



SUPREME COURT OF CANADA

CITATION: Toronto-Dominion Bank v. Young,
2020 SCC 15

**APPEAL HEARD AND JUDGMENT
RENDERED:** November 7, 2019
REASONS FOR JUDGMENT: June 19, 2020
DOCKET: 38242

BETWEEN:

Toronto-Dominion Bank
Appellant

and

Harold Young and Robert Young
Respondents

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown,
(paras. 1 to 2) Rowe, Martin and Kasirer JJ.

DISSENTING REASONS: Côté J.
(paras. 3 to 62)

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TORONTO-DOMINION BANK v. YOUNG

Toronto-Dominion Bank

Appellant

v.

Harold Young and Robert Young

Respondents

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2020 SCC 15

File No.: 38242.

Hearing and judgment: November 7, 2019.

Reasons delivered: June 19, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Hypothecs — Exercise of hypothecary rights — Taking in payment — Prescription — Loans to debtor secured by first hypothec in favour of bank and by second hypothec in favour of two individuals — Debtor defaulting on payments to individuals, and individuals taking immovable in payment subject to first hypothec —

Debtor defaulting on payments to bank — Bank filing and serving motion for forced surrender and taking in payment against individuals only — Superior Court hearing motion more than three years after it was filed — Individuals arguing that bank's claim against debtor had been extinguished by virtue of three-year prescription, with result that hypothec securing claim had been extinguished and that motion had to be dismissed — Superior Court finding that failure to serve motion on debtor was not fatal, that bank had instituted its action in timely manner and that delay between filing of motion and judgment could not be attributed to it — Court of Appeal setting aside Superior Court's judgment — Bringing of hypothecary action against person who holds immovable but is not debtor of personal obligation does not interrupt prescription of obligation, which continues to run during proceeding — On date of Superior Court's judgment, secured claim was prescribed and hypothecary action was barred because obligation secured by hypothec had been extinguished — Bank's hypothecary action dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.: The appeal should be dismissed for the reasons given by the Court of Appeal.

Per Côté J. (dissenting): The appeal should be allowed, the forced surrender of the immovable ordered and the bank declared the owner of the immovable. The bank exercised its hypothecary remedy against the individuals in a timely manner, while the personal claim against the debtor was not prescribed and all

of the applicable conditions were met. The filing of the motion for forced surrender and taking in payment interrupted prescription for the purposes of exercising the hypothecary remedy.

A hypothec is a real right made liable for the performance of an obligation. It gives the creditor a right to follow, allowing the creditor to follow the property in whatever hands it lies. The creditor can therefore exercise a hypothecary remedy against the person who has become the owner of the charged property. The fact that a hypothec is an accessory right means that it is valid only as long as the obligation whose performance it secures subsists. The prescriptive period for a hypothecary action follows that which applies to a personal action, since the accessory follows the principal. Three-year extinctive prescription applies in the case of a hypothec that secures a personal obligation, pursuant to art. 2925 C.C.Q.

The rights and remedies arising from a hypothec are in addition to the personal rights and remedies that the law confers on the creditor. It is a cardinal principle of the law of hypothecs that the creditor, and only the creditor, has the choice of remedy. Not only can the creditor choose the type of hypothecary remedy he or she wishes to pursue, but the creditor can also choose whether or not to exercise a hypothecary or a personal remedy. The creditor can also combine the two remedies if he or she wishes without worrying about *lis pendens* or *res judicata*, because their objects are different.

Hypothecary rights are exercised directly against the person who has the hypothecated property in his or her hands. It is possible that that person will not be the person with whom the hypothecary creditor contracted in the first place. For example, a hypothecary creditor who takes property in full payment of a claim and becomes its owner takes the property subject to all hypothecs published before his or her hypothec was published. In such circumstances, that creditor therefore becomes hypothecarily obligated toward a creditor holding an earlier ranking hypothec, and the latter's hypothecary rights must then be exercised against the former.

The *Civil Code* requires certain conditions to be met and preliminary measures to be taken in order for a creditor to exercise a hypothecary remedy. The conditions set out in art. 2748 para. 2 *C.C.Q.* must be met: the debtor must be in default and the claim must be liquid and due. In addition, art. 2749 *C.C.Q.* provides that the creditor may not exercise his or her hypothecary rights before the period determined in art. 2758 *C.C.Q.* for surrender of the property has expired. The creditor must therefore serve and register a prior notice of the exercise of a hypothecary remedy that specifies the period provided for by law for the surrender of the hypothecated property. Only after that period has expired can the creditor exercise a hypothecary remedy.

A court must look to the time when the creditor exercised his or her hypothecary remedy, i.e. the time when the creditor's motion was filed and served — not the time of the judgment — to determine whether the conditions of art. 2748

C.C.Q. are met and whether the remedy was therefore exercised in a timely manner. Like a personal remedy, a hypothecary remedy must be exercised while the principal obligation is not prescribed. The registration of a prior notice of the exercise of a hypothecary right does not represent the exercise of the hypothecary right itself. It is not the prior notice, but rather the motion for forced surrender and taking in payment, that constitutes a judicial application capable of interrupting prescription within the meaning of art. 2892 para. 1 *C.C.Q.* Once filed, the motion interrupts prescription until a judgment is rendered, and the interruption has effect with regard to all the parties with respect to any right arising from the same source, as stated in art. 2896 para. 2 *C.C.Q.* Both the hypothecary remedy and the personal remedy arise from the same source — the secured obligation — and thus meet the criterion in art. 2896 para. 2 for finding that prescription has been interrupted. A hypothecary creditor who chooses to pursue a hypothecary remedy is therefore not required to bring a personal action in order to interrupt prescription. Provided that the conditions set out in arts. 2748 and 2749 *C.C.Q.* are met, the exercise of a hypothecary remedy interrupts prescription on a hypothecary basis. These principles take on added relevance where a hypothecary remedy is exercised against a person who is not the debtor of the principal obligation.

In this case, the individuals took the immovable in payment and became its owners subject to the bank's first hypothec. They became bound *propter rem* because the hypothecated property was in their hands. Once the period specified in the prior notice of the exercise of a hypothecary right expired, the bank exercised its

hypothecary remedy by filing a motion for forced surrender and taking in payment against the owners of the immovable, the individuals, who were its hypothecary debtors. On that date, the debtor of the secured obligation was in default, the personal claim secured by the hypothec was liquid and due and the 60-day period had expired. All of the conditions for exercising the hypothecary remedy were met. The bank therefore exercised its hypothecary remedy in a timely manner. By filing its motion and serving it on the hypothecary debtors, the bank interrupted prescription in relation to them.

Cases Cited

By Côté J. (dissenting)

St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64, [2008] 3 S.C.R. 392; *ABB Inc. v. Domtar Inc.*, 2005 QCCA 733, [2005] R.J.Q. 2267, aff'd 2007 SCC 50, [2007] 3 S.C.R. 461; *Barakett v. Goyette*, 1999 CanLII 11983; *Latcon Ltd. v. Radial Investments Ltd.*, 2008 QCCS 35; *Poulin-Sansoucy v. Services immobiliers Simmco D.P. inc.*, 2000 CanLII 10400; *Développements de Normandie inc. v. Delorme*, 2004 CanLII 17395.

Statutes and Regulations Cited

Civil Code of Quebec, arts. 2660, 2661, 2663, 2688, 2748, 2749, 2751, 2757, 2758, 2761, 2769, 2782 para. 1, 2783 para. 1, 2797, 2892, 2896, 2923 para. 1, 2925, 2941 para. 1, 2943 para. 1, 2945.

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APPEAL from a judgment of the Quebec Court of Appeal (Bich and Savard JJ.A. and Emery J. (*ad hoc*)), 2018 QCCA 810, [2018] AZ-51494849, [2018] J.Q. n^o 4195 (QL), 2018 CarswellQue 4075 (WL Can.), setting aside a decision of Goulet J., 2016 QCCS 838, [2016] AZ-51259933, [2016] J.Q. n^o 1625 (QL), 2016 CarswellQue 1549 (WL Can.). Appeal dismissed, Côté J. dissenting.

Philippe H. Bélanger, Claude Savoie and Sébastien Cusson, for the appellant.

Normand Carrière, for the respondents.

English version of the reasons for judgment delivered by

THE CHIEF JUSTICE AND ABELLA, MOLDAVER, KARAKATSANIS, BROWN,
ROWE, MARTIN AND KASIRER JJ. —

[1] We have carefully read the reasons of our colleague Côté J. In our view, the Court of Appeal's reasons are complete having regard to the issues, and we are entirely in agreement with them.

[2] We would dismiss the appeal with costs.

English version of the reasons delivered by

CÔTÉ J. —

[3] Does a motion for forced surrender and taking in payment — a purely hypothecary remedy — brought against a debtor who is not the original debtor constitute a separate and independent remedy or a remedy that depends on the continued existence during the proceeding of a claim against the original debtor? That is the question before the Court in this case.

[4] In order to answer the question, it is necessary to consider two areas of the law which bear certain quite technical aspects, namely hypothecary remedies and prescription. The solution to the problem raised by the facts of this case turns on a rigorous interpretation of the relevant provisions of the *Civil Code of Québec* (“C.C.Q.” or “*Civil Code*”), an interpretation that must be firmly rooted in civil law principles and informed by the practical realities faced by the parties.

I. Facts

[5] The parties to this appeal are the Toronto-Dominion Bank (“TD Bank”), the appellant, and brothers Harold and Robert Young, the respondents. These two parties are before this Court as a result of the contractual relationship that each of them had with Linda Macht in the context described below.

[6] On September 14, 2009, Ms. Macht took out a mortgage loan with TD Bank for \$306,000. The loan was secured by a first hypothec on an immovable situated at 118 Eardley Road in Gatineau (“the immovable”). The hypothec was published the same day at the registry office of the Gatineau registration division.

[7] Also on September 14, 2009, Ms. Macht took out a second loan for \$94,160, this time with the respondents. That loan was secured by a second hypothec on the immovable. The respondents published their hypothec the next day, September 15, 2009. It is not disputed that the respondents were aware of TD Bank’s hypothec at the time, as it had been disclosed in their loan agreement with Ms. Macht.

In any event, a hypothec can be set up against third persons from the date it is published, that is, September 14, 2009 in the case of TD Bank's hypothec: arts. 2663, 2941 para. 1 and 2943 para. 1 *C.C.Q.* The ranking of rights is clear in this case: art. 2945 *C.C.Q.*

[8] On October 27, 2010, the loan agreement between TD Bank and Ms. Macht was renewed for a term of five years through a document called "Mortgage Renewal Agreement", under which Ms. Macht was entitled to a cash back amount of \$15,231.27. The maturity date for that new loan was November 1, 2015.

[9] On October 17, 2011, after Ms. Macht defaulted on her payments to them, the respondents obtained a judgment from the Quebec Superior Court allowing their action for forced surrender and taking in payment of the immovable pursuant to their second hypothec. They were therefore declared to be the owners of the immovable: A.R., vol. II, at pp. 55-57.

[10] On November 15, 2011, TD Bank served Ms. Macht with a prior notice of the exercise of a hypothecary right because she was in default in paying her arrears and interest on the principal of the mortgage loan granted by TD Bank. The prior notice was registered in the land register on December 5, 2011. On February 6, 2012, 60 days having elapsed since the registration of the prior notice, TD Bank filed a motion to institute proceedings for forced surrender and taking in payment in which it named Ms. Macht as the sole defendant.

[11] Following a series of letters between counsel for the respondents and counsel for the appellant, the respondents successively paid, under protest, for the benefit of the appellant, \$30,610.88 on February 17, 2012 and \$12,343.77 on February 29, 2012 in order to remedy Ms. Macht's default.

[12] It is in this context that, on March 8, 2012, the respondents filed a declaration of aggressive intervention in the litigation between TD Bank and Ms. Macht. They invoked their status as owners of the immovable and sought the dismissal of TD Bank's motion to institute proceedings. They stated the following in the declaration:

4. The defendant Linda Macht having already judicially been forced to surrender in favour of the interveners the immovable property hereinabove described is therefore no longer the person against whom the hypothecary right can be exercised;
5. Thus the persons against whom the hypothecary right (forced surrender and taking in payment) can be exercised are the interveners;
6. The interveners as owners and as the person against whom the hypothecary right should be exercised have since remedied the omission or breach set forth in the prior notice [Emphasis added.]

(A.R., vol. II, at p. 80)

The respondents argued that by remedying Ms. Macht's default, they had defeated TD Bank's right to exercise its hypothecary remedy. TD Bank therefore discontinued its proceedings on March 20, 2012.

[13] On July 10, 2012, TD Bank served a new prior notice of the exercise of a hypothecary right, this time on the respondents, for the balance of the amount due, which was \$327,661.90: A.R., vol. II, at pp. 95-97. The prior notice was registered on August 8, 2012. On August 22, 2012, the respondents filed a motion to institute proceedings, which they served on TD Bank, in order to have TD Bank's hypothec declared extinguished by reason of novation, to have that hypothec cancelled and to claim reimbursement of the amounts paid under protest. No allegation regarding prescription of any kind was made at that time. On October 11, 2012, TD Bank filed a motion for forced surrender and taking in payment in which the respondents were named as the defendants. It seems that, at the time, Ms. Macht was nowhere to be found.

[14] The proceedings moved forward in the Superior Court, and the two cases — the respondents' motion for a declaratory judgment and for cancellation of the hypothec and the appellant's motion for forced surrender and taking in payment — were joined on March 18, 2013. On January 22, 2014, the respondents requested a postponement of the hearing scheduled for February 24, 2014 because Harold Young was convalescing from a medical condition. The postponement was granted by consent on February 13, 2014. The hearing in the Superior Court was held on November 2, 2015 and judgment was rendered on February 19, 2016, more than three years after TD Bank filed its motion for forced surrender and taking in payment.

II. Judgments Below

A. *Quebec Superior Court, 2016 QCCS 838 (Goulet J.)*

[15] The Superior Court granted TD Bank's motion. The court, per Goulet J., ordered the forced surrender of the immovable and declared TD Bank its owner. The respondents' main argument in the Superior Court was that the Mortgage Renewal Agreement entered into by TD Bank and Ms. Macht on October 27, 2011 constituted a new loan and therefore effected novation, thereby affecting the rank of TD Bank's hypothec. During the weeks prior to the hearing, the respondents raised a second argument, namely that TD Bank's remedy was prescribed: paras. 24-25 and 60 (CanLII).

[16] The trial judge pointed out that novation cannot be presumed and that the respondents bore the onus of proving its existence: paras. 34-35. He found that such proof had not been made in this case, noting that there was no language in the Mortgage Renewal Agreement revealing a clear intention to novate: para. 41. In addition, the hypothecary loan provided that the first hypothec also secured future debts, in accordance with art. 2688 *C.C.Q.* The trial judge was therefore of the view that novation had not been effected and that even if the renewal had created a new debt, it would be a future debt covered by the hypothec: para. 51.

[17] The judge then considered the argument relating to extinctive prescription. He had to determine whether the fact that Ms. Macht had not been served with the prior notice of the exercise of a hypothecary right had any effect on TD Bank's hypothecary remedy: para. 68. Although art. 2757 *C.C.Q.* suggests that

service of a prior notice on the debtor is mandatory, the judge noted that the commentary of the Minister of Justice on this article is more equivocal. Citing Professor Denise Pratte, who observes that the courts have not sanctioned a failure to serve in the absence of prejudice, and mentioning that the debtor, Ms. Macht, had not only not been prejudiced but had been impossible to find when the prior notice was served, the judge held that service on the respondents alone was sufficient: para. 73.

[18] The judge applied the same reasoning to the hypothecary action and found that failure to serve the proceeding on Ms. Macht, a debtor who no longer had any real rights in the immovable, was not fatal. It followed that the respondents could not argue that extinctive prescription had extinguished the appellant's right for non-use. The appellant had instituted its action in a timely manner, and the [TRANSLATION] "delay before the conclusion of the hearing", that is, the delay between the filing of the motion and the judgment, could not be attributed to it: para. 90.

B. *Quebec Court of Appeal, 2018 QCCA 810 (Bich and Savard JJ.A. and Emery J. (ad hoc))*

[19] The Court of Appeal allowed the respondents' appeal and dismissed the appellant's hypothecary action. It noted that a hypothec is accessory to the obligation it secures. Thus, the secured obligation must not be prescribed at the time the creditor institutes a hypothecary action, because if it is prescribed, the claim is no longer due within the meaning of art. 2748 para. 2 *C.C.Q.*: para. 22 (CanLII). These principles

apply in the same way where the action is brought against the person holding the hypothecated property rather than against the debtor of the obligation: para. 27.

[20] The Court of Appeal noted that when TD Bank filed its hypothecary action, the claim on which it was based was not prescribed. Prescription was rather acquired during the course of the proceeding: para. 28. The Court of Appeal found that the appellant's claim had been extinguished on July 10, 2015 and that the hypothecary action brought against the respondents had not interrupted prescription: paras. 29 and 33. Because Ms. Macht was not a party to the hypothecary action and had not been served with the proceedings, the interruption of prescription did not apply to her, in accordance with arts. 2892 and 2896 *C.C.Q.*: para. 33. Thus, the bringing of a hypothecary action against the person who holds the hypothecated property and who is not the debtor of the personal obligation does not interrupt prescription of that obligation, which continues to run during the proceeding: para. 34. The Superior Court should therefore have dismissed the hypothecary action, since on the date of the judgment, the claim was prescribed and the hypothec was extinguished: para. 35.

III. Issues

[21] The parties submit the following issues:

[TRANSLATION]

1. Under Quebec law, does the bringing of an application for forced surrender for taking in payment, a purely hypothecary remedy,

constitute a separate and independent remedy or a remedy that depends on the existence and the maintenance during the proceeding of a debt in relation to the original debtor?

2. In the alternative, in the civil law, can court delay in hearing a case and rendering judgment, in light of judicial resources and other circumstances, result in the loss of clear and indisputable rights that a party had at the time of instituting an action?

(R.F., at p. 4; see also A.F., at para. 41)

IV. Analysis

A. *Applicable Principles*

[22] Hypothecs form part of the arsenal of securities available to a creditor to secure a claim and thereby be protected from a defaulting debtor. A hypothec is a real right “made liable for the performance of an obligation” and provides the creditor with a direct link to the property that is the subject of the security: art. 2660 C.C.Q.; see also D. Pratte, *Priorités et hypothèques* (3rd ed. 2012), at No. 9. As Professor Pierre-Claude Lafond states, [TRANSLATION] “[a] real right is a *power* that a person can exercise *directly* over property. Because there is a *direct link*, there is no intermediary between the holder of the right and the property”: P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at No. 422 (emphasis in original).

[23] Therefore, one of the fundamental features of a hypothec is that it gives the creditor a right to follow. This means that it allows the creditor to follow the

property in whatever hands it lies: arts. 2660 and 2751 *C.C.Q.* The right to follow helps ensure the effectiveness of a hypothec as security and enables the creditor to exercise the hypothecary rights provided for in the *Civil Code* [TRANSLATION] “regardless of who holds the property hypothecated in the creditor’s favour”: É. Lambert, *Les sûretés*, vol. 5, *Exercice des droits hypothécaires et extinction des hypothèques (Art. 2748 à 2802 C.c.Q.)* (2010), at p. 111. This means that if the hypothecated property leaves the patrimony of the grantor of the hypothec, the creditor can assert his or her right to follow and exercise a hypothecary remedy against the person who has become the owner of the charged property, “who is bound only hypothecarily on the property”: Lambert, at p. 120; see also D. Pratte, “Les recours des créanciers hypothécaires”, in *Collection de droit de l’École du Barreau du Québec 2019-2020*, vol. 7, *Contrats, sûretés, publicité des droits et droit international privé* (2019), 179, at p. 184.

[24] Another fundamental feature of a hypothec is that it is accessory to the principal obligation it secures. This means that it is valid only as long as the obligation whose performance it secures subsists: art. 2661 *C.C.Q.* This affects the prescriptive period applicable to a hypothecary remedy. While actions to enforce immovable real rights are prescribed by 10 years under art. 2923 para. 1 *C.C.Q.*, the prescriptive period for a hypothecary action follows that which applies to a personal action, since the accessory follows the principal: arts. 2661 and 2797 *C.C.Q.*; see also Pratte (2012), at No. 76; C. Gervais, *La prescription* (2009), at pp. 22-23. Three-year

extinctive prescription will therefore apply in the case of a hypothec that secures a personal obligation, pursuant to art. 2925 *C.C.Q.*

[25] While a hypothec is accessory to the principal obligation it secures, it confers rights that are nonetheless distinct. The principal obligation, or the claim, confers *personal* rights and remedies, whereas the hypothec confers *hypothecary* rights and remedies: Pratte (2012), at No. 69. The rights and remedies arising from a hypothec are therefore in addition to the other rights that the law confers on the creditor: L. Payette, *Les sûretés réelles dans le Code civil du Québec* (5th ed. 2015), at No. 1627.

[26] The *Civil Code* sets out the range of hypothecary remedies available to a creditor in addition to the personal remedy:

2748. In addition to their personal right of action and the provisional measures provided in the Code of Civil Procedure (chapter C-25.01), creditors may exercise only the hypothecary rights provided in this chapter for the enforcement and realization of their security.

Thus, where their debtor is in default and their claim is liquid and due, they may exercise the following hypothecary rights: they may take possession of the charged property to administer it, take it in payment of their claim, cause it to be sold under judicial authority or sell it themselves.

[27] It is a cardinal principle of the law of hypothecs that the creditor, and only the creditor, has the choice of remedy. The *Civil Code* is clear in this regard; the use of the words “[i]n addition to” in art. 2748 para. 1 *C.C.Q.* shows the freedom that a

creditor has to pursue the remedy he or she prefers for asserting a claim. As Louis Payette states, [TRANSLATION] “[t]his choice to exercise personal or real remedies is the creditor’s alone”: No. 1651. To be clear, this choice is multidimensional. Not only can the creditor choose the type of hypothecary remedy he or she wishes to pursue — taking of possession for the purposes of administration, taking in payment, sale under judicial authority or sale by agreement, by a call for tenders or by auction — but the creditor can also choose whether or not to exercise a hypothecary or a personal remedy. After all, as Professor Pratte states, [TRANSLATION] “[a] hypothecary creditor remains above all a creditor, who retains all of his or her rights in the debtor’s entire patrimony”: Pratte (2019), at p. 179. Thus, the existence of a hypothec does not force the creditor to exercise a hypothecary remedy: Pratte (2012), at No. 487.

[28] The creditor may therefore choose to sue the debtor *in personam* or *in rem* or both. If the creditor chooses to sue the debtor *in personam*, the personal remedy will enable the creditor to obtain a judgment that is enforceable against all property in the debtor’s patrimony, whereas if the creditor chooses to sue the debtor *in rem*, the hypothecary remedy will enable the creditor to realize on the hypothecary security on the charged property: Pratte (2012), at No. 488. The creditor can also combine these two remedies if he or she wishes. There are therefore three choices: the creditor can exercise a personal remedy *or* a hypothecary remedy *or* a personal and hypothecary remedy.

[29] It is important to note that even where a personal remedy is exercised concurrently with a hypothecary remedy, each remedy retains its own features. While personal and hypothecary remedies can be pursued jointly, they nevertheless remain two different remedies [TRANSLATION] “that each retain their nature”: Payette, at No. 1656, citing R.-J. Pothier, *Œuvres* (Dupin ed.), *Les Traités du droit français*, vol. 7, *Des arrêts et exécutions, etc., Introduction au Titre XX*, at p. 485. A creditor can therefore exercise them at the same time, or even in the same proceeding, without worrying about *lis pendens* or *res judicata*, because their objects are different: Pratte (2019), at p. 180; Pratte (2012), at No. 488; Payette, at No. 1654. Indeed, none of the hypothecary remedies provided for in the *Civil Code* inherently entails personal conclusions against the debtor: Payette, at No. 1656.

[30] I pause for a moment to consider taking in payment, the remedy exercised in the instant case. This hypothecary remedy involves taking the hypothecated property in full payment of the claim: Pratte (2012), at No. 557. Taking in payment therefore enables the creditor to become the owner of the property — whether the value of the property is higher or lower than the value of the creditor’s claim — and extinguishes the principal obligation: arts. 2782 para. 1 and 2783 para. 1 *C.C.Q.*; Pratte (2012), at No. 557; Payette, at No. 1901. It can thus truly be said that there is a transfer of the ownership of the property, which leaves the debtor’s patrimony and is transferred to that of the creditor, who becomes its owner: Pratte (2012), at No. 575. It should be noted that taking in payment has retroactive effect; the creditor becomes the owner of the hypothecated property and the obligation is extinguished retroactive

to the date on which the prior notice of the exercise of a hypothecary right was registered: art. 2783 para. 1 *C.C.Q.*

[31] The circumstances of the case are important, because a creditor contemplating the possibility of taking hypothecated property in payment must assess its value in comparison with the value of his or her claim. This must be done with a view to the higher ranking hypothecs on the property that the creditor seeks to take in payment: Lambert, at pp. 652-54; Pratte (2012), at No. 573. This is because — and this fact is fundamental to the appeal in this case — a hypothecary creditor who takes property in payment takes it as it stood at the time the prior notice was registered, that is, subject to all hypothecs published before the creditor’s hypothec was published: art. 2783 para. 1 *C.C.Q. a contrario*. A creditor who takes property in payment in such circumstances, as the respondents did in this case when they took the immovable in payment on the basis of their second hypothec, therefore becomes hypothecarily obligated toward a creditor holding an earlier ranking hypothec: Pratte (2019), at pp. 202-3. As Édith Lambert explains:

[TRANSLATION] Under article 2783 para. 1 *C.C.Q. a contrario*, a creditor who takes property in payment takes it subject to all hypothecs published before the creditor’s hypothec was published. As Denise Pratte states, this means that in relation to the higher ranking hypothecary creditors, the lower ranking creditor “who has taken in payment is a third party holder who is not bound personally for the debt but is bound hypothecarily”. A higher ranking creditor who is not paid off can therefore exercise a hypothecary right against the creditor who has taken the property in payment. . . . [Emphasis added; footnote omitted; pp. 692-93.]

[32] Accordingly, everything depends on the circumstances and on the creditor's situation at the time of exercising his or her remedy (or remedies). It remains clear, however, that these strategic considerations are a matter for the creditor, not for the court.

[33] When exercising a hypothecary remedy, a creditor must first determine from whom the remedy is to be sought. I reiterate that “[t]he creditor may exercise his hypothecary rights in whatever hands the property lies”: art. 2751 *C.C.Q.* It is true that the hypothec, as a real right, gives the creditor a direct link to the property, but that right must nevertheless be exercised against a person who can be answerable for it in court. That person is the holder of the property, who, as such, is under a “real” obligation:

[TRANSLATION] As a result of having possession of property, a person becomes obliged to bear the real rights attached to the property; the person is therefore said to be “under a real obligation”, that is, under an obligation by reason of the property. This is true of a person who acquires hypothecated property without having undertaken to pay the obligation secured by the hypothec: in such a case, the creditor retains the right to exercise his or her hypothecary remedies against the property but does not have the right to bring a personal action against the person. The “real” obligation is not reflected through the entire patrimony. [Footnotes omitted.]

(Payette, at No. 15)

Hypothecary rights are therefore exercised [TRANSLATION] “directly against the person who has the hypothecated property in his or her hands”: Pratte (2019), at p. 184. Usually, that person is the original debtor and grantor of the hypothec, who

remains the owner of the hypothecated immovable. However, it is possible that the person will not be the person with whom the hypothecary creditor contracted in the first place: Pratte (2012), at No. 64. Where the property is no longer part of the patrimony of the grantor or the original debtor of the hypothec, the right to follow enables the creditor to exercise a hypothecary remedy against the new owner of the property, [TRANSLATION] “who is bound only hypothecarily on the property”: Lambert, at p. 120.

[34] The *Civil Code* requires certain conditions to be met and preliminary measures to be taken in order for a creditor to exercise a hypothecary remedy. First, the conditions set out in art. 2748 para. 2 *C.C.Q.* must be met: the debtor must be in default and the claim must be liquid and due. In addition, art. 2749 *C.C.Q.* provides that the creditor may not exercise his or her hypothecary rights before the period determined in art. 2758 *C.C.Q.* for surrender of the property has expired. The creditor must therefore serve and register a prior notice of the exercise of a hypothecary remedy that specifies the period provided for by law for the surrender of the hypothecated property: arts. 2757 and 2758 *C.C.Q.* This requirement allows the defaulting debtor to know with certainty the time limit for remedying the default and gives interested third persons enough time to defeat the exercise of the hypothecary right: Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 1722.

[35] The condition imposed by art. 2749 *C.C.Q.* is therefore in addition to the requirements set out in art. 2748 *C.C.Q.* for the exercise of a hypothecary remedy. Only after the period for surrender of the property has expired can the creditor exercise a hypothecary right. In my view, it is at that time, i.e. at the time the remedy is exercised — not the time of the judgment — that a court must determine whether the conditions of art. 2748 *C.C.Q.* are met, including the condition that the claim be liquid and due, and whether the remedy was therefore exercised in a timely manner.

[36] Indeed, whether or not the secured claim is prescribed must be assessed by a court *at the time the remedy was exercised*. The wording of arts. 2748 and 2749 *C.C.Q.* clearly focuses on the “exercise” of rights:

2748. In addition to their personal right of action and the provisional measures provided in the Code of Civil Procedure (chapter C-25.01), creditors may exercise only the hypothecary rights provided in this chapter for the enforcement and realization of their security

Thus, where their debtor is in default and their claim is liquid and due, they may exercise the following hypothecary rights: they may take possession of the charged property to administer it, take it in payment of their claim, cause it to be sold under judicial authority or sell it themselves.

2749. Creditors may not exercise their hypothecary rights before the period determined in article 2758 for surrender of the property has expired.

[37] A prudent hypothecary creditor will therefore have verified the length of the period that applies in his or her case pursuant to art. 2758 para. 2 *C.C.Q.* in order to ensure that the claim will not be prescribed when that period expires. In other

words, the creditor will have ensured that the claim will still be due, in addition to being liquid, and that he or she will therefore be able to exercise his or her hypothecary rights, provided, of course, that the default has not been remedied within the specified period.

[38] It is when a motion is filed and served that a hypothecary remedy is exercised. While the registration of a prior notice of the exercise of a hypothecary right marks the start of the period provided for in art. 2758 para. 2 *C.C.Q.*, it does not in fact represent the exercise of the hypothecary right itself:

[TRANSLATION] The choice of the term “prior notice”, and the prohibition in article 2749 C.C. against exercising a hypothecary remedy before a predetermined period arising from that notice has expired, shows that the legislature intended the notice to be a preliminary measure to the exercise of such remedies. The prior notice must precede this “exercise” but is not, strictly speaking, its starting point. Thus, it is not equivalent to the filing of a judicial application and it does not interrupt prescription; it states an intention, which the creditor can revoke without any need for a formal discontinuance or cancellation of registration. [Emphasis added.]

(Payette, at No. 1747)

[39] It is not the prior notice of the exercise of a hypothecary right, but rather the motion for forced surrender and taking in payment, that constitutes a judicial application capable of interrupting prescription within the meaning of art. 2892 para. 1 *C.C.Q.*, which reads as follows:

The filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on

the person to be prevented from prescribing not later than 60 days following the expiry of the prescriptive period.

Indeed, it is at the time that the motion for surrender is filed and served that the rights crystallize. It is at this moment that one must consider whether the claim (the principal obligation) is prescribed.

[40] Once filed, the motion interrupts prescription until a judgment is rendered:

2896. An interruption resulting from a judicial application continues until the judgment has become final or, as the case may be, until a transaction has intervened between the parties.

The interruption has effect with regard to all the parties with respect to any right arising from the same source.

Moreover, art. 2783 para. 1 *C.C.Q.* provides that “[a] creditor who has taken property in payment becomes the owner of it from the time of registration of the prior notice”.

[41] The “same source” notion is worth emphasizing. It has consistently been held that the words “same source” must be interpreted broadly: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 103-4; *ABB Inc. v. Domtar Inc.*, 2005 QCCA 733, [2005] R.J.Q. 2267, at paras. 95-98, *aff’d* 2007 SCC 50, [2007] 3 S.C.R. 461; see also Gervais, at p. 139. It is clear that a hypothecary remedy has its source in the obligation being secured:

[TRANSLATION] However, the fact that these remedies have different objects is not a basis for concluding that they do not arise from the same source within the meaning of article 2896 C.C.Q. Indeed, both the hypothecary remedy and the personal remedy exercised by the plaintiff have their source in the claim for \$43,800 and, in both cases, it was Goyette's failure to meet his obligations that gave rise to the proceedings. The Court adopts the following statement by Brossard J.A.:

It seems to me that the bases of the two remedies, though technically not the same, are sufficiently connected to conclude that both remedies arise from the same source and to dispose of the argument based on prescription [*Banque de Nouvelle-Écosse v. Exarhos*, [1995] R.J.Q. 63 (C.A.), at p. 70].

...

The Court pursues this reasoning: “Without a claim, there can be no hypothec”. Although the two remedies have different objects, they arise from the same source and therefore meet the criterion in article 2896 paragraph 2 for finding that prescription has been interrupted. [Emphasis added.]

(*Barakett v. Goyette*, 1999 CanLII 11983 (Que. Sup. Ct.), at paras. 45-48; see also *Latcon Ltd. v. Radial Investments Ltd.*, 2008 QCCS 35, at para. 199 (CanLII))

Even if one accepts that there is no *lis pendens* between a personal action and a hypothecary action because there is no identity of object, the “same source” concept is broader. There is nothing inconsistent in the fact that the filing of a hypothecary action can interrupt prescription of the obligation for the purposes of that action.

[42] I see no conflict here with the principle that the accessory follows the principal. A hypothecary remedy remains closely connected with the secured obligation even though it is exercised on a different basis, i.e. a hypothecary basis. Like a personal remedy, a hypothecary remedy must be exercised while the principal obligation is not prescribed.

[43] This shows the full importance of the choice to be made by the creditor. Quebec civil law does not penalize a creditor who chooses to exercise a hypothecary remedy alone: [TRANSLATION] “A hypothecary creditor who chooses to pursue a hypothecary remedy is not required to bring a personal action in order to interrupt prescription” (Pratte (2012), at No. 487, citing *Poulin-Sansoucy v. Services immobiliers Simmco D.P. inc.*, 2000 CanLII 10400 (Que. C.A.)). This means that, provided that the conditions set out in arts. 2748 and 2749 *C.C.Q.* are met, the exercise of a hypothecary remedy interrupts prescription on a hypothecary basis.

[44] These principles take on added relevance where a hypothecary remedy is exercised against a person who is not the debtor of the principal obligation, a situation accepted and provided for by the *Civil Code*. Indeed, there are a number of scenarios in which the debtor of an obligation secured by a hypothec and the grantor of the hypothec are two different persons, who are therefore bound in different ways. In such cases, the debtor is bound personally toward the creditor, while the grantor is bound hypothecarily, his or her patrimony not otherwise being affected: see Pratte (2012), at No. 168; Payette, at No. 564; see also, e.g., arts. 2751, 2757, 2758, 2761 and 2769 *C.C.Q.*

[45] Since it is possible that a hypothecary remedy will be exercised against a person other than the debtor of the principal obligation, it is even clearer that the *hypothecary* debtor is the person who is to be prevented from prescribing by exercising a hypothecary remedy: art. 2892 para. 1 *C.C.Q.* That debtor is not

necessarily the debtor of the principal obligation but may be a third party grantor, a subsequent purchaser or a second ranking hypothecary creditor who has taken the immovable in payment. In this last case, as I stated above, that creditor takes the property subject to all hypothecs published before his or her hypothec was published. This means that that creditor is bound *propter rem*, or hypothecarily: [TRANSLATION] “In relation to those [earlier ranking] hypothecary creditors, the creditor who has taken in payment is a third party holder who is not bound personally for the debt but is bound hypothecarily” (Pratte (2012), at No. 577; see also *Développements de Normandie inc. v. Delorme*, 2004 CanLII 17395 (Que. C.A.), at para. 8).

[46] In short, a hypothecary remedy must be exercised while the secured obligation is not prescribed. The remedy can be exercised if, at the time of filing, the conditions set out in arts. 2748 and 2749 *C.C.Q.* are met. And the filing of a hypothecary action, when those conditions are met, interrupts prescription of the obligation on a hypothecary basis.

[47] I turn now to the application of these principles in the present case.

B. *Application*

[48] As I mentioned above, what must be determined in this case is whether, under Quebec law, a motion for forced surrender and taking in payment — a purely hypothecary remedy — brought against a debtor who is not the original debtor

constitutes a separate and independent remedy or a remedy that depends on the continued existence during the proceeding of a claim against the original debtor.

[49] Some observations are in order with respect to the legal consequences of the parties' actions in this case.

[50] First of all, when the respondents took the immovable in payment of their claim on the basis of their second hypothec, they became its owners, and Ms. Macht's right of ownership was extinguished: art. 2783 para. 1 *C.C.Q.* From that moment on, TD Bank's hypothecary rights had to be exercised against the respondents as the owners of the immovable, since hypothecary rights are exercised in whatever hands the property lies: art. 2751 *C.C.Q.* The respondents even insisted on this approach in their aggressive intervention.

[51] The respondents' taking of the immovable in payment had significant legal consequences in this case. It should first be noted that it did not affect TD Bank's rights with respect to the immovable, since the respondents acquired the immovable subject to TD Bank's first hypothec: art. 2783 para. 1 *C.C.Q. a contrario.* The respondents thus became hypothecary debtors who were bound *propter rem*, that is, under a real rather than a personal obligation:

[TRANSLATION] The fate of the *hypothecary* creditors is determined by article 2783 *C.C.Q.*, which provides that a creditor takes the property free of all hypothecs published after his or her hypothec is published. This means that a creditor holding a lower ranking hypothec takes the property subject to all earlier ranking hypothecs. In relation to those hypothecary

creditors, the creditor who has taken in payment is a third party holder who is not bound personally for the debt but is bound hypothecarily. [Underlining added; italics in original; footnotes omitted.]

(Pratte (2012), at No. 577)

The respondents' taking of the immovable in payment therefore gave TD Bank additional debtors, that is, *in rem* debtors that replaced the original debtor on a hypothecary basis. Rather than being bound both personally and hypothecarily toward TD Bank, Ms. Macht was then bound only personally, and the respondents became debtors who were bound hypothecarily.

[52] Thus, without assuming Ms. Macht's personal debt, the respondents were bound hypothecarily for that debt because they had become the owners of the hypothecated property subject to the hypothec published before theirs was published. Ms. Macht was not released from her personal obligation, but the hypothecary obligation was now owed by another party, the respondents. This means that if the respondents wanted to prevent the taking in payment by TD Bank and thus the loss of their right of ownership in the immovable, they had to remedy the default referred to in the prior notice. This outcome is entirely consistent with the fact that a hypothecary remedy is *in addition* to a creditor's personal remedy: art. 2748 para. 1 *C.C.Q.*

[53] Moreover, it is clear that once Ms. Macht ceased to be the owner of the immovable, the appellant could not seek any hypothecary conclusion against her, since hypothecary rights are exercised in whatever hands the property lies: art. 2751 *C.C.Q.* After the respondents took the immovable in payment, Ms. Macht

no longer had any rights in it. The appellant therefore *had* to exercise its hypothecary remedy against the respondents, even if it could — but was not required to — sue Ms. Macht personally. I am of the view that the Court of Appeal disregarded this factual situation in reaching its legal conclusions: para. 34. In my opinion, it decided the case as if a single person, Ms. Macht, was bound personally and hypothecarily.

[54] When Ms. Macht's new default was recorded, and in light of the respondents' statement in their aggressive intervention that they were "the persons against whom the hypothecary right (forced surrender and taking in payment) can be exercised", TD Bank decided to serve the respondents with a prior notice of the exercise of a hypothecary right: A.R., vol. II, at pp. 95-97. Despite the respondents' admission, there was some debate at trial as to whom the appellant had to serve with that prior notice, because art. 2757 *C.C.Q.* and the commentary of the Minister of Justice on that article suggest two different interpretations:

A creditor intending to exercise a hypothecary right must file a prior notice at the registry office, together with evidence that it has been served on the debtor and, where applicable, on the grantor and on any other person against whom he intends to exercise his right.

The registration of the notice must be notified in accordance with the Book on Publication of Rights.

(art. 2757 *C.C.Q.*)

[TRANSLATION] This article is based generally on the provisions of articles 1040*a*, 1979*c* and 1979*i* *C.C.L.C.* A hypothecary creditor wishing to exercise one of his or her rights will first have to give notice to the person against whom the right will be exercised; it may be the debtor, the grantor or another person, since the creditor may exercise his or her rights in whatever hands the property lies (art. 2751). The prior notice must be served and then published. To ensure that interested third persons are

informed of the exercise of a hypothecary right, the registrar is bound to notify them of the registration of the prior notice (art. 3017). [Emphasis added.]

(*Commentaires du ministre de la Justice*, at p. 1726; see also Payette, at No. 1690)

[55] In light of the commentary of the Minister of Justice, I agree with the trial judge that service on the respondents, the sole owners of the immovable that was the subject of the remedy, was sufficient. This approach also finds support in the academic literature. As Louis Payette explains:

[TRANSLATION] There is some jurisprudence indicating that where the debtor is not or is no longer the owner of the charged property, failure to serve the prior notice on the debtor does not invalidate the subsequent exercise of the remedy as long as the creditor's motion does not seek any conclusion against that debtor. This line of jurisprudence is justified in a situation where no real or personal award can be made against the debtor and where the debtor is not likely to have an interest to assert in the conduct of the sale of the property. [No. 1769]

Professor Pratte adds the following: [TRANSLATION] “The courts have thus far been very flexible about service of a prior notice on a co-debtor or even on the debtor himself or herself, and do not sanction failure to serve in the absence of prejudice”: Pratte (2019), at p. 185.

[56] Such comments become all the more meaningful when considered in light of practical reality. TD Bank's choice to serve its prior notice only on the respondents was perfectly logical. As mentioned above, a prior notice indicates an intention to exercise a *hypothecary* remedy, and in the case at bar, no *hypothecary* conclusion was

— or could be — sought against Ms. Macht, since it could not be demanded that she surrender property she no longer owned. Ms. Macht was therefore not prejudiced by not being served with the prior notice. A prior notice is necessary only to exercise a hypothecary remedy, as a personal remedy is not subject to any such formality: Pratte (2012), at No. 487. The criticism that the appellant acted imprudently is therefore unwarranted. Its approach was consistent with the principles of judicial economy and with the *Civil Code*, since it served the prior notice of the exercise of a hypothecary remedy on its *hypothecary* debtors, the persons against whom it intended to exercise its hypothecary rights: see Payette, at No. 1690.

[57] On October 11, 2012, the period specified in the prior notice of the exercise of a hypothecary remedy having expired, the appellant *exercised* its hypothecary remedy by filing a motion for forced surrender and taking in payment against the respondents. It is at that time, i.e. at the time the remedy is exercised — not the time of the judgment — that a court must determine whether the general conditions for exercising the remedy are met, since it is at that time that the rights crystallize. On that date, the debtor, Ms. Macht, was in default, the claim was liquid and due and the 60-day period had expired. The personal claim secured by the hypothec was not then prescribed, as the Court of Appeal in fact recognized: para. 29. The appellant therefore exercised its hypothecary remedy in a timely manner.

[58] I think it important to point out here that the judicial application that will constitute a civil interruption of prescription must be served “on the person to be

prevented from prescribing”: art. 2892 para. 1 *C.C.Q.* In this case, the respondents were the persons TD Bank sought to prevent from prescribing, namely because they were the only persons against whom it sought hypothecary conclusions. The conclusions sought in a motion for forced surrender and taking in payment are purely hypothecary in nature; no conclusion was sought against Ms. Macht on a personal basis. What interest would Ms. Macht have had in contesting the hypothecary action when she no longer had any interest in the property that was the sole object of that action? To ask the question is to answer it. By serving its motion on the respondents, TD Bank met the requirements of art. 2892 para. 1 *C.C.Q.* Moreover, there is no denying that the hypothecary loan agreement between TD Bank and Ms. Macht is the source of all the rights in this case: *Barakett*, at para. 48. The filing of the motion for forced surrender and taking in payment therefore interrupted prescription for the purposes of exercising the hypothecary remedy, which was exercised against the only persons who had an interest as parties to the dispute: art. 2896 *C.C.Q.*

[59] To summarize, Ms. Macht remained under a personal obligation to TD Bank, while the respondents had a real obligation, that is, a hypothecary obligation, from the time they took the hypothecated property in payment and became the owners of the immovable subject to TD Bank’s first hypothec. The respondents were bound *propter rem*, as hypothecary debtors, because the hypothecated property was in their hands. At the time TD Bank filed its hypothecary action, all of the applicable conditions were met: the 60-day period following the registration of its prior notice had expired, its claim was liquid and due, and the debtor, Ms. Macht, was

in default. The appellant therefore exercised its hypothecary remedy in a timely manner. It opted to exercise a hypothecary remedy and was not required to bring a personal action as well in order to interrupt prescription: Pratte (2012), at No. 487. By filing and serving its hypothecary action, the appellant interrupted prescription in relation to its hypothecary debtors, the respondents.

[60] In my view, and with respect, the Court of Appeal erred in concluding that the filing of the appellant's action did not interrupt prescription. As I explained above, a court must look to the time when a creditor exercised his or her hypothecary remedy — not the time of the judgment — to determine whether prescription has been acquired and whether the applicable conditions are met: arts. 2748 and 2749 *C.C.Q.* In this case, the appellant exercised its hypothecary remedy in a timely manner, while the personal claim against Ms. Macht was not prescribed.

[61] Given my conclusion on the first issue, I need not consider the appellant's arguments on the impact of the delay caused by the judicial system on its rights. I therefore do not propose to do so.

V. Conclusion

[62] I would accordingly allow the appeal with costs throughout. I would order the respondents to surrender the immovable, and I would declare the appellant the owner of the immovable.

Appeal dismissed with costs, CÔTÉ J. dissenting.

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