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# THE LAW COLUMN

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## BUSINESS SEGMENTS

by *André Morin, lawyer*

### The contractor's perspective

When it is time to publish a legal hypothec for construction (C.c.Q., art. 2726 and subsequent articles), the general contractor has to provide his lawyer with certain information to properly identify what is commonly called a "business segment". It is important to define which property or properties will benefit from the added value of the general contractor's, sub-contractor and supplier's materials and/or work, and, in particular, to describe the property titles, type of building under construction, and the manner in which the properties are used. In 1929, in the matter of *Gadbois v. Stimson-Reeb* [1929] S.C.R. 587, the Supreme Court issued a general ruling that can be understood simply as "one lot, one hypothec". The ruling has certain exceptions, primarily in cases where an owner uses several properties (lots) together as one for a real estate project he develops on the lots in question.

A good example of the above is a property with 24 dwelling units and various common areas built on several distinct lots designated at the proper registry division. In this case, it is evident that there is only one business segment, and the contractor would be well advised to proceed to publish a legal hypothec for a single construction for the total of the amounts due to him for the four lots in question.

The professional hired by the contractor should take into account a very important piece of additional information regarding co-ownership: how the declaration of co-ownership of the project was published. Is there a single co-owner or many co-owners? Briefly on this subject, the contractor must advise his lawyer about the type of building constructed, and the lawyer must carry out an exhaustive title search to properly identify the relevant legal framework of the project (declaration of co-ownership).

A recent decision by the Honourable Superior Court Judge William Fraiberg is a good example of the problems inherent in identifying what constitutes a business segment. In the matter of *2861-7918 Québec Inc. (Construction Serge Gagnon) v. Navaro Inc. et al*, the court heard a case two properties with twelve units each, which were joined to each other (like semi-detached units), each built on a distinct lot, but which, on obser-

vation, appeared to be the same single three and a half story structure.

It should be noted that each property had individual parking areas, water supply and sewage entries and separate electrical installations, and there were no interior entrances to allow passage from one unit to the other.

The court had to decide on what seemed to be a simple question; was the general contractor's publication of a single hypothec for all sums charged against the two lots valid or would it have been necessary to separate the amounts between the two lots?

After reviewing substantial documentary proof and hearing many witness, Judge Fraiberg concluded that the publication of a single hypothec charged against the two lots was valid because the general contractor was justified in trusting what he saw; i.e.: what appeared to be a single structure which led him to presume there was a single business segment.

In effect, the Honourable magistrate decided that the principles set forth in the matter of *Gadbois* (as noted above), cannot oblige a contractor who participates in constructing this type of building to carry out a detailed inquiry by studying plans and specifications as well as certain regulatory provisions of the borough of Pointe-aux-Trembles.

After citing long extracts from the matter of *Gadbois*, and after analyzing a considerable quantity of jurisprudence on the subject, Judge Fraiberg determined that it would not be reasonable to impose such an obligation on the general contractor and we cannot do better than to quote an extract from his decision (par. 54):

*"If it were not, the building professional or supplier would be forced to go to unreasonable length to safeguard his rights in a situation that often is too urgent to permit that luxury."*

In conclusion, we must specify that determining what might constitute a business segment remains a question of facts, and each particular case must be analysed according to all the available information.

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## YOUR SPOUSE IN YOUR BUSINESS: WHAT ARE THE RISKS?

*By the family law team*

Even if you are the sole owner or shareholder of your business and the only person to assume the financial risks, you are not necessarily protected against a claim by your spouse in case of separation.

In Quebec, there are three procedures that allow a spouse to claim a part of the value of the business in cases of separation, sharing of the partnership of acquests and compensatory allowance for married spouses, unjustified enrichment, and action in dissolution of partnership for unmarried spouses.

### Married spouses:

#### Regime of partnership of acquests:

If you are married and you did not sign a marriage contract specifying separation of property, you are subject to the regime of partnership of acquests. You may even have chosen this regime in your marriage contract. If you are subject to this regime, the value of your business acquired during the marriage must be shared except as provided. You can change your matrimonial regime during the marriage and opt for the regime of separation of property. You must draw up a marriage contract; however it must include a sharing of partnership of acquests. Before making this decision, many factors must be considered and it would be wise to consult your legal advisor in advance.

#### Compensatory allowance:

You were married under the regime of separation of property, you own a business, but your spouse worked in the business without remuneration or for remuneration that does not correspond to her (his) allowance. In this case your spouse can claim a compensatory allowance because she has enriched your personal assets and diminished her own. To prevent such claims in the eventuality of a separation, it would be wise to draft an agreement including certain provisions describing tasks and responsibilities, remuneration and benefits. This agreement can be periodically revised.

### For unmarried spouses:

#### Recourse for unjustified enrichment:

Recourse for unjustified enrichment is for unmarried spouses. It is similar to the compensatory allowance for married persons and consequently the same recommendations apply.

#### Action in dissolution of partnership:

This is an action a spouse takes to assert that a partnership was formed between the spouses even if no documents exist. The partnership that becomes recognized could include your business. This claim is rarely used but it has been accepted by the courts. This action attempts to demonstrate that the spouses had intended to form a partnership, that they both contributed financially or otherwise, and that they assumed the risks and losses together, in short that the spouses acted as real partners without any supporting documents. If this is proved before the court, the court may decide that the spouses are co-owners of the business and share in its worth.

These are situations that require thought and consultation.

### NEWS FROM OUR FIRM

On day 6 of the study session on contract claims, set to take place on February 22 at Centre Mont-Royal in Montreal, **Me Richard Gendron** will lecture on the subject of 'Discussion regarding out-of-court settlements: how to prepare and traps to avoid'.

On February 6<sup>th</sup> **Me Jean-Sébastien Michaud** spoke to the members of CGA Section Laurentides, at Hotel Best Western in Saint-Jérôme, about the application of by-law 45-106 regarding prospectus and registration exemptions. The main purpose of the by-law is updating governing documents of old private companies before October 12, 2007.

Congratulations to **Amélie Chouinard** who succeeded her Quebec Bar exams. She is currently completing her training period at our Saint-Jérôme office.



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**Saint-Jérôme**  
55, Castonguay Street  
Office 400, J7Y 2H9  
**(450) 436-8244**  
Fax: (450) 436-9735

**Blainville**  
370, de la Seigneurie Ouest  
Office 100, J7C 5A1  
**(450) 979-9696**  
Fax: (450) 979-4039

**Montréal**  
1240, Beaumont Avenue  
Office 100, H3P 3E5  
**(514) 735-0099**  
Fax: (514) 735-7334

**Sainte-Agathe**  
124, St-Vincent Street  
J8C 2B1  
**(819) 321-1616**  
Fax: (819) 321-1313

**Affiliation in Ontario**  
Szemenyei Kirwin  
Mackenzie, law firm  
Toronto and London