interpretation of the PPSA, s. 45(4) set out in *Adelaide Capital v. Integrated Transportation Finance Incorporated* (1994), 6 P.P.S.A.C. (2nd) 267 (Ont. Ct (Gen. Div.)).

ing possession of the inventory in order to have the effect of giving a super-priority but rather it is linked, by application of the rule in Article 1745 of the *Civil Code*, to the date of the sale.

In respect of collateral, other than inventory and its proceeds, a PMSI has priority over any other security interest in the same collateral given by the same debtor if, other than in the case of intangibles, such PMSI was perfected before or within ten (10) days after the debtor, obtained possession of the collateral, as a debtor, or a third party, at the request of the debtor, obtained or held possession of the collateral, whichever is earlier. In the case of intangibles, other than inventory or its proceeds, the PMSI must be perfected before or within ten (10) days after the attachment of the PMSI in the intangible. The provisions concerning instalment sales under Article 1745 of the *Civil Code* and priority are not linked at all to obtaining possession of the collateral but rather to the date of the sale. The delays also differ. As a final note, it is clear that a properly perfected PMSI will give a super-priority in proceeds to the extent they are traceable or identifiable. The current doubt in respect of the extension of an instalment sale to proceeds has been canvassed previously.⁷¹

d) Realization

One of the avowed goals of the reform under Bill 181 is to provide instalment sales, other than in the case of consumer contracts, with the fully panoply of hypothecary recourses.⁷² Duquette & Payette argue that, since Article 1748 of the *Civil Code* has not been modified, the current rights of the vendor to either require immediate payment of the instalments or to take back the property remain, and in taking back such property it is the provisions concerning the taking of possession applicable to hypothecs that will apply.⁷³ The issue may center on the interpretation of the phrase «take back the sold property» in Articles 1748 and 1749 of the *Civil Code*.

In accordance with an alternative interpretation of the legislative changes to Article 1749 of the *Civil Code*, the taking back of the sold property under Article 1748 of the *Civil Code* would simply be analogous to obtaining possession of the hypothecated prop-

71. See *supra* at 13 et seq.

72. See Explanatory Notes to Bill 181.

73. Duquette & Payette, *supra*, note 36 at 11-12.

erty or surrender as a preliminary measure prior to exercise of any specific hypothecary recourse. Hence, Article 1749 of the *Civil Code*, as modified by Bill 181, is more than just a procedural mechanism. It sets out the substantive remedies available to a vendor under an instalment sale, other than in the case of a consumer contract, once the vendor has elected to take back the sold property as a preliminary step in realization.⁷⁴ Thus, when the *Civil Code* speaks of taking back the sold property in Article 1748, one must ask the further question as to what the specific rights of the vendor are upon taking back such property. These rights are governed by the realization regime set out or referred to in Article 1749 of the *Civil Code*.

Bill 181 introduces the rule that, if the instalment sale is a consumer contract, the *Consumer Protection Act* rules applicable to the exercise by the seller of the right of repossession govern. Other than in respect of instalment sales falling into the first two categories of subject property discussed above, one may be tempted to conclude that instalment sales that constitute consumer contracts need not be registered in order to be opposable to third parties. It should be noted, however, that there is an overlap in the notions of “consumer”, for purposes of the *Consumer Protection Act*, and “enterprise” under the *Civil Code*. Certain case law has held that professionals, skilled trades persons and farmers may be considered to be consumers for purposes of the *Consumer Protection Act*, although, their activities may also fall within the extended definition of an enterprise.⁷⁵ Hence, a vendor contemplating the use of instalment sales as a secured financing device may need to consider the application of the *Consumer Protection Act* in the event of realization and as to form and content of the contract. Notwithstanding that a particular instalment sale may constitute a consumer contract subject to the *Consumer Protection Act*, it may also require registration at the Register in order to be opposable to third parties if the movable property is acquired for the service or operation of an enterprise by a person considered to be a consumer for purposes of the *Consumer Protection Act*.

74. I am indebted to Mtre Catherine Jenner of Stikeman, Elliott for this argument.

75. See, for example, *Bérubé v. Tracto Inc.* (1997), [1998] R.J.Q. 93 (C.A.) and *Équipement Robert Charest v. Cadieux* (1998), B.E. 98BE-1258 (C.Q.) (Motion for permission to appeal refused 1998-08-26 (C.A.Q. 200-09-002119-987)). A prior draft of the *Implementation Act* had proposed amendments to the *Consumer Protection Act* such that the notion of merchant would correspond to enterprise in Article 1525 of the *Civil Code*. This version was not adopted.

5- LEASING

a) Definition

Bill 181 does not modify the definition of a leasing contract or the rules concerning movable or immovable accession nor does it address the uncertainty as to proceeds.

b) Registration and Priority

As is the case with reservation of ownership under installment sales, the rights of ownership of the lessor under a leasing contract will be opposable to third parties if registered at the Register within 15 days of the leasing contract. Bill 181 has not modified Article 1847 of the *Civil Code* in a manner analogous to Article 1749 of the *Civil Code* in order to indicate what will occur if the rights of ownership are not registered or are registered after the 15-day period. This has led Duquette & Payette to suggest that the rights of ownership of a lessor will not be opposable to third parties in such circumstances.⁷⁶

The general principles of the effect of publication are set out in Article 2941 et seq. of the *Civil Code*. Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect. Furthermore, unless otherwise provided by law, rights rank according to the date, hour and minute entered on the memorial of presentation, provided that the entries have been made in the proper registers.⁷⁷ In the absence of the last portion of the first paragraph of Article 1847 of the *Civil Code*, these general principles would mean that the rights of ownership of the lessor would only be opposable to third parties from the date, hour and minute of registration at the Register. When Bill 181 states that the effect against third persons operates from the date of the leasing contract provided the rights are published within 15 days, this is an exception to the rule set out in Article 2945 of the *Civil Code*. Therefore, if the rights of ownership of the lessor are registered within 15 days of the date of the leasing contract, rank will be established from the date of such leasing contract, otherwise, the rule in Article 2945 of the *Civil Code* applies and the rights of ownership will only rank from the date, hour and minute of registration.⁷⁸ This interpretation is more consistent with the overall

76. Duquette & Payette, *supra*, note 36 at 17.

77. Article 2945 of the *Civil Code*.

78. This position seems to be accepted by others, see *Bill 181 – Developments in the Law of Security in Quebec*, Ogilvy Renault, November 1998 at www.ogilvyrenault.com.

economy of the *Civil Code* and would permit a lessor under a leasing contract to register after the 15-day period in order to render the rights of ownership opposable to third parties from the date of registration. This would also be consistent with the interpretation of the rule applicable to the vendor's hypothec in Article 2954 of the *Civil Code*.

The difficulty with this interpretation is that the legislator specifically provides for the consequences of lack of registration or registration after the 15-day period for the reservation of ownership under instalment sales in the second and third paragraphs of Article 1749 of the *Civil Code* introduced in Bill 181. Does this demonstrate the intention of the legislator in the case of leasing contracts to require registration within the 15-day period following the leasing contract in order to render the rights opposable to third parties? Presumably, the general provisions concerning the effects of publication as outlined above would still be applicable since those particular rules have not been rendered inoperative by specific provisions in Bill 181⁷⁹.

Article 1847 of the *Civil Code* states that it is the rights of ownership of the lessor that must be registered in order to be opposable to third parties. The traditional view in the civil law is that the rights of ownership are *usus* (*droit d'usage*), *fructus* (*droit aux fruits et revenus*) and *abusus* (*droit de disposer*).⁸⁰ The nature of the leasing contract is that the lessee has the *usus*. *Fructus* would include the payments that the lessee makes to the lessor in return for the use of the particular property. Does the expression «the rights of ownership» extend to all of the rights generally associated with ownership? If so, in order for the lessor to be able to have its right to the payments under the leasing contract opposable to third parties, the rights of ownership thereunder must be registered in the Register. This should be contrasted with Article 1745 of the *Civil Code* where it is only the reservation of ownership in respect of the property under the relevant instalment sales

79. If the rights of ownership of a lessor are opposable from the date of registration when registration occurs outside of the 15 day period, it does not necessarily follow that the application of the general principles concerning publication and opposability will render the same results for a leasing contract as for those established by the second and third paragraphs of Article 1749 of the *Civil Code*. For example, the lessor may argue that its rights are opposable to a prior registered hypothecary creditor provided that the lessor's rights of ownership are registered prior to realization by such hypothecary creditor.

80. Article 947 of the *Civil Code* and D.-C. Lamontagne, *Biens et propriété*, 3rd ed. (Cowansville: Éditions Yvon Blais, 1998) at 55.

that must be registered in order to be opposable to third parties. On one possible interpretation, this reservation of ownership only includes the real right in the movable property subject to the instalment sale and does not extend to the income or payments generated under the instalment sales contract. Alternatively, one might argue that the reservation of ownership of the subject property reserves to the vendor all of the rights of ownership set out in Article 947 of the *Civil Code*, except those that are given to a third party by the owner, e.g. *usus* to the purchaser. This issue is of importance when considering the effect of Bill 181 on assignments.

A single registration at the Register will now be possible for a master agreement and various leasing contracts subsequently entered into pursuant thereto in order for the rights of ownership under all such leasing contracts to be opposable to third parties. This registration will be valid for a maximum of 10 years with a possibility of renewal.⁸¹

Practitioners are now faced with the task of determining whether a particular contract is a lease or a leasing. This characterization is important since the rights under a lease with a term of more than one year will not always require registration whereas the rights of ownership of a lessor under a leasing contract must always be registered in order to be opposable to third parties. If the rights resulting from a leasing contract are registered as a lease, arguably the rights of ownership of the lessor have not been appropriately registered and will not be opposable to third parties.⁸²

A contract that is not a leasing contract is not necessarily a lease. The current accepted position is that, since the adoption of the *Civil Code*, a leasing contract may no longer be characterized

81. Grenon, *supra*, note 5 at 227 suggests that leasing contracts between the same parties occur on an irregular basis. It is possible, however, to conceive of a financing structure whereby a lessee might finance its fleet of vehicles by way of various leasing contracts under a master agreement with a particular lessor. For a general discussion of other principles applicable to instalment sales contracts that apply also to leasing contracts, see the discussion, *supra*, under the headings of “opposability”, “diminishing ownership rights”, “single registration” and “realization”.

82. The registration form annexed to the Amendment, Form RD, distinguishes between rights under a lease and rights of ownership of a lessor under a leasing contract. The *Civil Code* introduced the important reform in 1994 whereby the registration regime for personal and real movable rights was based on registration of rights. Characterization of rights in order to determine proper registration is therefore of extreme importance.

as a lease.⁸³ Furthermore, certain commentators have suggested that if a particular contract does not conform with the definition of a leasing contract, it will not be characterized as a lease but will be an innominate contract.⁸⁴

Assume for a moment that a contract is designated by the parties as a leasing contract however, the only element necessary for a leasing contract that is absent is that the lessor does not acquire the property from a third person at the demand and in accordance with the instructions of the lessee. Since the relationship between the parties corresponds to the remaining conditions in Article 1842 of the *Civil Code*, it is very possible that such contract could also conform to the definition of a lease in Article 1851 of the *Civil Code*. The practitioner would therefore have to determine if the rights resulting from such contract will need to be registered under Article 1852 of the *Civil Code*. If, however, the contract is not a lease, no registration will be necessary in order to render the rights of ownership of the lessor enforceable against third parties. Practitioners may wish to adopt a prudent approach. If it is not obvious that a contract purporting to be a leasing contract conforms to the particular definition of leasing then the rights of ownership of the lessor thereunder may need to be registered as rights resulting from a lease as well as rights of ownership of the lessor under the leasing contract. This may lead to a multiplicity of registrations at the Register under Articles 1847, 1852 and 2961.1 of the *Civil Code*.

c) Realization

Bill 181 introduces no change to the current regime for realization for a leasing contract.

6- LEASES

a) Definition

Bill 181 has not modified the rules concerning movable or immovable accession. There is also no modification to address the uncertainty as to proceeds.

83. See Minister's Commentary, *supra*, note 2 at 1156 et seq. and Godin, *supra*, note 5 at 688.

84. See Godin, *Ibid* and P.-G. Jobin, *Traité de droit civil: Le louage de choses*, 2nd ed. (Cowansville: Éditions Yvon Blais, 1996) at 56. See also *Xerox Canada Ltée v. Pathfinder Marine Inc.* (1999), J.E. 99-580 (C.S.), a case under the *Civil Code of Lower Canada*, where the court held that a contract that did not fulfill all of the requirements for a leasing was in fact an innominate contract even though the contract had a great similitude to a lease.

Although Bill 181 has not modified the definition of lease in Article 1851 of the *Civil Code*, an important preliminary consideration is whether or not the particular contract constitutes a lease. We have previously examined the possibility of considering a contract that does not conform with all of the requirements of a leasing contract as a lease.⁸⁵

The case of *I.G.U. (Ingraph) Inc. v. L.B.G.P. Consultants Inc.* (1990), J.E. 90-1224 (C.S.) [hereinafter *Ingraph*] provides an interesting fact situation which, if to be decided now, would give rise to a number of issues. In this particular case, the parties had entered into a license agreement. L.B.G.P. Consultants Inc. was seeking to quash a seizure before judgment. Mr. Justice Trudel had to determine the nature of the license agreement. The plaintiff argued that the license constituted a real right of usufruct. The Court indicated that this particular legal institution licence coming from the common law was not part of Quebec civil law. After consideration of various authors, particularly French doctrine, Mr. Justice Trudel states that "...le tribunal juge que la licence d'exploitation dont I.G.U. est titulaire s'assimile à un contrat de louage et non à un usufruit." Some commentators, based upon the *Ingraph* decision, advance the argument that a license, whether it be exclusive or non exclusive, constitutes under civil law an innominate contract in the nature of a contract of lease.⁸⁶

For purposes of registration under Article 1852 of the *Civil Code*, it is not sufficient that the contract under consideration be "in the nature of", "analogous to" or "like" a lease. The contract must be a lease. The third paragraph of Article 2938 of the *Civil Code* states that personal rights and movable real rights require publication only to the extent prescribed or expressly authorized by law. The Minister's Commentary to Articles 1852 and 2938 of the *Civil Code* confirms that the law must expressly authorize or require publication of personal and movable real rights.⁸⁷ Accordingly, one should adopt a restrictive interpretation to provisions requiring publication of personal and movable real rights in order for such rights to be opposable to third parties. Hence, even if a license agreement is analogous to a contract of lease, unless such

85. See the discussion, *supra*, at 36 et seq.

86. See L. Payette and S. Picard "Les prises de garantie en matière de transferts de technologie" Presentation to the Canadian Bar Association and Licensing Executives Society (U.S.A. and Canada), Inc., December 2, 1998 at 26.

87. See, *supra*, note 2 at 1163 and 1846.

license agreement is specifically held to be a lease, rights resulting from the license will not be required to be registered in order to be opposable to third parties.

b) Registration and Priority

Article 1852 of the *Civil Code*, as amended by Bill 181, provides that the rights under a lease with a term of more than one year of the following property will need to be registered in order to be opposable to third parties: (a) road vehicle determined by regulation, (b) other movable property determined by regulation, and (c) any movable property required for the service or operation of an enterprise, subject to exclusions to be set out in a regulation.⁸⁸ Bill 181 provides that the term of one year or less is deemed to be a term of more than one year if, by operation of a renewal clause or another covenant to the same effect, the term of the lease may be extended to more than one year. As is the case with a leasing contract, opposability is from the date of the lease provided that the rights under the lease are published within 15 days thereof.

The third category of movable property in respect of which registration will be required is that “required for the service or operation of an enterprise”. This should be contrasted with the applicable test for instalment sales of movable property “acquired for the service or operation of an enterprise”. Does the use of the word “required” render this test more objective than the test under Article 1745 of the *Civil Code*?⁸⁹

The obvious issue that must now be faced is to determine what is meant by “rights under a lease”. Duquette & Payette state that this does not include the rights of ownership of the lessor.⁹⁰ They maintain that the rights under a lease are, for the lessor, the right to receive the rent and, for the lessee, the right to enjoyment of the property. In accordance with their position, lack of registration of the rights under a lease would not prevent a lessor from claiming the leased property in the hands of a third party.

88. See the comments, *supra*, at 21 et seq. concerning the scope of road vehicles and other movable property. The Amendment does not set out any exclusions.

89. See *supra*, under the headings of “opposability”, “diminishing ownership rights”, “single registration” and “realization” for other issues that arise for instalment sales that may also be relevant to leases.

90. See Duquette & Payette, *supra*, note 36 at 18.

The Minister's Commentary in respect of Article 1852 of the *Civil Code* specifically states that the rights under a lease are personal rights and therefore their registration must be specifically provided for by law. As an additional argument in favor of the position of Duquette & Payette, no one seriously advances the argument that registration of a lease of an immovable property is required in order to render the lessor's rights of ownership in the immovable opposable to third parties.

Duquette & Payette argue that registration is required in order that the receipt of rent by the lessor from the lessee be opposable to third parties. Since, as indicated above, *fructus* is a right that arises out of ownership, one might argue that the right to the rent does not arise out of the lease but is a corollary to the right of ownership which does not need to be registered on Duquette & Payette's argument. Note however, that the better view is that the right to rents from this specific lessee arises from the specific lease and hence the payment and terms and conditions in respect thereof are indeed rights resulting from the lease.

Arguably, the lessor may have other rights resulting from the lease. It is the essence of a lease that the lessee have the *usus* of the leased property. As a corollary, one of the rights of the lessor is its ability to take back possession of such leased property at the end of the term, in the event of default or upon other terms and conditions provided for specifically under the lease. Even if one of the rights of ownership of the lessor is to be able to take back the property, the specific terms and conditions under which the lessor may take back the property from this specific lessee are rights of the lessor specifically outlined under the lease. If this interpretation is accepted, one of the important rights resulting from the lease is the right of the lessor to require the lessee to give back the leased property upon the terms and conditions set out in the lease. Hence, if a lessor wants these rights to be opposable to third parties and protect its ability to realize on the specific leased property it is important that the lessor register these rights under the lease.⁹¹

91. As a further technical argument, Section II of Chapter IV of Title Two of Book Five of the *Civil Code* is entitled *Rights and Obligations Resulting from Lease*. Article 1863 of the *Civil Code*, as part of that Section, permits a party to require, where applicable, specific performance in the event of non-performance of an obligation and to resiliate the lease if non-performance causes serious injury. If the lessor resiliates, the lessee must surrender the leased property. The legis-

In many of the common law jurisdictions in Canada, it is a requirement that the rights of ownership of a lessor to leased property subject to a long term lease be perfected through registration in order to be enforceable against third parties.⁹² It would appear that an important consideration of the legislator in adopting Bill 181 was to conform Quebec civil law to the applicable regime in other jurisdictions in Canada. In fact, Serge Ménard, the then Minister of Justice, in presenting Bill 181, stated:

Le projet de loi propose également de soumettre à la même exigence tous les baux de plus d'un an, qu'ils concernent des particuliers ou des entreprises, dès lors que ces baux porteront eux aussi sur des véhicules routiers ou d'autres biens meubles de valeur.

On connaît bien l'importance qu'ont, de nos jours, la vente à tempérament ou avec faculté de rachat et la location à long terme comme modes de financement utilisés pour l'obtention de biens mobiliers et en particulier de véhicules automobiles, mais, lorsqu'on sait que les droits ou charges qui découlent de ces contrats demeurent présentement occultes et bien souvent ignorés des acquéreurs potentiels des mêmes biens, voire des créanciers de ceux qui détiennent ces biens, on comprend aisément la nécessité des deux nouvelles mesures que propose ici le projet de loi no. 181. On comprend d'autant plus, d'ailleurs, leur nécessité lorsqu'on sait aussi que des mesures similaires existent depuis déjà un certain temps dans les autres provinces canadiennes et que plusieurs groupes déplorent actuellement le fait qu'on ne dispose pas, au Québec, d'un système comparable à celui qui prévaut dans ces provinces permettant de vérifier l'existence de droits ou de charges grevant des véhicules routiers. ... [L]es citoyens et les entreprises du Québec sont en droit de bénéficier, au même titre que leurs voisins, d'un système de publicité des droits mobiliers, qu'il soit complet, fiable et qu'il permette d'assurer efficacement la protection de leurs droits en tant qu'acquéreurs ou créanciers.⁹³

It is very possible therefore that, in the mind of the drafter of Bill 181, it is in fact the rights of ownership of the lessor in leased movable property that must be registered in order to be opposable to third parties. As Duquette & Payette have pointed out, upon a strict technical reading of Bill 181, this is not clearly reflected. In light of our discussion above concerning the lessor's right to the

lator therefore characterizes the lessor's right to require specific performance and to resiliate as rights resulting from the lease.

92. See, for example, the discussion of the Supreme Court of Canada in *Giffen*, *supra*.

93. *Supra*, note 35.

rent as well as the right to take possession, the prudent approach, in order to protect the rights of a lessor, will be to register such rights.

Bill 181 does not distinguish between the rights of the lessor and the rights of the lessee resulting from the lease. The lessee has rights under the lease such as the right to the *usus* of the leased property in accordance with the terms of the lease. The question will arise as to the scope of the lessee's rights under the lease that are intended to be caught by Article 1852 of the *Civil Code*. Will such include, for example, the option to purchase the leased property? In the recent decision of *9046-7309 Québec Inc.* (1998), J.E. 98-2374 (C.S.), Mr. Justice Tremblay had to determine whether, for the purposes of the definition of rent in the security of Compagnie Trust Royal, such would include the claim of the lessor to a balance of purchase price of the equipment sold by the lessor to the lessee pursuant to an option to purchase set out in the lease. The Superior Court came to the conclusion that:

L'option d'achat d'équipement contenue au bail ne constitue pas une réclamation découlant du bail, c'est plutôt une obligation du propriétaire de vendre au locataire si jamais celui-ci exerce son option.

Even if the claim resulting from the sale following the exercise of the option to purchase in the lease was not a claim resulting from the lease, the Court states that the option to purchase was an obligation of the owner to sell to the lessee. Such obligation on the owner is also a right of the lessee.⁹⁴ Thus, the rights of a lessee under an option to purchase in a lease may not be opposable to third parties, including a trustee in bankruptcy of the owner or a subsequent acquirer of the owner's right, unless such rights are registered.

If a license agreement is held to be a lease,⁹⁵ one of the important rights resulting from the license may be exclusivity. A licensee wanting to render such exclusivity opposable to third parties may wish to have its rights registered. The licensor, given the possible sensitive nature of the rights subject to the license, may, on

94. Article 1850 of the *Civil Code*, in the context of a leasing contract, contemplates that an option to acquire the subject property may be given to the lessee by the contract.

95. For a discussion on this point, see *supra*, at 38 et seq.

the contrary, prefer that such rights not be divulged or available to the public.⁹⁶ Article 2936 of the *Civil Code* states that any renunciation or restriction of the right to publish a right which shall or may be published, as well as any penal cause relating thereto, is without effect. Licensors and licensees will need to give careful consideration to the necessity to publish rights resulting from the license and the way in which certain sensitive information should be protected so as not to be divulged or available to the public.

As is the case with the reservation of ownership under certain instalment sales and the rights of ownership under leasing contracts, rights resulting from the applicable leases may be the subject of a single registration for various leases arising under a master agreement.⁹⁷

Duquette & Payette argue that if the rights under the lease are not registered within 15 days of the lease, such rights will never be opposable to third parties.⁹⁸ As argued above in respect of the rights of ownership of the lessor under leasing contracts, rights resulting from leases should rank from the date of registration if registered outside the 15 day period.

c) Realization

Bill 181 introduces no change to the regime for realization.

7- ASSIGNMENTS

a) Universalities

Although the *Barreau du Québec* had suggested that Article 1642 of the *Civil Code* be modified in order to address the difficulties of rendering certain assignments of claims opposable to third parties,⁹⁹ the legislator did not take this suggestion into account in Bill 181. Practitioners will continue to be faced with difficult issues respecting assignments of claims and universalities.

96. Article 2981 of the *Civil Code* requires that the applications for registration at the Register identify the property concerned.

97. See the discussion *supra* concerning other issues applicable to a single registration.

98. Duquette & Payette, *supra*, note 36 at 19.

99. See *Mémoire concernant la publicité des droits personnels et réels mobiliers et la constitution d'hypothèque mobilière sans dépossession* (P.L. 181) (Montreal: Barreau du Québec, February 1998) at 4.

Bill 181 requires that assignments of reservations of ownership under certain instalment sales and rights of ownership under a leasing contract be registered in order to be opposable to third parties.¹⁰⁰ This should be compared to the current requirement for hypothecs under Article 3003 of the *Civil Code* where the formalities of registration and notification to the hypothecary debtor are only necessary in order to render the assignment of the hypothec opposable to a subsequent assignee that conforms to such formalities. Article 3003 of the *Civil Code* is analogous to Article 2127 of the *Civil Code of Lower Canada*. Under the prior legislation, the Quebec Court of Appeal interpreted the term “subsequent transferee” to exclude a trustee in bankruptcy.¹⁰¹ In light of these cases and the text of Article 3003 of the *Civil Code*, if the assignments contemplated under Article 1745 and 1847 of the *Civil Code* are not registered they will not be opposable to a trustee in bankruptcy.

In the modifications to Article 1852 of the *Civil Code*, Bill 181 omits to state, in contrast to Articles 1745 and 1847 of the *Civil Code*, the consequences of not registering an assignment. Application of the general principle in Article 2941 of the *Civil Code* will require assignments of rights resulting from a lease requiring registration to be registered in order to be opposable to third parties.

It would seem clear that the rights resulting from a lease include the rights of the lessor to the rent. Therefore any assignment by a lessor of receivables generated from leases will be subject to registration under Article 1852 of the *Civil Code*. Insofar as leasing contracts are concerned, if the rights of ownership, as such expression is used in Article 1847 of the *Civil Code*, include the *fructus* or payments, then assignment by a lessor of receivables arising from leasing contracts will also need to be registered in order to be opposable to third parties. These registrations would be in addition to any registration undertaken pursuant to Article 1642 of the *Civil Code*.

100. See Articles 1745 and 1847 of the *Civil Code*, as modified by Bill 181. There is no requirement, contrary to Article 3003 of the *Civil Code* in respect of hypothecs, that a subrogation in such rights be registered in order to be opposable to certain third parties.

101. *Banque de Nouvelle-Écosse v. Perras, Fafard, Gagnon Inc.* (1984), [1985] C.A. 21; *In Re Royal Limoge Inc.*; *Huot v. Quintex* (1994), 62 Q.A.C. 231 (C.A.) and *Provi-Grain (1986) Inc.* (1994), [1994] R.J.Q. 1804 (C.A.).

In previous discussions in this article,¹⁰² it was argued that there was a distinction to be made between assignments of receivables arising out of instalment sales contracts and assignments of the reservation of ownership. If the reservation of ownership in respect of the movable property outlined in Article 1745 of the *Civil Code* only includes the rights of ownership in such movable property and not any receivables generated under the applicable instalment sales contract, an assignment of such reservation of ownership would not include an assignment of the receivables. If receivables are included, registration is necessary in order for the assignment to be opposable to third parties.

The issue concerning reservation of ownership may, alternatively, be stated as to whether it is possible to assign separately the receivables generated under an instalment sales contract and the reservation of ownership in respect of the sold movable property. As an analogy, it would seem possible to assign the rents produced by an immovable without a transfer of the rights of ownership in the immovable.¹⁰³ Part of the difficulty may arise from interpreting Articles 1442 and 1638 of the *Civil Code*. When a claim, being a receivable under the instalment sales contract, is assigned will the reservation of ownership follow as an accessory or since it is directly related to such receivable? The distinction between *fructus*, *usus* and *abusus* may be useful. The *usus* is not in the hands of the owner since it is given to the purchaser under the instalment sale. Arguably therefore, the *usus* could be in the hands of the purchaser, part of the *fructus* in the hands of an assignee of the receivables under the instalment sales contract while the *abusus* remains in the vendor.

This result also follows from the nature of an instalment sale as contrasted to a hypothec. The hypothec is by its nature an accessory right,¹⁰⁴ hence if the obligation secured by hypothec is assigned by the hypothecary creditor, the hypothec will follow, subject to fulfilling any other formalities of registration or notification set out in the *Civil Code*. This may not necessarily be the result for the reservation of ownership of movable property under an instalment sale, since different rights in respect of the subject

102. See, *supra*, at 35 et seq.

103. Under the pre-1994 regime, it was common to have an assignment of rentals.

104. See Article 2661 of the *Civil Code*.

property may be in the hands of different persons. This distinction is important. For an assignment of a universality of claims arising from instalment sales, whose reservation of ownership is required to be registered under Article 1745 of the *Civil Code*, the assignee would be able to benefit from the receivable *vis-à-vis* third parties if it had complied with Article 1642 of the *Civil Code*. The assignee would not, however, be able to benefit from the reservation of ownership if it had failed to comply with the registration requirement for the assignment of such reservation of ownership.¹⁰⁵

b) Additional Registrations

With the introduction of Article 2961.1 of the *Civil Code*, it will be possible to make a single registration for various reservations of ownership under instalment sales, rights of ownership under leasing contracts and rights under certain leases. Practitioners may wish to have a master agreement in respect of assignments of such rights benefit from a single registration. This would be extremely useful for receivables financing structures including factoring and securitization where the receivables in such programs are generated under instalment sales, leasing contracts and leases.

As an example, a car manufacturer enters into various instalment sale contracts with its dealers from time to time. Registration in respect of these instalment sales between the particular manufacturer and the particular dealer may be made by a single registration. Over the course of a period of time, the manufacturer will also enter into new arrangements with new dealers. The manufacturer may then enter into a master agreement with a financial institution to assign from time to time certain of the receivables generated from present and future instalment sales contracts with present and future dealers. Article 2961.1 of the *Civil Code* appears to permit a single registration for the various assignments that may occur between the manufacturer and the financial institution. This registration would be in addition to any registration required under Article 1642 of the *Civil Code*. Note that a registration under Article 2961.1 of the *Civil Code* could be

105. Because of the interpretation given in this article to the rights of ownership in Article 1847 of the *Civil Code* and the rights resulting from a lease in Article 1852 of the *Civil Code*, this argument is not available in respect of leasing contracts and leases. From a practical perspective, this argument may be academic since the assignee will want to be able to collect the claims and benefit from the reservation of ownership.

valid not only for a single assignment but for various subsequent assignments that could arise from time to time pursuant to the master agreement¹⁰⁶.

Practitioners will also need to be aware that registrations will be necessary in connection with a sale of an enterprise if the rights being acquired are those of a secured creditor under applicable instalment sales, leasing contracts and leases. Furthermore, if the vendor of the enterprise is a lessee under leases which are required to be registered, an assignment of the leases in connection with a sale of an enterprise will also need to be registered in order for the acquirer to benefit from the rights of the original lessee.¹⁰⁷

Article 2712 of the *Civil Code* is not modified by Bill 181. Therefore, if claims subject to a movable hypothec result from instalment sales, leasing contracts and leases that need to be registered, there is no requirement that the hypothec on such receivables be registered against such particular registered rights or that the purchaser or lessee be notified. There is a current administrative practice at the Register such that if radiations or reductions for hypothecs are tendered where the hypothecary creditor has itself granted a hypothec on receivables to another hypothecary creditor, the registrar will not permit such radiation or reduction unless it is clear that the first hypothecary creditor may do so without the consent of such second hypothecary creditor or if the consent of the second hypothecary creditor is obtained. It is possible that this administrative practice will continue and be extended to instalment sales, leasing contracts and leases even if no particular provision requires that a hypothec on claims arising under such contracts be registered against them.¹⁰⁸

106. Although the text of Article 2961.1 of the *Civil Code* appears to permit a single registration for assignments, the User's Guide, *supra*, note 20 does not appear to provide for a mechanism for registration of multiple assignments where various third-party purchasers or lessees are involved. A Form RD may be used for multiple assignments between the same assignor and assignee where only one purchaser or lessee is involved, see for example, the User's Guide, *supra*, note 20 at 74.19 et seq.

107. A prudent approach is warranted even if the purchaser is acquiring by assignment of lease. There may be other considerations associated with the sale of an enterprise where the purchaser would be assuming certain rights of the purchaser or lessee under existing instalment sales, leasing contracts and certain leases. See *supra* at 29 et seq.

108. Perhaps the current practice arises from the interpretation of Article 2743 of the *Civil Code* which gives the creditor and not the grantor of the hypothec the right to grant acquittances. In accordance with Article 3065 of the *Civil Code*, radiations and reductions are associated with acquittances.

The current administrative practice for assignments of a universality of claims where some of such claims benefit from a registered hypothec is that the registration number of the hypothec may be included in the Form RG used for registration.¹⁰⁹ It is anticipated that a similar practice will be followed for assignment of registered reservations of ownership under instalment sales, rights of ownership under leasing contracts and rights resulting from leases that have a registration number at the time of assignment.¹¹⁰ A technical difficulty arises where a single registration pursuant to Article 2961.1 of the *Civil Code* is undertaken for present and future assignments. At the moment of registration pursuant to Article 2961.1 of the *Civil Code* there will be no registration number for certain future rights since the applicable vendor or lessor has not as yet entered into instalment sales, leasing contracts or leases with purchasers or lessees. Will the assignee need to add these registration numbers in the future? Unfortunately, the Amendment does not clarify this, but it is hoped that subsequent registrations will not be required or that an administrative practice will develop in order to address this particular issue in a practical way.

8- TRANSITIONAL RULES

Section 19 of Bill 181 repeals Articles 98, 107, 137 and 162 of the *Implementation Act*. The provisions of Bill 181 apply in respect of registration of rights under certain instalment sales contracts, leasing contracts and leases subsisting on September 17, 1999. The transitional period for registration of subsisting rights is one year from the date of coming into force of section 19 of the Bill 181. Such rights must be registered in order to remain opposable to third parties.¹¹¹ If the rights resulting from a lease have already been published pursuant to the former permissive rule under Article 1852 of the *Civil Code*, no transitional registration in respect of such rights is required.

It should also be noted that assignments of the relevant reservations of ownership under instalment sales contracts, rights of

109. See User's Guide, *supra*, note 20 at 152.

110. The Form RD will permit registration of certain rights and their assignment using the same form.

111. Compare this to Article 157 of the *Implementation Act* and the current controversy in the cases in respect of this provision. *Emballages PlastiDesign Inc.* (1996), [1996] R.J.Q. 1613 (C.S.) (reversed on appeal (1999), [1999] R.J.Q. 1361 (C.A.)); *2748-6588 Québec Inc.* (1996), [1996] R.J.Q. 1707 (C.S.) (appeal dismissed C.A.M. 500-09-002714-962) and *Re 157637 Canada Inc.* (1996), 43 C.B.R. (3rd) 146 (Que. C.S.).

ownership under leasing contracts and rights under the relevant leases must also be registered within such 12 month period in order for such assignments to remain opposable to third parties. This registration of assignments will be necessary even if all previous formalities to render an assignment opposable to third parties have been completed.¹¹² This will entail a large amount of due diligence not only concerning assignments but also in respect of the underlying instalment sales, leasing and leases since many of such underlying rights will need to be registered first before the assignments may be registered.

Section 25 of Bill 181 prohibits realization proceedings for certain instalment sales if there has been no transitional registration of such instalment sales. This may be compared to Article 158 of the *Implementation Act* which had the same effect in respect of certain pre-1994 securities that became, by operation of law, hypothecs on January 1, 1994.

An issue will arise as to whether it is possible to undertake a single registration for various subsisting instalment sales, leasing contracts and leases arising in the ordinary course of business between persons operating enterprises. No specific transitional rule applies Article 2961.1 of the *Civil Code* to transitional registrations of subsisting instalment sales, leasing contracts and leases. The Amendment, in the second paragraph of a new Article 52.2 to the Regulation, requires that a Form RD be used for transitional registrations where "...registration of the right is required under article 2961.1 of the *Civil Code*". In order for Article 2961.1 of the *Civil Code* to be used, the phrase "preserves all the rights ... in that property" must be interpreted as preserving the rights of the applicable vendor and lessor in the property subject to all subsisting contracts. This interpretation does not seem to concur with the intention that Article 2961.1 of the *Civil Code* be used to preserve rights in property subject to one specific contract and similar property subject to subsequent contracts. Article 3024 of the *Civil Code* empowers the government, by regulation, to take all necessary steps for the implementation of the provisions of the *Civil Code* dealing with publication. The Minister's Commentary in respect of this provision are instructive in determining its scope:

En prévoyant que le gouvernement peut, par règlement, prendre toute mesure nécessaire à la mise en application du Livre neu-

112. See Article 94 of the *Implementation Act* and the discussion in Dietze, *supra*, note 32 at 11 et seq.

vième, l'article vise à octroyer au gouvernement la possibilité de réglementer tout ce qui n'est pas une règle de base de la publicité. L'article devrait ainsi faciliter la mise à jour des règles de fonctionnement des registres.¹¹³

In light of this interpretation of the government's ability by regulation to modify the regime for publication, it would have been preferable that Bill 181 specifically address the possibility of a single registration during the transitional period in order to preserve rights relating to subsisting contracts. Hopefully, a court will uphold the rights of the vendor or lessor in the subsisting contract if registration is undertaken in accordance with the administrative practice adopted pursuant to Article 52.2 of the Regulation.

When Bill 181 was initially adopted in 1998, there was some thought that it would come into force by the end of that year. There was then some suggestion that this would be on July 1, 1999.¹¹⁴ The government was apparently working towards having the Register functionally able to receive electronically transmitted registrations before proclaiming the remaining provisions of Bill 181 in force.

As an interesting aside, the federal government introduced on June 12, 1998 Bill C-50 as a first act to harmonize federal law with the civil law of the Province of Quebec. This will be known as the *Federal Law – Civil Law Harmonization Act, No. 1*. If this Bill is adopted in its current form, it will modify the *Bankruptcy and Insolvency Act* such that a vendor of any property sold to a debtor under a conditional or instalment sale, if the exercise of such vendor's right is subject to the provisions of the *Civil Code* concerning hypothecs, will be considered to be a secured creditor for purposes of the *Bankruptcy and Insolvency Act*. This would be a major departure from the current treatment of such vendors. By introducing this provision, the federal government would be treating certain instalment sales vendors as equivalent to hypothecary creditors. This almost seems to be the adoption of a presumption of hypothec for these vendors. Since the Quebec legislator has expressly rejected the presumption of hypothec, Bill C-50 does not seem to harmonize the federal law with the underlying principles of Quebec civil law.

113. Minister's Commentary, *supra*, note 2 at 1908.

114. See M.-J. Longtin, "Les incidences de la réforme du Code civil sur la législation" in *La réforme du Code civil, cinq ans plus tard* (Montreal: Éditions Yvon Blais, 1998) 1 at 30.

9- CONCLUSION

Bill 181 represents the most important reform undertaken by the Quebec legislator in the area of secured transactions since the coming into force of the *Civil Code* and the *Implementation Act* in 1994. Instead of simply publishing a notice indicating that the Register is fully operational, as provided previously in Article 162 of the *Implementation Act*, the legislator determined that certain modifications to the *Civil Code* were necessary in order to render the regime applicable to instalment sales, leasing and leases more responsive to the types of secured financings undertaken in the Province of Quebec.

By introducing the provisions of Bill 181, the legislator sought, particularly for instalment sales contracts, leasing and leases, to expand the requirement for registration of certain rights under these contracts in order that they be opposable to third parties. The intent is also to expand the recourses available to a vendor under certain instalment sales contracts in a commercial context. In order to facilitate certain transactions, Bill 181 introduces a single registration for various instalment sales contracts, leasing and leases among the same parties concerning a universality of movable property of the same kind where such parties are involved in an enterprise.

If the regime applicable to a movable hypothec without delivery is taken as a benchmark, certain important issues in the area of secured transactions by way of instalment sales contracts, leasing and leases are not addressed in Bill 181. The reform has also introduced a number of uncertainties.

The issues not squarely addressed by Bill 181 include the following:

1. If movable property subject to an instalment sales contract, leasing or lease is transformed or modified, the rules of movable accession may operate such that the owner loses its real right in such property. Conversely, in certain cases, the owner may own such resulting property but subject to a movable hypothec. This differs from the result for a movable hypothec without delivery since a hypothecary creditor may preserve, through appropriate registration where applicable, its real rights in the property and hypothecary creditors rank *pari passu* amongst themselves in proportion to the value of their respective pre-transformation charged property.

2. If movable property subject to an instalment sales contract, leasing or lease is incorporated into an immovable losing its individuality, the owner will most likely lose its real right to such movable property. A hypothecary creditor may, by appropriate registration, have its movable hypothec subsist as an immovable hypothec.
3. In the absence of any specific text analogous to Article 2674 of the *Civil Code* applicable to instalment sales contracts, leasing contracts and leases, will the courts follow the case law interpreting the pre-1994 legislation and extend the rights of the owner to proceeds?
4. Even though a cession of rank between two hypothecary creditors may be registered, Bill 181 does not establish a rule permitting registration of a cession of rank between, for example, a vendor under an instalment sales contract registered outside of the 15 day period and a prior ranking hypothecary creditor.
5. If movable property subject to an instalment sales contract, leasing or lease is sold out of the ordinary course of an enterprise, Bill 181 does not require registration in order for the owner's rights to continue to be opposable to third parties contrary to the requirement under Article 2700 of the *Civil Code* for certain movable hypothecs.
6. There is no ability to register an assumption of the debtor's rights under an instalment sales contract, leasing or lease analogous to Article 2701 of the *Civil Code* for movable hypothecs.
7. A secured creditor obtaining, by way of subrogation, the rights of the owner under an instalment sales contract, leasing or lease will not need to register such subrogation in order to render it opposable to a subsequent assignee contrary to the rule under Article 3003 of the *Civil Code* for hypothecs.
8. The *Consumer Protection Act* has not been modified in order to conform the notion of merchant thereunder to that of an enterprise under the *Civil Code*. Consequently, certain contracts may be considered to be consumer contracts and hence, need to comply with the applicable provisions of the *Consumer Protection Act*, even if these contracts are with individuals carrying on an enterprise.

Some of the uncertainties that will arise in interpreting and applying the provisions of Bill 181 are as follows:

1. Article 1847 of the *Civil Code* will require the rights of ownership of the lessor under a leasing contract to be registered in order to be enforceable as against third parties. Do these rights include not only the real right in the particular movable property subject to the leasing contract but also the right of the lessor to payments under such contract?
2. Rights under certain leases with a term exceeding one year will be required to be registered in order to be opposable to third parties. Unfortunately, there is uncertainty as to which rights will require registration in order to be opposable to third parties. Particularly, there is a debate as to whether it is necessary to register the rights of a lessor under a lease in order for such lessor to be able to repossess the leased property in the hands of a third party.
3. If the rights of ownership of the lessor under a leasing contract or the rights of the lessor resulting from a lease are registered outside of the 15 day period, may such rights be registered in any event and will they rank from the date of such registration? Bill 181 specifically addresses this issue for instalment sales contracts but does not address this issue for leasing and leases. The general principles applicable to publication would appear to support the argument that such rights may be registered outside of the 15 day period; however, not all commentators support this view.
4. Although the currently accepted view is that a contract that does not conform with all of the requirements for a leasing is not a lease, practitioners may wish to take a prudent approach and, when in doubt, register rights of a lessor both as rights resulting from a lease and rights of ownership under a leasing contract.
5. Is a license agreement a lease such that rights resulting therefrom will need to be registered in order to be opposable to third parties if the other criteria of Article 1852 of the *Civil Code* are met?
6. The vendor's hypothec will not benefit from a single registration under Article 2961.1 of the *Civil Code*. It is very possible that this security mechanism will be used in very limited circumstances, particularly for inventory

financing, since it may not benefit from one single registration for various acts of acquisition.

7. The owner of movable property will not have a right to follow such property sold in the ordinary course if a registration is made pursuant to Article 2961.1 of the *Civil Code*. However, if movable property subject to an instalment sales contract, leasing or lease is sold in the ordinary course and a registration of the appropriate rights of the owner was undertaken under the applicable provision but not undertaken under Article 2961.1 of the *Civil Code*, there is an apparent right to follow such property sold in the ordinary course.
8. Article 2961.1 of the *Civil Code* introduces a welcome mechanism for registration of rights arising under various instalment sales contracts, leasing and leases between two parties. The text of such article also contemplates assignments although it is not clear how this will be applied by the administration to permit a single registration for various assignments involved in receivable financing structures such as securitizations and factoring.
9. One of the avowed goals of the reform in Bill 181 is to extend the full panoply of hypothecary recourses to vendors under certain instalment sales contracts. Unfortunately, the text is not clear and there are doubts as to whether this has been accomplished.
10. During the 12 month transitional period, it is unclear whether a single registration pursuant to Article 2961.1 of the *Civil Code* may be used for all subsisting contracts.

The then Minister of Justice, Serge Ménard, intimated, during the detailed study of Bill 181 by the *Commission des institutions* of the National Assembly, that there would be a global review of the law concerning movable securities.¹¹⁵ Hopefully, the unresolved issues and uncertainties summarized above will be addressed in this review process. Until such time, practitioners and courts will continue to grapple with the issues and uncertainties arising from the application of Bill 181 to secured transactions.

115. See, *supra*, note 35 (19 March 1998).

TABLE A (PART I)
INVENTORY FINANCING

NATURE OF RIGHT	CONSTITUTION	PUBLICATION	RIGHT TO FOLLOW (DROIT DE SUITE)	RECOURSES
Movable hypothec without delivery Art. 2684, al. 2 CCQ	<p>all creditors</p> <p>written contract Art. 2696 C.C.Q.</p> <p>specific sum Art. 2689 CCQ</p> <p>vendor's hypothec: in deed of acquisition Arts 2696, 2954 CCQ</p>	<p>always registered</p> <p>rank from registration for 10 years, renewable Arts 2798, 2945 CCQ</p> <p>vendor's hypothec: superior rank if published within 15 days of sale Art. 2954 CCQ</p> <p>one registration per deed</p> <p>cession of rank Art. 2956 CCQ</p>	<p>movable accession and transformation Arts 2671, 2673, 2953 CCQ</p> <p>real subrogation, proceeds if identifiable Art. 2674 CCQ</p> <p>registration necessary if sold out of normal course Art. 2700 CCQ</p> <p>assumption Art. 2701 CCQ</p>	<p>hypothecary recourses Arts 2748 et seq. CCQ</p>

TABLE A (PART I - cont.)

INVENTORY FINANCING

NATURE OF RIGHT	CONSTITUTION	PUBLICATION	RIGHT TO FOLLOW (DROIT DE SUITE)	RECOURSES
Instalment sale Arts 1745 et seq. CCQ	<p>vendor reserves ownership until payment in full of purchase price Art. 1745 CCQ; Art. 132 CPA</p> <p>written contract not necessary Art. 1385 CCQ</p> <p>no specific sum</p> <p>master agreement possible</p>	<p>registered if vehicle, "other" movable or movable acquired for service or exploitation of enterprise</p> <p>superior rank if published within 15 days of sale Arts 1745, 1749 CCQ</p> <p>one registration possible for 10 years, renewable Art. 2961.1 CCQ</p> <p>cession of rank?</p>	<p>movable accession and transformation? Art. 971 et seq. CCQ</p> <p>proceeds?</p> <p>sold in or out of the normal course? Arts 1714, 2961.1 CCQ</p> <p>assumption?</p>	<p>hypothecary recourses apply, for consumer contract CPA applies Art. 1749 CCQ</p> <p>other recourses available Arts 1721, 1740 CCQ</p> <p><i>Bankruptcy and Insolvency Act</i> ss. 81 and 81.1</p>

TABLE A (PART II) EQUIPMENT FINANCING

NATURE OF RIGHT	CONSTITUTION	PUBLICATION	RIGHT TO FOLLOW (DROIT DE SUITE)	RECOURSES
Movable hypothec without delivery and instalment sale (See Table A (Part I) concerning inventory financing.)		instalment sale: registration may be for more than 10 years, renewable Arts 1745, 2937, 2942, 2983 CCQ	hypothec: immovable accession Arts 903, 2672, 2796, 2951 CCQ; Art. 571 CCP; Art. 48 <i>Implementation Act</i>	
Leasing Contract (<i>Crédit-bail</i>) Arts 1842 et seq. CCQ	rights of ownership? Art. 1847 CCQ no specific sum master agreement possible Lease if not a <i>crédit-bail</i> ?	always registered Art. 1847 CCQ superior rank if published within 15 days of contract? Arts 1847, 2941, 2945 CCQ registration may be for more than 10 years, Arts 1842, 2937, 2942, 2983 CCQ one registration possible for 10 years, renewable Art. 2961.1 CCQ	immovable accession Arts 903, 1843 CCQ; Art. 571 CCP; Art. 48 <i>Implementation Act</i> proceeds? Sold in or out of ordinary course? assumption?	hypothecary recourses inapplicable

TABLE A (PART II - cont.) EQUIPMENT FINANCING

NATURE OF RIGHT	CONSTITUTION	PUBLICATION	RIGHT TO FOLLOW (DROIT DE SUITE)	RECOURSES
Lease Arts 1851 et seq. CCQ	rights resulting from lease of more than one year? Art. 1852 CCQ no specific sum Master agreement possible	registered if vehicle, "other" movable or certain movable required for service or exploitation of enterprise superior rank if published within 15 days of lease? Arts 1852, 2941, 2945 CCQ registration may be for more than 10 years, Arts 1851, 1880, 2937, 2942, 2983 CCQ one registration possible for 10 years, renewable Art. 2961.1 CCQ	immovable accession Art 903 CCQ; Art. 571 CCP; Art. 48 <i>Implementation Act</i> proceeds? Sold in or out of the ordinary course? assumption?	hypothecary recourses inapplicable