

# The Juridical Capacity of the Married Woman in Quebec: In relation to partnership of acquests and recent amendments to the Civil Code

Frances Schanfield Freedman\*

## I. INTRODUCTION

The intention of this article is to examine the juridical capacity of the married woman in Quebec as it is today. The first part of it is devoted to an examination of the new regime, partnership of acquests, which in the absence of a marriage contract, regulates the property rights of married people. In order to show how the legislators of *An Act respecting matrimonial regimes*<sup>1</sup> (hereinafter referred to as Bill 10), decided upon partnership of acquests as the regime most suitable for the needs of Quebecers, this article includes a small section on separation of property, the regime most in favour with the population before 1970, and one on community of property, the prior legal regime.

The latter part of this article deals with what is known as the *regime primaire*, which governs all consorts irrespective of matrimonial regime. As this regime regulates the married woman's place in the family with respect to her control over it (her power of representation, her contribution to the family expenses and her responsibility to third parties), it is most indicative of her present juridical capacity. Even though unaffected to a great extent by the promulgation of Bill 10, it is a necessary inclusion in an examination of the married woman's juridical capacity today.

This article does not attempt to deal with the other changes effected by Bill 10, such as the community of property regime which after 1970 became a conventional regime and which has been amended considerably to coincide with the new trend in legislation; nor does it deal with mutability of regimes in contrast to the former law which had prohibited any change to marriage contracts, nor with the abolition of traditional prohibitions between husband and wife. It does, however, consider on a small scale the application in

---

\* B.A. (McGill); M.A. (U.deM.); B.C.L.III (McGill); Member of the Editorial Board, McGill Law Journal, Volume 21. The writer wishes to express her thanks to Professor Ethel Groffier Atala for her valuable guidance and suggestions.

<sup>1</sup> S.Q. 1969, c.77.

the business world of the new trend in legislation with respect to the married woman.

Before considering the first part of this article entitled the "Creation of a New Legal Regime", and its effect on the married woman's juridical capacity, a brief summary of some of the significant facts which were catalytic to the new legislation is appropriate.

The fundamental idea of the married woman's status in the family before the implementation of change is reflected in the original version of article 174 C.C.:

A husband owes protection to his wife; a wife obedience to her husband. The marital authority of the husband was such that the jurisprudence did not hesitate to give it the disposition of public order, so that any acts engaged in by the wife without his consent might be subject to absolute nullity.<sup>2</sup> The prevalent attitude is aptly stated in *Peloquin v. Cardinal*:

Considérant qu'aux termes de l'article 183 c.c., le défaut d'autorisation du mari, dans les cas où elle est requise, *comporte une nullité que rien ne peut couvrir* et que la cour est tenu d'en prendre connaissance en tout état de cause.<sup>3</sup>

One of the earliest changes was effected in 1931, when upon the recommendation of the Commission of Civil Rights of the Woman, the married woman was given powers over her reserved property (which constituted what she had acquired by her own work), by articles 1425a-1425i C.C.<sup>4</sup> Prior to 1931, this reserved property had been subject to the husband's administration because it was considered an asset of the community. This reform, according to Professor Brierley, was "intended to prevent dissipation of such property by the husband" and was "reserved to the entire administration and enjoyment of the wife".<sup>5</sup> Henceforth, irrespective of matrimonial regime, the married woman could enjoy greater legal capacity with respect to her reserved property; she could alienate it onerously and she could appear before the courts without authorization in any action or contestation relating to her reserved property.<sup>6</sup> However, this was the extent of the reform at this time. It still did not affect the married woman's general incapacity; the lack of authorization by her husband constituted a nullity which nothing could cover.

<sup>2</sup> Baudouin, *Les réformes de l'incapacité de la femme mariée* (1952) 12 R.du. B. 214, 222.

<sup>3</sup> (1894) 3 B.R. 10, 11 (emphasis added).

<sup>4</sup> *An Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1930-31, c.101, s.27.

<sup>5</sup> Brierley, "Husband and Wife in the Law of Quebec: a 1970 Conspectus" in Mendes da Costa (ed.), *Studies in Canadian Family Law* (1972), vol.2, 795, 823.

<sup>6</sup> Art.1425a C.C.

In 1954, the married woman was removed from the company of minors and interdicts by the modification of article 986 C.C., which formerly read as follows:

Those legally incapable of contracting are:

Minors ...;

Interdicted persons;

Married women, except in the cases specified by law; ...

Persons insane or suffering a temporary derangement of intellect ...  
or who by reason of weakness of understanding are unable to give a valid consent;

Persons who are affected by civil degradation.

However, even the addition to the Civil Code on December 16, 1954, of article 986a — “[t]he capacity of married women to contract, like their capacity to appear in judicial proceedings, is determined by law”<sup>6a</sup> — did not derogate from the fact that incapacity was still the principle.

In short, it was not until Me André Nadeau became the president of the Commission of Revision of the Civil Code in 1961, that the juridical capacity of women became the object of a lengthy study which in 1964 led to the enactment of *An Act respecting the legal capacity of married women*,<sup>7</sup> (hereinafter referred to as Bill 16), and ultimately to Bill 10.

The intention of the legislators of Bill 16 was to make the married woman capable, incapacity having been the rule up to that time;<sup>8</sup> however, they only succeeded in proving that capacity does not mean independence. Although they did proclaim the principle that the legal capacity of the married woman is not diminished by marriage, they could only do so with respect to the woman married under a regime of separation of property. The woman married under the legal regime of community of property could not be the equal of her husband as the common patrimony was subject to his control. With the realization that from community of property flowed the suppression of the married woman’s full capacity came the awareness that the legal regime must be altered. Thus, although it was originally the aspiration of the legislators of Bill 16, the equality of the married woman was not realized until the advent of Bill 10.

Bill 10 came into force on July 1, 1970. It reproduced the report prepared by the Office of Revision of the Civil Code (hereinafter referred to as O.R.C.C.), as well as certain amendments recommended

---

<sup>6a</sup> *An Act to amend the Civil Code*, S.Q. 1954-55, c.48, s.3.

<sup>7</sup> S.Q. 1963-64, c.66.

<sup>8</sup> Kirkland-Casgrain, *La capacité juridique de la femme mariée dans le Québec* (l’Office d’information et de publicité du Québec, 1964).

by the Committee on the Administration of Justice. In his preface to *Les régimes matrimoniaux* prepared by the Quebec Government, Me Choquette referred to Bill 10 as the most important modification to the Quebec Civil Code since its inception in 1866, in that it accorded complete emancipation to the married woman.<sup>9</sup>

This in brief was the situation before 1970. The following section of this article, the "Creation of a New Legal Regime", will consider those factors that most influenced the legislators to bypass the two prevalent regimes, community of property and separation of property, in their search for a suitable regime which was in accordance with the new legislation and which would assure the married woman equality in all areas. The intention of the Committee on Matrimonial Regimes set up by the Office of Revision of the Civil Code (hereinafter called the Committee) is aptly stated in the following passage:

Cette réforme doit s'organiser... à partir d'une reconnaissance expresse du principe de la pleine capacité juridique de la femme mariée. C'est là la première étape à franchir. Une seconde étape sera la réforme des régimes matrimoniaux, étant donné la connexité qui existe entre la question de la capacité juridique de la femme mariée et celle des divers régimes matrimoniaux.<sup>10</sup>

## II. CREATION OF A NEW LEGAL REGIME

The legislators of Bill 10 sought to establish the juridical equality of the partners in the marriage so that third parties need no longer be wary of dealing with the wife, and so that both partners would be assured of the independence of their patrimonies and a fair partition of the accumulation of savings on dissolution of the marriage. The aim of the authors was to establish a just regime by recognizing the worth of the wife in monetary terms. It was felt that years spent in the home, with no chance of entering the work force, or advancing in her field if she already had a profession, or accumulating savings from her work, should not deprive a woman at the end of the marriage of the worth that she had brought to it:

... ce régime de la société d'acquêts veut, sur le plan de la politique législative, traduire une certaine philosophie, une certaine conception du mariage. Il veut, dans le respect de l'indépendance des patrimoines, consacrer le fait que dans la société conjugale, comme dans toute société, l'apport des partenaires, pour être différent, n'en est pas moins réel. Il veut dans un souci de justice, reconnaître, d'une manière concrète, la

---

<sup>9</sup> Choquette, *Les régimes matrimoniaux* (Gouvernement du Québec, Service d'information, 1970).

<sup>10</sup> O.R.C.C., *Report on the legal position of the married woman* (1964), 4.

participation effective de l'épouse à l'accumulation du patrimoine familial. Il veut faire comprendre que ce qui est gagné hors du foyer par l'un des conjoints est gagné pour les deux.<sup>11</sup>

Thus in Quebec, couples are now free to make "[a]ll kinds of agreements . . . even those which, in any other act *inter vivos*, would be void", subject to the rules of public order and good morals.<sup>12</sup> They can have a notarial marriage contract drafted with any one of a number of possibilities ranging from universal community of property where the familial property is mingled into a common mass, to separation of property where the patrimonies of husband and wife are completely separate except for their respective contributions for family support. Those who do not choose to regulate their own matrimonial regime are subject to the legal regime:

The law does not determine the matrimonial regime except in the absence of special agreements by marriage contract.<sup>13</sup>

In developing the legal regime of partnership of acquests as that best able to meet the needs of married people in Quebec, the Committee took into consideration three possibilities: an adaptation of community of property; separation of property (the regime most in favour with the populace); and regimes in other countries.<sup>14</sup>

#### A. Community of Property

One important consideration in discarding community of property as the legal regime was that it was no longer favoured by the population. A survey undertaken by Me Roger Comtois showed that over seventy per cent preferred separation of property.<sup>15</sup> In their Explanatory Notes to Bill 10, the legislators commented on the situation as follows:

It is inadmissible that the regime of the ordinary law exist only for that small number of persons who, through ignorance, error or imprudence, did not formally or correctly repudiate it. As a matter of sound legislative policy, the legal regime must not only represent a certain ideal, it must also suit the majority.<sup>16</sup>

---

<sup>11</sup> Crépeau, "Les principes fondamentaux de la réforme des régimes matrimoniaux" in *Lois nouvelles II* (1970), 9, 17.

<sup>12</sup> Arts.1257 and 1258 C.C.

<sup>13</sup> Art.1260 C.C.

<sup>14</sup> *Supra*, f.n.11, 12; see also Baudouin, *A propos de la réforme des régimes matrimoniaux en droit québécois* Partie II (1969) 71 R.du N. 279, 290.

<sup>15</sup> Comtois, *Traité théorique et pratique de la communauté de biens* (1964), 317, para.371 *et seq.*

<sup>16</sup> O.R.C.C., *Explanatory Notes: An Act Respecting Matrimonial Regimes* (1970), Notary's Handbook, vol.1, 6.

### 1. *Effects of Bill 16 on the Married Woman's Juridical Capacity*

The effects of Bill 16 on the wife in community of property were ambivalent:

A married woman has full legal capacity as to her civil rights, subject only to such restrictions as arise from her matrimonial regime.<sup>17</sup>

In analyzing the import of this article, Me Comtois concluded that "la femme commune est capable mais elle n'a pas de pouvoirs".<sup>18</sup> She was bound by the organization of the regime rather than by the principle of incapacity which was now uniquely an effect of the regime. That this had dire consequences for the wife is well reflected in the jurisprudence, according to Professor François Héleine:

On ne peut manquer toutefois de s'étonner de constater l'importance que certains juristes ont entendu donner à la restriction textuelle: 'sous la seule réserve des restrictions découlant du régime matrimonial' qui permettrait de limiter considérablement la portée de la réforme.<sup>19</sup>

In *Isaac Gelber v. Dame Fritschi* a married woman under the community regime rented an apartment for herself while intending to bring an action in separation from bed and board. Sued by the bailiff for non-payment of rent she raised the question of her capacity to oblige herself and to *ester en justice*. The judge considered article 177 C.C.:

Bien que ce nouvel article, à prime abord, semble déclarer que la capacité juridique de la femme mariée sous tous les régimes est la règle et l'incapacité, l'exception, ceci n'est vrai que pour ... la femme séparée de biens.<sup>20</sup>

Theoretically then, article 177 C.C. gave the wife the full right to accomplish acts without marital or judicial authority, but she did not have the *power* to do so because not only was the property of the community affected, but also the private property of the consorts was subjected to the *charges du ménage*. She was thus divested of power even with respect to her private property since the revenues from this were a part of the community.

According to Me Comtois, had the legislators established that the wife in community had full capacity to do all civil acts, but that the community would not be obligated by these acts except in the measure of profit that it would derive from them (as they had established with respect to the business wife), then one could have

<sup>17</sup> Former art.177 C.C.

<sup>18</sup> *Supra*, f.n.10, 32.

<sup>19</sup> Héleine, *L'article 177 c.civ. ou la capacité juridique de la femme mariée selon la loi québécoise* (1970) 1 R.G.D. 62, 65.

<sup>20</sup> [1967] R.P. 416, 418.

said that the wife was capable but that the community could not be engaged without her husband's consent.<sup>21</sup>

a) Improvements

Complete equality for the married woman may not have been actualized by the legislators of Bill 16; nonetheless, they did succeed in removing many obstacles to her capacity, notably the following:

- A. Article 176 C.C. was repealed. This had stated that a married woman could not appear in judicial proceedings without either her husband or his authorization, even as a public trader. The article had applied even if she was not in community of property. After Bill 16 she could *ester en justice* with respect to all actions pertaining to her personal moveable property.
- B. The legislators repealed article 183 C.C. in which lack of authorization by the husband to the "incapable" had constituted an absolute nullity.
- C. The legislators repealed article 1259 C.C. which had decreed that the consorts could not derogate from the rights incident to the authority of the husband over the person of the wife and children, or belonging to him as the head of the conjugal association.
- D. Mention of the wife in article 1011 C.C. which had placed her with minors and interdicts who had a right to be restituted, was removed.
- E. The necessity for a demand by the wife to seek authorization to *ester en justice* with respect to her provisional residence in an action for separation from bed and board disappeared, and she only had to get her provisional residence approved.<sup>22</sup>
- F. Before Bill 16, pecuniary condemnations incurred by the husband alone could be recovered from the property of the community, while those of the wife could only be recovered out of her property and only after the dissolution of the regime. Bill 16 permitted pecuniary condemnation incurred by either consort to be exercised on the community.<sup>23</sup>
- G. Since 1964, the married woman has been able to engage the community without the consent of her husband and without judicial authorization, but only to the extent of the amount of benefit it derived.<sup>24</sup>

---

<sup>21</sup> *Supra*, f.n.33.

<sup>22</sup> Former art.194 C.C.; see also Ouellette, *Condition juridique de la femme mariée en droit québécois* Partie II (1970) R.J.T. 189, 198.

<sup>23</sup> Former art.1294 C.C.; *supra*, f.n.10, 43.

<sup>24</sup> Former art.1296 C.C.

- H. Bill 16 accorded the wife the right to administer all her private property although she was obliged to pour the revenues into the community. Article 1297 C.C. gave her powers over her private property analogous to those that her husband enjoyed over the community property; she could exercise all moveable and possessory actions alone; she could alienate, sell or pledge her moveable property other than business or household furniture, although she still could not do the same with respect to her immoveables unless she had her husband's consent.
- I. Before Bill 16, the husband was prohibited from disposing gratuitously of immoveable property without his wife's consent, although he could do so with respect to moveable property. After Bill 16, he could no longer dispose onerously of immoveable property although he could so dispose of moveables other than household furniture.<sup>25</sup> *Rosy v. Cinq-Mars et Dame Cahill* is indicative of this change. The husband sold moveables consisting of household furniture to the plaintiff without his wife's consent, contrary to article 1292 C.C. He contended that since his wife had left there was no longer a need for them. It was held that the husband had no authority to sell these moveables since the household had not been legally dissolved.<sup>26</sup>
- J. After Bill 16, the husband could no longer burden an immoveable with a real right nor agree to a conditional giving in payment of an immoveable for a loan made without his wife's consent.<sup>26a</sup> However, it must be remembered that the husband still had the power to oblige the community in general, since Bill 16 retained that portion of article 1292 C.C. which stated that he alone administered the property of the community.
- K. With Bill 16, the wife became the representative of her husband and was allowed to participate with him in ensuring the moral and material control of the family.<sup>27</sup> In *Dame Lapierre v. Trottier*, in 1970, a wife asked for an alimentary pension without resorting to an action in separation from bed and board, and while continuing to live with her husband and children. Desaulniers J. said that prior to 1964 the jurisprudence would have refused such a request as striking a blow against marital authority and paternal power and that it would constitute a transfer of the administration of the property to the wife when this power could only belong to the husband:

---

<sup>25</sup> Former art.1292 C.C.

<sup>26</sup> [1966] C.S. 423.

<sup>26a</sup> Former art.1292 C.C.

<sup>27</sup> Art.174 C.C.

... le Bill 16 a complètement changé la situation juridique des parties dans la direction morale et matérielle de la famille . . . . L'on doit donc considérer l'épouse et l'époux comme des associés avec responsabilités et des droits égaux. Si l'épouse concourt avec le mari à assurer la direction morale et matérielle de la famille, le tribunal doit lui fournir les moyens nécessaires pour exercer ce droit si le mari néglige ou refuse de l'exercer lui-même.<sup>28</sup>

- L. The married woman was given the power to represent her husband for the current needs of the household.<sup>29</sup> Thus the domestic mandate she had enjoyed tacitly was legalized and the courts began to validate acts that at one time were considered forbidden. In *Bouchard v. Lachance*, a wife was permitted to pay her husband's debt because the payment was interpreted as conforming to this mandate.<sup>30</sup> Similarly in *Crescent Finance v. Blackburn*, an action against a husband was maintained with respect to a loan which his wife had made which it was also considered conformed to the mandate.<sup>31</sup>
- M. Under article 183 C.C., the married woman acquired the right to sell, alienate, hypothecate or pledge property with the authorization of a Superior Court judge, provided there was a necessity to do so and provided her husband was unable to manifest his consent because of incapacity, absence or unjustified refusal.<sup>32</sup> However, again one must remember that the import of this article was limited with respect to the wife in community; she could not, even with this judicial authorization, alienate anything other than the bare ownership of her own property since the community could not be deprived of the revenues of her property without her husband's consent.<sup>33</sup> However, the married woman was no longer incapable, and where at one time the absence of her husband's authorization meant absolute nullity, after Bill 16 the husband could subsequently ratify the contract signed without his consent.

b) Disadvantages

In spite of the improvements in the community of property regime effected by Bill 16, there were still some areas that it did not touch on:

---

<sup>28</sup> [1970] R.P. 309, 311.

<sup>29</sup> Art.180 C.C.

<sup>30</sup> [1967] R.L. 128.

<sup>31</sup> [1969] R.L. 185.

<sup>32</sup> Baudouin, *supra*, f.n.14, 283.

<sup>33</sup> *Supra*, f.n.10, 44.

- A. A married woman could not be a tutor without her husband's consent and if she had been a tutor before marriage, the act of marriage deprived her of her tutorship.<sup>34</sup>
- B. A married woman could not accept a succession without her husband's consent.<sup>35</sup>
- C. A married woman needed her husband's consent to make or accept a gift *inter vivos*.<sup>36</sup> Although according to article 643 C.C. the wife in community could be authorized by a judge to accept a succession, this did not imply that she could address herself to the judge when her husband had refused to authorize her acceptance of a donation.<sup>37</sup>
- D. The married woman could not accept a testamentary executorship without her husband's consent.<sup>38</sup>
- E. Article 1280 C.C. which had required the consent of the husband in order for the community to be responsible for the debts of the wife was not repealed.<sup>39</sup>
- F. The wife had no power over the private property of her husband. She could not buy on credit without his consent, nor give a general pledge on the community patrimony to a vendor.<sup>39a</sup>
- G. The wife could only act with respect to her share of the community property on the dissolution of the community. She could not do so before because in the event that she renounced the community, the immoveables would be deemed to have always belonged to her husband. If she accepted the community she was then bound to wait for the results of the partition.<sup>40</sup>

The fact that the entire community was subject to the husband's administration and benefited little from the 1964 law discouraged people from choosing it as their matrimonial regime.<sup>41</sup> A regime where everything was bound into one patrimony could only portend serious consequences if the husband fell into financial difficulty. Coupled with the fact that once chosen, a regime could not be changed (prior to 1970),<sup>41a</sup> many people opted for a marriage con-

<sup>34</sup> Former arts.282 and 283 C.C.

<sup>35</sup> Former art.643 C.C.

<sup>36</sup> Former art.763 C.C.

<sup>37</sup> *Supra*, f.n.10, 44.

<sup>38</sup> Art.906 C.C.

<sup>39</sup> The community had always been responsible for the debts of the husband.

<sup>39a</sup> This follows from former arts.1290, 1293, 1296, 1297 and 1298 C.C.

<sup>40</sup> *Supra*, f.n.10, 39.

<sup>41</sup> Even the reserved property, established in 1931, was of little help since it pertained particularly to the working wife; *supra*, f.n.4.

<sup>41a</sup> Former art.1260 C.C.

tract outlining a separation of property regime with a donation by the husband, and no subsequent subjugation.

## B. Separation of Property

One of the reasons that the Committee considered making separation of property the legal regime was the fact that it seemed to be so popular with the majority.<sup>41b</sup> The marriage would have no effect on the patrimonies of the consorts:<sup>42</sup> both would have free administration and disposition of their respective property<sup>43</sup> and the wife would be considered the equal of her husband, as was intended by the legislators of Bill 16. It seemed simple.

But it was felt that the inherent qualities of separation of property could be very dangerous for the wife and especially for the housewife, since it gave her no claim on her husband's savings. She may have contributed in no small way to the family's savings, and yet because she earned no salary of her own she could not amass her own patrimony. Donations by the husband to his wife which were wholly discretionary before the marriage tended to compensate her for those benefits she was relinquishing under a regime of community of property,<sup>44</sup> *i.e.*, her right to the common property. But if separation of property became the legal regime, there would no longer be any need to go before a notary to have a contract drafted, and consequently there would no longer be the occasion to compensate her.

Had the legislators been able to limit the husband's freedom of willing by means of a post-mortem alimentary obligation, separation of property would have been feasible as a matrimonial regime.<sup>45</sup> However, it would also have put an undue restriction on the husband, who would have been prohibited from doing what he wanted with his private property, a result which would have been antithetical to the whole intent of the regime.

Furthermore, the apparent simplicity of the regime was an illusion. Theoretically, it appeared that the two patrimonies could be separated easily, but in practice it was not that simple. After years of co-habitation and sharing, how could one easily separate mutual objects? A notary summed up the situation to Me Comtois

---

<sup>41b</sup> *Supra*, f.n.15.

<sup>42</sup> Art.1423 C.C.

<sup>43</sup> Art.1422 C.C.

<sup>44</sup> Comtois, *Pourquoi la société d'acquêts?* (1967) 27 R.du B. 602, 609.

<sup>45</sup> *Supra*, f.n.11, 15.

as follows: "Nous sommes séparés de biens, mais nous avons toujours vécu en communauté"; separation of property turned out to be a community to which the partners were bound in spite of themselves:<sup>46</sup>

Le régime de séparation conventionnelle de biens ... requiert en effet la tenue d'une véritable comptabilité durant tout le mariage malgré l'absence de masse commune afin de retracer le caractère de biens propres, notamment dans le domaine des biens mobiliers. En outre il est de notoriété que bien souvent la femme abandonne en fait à son mari l'administration de ses biens personnels.<sup>47</sup>

Thus, the two regimes most in use before 1970 were not adequate to meet the needs of the people. As yet another alternative, the legislators might have developed a regime of community with different rules, but this idea was also dispensed with since Quebecers had already shown that they were completely opposed to relinquishing part of their juridical autonomy through marriage. What the legislators wanted was something different. In their report, the Committee stated as follows:

If it were possible to organize a matrimonial system which would, at the same time, respect the autonomy, equality and independence of the two consorts, and permit each to participate, at the dissolution of the regime, in the gains realized in the course of its duration, would we not have a standard formula achieving the desired objective and capable of rallying, as it should, the support of the majority? These objectives are fundamentally reflected in the proposed legal regime, the *partnership of acquests*.<sup>48</sup>

Thus, the partnership of acquests was elected as the most appropriate regime. Before considering its effects on the juridical capacity of the married woman, it is appropriate to look at the composition of the partnership of acquests.

### C. Partnership of Acquests

#### 1. *Features Common to Separation of Property and Community of Property*

In many ways the essential advantages of both community of property (the prior legal régime) and separation of property (the most popular regime) have been incorporated into the partnership of acquests, while the disadvantages of both have been discarded.<sup>49</sup>

During marriage the partnership of acquests resembles separation of property in that the notion of administration by the husband

<sup>46</sup> *Supra*, f.n.44, 611.

<sup>47</sup> *Supra*, f.n.32, 298.

<sup>48</sup> O.R.C.C., *Report on Matrimonial Regimes* (1968), 7-8.

<sup>49</sup> *Supra*, f.n.44, 605.

disappears. The patrimonies of each consort remain distinct. Without the need of consent from the other, each has the right to administer his or her own property and participate in acts of borrowing; each is wholly responsible for his or her own debts; each has the power of disposition with the sole exception that neither, without the agreement of the other, can dispose of his or her acquests gratuitously.<sup>50</sup> This last provision is in recognition of the fact that on dissolution of the regime each has a right to one half of the other's acquests. The Committee had no alternative but to restrict the independence of the consorts in this area in order to ensure that one partner did not dispose of acquests to which the other had the right to one half at the end of the marriage.<sup>51</sup>

Partnership of acquests resembles the community regime in that each consort has a right to an eventual partition of the acquests. This right can be exercised not only at death, divorce, or separation but also when a consort, although desirous of continuing the marriage, requests that the regime be liquidated because the partner is mismanaging the savings. The Minister of Justice in a speech on December 2, 1969, expressed the philosophy of this regime in the following terms:

Il [ce régime] veut exprimer, en effet, une réalité profonde: Deux êtres qui s'unissent en mariage, participent au fil des jours, chacun à sa manière, de façon différente, à l'accumulation, à la sauvegarde et à l'accroissement du patrimoine familial. Il paraît alors juste et équitable qu'au terme de l'association conjugale, les conjoints puissent, en l'absence de convention expresse au contraire, partager en deux ce qu'ils ont acquis ensemble.<sup>52</sup>

## 2. *Composition of Partnership of Acquests*

Whereas the prior legal regime, community of property, consisted of only three patrimonies — the private property of the husband, that of the wife and the common property administered by the husband — the partnership of acquests consists of four patrimonies: the acquests and private property of the husband and the acquests and private property of the wife.

According to Professor Brierley, under the regime of partnership of acquests each consort can participate in gains made during the marriage by the other, whether by way of earnings, revenues, or savings. However, the capital of property possessed before marriage, or received freely during marriage, and property acquired by way

---

<sup>50</sup> Arts.1266o and 1266p. C.C.

<sup>51</sup> In the event that a partner does dispose gratuitously without the other's consent, an action in nullity can be taken under art.183 C.C.

<sup>52</sup> *Débats de l'Assemblée nationale du Québec*, 27 novembre, 1969, vol.8, no.92, 4514.

of investment or reinvestment, is kept by each consort as private property.<sup>53</sup>

The acquests and private property are considered in much the same way as they were under community of property. The partnership of acquests consists of all the savings effected by the consorts during marriage (regardless of their source), the fruits and revenues of their private property and the proceeds of their personal work. Had the acquests only consisted of the savings of the spouses' earned income, the wife would have been inadequately protected on the dissolution of the marriage because of the principle of freedom of willing. There would have been the difficulty also of distinguishing between the savings from the revenues, those from personal property and those from earned income. The expanded scope of these acquests does not infringe on the control of the consorts over their personal property, since it is only the proceeds of the fruits and revenues which become part of the acquests.<sup>54</sup>

According to Professor Brierley, "whether property is an acquest or private property depends wholly on the *time* at which and the *title* by which it is acquired".<sup>55</sup> During the marriage there is little need to know whether an object is an acquest or a private belonging, except if one partner wants to make a donation of the acquests *inter vivos* which is forbidden without the consort's consent.<sup>56</sup> However, at dissolution, the distinction becomes very important since the partition includes only the acquests.

Because each consort would have no right over the other's private property, it was felt that the notion of acquests should be as encompassing as possible. Accordingly, article 1266d C.C. provides that the acquests of each consort include all property not declared to be private, article 1266m C.C. that all property is deemed to be acquests, and article 1266n C.C. that property with respect to which neither consort can establish exclusive ownership is deemed to be an acquest.

The *propres* are specific and are clearly itemized in article 1266e C.C. They include all property whether moveable or immovable possessed before marriage, all property whether moveable or immovable received during marriage by succession, legacy or donation, as well as the fruits and revenues if the testator has so stipulated.

---

<sup>53</sup> *Supra*, f.n.5, 837-838.

<sup>54</sup> Tees, *The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec* (1968) 14 McGill L.J. 113, 115.

<sup>55</sup> *Supra*, f.n.5, 838.

<sup>56</sup> Caparros, *Chroniques de législation: Loi concernant les régimes matrimoniaux* (1970) 11 C.de D. 303, 306.

This is in contrast to the former legal regime where all moveable property acquired by will or donation automatically entered the community and was subject to the husband's authority unless the donor or testator had expressed otherwise. The *propres* include as well property that a consort may acquire in replacement of a private property, clothing, personal effects, the amounts, rights, and other benefits accruing to the consort as beneficiary under a contract or plan of annuity, retirement pension or life insurance where he or she has been nominally designated beneficiary by the other consort or by a third person. They also include the right of the consort to keep alimentary or invalid pensions. However, according to articles 1266h and 1266e C.C., the products and revenues of these will be acquests.

Should one consort entrust the administration of his or her property to the other, then the latter will be subject to the general rules respecting the contract of mandate, under which the mandatary is obliged to render an account except for fruits received, which will be presumed to have been consumed for the needs of the household.

### 3. *Effects of Dissolution*

The dissolution of the partnership of acquests is effected through the same causes as was the community of property: by the death of one of the consorts, by absence as contemplated in articles 109 and 110 C.C., by a judgment granting a divorce or separation, by a conventional change of regime, and by a judgment pronouncing a separation of property.<sup>57</sup> Both husband and wife can ask for a judicial separation according to article 1440 C.C.

Founded on the basis that each consort has a right to one half of the acquests of the other, there is no intermingling of the patrimonies during the marriage.<sup>58</sup> In the event that one patrimony has been enriched at the expense of the other, a system of compensation has been worked out so that at the end of the regime any imbalance between the private property and the acquests is corrected by means of compensation.<sup>59</sup> A consort may have made improvements to an immovable which belongs to him as private property, by using funds from his acquests. Therefore the mass of private property would owe compensation to the mass of acquests.<sup>60</sup> According to Me Comtois, this system of compensation is no more complicated

---

<sup>57</sup> Art.1266r C.C.

<sup>58</sup> *Supra*, f.n.5, 837.

<sup>59</sup> *Supra*, f.n.56, 307.

<sup>60</sup> Baudouin, *supra*, f.n.14, 298.

than the one in the prior regime of community of property; the acquests will normally be in the name of the husband, and the wife can renounce or accept.<sup>61</sup>

Upon dissolution, a list is made of all the property, and the private property is separated from the acquests. Each keeps his or her private property, the partner having no right in it. This procedure is facilitated by the presumption of acquests; unless a consort can prove that something is a private belonging, then it is deemed to be an acquest.<sup>61a</sup> Once the private property and the acquests have been separated, compensation, if any is due, is effected.

Each consort has the right to accept or renounce the partition of acquests of the partner, any agreement to the contrary being null. The authors of the draft were hesitant before deciding on this right of renunciation because of their recommendation elsewhere that a consort cannot be held liable for the debts of the partner over and above the benefit derived.<sup>62</sup> In spite of this, however, they felt that under certain circumstances the right of renunciation would simplify the liquidation procedure.

Once the option to accept or renounce has been made, it is irrevocable.<sup>63</sup> Therefore, the different possibilities must be clearly understood and for this reason a delay of one year from the time of dissolution is allowed, at the expiration of which the partner is deemed to have accepted it. The renunciation must be made by notarial deed *en minute* or by judicial declaration which is recorded by the court. Registration is effected in the offices of the registration division where the conjugal domicile is situated.<sup>64</sup>

According to article 624c C.C., as amended by Bill 10, the surviving consort cannot at the same time be both heir and have rights in the partnership of acquests as well. Therefore, he or she can either accept the rights in the partnership of acquests and have no rights in the succession, or accept the succession and renounce the partnership of acquests, thereby bringing that part of it into the succession of the *de cujus*. Should the husband or wife under the present legal regime die *ab intestat*, the surviving partner cannot be heir unless he or she renounces all rights in the regime.

The different possibilities with respect to article 624c C.C. which the survivor would have to consider before deciding whether to

---

<sup>61</sup> *Supra*, f.n.44, 613.

<sup>61a</sup> Art.1266m C.C.

<sup>62</sup> *Supra*, f.n.48, 42.

<sup>63</sup> Art.1266x C.C.

<sup>64</sup> *Supra*, f.n.48, 42.

accept or renounce have been outlined by Professor Germain Brière.<sup>65</sup> If a husband dies intestate leaving a wife and children, the wife can either accept the partition of her husband's acquests or renounce. If she accepts, then her children, being the heirs of their father, can ask for the partition of their mother's acquests or renounce. If they accept the partition of her acquests then they will be entitled to the property of the father (which the wife has renounced as heir by accepting the partition of his acquests), one half of his acquests, and one half of their mother's acquests; the wife will have one half of her own acquests and one half of his. If the children renounce their mother's acquests, they will have their father's property and one half of his acquests, while their mother will have all of her acquests and one half of her husband's. If the wife renounces her husband's acquests in order to succeed to his estate, again the children can ask for or renounce the partition of their mother's acquests. If they accept the partition of her acquests, Professor Brière is of the opinion that the succession will then consist of the husband's private property, all of his acquests and one half of their mother's acquests, and will be divided in the proportions of one third to the wife and two thirds to the children.<sup>65a</sup>

Mayrand J. is of a different opinion and feels that if the wife wishes to succeed to her husband's estate, and should the children decide to accept the partition of their mother's acquests, the succession will then consist of the husband's private property, all of his acquests and all of the wife's acquests. He contends that the wife must return all of her own acquests because her rights are exercised on all of the acquests, her own and those of her husband.<sup>66</sup> There is no difference of opinion between Professor Brière and Mayrand J. with regard to the children's renunciation of the partition of their mother's acquests. In this case, the wife can succeed to the estate of her husband and still retain all of her acquests. The succession will be composed of all the husband's private property and acquests of which one third would go to the wife and two thirds to the children. As these combinations of possibilities lead to different results, it is obviously most important that the survivor understand them fully.

Should the consort renounce in order to avoid paying debts for which the acquests are liable, or in order to defraud creditors, in the former case "the share of the acquests to which he would have

---

<sup>65</sup> Brière, "Les dispositions essentielles du bill 10 sur les régimes matrimoniaux" in *Lois nouvelles II* (1970), 23, 28.

<sup>65a</sup> *Ibid.*, 29.

<sup>66</sup> Mayrand, *Les successions ab intestat* (1971), 135-136.

been entitled remains vested in the consort owner",<sup>67</sup> and in the latter case "la renonciation n'est annulée qu'en faveur des créanciers à concurrence de leurs créances".<sup>68</sup>

#### 4. *The Capacity of the Married Women under Partnership of Acquests*

Having considered the relevant features of the partnership of acquests, it is now appropriate to ask whether the juridical capacity of the married woman is complete under this regime.

As we have seen, the legislators of Bill 10 intended to give each consort complete juridical capacity and with it the corresponding power to act.<sup>69</sup> All the dispositions of the Civil Code with respect to the capacity of the husband and wife were accordingly revised with a view to giving the consorts the right to make all kinds of transactions without third parties being put into doubt with respect to the power of one of the contractants. By its very composition and philosophy the partnership of acquests is antithetical to the subordination of the wife.

Today, we can say that the juridical capacity of each consort is the same under the partnership of acquests; the Civil Code in this area does not distinguish between husband and wife. Whatever the husband can do contractually, the wife can do. There is no longer a head of the family overseeing the community because there is no longer a community.

Accordingly, the patrimonies of each remain distinct; each can administer his or her own property, each can participate in acts of borrowing and each is entirely responsible for his or her debts, no consent being required from the other. Each has the power of disposition with the sole exception that neither, without the concurrence of the other, can dispose of his or her acquests gratuitously, because each, as we have seen, has a right to the eventual partition of the acquests and a right to one half of the partner's acquests. Furthermore, according to Me Comtois, "malgré certaines hésitations et certaines réticences, il semble que les banques, les compagnies, institutions et maisons d'affaires acceptent plus facilement de transiger avec la femme, sous sa seule signature".<sup>70</sup> It would seem therefore that under the partnership of acquests the juridical capacity of the married woman is such that she is now equal to her husband.

---

<sup>67</sup> *Supra*, f.n.5, 839.

<sup>68</sup> Baudouin, *supra*, f.n.14, 300.

<sup>69</sup> Comtois, *Le bill 10 depuis le premier juillet 1970* (1970) 1 R.G.D. 220, 222.

<sup>70</sup> *Ibid.*, 223.

At this point, it is appropriate to consider those articles in the Civil Code which do not pertain to the partnership of acquests as such, but which are common to all consorts irrespective of matrimonial regime.

### III. ARTICLES OF THE CIVIL CODE PERTAINING TO THE THE MARRIED WOMAN'S JURIDICIAL CAPACITY IRRESPECTIVE OF MATRIMONIAL REGIME

We have seen that under the regime of partnership of acquests, the married woman is textually the equal of her husband. However, other articles, affecting all consorts, appear to be contrary to this equality.

To consider the situation, the following section has been divided into three sub-sections: The first two deal respectively with articles that have been repealed and amended; each of these sections also contains a summary of the evolution of the more significant articles. The third sub-section deals with articles 173 to 184 C.C., the *régime primaire*. For purposes of comparison, this last subsection also includes an examination of the *charges du ménage* as they are outlined in the Civil Code, both in the former legal regime and in the present one.

#### A. Repealed Articles

Some articles were repealed by Bill 10 because their provisions had become self-evident:

1. An example is article 832 C.C. Under Bill 16, the married woman had acquired the right to make a will. If Bill 10 made her equal to her husband, then it was no longer necessary to state that she could do so.
2. Similarly, article 906 C.C. which had provided that "a married woman common as to property cannot accept testamentary executorship without her husband's consent" was not reproduced in recognition of the fact that she now had full capacity.
3. Article 181 C.C. which provided that a married woman could exercise a trade or profession separate from that of her husband was also repealed. The original article 179 C.C. had provided that a married woman could not become a public trader without the express or presumed authorization of her husband. In *Dame Langstaff v. The Bar of the Province of Quebec*, it was held that a married woman could neither be admitted to the practice of law nor as a member of the Bar without the authorization of

her husband or a judge.<sup>71</sup> If for one of the reasons set out in the original article 180 C.C. (the husband being interdicted or unable to make his will known within the requisite time, through absence or otherwise), the husband did not authorize her to be a public trader, then the judge could do so, but in this case she did not bind the community.<sup>72</sup> If the husband did authorize her, then she not only obligated herself but him as well if they were under the regime of community of property. In *Gendron v. Dame Lévesque*<sup>73</sup> it was held that former articles 1425a C.C. and following did not discard the dispositions of article 179 C.C., which provided that the wife, if she was a public trader, could oblige herself for all that concerned her business without her husband's consent if they were in community of property and if he had authorized her to be a public trader.

The legislative changes of 1931<sup>73a</sup> did not affect the juridical capacity of the wife who was a public trader. If she was under community of property she could not appear in legal proceedings without her husband or his authorization.<sup>74</sup> In time, however, the married woman acquired full powers over the fruits of her work — the *biens réservés* — powers greater in fact than the husband had over the common property. She did not need his agreement except to dispose gratuitously; she could engage the community (of which remuneration from her husband's work formed part) through the exercise of her trade, while the husband could not engage her *biens réservés* by his professional activities.<sup>75</sup> In addition, her property was protected in that creditors of the husband could not pay themselves from it unless they were dealing with debts contracted in the interest of the home. By Bill 16, the married woman was given the right to engage in a calling distinct from that of her husband.<sup>76</sup> No longer did she require his authorization, his refusal having no juridical import. However, he could oppose her exercise of a trade, but only under the regime of community of property, since it was

---

<sup>71</sup> (1915) 47 C.S. 131.

<sup>72</sup> With respect to former art.176 C.C., the right of the wife who was a public trader to appear in legal proceedings without her husband's authorization only referred to actions pertaining to her reserved property; former arts.1425a and 1425g C.C.

<sup>73</sup> [1955] C.S. 412.

<sup>73a</sup> *An Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1930-31, c.101.

<sup>74</sup> O.R.C.C., *Report on the Legal Position of the Married Woman* (1964), 15.

<sup>75</sup> *Supra*, f.n.10, 34.

<sup>76</sup> Former art.181 C.C.

only under that regime that she could render property in which he had an interest liable for the debts of her trade. This opposition did not stop her from exercising her trade, but it meant that her agreements were not opposable to her husband.<sup>77</sup> If the husband did oppose it then he was bound to deposit a notice, as required by former article 182 C.C., that his wife did not have his consent and in this case the liability of the community property was limited to the extent that it benefited from such exercise. His opposition was deemed known to third parties with whom she contracted by the deposition in the court of this declaration that she lacked his consent. However, as Professor Brierley points out, in the event that it was shown that the husband's refusal was unjustified in the family interest, no provision had been made to lift that opposition. Thus only if the married woman had either her husband's express or implied consent or judicial authorization did she obligate the community for all that related to such trade.<sup>78</sup>

## B. Amended Articles

Some articles were amended by Bill 10 so that the intention of the Bill 16 legislators to remove the incapacity of married women could be reinforced.

1. Article 643 C.C. had included married women in community with interdicts and minors, as being unable to accept a succession without the consent of their husbands. This was amended so that married women were excluded.
2. Originally article 176 C.C. had provided that a married woman could not appear in legal proceedings even as a public trader. She could, however, appear in judicial proceedings or make a deed when her husband refused his consent if she had a judicial mandate.<sup>79</sup> Her right to appear before the courts without authorization at this time only pertained to her reserved property.<sup>80</sup> Bill 16 introduced article 177 C.C. in place of article 176 C.C. It provided that a married woman had full legal capacity with respect to her civil rights, subject only to restrictions arising from her matrimonial regime, capacity being one thing and matrimonial regime another. However, because the interpretation of this article was such that it seemed that her *capacity*

---

<sup>77</sup> Beausoleil, Côté, Delaney, *La Femme mariée commerçante* (1965-66) 7 C.de D. 366, 374.

<sup>78</sup> Former art.182 C.C.; see also, *supra*, f.n.5, 816.

<sup>79</sup> This judicial mandate was not retained under Bill 10.

<sup>80</sup> Art.1425g C.C.

was restricted rather than her power, it was amended by the drafters of Bill 10 so that the distinction between capacity and powers was clear. The present article 177 C.C. accordingly reads as follows:

The legal capacity of each of the consorts is not diminished by marriage. Only their powers can be limited by the matrimonial regime.

From her inability to *ester en justice* without her husband's consent, under Bill 16 the married woman advanced to the stage of being able to address the judge to obtain judicial authorization with respect to sale, alienation, hypothec or pledge.<sup>81</sup>

... l'autorisation de justice remplacera le consentement de l'époux récalitrant, lorsqu'il aura été prouvé que le simple refus de ce dernier est contraire à l'intérêt de la famille.<sup>82</sup>

There had been uncertainty with respect to this; whenever a consort did something without the concurrence of the partner, the consequences were in doubt whether to dissolve the community, attack the act or ask for a judicial separation of property.

Therefore, with respect to acts necessitating concurrence, the legislators of Bill 10 decided that the principle of equality of the powers of the consorts had to be sanctioned by a text allowing the partner whose concurrence was required but not given, to have the operation annulled without awaiting the dissolution of the regime.<sup>83</sup> Accordingly, article 183 C.C. provides:

If one of the consorts has exceeded his powers over the property of the community, over his private property or his acquests, the other, unless he has ratified the act, may ask for its annulment.

By Bill 10, the married woman may be judicially authorized to enter alone into an act which would ordinarily require her husband's concurrence, if this cannot be obtained for one of the reasons outlined in article 182 C.C. For example, should one consort wish to dispose of his or her acquests gratuitously and be unable to obtain the consent of the other, it can be accomplished through the authorization of a Superior Court judge, with the proviso that it be shown that the donation is in the interests of the family.<sup>84</sup> Should a consort dispose of his or her acquests gratuitously without the agreement of the partner, the latter can demand annulment.<sup>85</sup> This is a relative

---

<sup>81</sup> Former art.183 C.C.

<sup>82</sup> Pineau, *L'autorité dans la famille* (1965-66) 7 C.de D. 201, 206.

<sup>83</sup> *Supra*, f.n.16, 19.

<sup>84</sup> Pineau, *L'élaboration d'une politique générale en matière matrimoniale* (1971) 74 R.du N. 3, 17.

<sup>85</sup> *Ibid.*, 20.

nullity,<sup>86</sup> the action being open during two years from the date that the partner learned of the act. The consort whose consent is replaced by that of the judge although not able to contest the act passed, will not be bound by a personal obligation, as he or she will not possess the quality of contractant.<sup>87</sup>

Thus, as the foregoing shows, the legislators attempted to eradicate any doubt that the juridical capacity of the married woman was not the same as that of her husband.

### C. Articles 173 to 184 C.C.

This section deals with articles 173 to 184 C.C. which are referred to by the authors<sup>87a</sup> as the *régime primaire*. The *régime primaire*, which governs the responsibilities of the consorts to each other, to the family and to third parties, applies to all consorts by the sole act of marriage, irrespective of matrimonial regime. Me Caparros says this about the *régime primaire*:

... ce régime primaire va donc établir le minimum des conditions économiques sans lesquelles le ménage ne pourrait pas s'épanouir; il garantit à la fois aux tiers un minimum de sécurité et à chacun des époux une indépendance doublée de la solidarité nécessaire.<sup>88</sup>

The legislators of Bill 10 did not concentrate on the *régime primaire*, much to the concern of some authors who were of the opinion that certain reforms should have been introduced, aimed at establishing an imperative *régime primaire*, which would protect the family. The concurrence of both consorts would be required with respect to important acts concerning the family, and economic relations both between the consorts themselves and in their dealings with third parties would be facilitated.<sup>89</sup>

A decided contradiction arises when the articles pertaining to the *régime primaire* are read together with the articles outlining the responsibilities of each consort to the household expenses, both in the prior and the present legal regime. Before considering what the married woman's juridical capacity is under the *régime primaire*, a consideration of the responsibilities of each consort to the household expenses as they are set out in the Civil Code is in order.

---

<sup>86</sup> Art.183 C.C.

<sup>87</sup> *Supra*, f.n.84, 18.

<sup>87a</sup> E.g., Caparros, *Remarques sur le bill 10, loi concernant les régimes matrimoniaux* (1969) 10 C.de D. 493; Brierley, *supra*, f.n.5.

<sup>88</sup> Caparros, *ibid.*, 497.

<sup>89</sup> *Ibid.*, see also, *supra*, f.n.5, 843.

### 1. Interpretation of "Charges du ménage"

The charges of the marriage or expenses of the household are referred to in article 1280 C.C. and article 1423 C.C.<sup>90</sup> Although in general undefined, article 1280 C.C. gives an indication of what they involve. According to Professor Germain Brière, the charges of the marriage can be divided into three parts:

- (i) Les frais d'aliments, ... il s'agit des dépenses du 'ménage', dépenses occasionnées par la vie commune des époux, qui leur permettent de vivre suivant leur état et leur rang social; ce sont non seulement les frais de nourriture proprement dit mais aussi les frais de vêtements, les frais de maladie ... les frais de logement ... et en général les dépenses de tout procès concernant la personne de l'un ou l'autre des époux.
- (ii) Les frais d'aliments, d'entretien et d'éducation des enfants ...
- (iii) ... des dépenses qui, sans être nécessaires à l'existence, contribuent au bien-être des deux époux, ... les frais d'aménagement de la résidence familiale et du chalet, les gages des domestiques, ... les frais de voyage et ce qu'on appelle dans le langage courant 'les petites dépenses'.<sup>91</sup>

#### a) "Charges du ménage" under Community of Property

Under the prior legal regime, the common mass supported the charges of marriage,<sup>92</sup> although at times the wife might be obliged to contribute her reserved property.<sup>93</sup> According to Professor Brière, "[o]n a donc pu dire que la mise en commun des revenus réalise automatiquement la contribution des époux aux frais de la vie commune".<sup>94</sup> In the event that debts were contracted in the interest of the household (which were not necessarily the same as those of the charges of marriage), they, including those incurred by the husband, could be claimed against the reserved property.<sup>95</sup> This is illustrated in *Dame Bundock v. Potvin*.<sup>96</sup> The wife, after letting her husband manage her reserved property for three years, asked for repayment. The court decided that by this tacit mandate the wife had left the fruits and revenues of her work to her husband to defray the costs.

With respect to the former article 1301 C.C. the wife could not oblige herself with or for her husband except in a common quality and she could in no way be held personally liable. In *Hudon v. Marceau*, Dorion J. says this:

<sup>90</sup> Repealed by S.Q. 1969, c.77, s.85.

<sup>91</sup> Brière, *Les charges du mariage* (1967) 2 R.J.T. 451, 452-453.

<sup>92</sup> Former art.1280 C.C.

<sup>93</sup> Former art.1425l C.C.

<sup>94</sup> *Supra*, f.n.91, 455.

<sup>95</sup> Art.1425e C.C.

<sup>96</sup> (1940) 78 C.S. 238.

... lorsque la femme commune en biens achète des fournitures pour les besoins de la famille, elle le fait au nom du mari et pour la communauté, et qu'elle n'encourt aucune responsabilité personnelle, puis qu'elle ne peut s'obliger pour ou avec son mari qu'en qualité de commune... En acceptant la communauté, elle ne devient personnellement tenue que pour sa proportion dans la communauté, et elle ne peut être poursuivie pour la proportion dont elle peut être tenue, qu'après la dissolution de la communauté.<sup>97</sup>

Similarly in *Canadian Pacific Railway v. Dame Kelly* where both a husband and wife, who were in community of property, were sued on a promissory note signed by the two of them, the action was held against the husband but dropped against the wife:

... il est aujourd'hui unanimement admis que même si la femme agit personnellement, et achète les nécessités de la vie pour les besoins du ménage, elle est considérée comme mandataire de son mari, et ne peut être tenue personnellement responsable. C'est une dette de la communauté pour laquelle seul le mari pourra être recherché... Il en est responsable "ex contractu" vis-à-vis l'appellante, et il le serait également si c'eût été sa femme agissant comme son mandataire, qui l'eût contractée. Il s'agit d'une nécessité de la vie dont la femme commune n'est pas responsable même si elle en a profité... Le billet signé conjointement et solidairement par les deux défendeurs n'est qu'une reconnaissance de cette dette, et n'a pas opéré de novation. En la signant, à la demande de son mari, Mme Kelly s'est "obligée pour ou avec son mari" pour une dette de ce dernier, et comme le constate une jurisprudence uniforme, son acte est frappé de nullité absolue, comme étant une violation de l'article 1301 C.C. qui est d'ordre public.<sup>98</sup>

The wife in community could not be pursued during the existence of the community; once the community was dissolved, the creditors had no recourse against her unless she had accepted the community.<sup>99</sup> She was therefore in a position whereby she could keep her reserved property, and renounce the community at its dissolution, thus freeing herself without exception of all responsibility toward the debts of the community.

#### b) "Charges du ménage" under Partnership of Acquests

The situation of the married woman under partnership of acquests with respect to the *charges du ménage* is similar to that of her situation under separation of property. In fact, the rules of separation of property<sup>100</sup> were incorporated into article 1266q C.C.:

The consorts contribute to the expenses of the household in proportion to their respective means. Failing an agreement between them, the court may, on motion, fix their contributory portions.

<sup>97</sup> (1878) 23 L.C.J. 45, 48.

<sup>98</sup> (1952) 1 S.C.R. 521, 536-537.

<sup>99</sup> *Supra*, f.n.91, 463.

<sup>100</sup> Art.1423 C.C.

Because there is no common mass of property in this regime, and because each consort has freely contracted the obligation that involves only him or her, each is personally responsible. Article 1266p C.C. provides that each consort is liable for all debts that arise before or during the marriage on all his or her private property and acquests. Neither partner is responsible during the regime for the other's debts — with the exception of the wife representing her husband for the current needs of the household.<sup>100a</sup>

At the end of the regime, not only can the dissolution not prejudice the rights of the creditors, but the partition enables the creditors to exercise a recourse. Article 1267d C.C. provides that anterior creditors can conserve their recourse before the partition on the entire patrimony of their debtor, and after the partition, they can pursue "the consort who is their debtor, or his successors and also his spouse, or the latter's successors, but only to the extent of the benefit such spouse or successors derived from it".<sup>101</sup> Each consort keeps a recourse against the other for one half the sums he or she had to pay.<sup>102</sup> According to Professor Brierley, article 1267d C.C. provides that after the acquests are divided, "the consorts remain jointly and severally liable to creditors for any unpaid debts but, as between themselves, each is only liable for one-half, but only to the extent that such consort or his successor derived any benefit therefrom".<sup>103</sup> Should a consort renounce the partition of acquests in order to defraud his creditors, the latter can attack this renunciation which would then be annulled in favor of the creditors to the amount of their credit.<sup>104</sup>

Now that we have considered the responsibilities of each consort to the household expenses, we are in a position to examine how article 176 C.C. has been interpreted.

## 2. *Interpretation of Article 176 C.C.*

In contrast to the clarity with which the responsibilities of each consort toward the household expenses and debts are defined, article 176 C.C. is incongruent and seems to conflict with the Bill 10 legislators' intentions of equality.

---

<sup>100a</sup> Art.1266p.

<sup>101</sup> The benefit of gain is not subordinated to the condition that an inventory be made as in community; art.1370 C.C.

<sup>102</sup> Art.1267d C.C.

<sup>103</sup> *Supra*, f.n.5, 840; see also, *supra*, f.n.48, 50.

<sup>104</sup> Art.1266v C.C.; see also, *supra*, f.n.2, 300.

While article 173 C.C. provides that husband and wife mutually owe each other fidelity, succor and assistance (succor being the duty of the consort "having means" to provide for the other),<sup>105</sup> according to article 176 C.C. which was unchanged by the legislators of Bill 10, it is the husband who must supply the wife with the necessities of life according to his means and condition, a duty which has even been enforced in *de facto* separations. There is an abundance of jurisprudence with respect to this.

In *D'Anna v. Corbeil*, it was held that the husband was responsible for the payment of medical care furnished to his wife but within the limit of his resources:

... les époux se doivent mutuellement secours et assistance, et que vis-à-vis des tiers le mari est responsable pour les choses nécessaires à vie de son épouse, même quand les torts sont de son côté ... le mari ne peut être tenu à payer que suivant ses moyens et le compte du demandeur devrait être réduit en conséquence ...<sup>106</sup>

Similarly in *Larocque v. Pilon*, a husband was held responsible, even though separated from his wife, for furnishing her with medical attention which he had not authorized.<sup>107</sup>

The question has been raised whether, in the event of the husband's insolvency, the wife would have the obligation of succor. It is interesting to note that as early as 1877, it was decided that if the husband was without means the creditors could pursue the wife for the payment of debts created after the bankruptcy of her husband.<sup>108</sup> According to Professor F. Héleine, when a husband is insolvent, jurisprudence has tended to make his wife responsible, reclaiming from her the payment of the household debts "dans la mesure de sa part contributive aux charges du ménage".<sup>109</sup>

Under the old legislation the husband's duty to supply his wife was an object of judicial consideration which in the process evolved the usage of various terms. In *Pepin v. De La Chevrotière*, it was decided that "[u]ne femme commune en biens peut engager la communauté, en vertu d'un mandat tacite qui lui est donné par le mari, pour toutes les choses nécessaires à la vie...".<sup>110</sup> In *Lefebvre v. Labonté*, it was held that a head of a family earning little was only responsible for the *nécessités du ménage*.<sup>111</sup> In *Gratton v. Hermann*,

<sup>105</sup> *Supra*, f.n.5, 811.

<sup>106</sup> [1944] C.S. 400.

<sup>107</sup> [1963] C.S. 298.

<sup>108</sup> *McGibbon v. Morse* (1877) 21 L.C.J. 311.

<sup>109</sup> Héleine, *Chronique de droit familial: rapports personnels entre époux* (1971) 2 R.G.D. 40, 41.

<sup>110</sup> [1959] C.S. 603, 610 (emphasis added).

<sup>111</sup> [1944] C.S. 256.

it was said that "... la jurisprudence admet au profit de la femme un pouvoir de représentation du mari pour *toutes les dépenses du ménage*".<sup>112</sup>

The courts tended to consider the financial and social status of the parties in determining whether something should be a *chose nécessaire à la vie*. If the wife made extravagant purchases having regard to the resources of her husband and exceeded the limits of her mandate, one would no longer be dealing with a *charge du mariage*.<sup>113</sup> In *Brown & Co. v. Marlowe*, *objets de luxe* were sold to the wife who was under a regime of community of property. The husband who knew nothing of these purchases had eleven children and earned \$140 per month. It was held that "... la vente de toilettes pour une somme de \$179.17 ... n'est pas proportionnée à ses revenus, sa condition sociale et son état de fortune ...".<sup>114</sup> Where it was recognized that the husband had considerable means and that "the good life" was a normal part of their *modus vivendi*, the husband was generally held responsible for his wife's entire account. In *Gratton v. Dorfman*, the husband was held liable for his wife's account of \$231 for a three day holiday in a Laurentian hotel:

Considérant que l'article [175 C.C.] édicte, ... que le mari est obligé de recevoir sa femme et de lui fournir tout ce qui est nécessaire pour les besoins de la vie selon ses facultés et son état;

Considérant que les vacances, les distractions et même certaines dépenses faites pour recevoir parents et amis font partie des besoins de la vie et que le mari est tenu de les procurer à son épouse dans les limites de ses moyens et selon son état et sa position sociale.<sup>115</sup>

In *Pepin v. De La Chevrotière*, it was held that "[d]ans notre province, l'achat d'un manteau de fourrure [de \$450] doit être ordinairement considéré comme une chose nécessaire à la vie",<sup>116</sup> whereas in *M. Shuchat Fur Co. Ltd. v. Pariseault*, because the wife had purchased a Persian lamb fur coat seven months earlier with her husband's consent, her subsequent purchase of a mink coat without his consent "ne constituait pas une nécessité de la vie".<sup>117</sup> In *Baron v. Court* it was decided that a wife separated *de facto* could not buy luxury items without her husband's consent.<sup>118</sup>

The husband was not permitted to fix the level below that of

<sup>112</sup> (1931) 69 C.S. 479, 480 (emphasis added).

<sup>113</sup> *Supra*, f.n.91, 461.

<sup>114</sup> [1944] C.S. 61, 63.

<sup>115</sup> [1960] C.S. 457, 458.

<sup>116</sup> *Supra*, f.n.110, 611.

<sup>117</sup> [1972] C.A. 138, 139.

<sup>118</sup> (1939) 77 C.S. 428.

couples in the same social situation. In *Dame Moquin v. Charron*, it was said that “[l]e défendeur agit très imprudemment en restreignant ses contributions aux nécessités domestiques et aux besoins personnels de sa femme, dans des proportions incompatibles avec son état de fortune”.<sup>119</sup>

If the wife was refused credit, she could ask for a separation. If they separated the husband had to support her in the same life style as that maintained during the marriage.<sup>120</sup>

En vertu de l'article 175 C.C., le mari est obligé de fournir à son épouse tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état. L'action en séparation de corps ne met pas fin à cette obligation ... c'est pourquoi le législateur entend que, pendant l'instance, subsiste entre les époux, quant à l'obligation alimentaire du mari et compte tenu des circonstances présentes, un équilibre proportionné aux conditions de vie antérieures des époux.<sup>121</sup>

The intention of the legislators of Bill 10 was to require each consort to contribute to the cost of the necessities of life of the family in proportion to his or her respective means. Article 176 C.C., however, seemed to be antithetical to the spirit of the new law that there be no conjugal head, because the wife did not have an obligation similar to that of the husband. If the wife was in fact equal to her husband, why should the husband be obliged to supply her with the necessities of life but not *vice versa*? When the husband was the titular head of the family it was natural that he had the ensuing responsibilities. Now the title of head had been suppressed, but the function still remained, the wife benefiting in a way detrimental to her capacity if not to her ease.

Professor Ouellette-Lauzon is of the opinion that both partners should be responsible jointly, and that if the wife wants equality, she should bear the consequences. If this were to happen, she believes that the power of unilateral revocation by the husband would disappear.<sup>122</sup>

Similarly, Me Pineau states that since each consort now has complete control of his or her patrimony, then it is only right that each should be responsible for his or her own debts. Since both consorts are now obliged to contribute to the expenses of the household in proportion to their respective means, what is needed is not

---

<sup>119</sup> [1968] B.R. 16, 19 (emphasis added).

<sup>120</sup> *Supra*, f.n.109, 111.

<sup>121</sup> *Deyglun v. Dame Boucher* [1968] B.R. 138.

<sup>122</sup> Ouellette-Lauzon, *Le mandat domestique ou "Du pouvoir des clefs"* Partie II (1972) 75 R.du N. 154, 171.

representation but solidarity.<sup>123</sup> Since the repeal of article 1301 C.C. (by Bill 10), which had provided that a wife could not bind herself either with or for her husband ("... any such obligation ... is void and of no effect ..."), there now is a possibility of solidarity of both spouses to a *debt ménager*.<sup>124</sup>

### 3. *Mandate*

An examination of the legal mandate created in article 180 C.C. shows how the notion of equality between husband and wife is upset; not only is the wife alone given the power to bind her husband for the current needs of the household, but the husband alone holds the absolute power of revocation. Under article 180 C.C., the wife, irrespective of matrimonial regime, legally acquired the right to represent her husband for the current needs of the household and for the maintenance of children, which included medical and surgical care.<sup>125</sup>

Until this mandate was legalized, the wife had held it from her husband as a tacit mandate. Pothier in his *Traité de la puissance du mari* said this about the tacit mandate:

... lorsque une femme mariée arrête les parties des marchands et artisans, pour les fournitures faites pour le ménage, ces arrêtés qu'elle fait, par le consentement tacite de son mari, qui est dans l'usage de la charger de ce soin, n'ont pas besoin de l'autorisation du mari pour être valables; car ce n'est pas la femme qui est censée faire en son nom ces arrêtés; c'est le mari qui est censé les faire par le ministère de sa femme.<sup>126</sup>

This tacit mandate was recognized as early as 1878 in *Hudon v. Marceau*:

Il suit de ces diverses règles que lorsque la femme commune en biens achète des fournitures pour les besoins de la famille, elle le fait au nom du mari et pour la communauté, et qu'elle n'encourt aucune responsabilité personnelle, puisqu'elle ne peut s'obliger pour ou avec son mari qu'en qualité de commune.<sup>127</sup>

Revocation of the tacit mandate had to be express and made personally to third parties with whom the wife had contracted.<sup>128</sup>

<sup>123</sup> *Supra*, f.n.84, 15. According to Me Pineau, solidarity really is a protection for the supplier. If the supplier knows that both spouses are liable, then he is assured of someone who will pay.

<sup>124</sup> *Ibid.*

<sup>125</sup> This is in contrast to art.176 C.C. by which the husband is obliged to supply his wife with necessities — a duty which is much wider, which cannot be revoked and which can be fulfilled without mandate.

<sup>126</sup> Pothier, *Oeuvres* 3d ed. (1890), vol.7, 20, para.49.

<sup>127</sup> *Hudon v. Marceau* [1878] B.R. 45, 48.

<sup>128</sup> Lassonde, *Du mandat tacite au mandat légal de l'article 180 c.c.* (1965) 53 R.J.T. 62.

In *Hôpital Ste-Jeanne d'Arc v. Prud'homme*, it was decided that notices published in the newspaper to the effect that the husband declined all responsibility with respect to debts incurred in his name could not bar the rights of a hospital to claim for treatment of his wife for narcomania, in view of the fact that the hospital had no knowledge of the notices. An additional reason was that the husband was responsible for the debts of his wife for necessaries.<sup>129</sup>

This tacit mandate was not legalized until 1964. It was felt that it should be legalized because of its disappearance in the event of a separation *de fait*. Because the mandate was seen as emerging from the pure volition of the husband, it could not be supposed that he intended to be responsible for household debts incurred by the wife when their life together was at an end.<sup>130</sup> *Desruisseau v. Hume* held that the mandate ended with the dissolution of their life together, even when the wife had separated only provisionally.<sup>131</sup> This previously had been stated in *Morgan v. Vibert*.<sup>132</sup>

Today, however, it is felt that in a separation *de fait* there is still a glimmer of hope of reconciliation and, unlike divorce or separation where the matrimonial regime is dissolved, the mandate should exist unless revoked (even if the husband deserts his wife) because it is in this situation that she most needs it.<sup>133</sup>

With this new legal mandate, the wife has considerable power in that she holds it from the law rather than from her husband's volition. Because it is legal, it is easier to consider that it subsists in spite of cessation of life together.<sup>134</sup> However, notwithstanding the fact that some may say that the wife has acquired dignity through the imposition of a legal mandate, both consorts should still share equally in the responsibilities of their marriage and should be able to bind each other for the current needs of the household.

According to Me Caparros, the wife's power to represent her husband under article 180 C.C. makes no sense in the egalitarian context of the new law. It had meaning in a context of incapacity, but it no longer has so today. Furthermore, Me Caparros states that "l'article 180 est, à la rigueur, en contradiction avec les articles 1266p, 1266q, 1425h et 1438 dans lesquels on précise que les deux époux sont obligés de contribuer aux besoins de la famille selon

---

<sup>129</sup> [1949] C.S. 487.

<sup>130</sup> *Supra*, f.n.22, 202.

<sup>131</sup> (1933) 55 B.R. 508.

<sup>132</sup> (1906) 15 B.R. 407.

<sup>133</sup> *Supra*, f.n.122, 172.

<sup>134</sup> Brière, "Le nouveau statut juridique de la femme mariée" in *Lois nouvelles* (1965), 7, 25.

leurs facultés".<sup>135</sup> Also, in spite of the fact that article 174 C.C. states that both consorts should ensure the moral and material direction of the family, article 180 C.C. only succeeds in perpetuating the traditional roles. Professor Ouellette-Lauzon notes that in a situation in which the *ménage* exists entirely on the wife's earnings, if the husband were to purchase things for the household which fulfill the requirements of necessities had the wife done so, she as the breadwinner can refuse to pay for them and the creditors would only have a recourse against the husband.<sup>136</sup> For the wife to be completely equal each consort should have the automatic right to represent the other for the current needs of the household.

The situation today is such that the married woman can represent her husband not for the "necessities of life" as she could formerly under the tacit mandate, but for the "current needs of the household"<sup>136a</sup> which are determined by many factors. Before legalization, because the husband's duty to supply his wife was an object of judicial consideration, there was a tendency to stretch the mandate to include things that did not necessarily have the character of "necessities of life". Once it was expressed as a text, there was a general feeling that the judges would probably be less generous than they had been under the old regime, and that there would be a tendency to interpret it restrictively and to exclude those things which were not regularly needed.

The "current needs of the household" was first examined in *Woodhouse and Co. Ltd. v. Blouin* in 1966.<sup>137</sup> It was claimed that even though there was separation *de corps* the husband should pay the debts incurred by the wife when they were *nécessaires à la vie*. However, the court did not establish a precedent by interpreting article 180 C.C. in a new way. Rather, it felt itself bound by prior jurisprudence and considered early cases.<sup>138</sup>

Thus, although there had been a hope of objectifying the mandate, the subjective criteria were kept, the court apparently considering itself bound by the rules of tacit mandate.<sup>139</sup>

In 1969, the legalized mandate was again examined in *T. Eaton Co. v. Dame Egglefield*.<sup>140</sup> A credit card had been issued to Mrs

<sup>135</sup> *Supra*, f.n.56, 318.

<sup>136</sup> *Supra*, f.n.122, 171.

<sup>136a</sup> Art.180 C.C.

<sup>137</sup> [1966] C.S. 456.

<sup>138</sup> E.g., *Morgan v. Vibert* (1906) 15 B.R. 407; *Baron v. Court* [1939] C.S. 428; *Pridham v. Ruel* [1943] R.L. 389.

<sup>139</sup> *Supra*, f.n.122, 155.

<sup>140</sup> [1969] C.S. 15.

Egglefield and although it had specified that the credit extended would not surpass \$60 at any time, she had spent over \$1,000 for which both she and her husband were being sued together. The judge considered the status of the husband, the fact that his wife had concealed the purchases from him and was subsequently interdicted for prodigality, and the fact that Eaton's had allowed the limit of credit to be surpassed:

... que les besoins d'une maison et les nécessités d'une maison sont deux choses différentes: ce qui peut être un achat normal dans un foyer peut devenir un luxe dans un autre foyer.<sup>141</sup>

L'article 180 a un caractère subjectif déterminé par la fortune personnelle du mari et sa situation sociale.<sup>142</sup>

The judge held that the husband could only be held responsible for those effects that fell within the purview of article 180 C.C. Because the store had not assured itself that the husband would pay his wife's debts, the remainder of the amount would have to be sought from the wife. Finally, in comparing the present legal mandate with the prior tacit mandate, he said that the results of both were the same.

The extent of the power of the wife to bind her husband is well illustrated in *Dupuis Frères v. Gauthier*.<sup>143</sup> This involved a nine year separation *de fait* in which the wife had abandoned her husband and children; the husband did not know where she lived and he himself had never bought any of the merchandise in question. In addition, the department store knew of her marital situation because she was in their employ. However, because the husband had not sent the notice of non-responsibility required by article 180 C.C., he was held responsible for all the purchases she had made. Here too, the judge referred to prior jurisprudence and decided that since a husband is responsible for the debts of his wife he should be held liable to pay the amount.

Critics of this judgment find it a rigorous application of article 180 C.C., and prefer the theory of the old mandate that separation *de facto* implies a tacit revocation. They believe that the old mandate should have been used in this instance instead of the legalized one in view of the particular situation.<sup>144</sup>

In *Robert Simpson Montreal Ltd. v. Dix* however, where a credit card with a limitation of \$120 had been issued and \$1,033 had been spent in two days, although the plaintiff store invoked article 180

---

<sup>141</sup> *Ibid.*, 18.

<sup>142</sup> *Ibid.*, 19.

<sup>143</sup> [1970] R.L. 178.

<sup>144</sup> *Supra*, f.n.122, 114.

C.C., the Court did not hold against the husband and said that the wife had engaged herself personally.<sup>145</sup>

a) **Protection for the Husband**

In spite of the vast powers that the domestic mandate seemingly gives to the married woman, it is limited in two ways. Firstly, the husband still maintains the *puissance paternelle* with respect to the children, and the wife cannot substitute her right for that of her husband.<sup>146</sup> Furthermore, although the wife now has the power to oversee emergencies pertaining to her children when her husband is unavailable, in Me Ouellette's opinion, she probably could not decide on medical care when no present emergency exists.<sup>147</sup>

Secondly, the husband has the power of retraction. Under community it was felt that the husband should have this power of revocation since the wife could engage both the common property and his private property. Under the old law, the revocation of the tacit mandate had to be express and made personally to third parties with whom the wife had contracted.<sup>148</sup> Contrary to the tacit mandate founded on the husband's will, where cessation of life together automatically meant stoppage of mandate, today when consorts are separated *de facto*, this mandate is not deemed to cease. It was felt therefore, that Bill 16 should not leave the husband with such a heavy responsibility as under the old law without allowing him certain methods of evasion. Therefore, the husband now has the power of revocation which he must use formally unless he is prepared to be sued by the merchants who give credit to his wife. Unless the mandate is retracted, the married woman is deemed to hold it. In cases involving *de facto* separation, it has been held that where the husband has not retracted, third parties should not have to suffer because of appearances; accordingly, husbands have been held liable to pay in instances where the services given to the wife were necessary.<sup>149</sup>

According to Professor F. Héleine, articles 1728 and 1758 C.C. state the principles which are applied by article 180 C.C.<sup>150</sup>

1728: The mandator ... is bound toward third persons for all acts of the mandatary, done in execution and within the powers of the

<sup>145</sup> [1971] C.S. 196.

<sup>146</sup> Art. 243 C.C.

<sup>147</sup> *Supra*, f.n.22, 201.

<sup>148</sup> *Gratton v. Hermann* (1931) 69 C.S. 479.

<sup>149</sup> *E.g., Dupuis Frères v. Gauthier* [1970] R.L. 178; *Gratton v. Hermann* (1931) 69 C.S. 479; see also Ouellette-Lauzon, *supra*, f.n.122.

<sup>150</sup> Héleine, *Les pouvoirs ménagers de la femme mariée en droit québécois* (1972), 337.

mandate after it has been extinguished, if its extinction be not known to such third persons.

1758: If notice of the revocation be given to the mandatary alone, it does not affect third persons who in ignorance of it have contracted with the mandatary, saving to the mandator his right against the latter.

This retraction will not be effective unless third parties have knowledge of it at the moment of dealing with the wife. However, this right is more theoretical than practical since it is difficult if not impossible for the husband to advise all third parties capable of dealing with his wife and even more so, to prove that they know of this retraction at the moment of dealing with her.<sup>151</sup>

In Professor Ouellette-Lauzon's opinion, if the wife uses credit cards, the companies should be advised personally as should the regular suppliers of the wife. As for the rest, article 139 C.C.P. provides for the issuance of a public notice.<sup>152</sup>

In the case of a wife abusing her right, her husband has the power to revoke the mandate. However, the Civil Code says nothing with respect to an abusive retraction by the husband: "... le droit du mari d'effectuer le retrait paraît discrétionnaire".<sup>153</sup> The problem with the power of revocation is that it seems to be contradictory to the intention of the legislators; if one admits that the power of revocation is absolute and without boundary, then one returns to the arbitrary rules prior to Bill 16. Perhaps in the case of a mandate being retracted without good reason, a married woman can reacquire it by bringing the matter before the court.

#### b) Protection for Third Parties

With respect to acts involving third parties, the legislators of Bill 10 have taken another step forward in establishing equality between the husband and the wife. Prior to Bill 10, Quebec Law did not have a provision equivalent to article 1427 of the Napoleonic Code, which provided that if one consort surpassed his or her powers on the private, common or reserved property, the other could ask for annulment so long as the act had not been ratified. Quebec Law had opted neither for nullity, nor opposability, but rather for a hybrid: "Saving the case of article 180, acts done by the wife without her husband's consent or judicial authorization do not affect the property of the community beyond the amount of the benefit it derives from them."<sup>154</sup>

---

<sup>151</sup> *Supra*, f.n.134, 26.

<sup>152</sup> *Supra*, f.n.122, 101.

<sup>153</sup> *Supra*, f.n.134, 26.

<sup>154</sup> Former art.1296 C.C.

Jurisprudence however, found this Bill 16 formula ineffective and opted for nullity. In *Rossy v. Cinq-Mars*, the Court annulled the sale of the common *meubles meublant* made by the husband in contravention of article 1292 C.C. which forbade him to alienate that furniture which was in use by the household.<sup>155</sup> The problem created by this type of situation has been posed as follows:

One of the difficulties affecting the application of matrimonial rules relates to the relationships between the consorts and third parties. The latter, in the present state of our law are constantly having to ask themselves whether the consort with whom they are desirous of contracting has the necessary power to do so. It is urgent that this situation be clarified and that third parties be enabled to contract without being subject to risk: hence the presumption enacted in this article.<sup>156</sup>

Bill 10 established article 184 C.C. both as a protection for third parties, and to facilitate transactions so that it would not be necessary to prove change of regime or that one had the right to alienate the property in question.

There is now a compromise between the protection of third parties and that of the consorts; under article 183, the protection of the consorts is assured by the nullity of the act passed without power, and the protection of third parties by the relatively short delay in which to contest the act.<sup>157</sup> On the one hand, article 184 C.C. prevents contracts with third parties in good faith being annulled because one of the parties exceeded his powers; on the other, it forbids one of the consorts from proving that the moveable which the other disposed of onerously was a property that did not belong to him or her, or that the moveable disposed of gratuitously was an acquiescent susceptible of being partitioned.<sup>158</sup> According to Me Pineau, article 183 C.C. will be inapplicable when the act bears on a moveable held individually and when the third party is in good faith. Only if the third party is in bad faith with respect to the moveable will the consort foreseen by article 183 C.C. have a recourse.<sup>159</sup> Me Pineau goes on to say that he who acquires important property without interrogating the vendor with respect to his matrimonial status can lose the presumption of good faith. Therefore, it would be to his advantage to ask for a double signature, which in turn would make article 184 C.C. ineffective.

---

<sup>155</sup> *Rossy v. Cinq-Mars* [1966] C.S. 423.

<sup>156</sup> *Supra*, f.n.48, 126.

<sup>157</sup> *Supra*, f.n.19, 75.

<sup>158</sup> *Supra*, f.n.84, 25.

<sup>159</sup> *Ibid.*

#### IV. CONCLUSION

As shown in the preceding sections, many articles of the Civil Code have been introduced, repealed, or amended in order to establish equality for the married woman.

It is evident that the legislators have not yet had sufficient time to complete their task for there are still a number of articles which, because they are unchanged, might lead to the claim that the husband was intended to remain the head of the family. In addition to articles 176 and 180 C.C. which have already been discussed, these articles include the following:

- A. Article 243 C.C. which came into force with the promulgation of the Civil Code states that "the father alone" exercises authority with respect to the child during marriage.
- B. Article 174 C.C., on which the concept of male supremacy was founded, still preserves the notion of inequality. This is so in spite of the fact that it was amended by Bill 16 from "a husband owes protection to his wife: a wife obedience to her husband" to "[t]he wife participates with the husband in ensuring the moral and material control of the family". Nevertheless, it is she who participates with him and not he with her, and it is she who can exercise these functions alone when he is unable to, rather than both being able to in the event of the other being *hors d'état*.
- C. Article 175 C.C. was improved by Bill 16. Originally the wife was always obliged to live with her husband; now she may take up a new residence in the event that the house chosen by the husband exposes the family to danger of a physical or moral nature. Because the prerogative of choice was left with the husband (even though his discretion was not absolute), and was unchanged by Bill 10, again it would seem that the intention was to leave the husband as the head of the family.<sup>160</sup>
- D. Article 83 C.C. provides that a married woman, unless she is separated from bed and board, has no domicile but that of her husband.

The foregoing articles serve as examples of those which require review in order to comply with the spirit of equality of Bill 10.

---

<sup>160</sup> According to Me Ouellette, this new right added little, for even before Bill 16, the wife was not obliged to cohabit when the residence offered was contrary to her dignity. Whereas before the situation was illegal, today she can legalize it by asking the judge to authorize a separate residence; *supra*, f.n.22.

In general then, the married woman under partnership of acquests is the juridical equal of her husband. But is this so in fact? Does the business world recognize her equality and grant her personal loans and hypothecs, and make her solely responsible for her charge accounts?

To learn about prevailing attitudes, I submitted a questionnaire to five banks and five department stores with the explanation that I wanted to know whether their treatment of women had changed with the promulgation of the new law.

Of the banks, only two answered: One sent a non-committal letter that ignored the questionnaire and stated that it did not matter whether a borrower was male or female and that any differences the bank took into account were those it was required to observe by the law of the province. The second bank replied that with respect to personal loans it would only lend to a housewife who had sufficient private means, and with respect to mortgages it would definitely not give one to any married woman unless her husband guaranteed it. In conclusion, the bank stated that in Quebec, it is the credit of the husband that is considered when the wife borrows.

Of the department stores, three answered. One stated that they did not answer questions of this type by mail. With respect to the other two, the consensus of opinion was that Bill 10 had not influenced their treatment of women, and that the husband was still responsible for his wife's debts while the opposite was not so.

The attitudes of the business world and institutions in general may take some time to change. But change they must, as has the Civil Code, to recognise the full juridical capacity of the married woman.

---