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THE PROTECTION OF THIRD PARTIES CONTRACTING WITH COMPANIES IN QUEBEC

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Introduction

Since Confederation Quebec has copied the provisions of its Companies Act¹ mostly from those enacted by other Canadian legislatures probably with a view to preserving a certain uniformity in company law throughout the country. However, the introduction in a civil law jurisdiction of legislation drafted to suit a common law one may produce a different effect, not so much because the courts in Quebec make a point of interpreting legislation differently but rather because certain common law concepts which fill in the gaps left open by statute do not have identical counterparts in civil law.² Further, the courts have often adhered to common law instead of civil law principles in cases involving corporations thus causing the interaction of both systems.

Quebec's civil law heritage can, however, in certain respects be used to tackle company law problems with a different approach. For example, the principles of quasi-contracts and unjustified enrichment, which counterparts are not well developed in common law, should provide a positive contribution to the advance-

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¹ R.S.Q., 1964, c. 271, as am.

² See e.g. Liability of Corporate Executives for Illegal Profits in the Company Law of the Province of Quebec (1973), 33 R. du B. 253 and Transactions Involving Conflicts of Interest in the Company Law of the Province of Quebec (1973), 75 R. du N. 293 and 381 where the author illustrates how civil law and common law concepts filling in the gaps of the Companies Act produce different results.

ment of company law in Canada for the protection of third parties contracting with companies.

A third party must establish that the corporation representative acted with authority in order to hold a company bound by the contracts entered into by its representative. What are however the rights of a third party where a corporate representative acts illegally, or *ultra vires* the powers of the company, or where he acts without, or in excess of his authority? There are a host of principles in civil law by which protection can be afforded to third parties. In this article it is intended to concentrate on the third party's right to claim from the company. The various ways by which this can be done may be conveniently grouped under two separate headings: those relating to civil law mandate and to quasi-contracts.

I. *Protection Afforded by Mandate Principles.*

A. *Ratification.*

Where a corporate representative acts without express or usual authority a third party can establish the apparent authority to hold the company bound. A corporation, like any other person in civil law, may also ratify the act of its agent which is in excess of his actual authority.³ Ratification is another method by which the unauthorized acts of a company representative can become effective in civil law. It is performed by the company after the contract has been entered into by its representative and can overcome the absence of apparent, usual or express authority. If the company ratifies the contract, the effect is as if the representative had acted with authority.

Article 1727 of the Civil Code⁴ says essentially that the mandator is also answerable for acts which exceed the mandatary's authority, if he has ratified them either expressly or tacitly. At the beginning of this century, however, the courts had on a few occasions required that ratification be effected pursuant to articles 1213 and 1214 C.C.⁵ This ratification or confirmation as it will

³ *Montreal and St-Lawrence Light and Power Co. v. Robert* (1904), 25 S.C. 473 (C.R.), at p. 513, Taschereau J. held that a corporation "a absolument les droits des autres contractants, et si elle ratifie quand elle peut ratifier, si elle confirme quand elle peut confirmer, ces actes de confirmation et de ratification ont absolument le même effet que s'ils étaient faits par un cocontractant ordinaire, par n'importe quel citoyen."

⁴ Hereinafter cited C.C.

⁵ See, *Merchant's Advertising Co. v. Bissonnet* (1904), 10 R. de J. 209 and *Montreal and St-Lawrence Light and Power Co. v. Robert*, *supra*, footnote 3, at pp. 491-492. But, there had been cases of high authority which were opposed to such an interpretation. See, e.g., *Société de Construction d'Hochelaga v. S.C. Métropolitaine* (1885), 4 D.C.A. 199 and *Banque Jacques-Cartier v. La Banque d'Epargnes de la Cité du District de Montréal* (1887), 13 A.C.111 (P.C.).

hereafter be called to avoid confusion, occurs in the words of the Code where an obligation is voidable, and "does not make proof unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity".⁶ In the case of *Montreal St-Lawrence Light and Power Co. v. Robert*,⁷ Taschereau J. in the Court of Review reversed the decision of Davidson J. who at first instance had decided that a company should confirm the acts of its representatives exceeding their authority pursuant to articles 1213 and 1214 C.C.⁸ Instead, Taschereau J. held that ratification of such an agent's act must be done pursuant to the provisions of article 1727 of the Civil Code.⁹ The purpose of articles 1213 C.C. and 1214 C.C., he said, was to establish the conditions precedent to "confirmation" of a voidable act, and that was something quite different from ratification of an agent's act. The author of a confirmation rectifies what his own consent has created, whereas the author of a ratification approves the consent of another person acting on his behalf.¹⁰ The mandator may ratify his agent's act either expressly or tacitly, whereas the party confirming the contract must "express the substance of the obligation, the cause of its being voidable and the intention to cover the nullity". Concerning the incompatibility of ratification and confirmation Taschereau J. presented a conclusive argument:¹¹

. . . je me demande comment il serait possible de ratifier tacitement, ainsi que le dit la loi, à l'article 1727 C.c. des actes semblables au moyen d'une déclaration où, suivant l'article 1214 C.c., il faudrait reproduire tout l'acte qu'il s'agit de confirmer.

According to the strict wording of article 1727 C.C. ratification takes place where a mandatary exceeds his authority; no mention is made in this article of a person who acts on behalf of the mandator without authority. The courts, however, have extended the application of article 1727 C.C. to cases where a corporate representative exceeds or acts without authority.¹² In many cases, ratification is upheld merely as an alternative basis to a decision recognizing the existence of usual or apparent authority¹³ or the application

⁶ Art. 1214 C.C.

⁷ *Supra*, footnote 3.

⁸ *Ibid.*, at p. 491.

⁹ *Ibid.*, at p. 494.

¹⁰ Clarisse, *De la représentation* (1949), p. 208. Arts 1213-1214 C.C. apply to authentic writings.

¹¹ *Supra*, footnote 3, at p. 515.

¹² It is possible for the company to ratify the act of its *gestor* who did not have any previous legal relationship with it.

¹³ See, *Montreal and St-Lawrence Light and Power Co. v. Robert*, *supra*, footnote 3; *Gaudreau v. Canada Atlantic Railway Co.* (1903), 24 S.C. 337 (C.R.); *Windsor Hotel Co. v. Date* (1881), 27 L.C.J. 7 (S.C.). The distinc-

of the indoor management rule.¹⁴

The courts, through their decisions, have developed the conditions precedent to an effective ratification. Influenced both by common law and French civil law,¹⁵ they have evolved certain conditions to ratification which may conveniently be discussed in the form of the following six propositions.

1. *Ratification is either express or tacit.*

Ratification can be accomplished by an express statement¹⁶ but usually it results from the company's tacit acquiescence to an action or course of conduct which can be explained only by ratification. The courts attach great significance to any acts or omissions on the part of the company from which an intention to adopt the unauthorized acts of the representative may be inferred. Accordingly, a rebuttable presumption of ratification is raised where a company executes its representative's contract, even partially;¹⁷ or accepts a partial payment of a debt following an arrangement entered into by its representative;¹⁸ or accepts the delivery of merchandise;¹⁹ or produces evidence for arbitrators²⁰ in consequence of a contract made by its representative. Tacit ratification is again often held to be constituted by the silence observed by a company during a period of time sufficiently long to indicate the company's

tion which must be made between the acts of the company which lead to apparent authority and ratification has not always been respected. Ratification takes place after the agent's contract, whereas, holding out results from representations made before the agent acted on behalf of the company. See, Roch et Paré, *Traité de droit civil du Québec*, Vol. 8 (1949), pp. 91-93, where cases referring to ratification and apparent authority are cited with confusion. A similar confusion between both these legal concepts may also be illustrated in the speech of Lord Tomlin, in *Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co.* (1931), 50 Que. K.B. 57 (P.C.), at p. 64. The basis of the discussion should have been the intention of the company to hold out an agent as having authority, and not the intention to ratify the agent's act.

¹⁴ *Schneider v. La Compagnie de Sable et de Brique des Laurentides* (1918), 54 S.C. 4.

¹⁵ In the field of company law, the courts have referred to English authors. See, e.g., *Montreal and St-Lawrence Light and Power Co. v. Robert*, *supra*, footnote 3, at pp. 513-520; *Hôpital du Sacré Coeur v. Lefèbvre* (1891), 17 Q.L.R. 35 (S.C.), at p. 51. French civil law is however considered the basis of present legislation.

¹⁶ *Montreal and St-Lawrence Light and Power Co. v. Robert*, *ibid.*, at pp. 503-504.

¹⁷ *Albion Construction Company v. Moreau*, [1956] Que. Q.B. 830, at p. 836. *Hôpital du Sacré Coeur v. Lefèbvre*, *supra*, footnote 15, at p. 51.

¹⁸ *Zakibe v. Graf* (1926), 40 Que. K.B. 47, at p. 61.

¹⁹ *Cassidy v. Montreal Fish and Game Club* (1890), 6 M.L.R. 229 (S.C.), at p. 230.

²⁰ *Concrete Column Clamps Ltd. v. Compagnie de Construction de Québec*, [1940] S.C.R. 522, at p. 533.

intention to accept for itself the act of its representative. Silence is viewed as "tantamount to positive action of the company".²¹

2. *Ratification must result from the act of an authorized corporate organ.*

Where the representative does not have the express or usual authority to enter into the contract in the first place, the board of directors, within its powers, may decide to adopt the unauthorized contract if it considers such a contract advantageous to the company.²² Although the question was not put to the courts in Quebec, ratification could probably also be performed by any other corporate representative who could have initially authorized the contract. Where ratification is effectuated by the board of directors it is not necessary to establish that the board expressly stated its intention to ratify the unauthorized contract of its representative.²³ Since ratification can be done tacitly, it is sufficient to prove that the board of directors has kept silent when it had been informed of the contract entered into by its representative. This leads us to the discussion of the third proposition.

3. *The company must have had knowledge of the contract to be ratified.*

The company's act must have been an informed act, that is, knowledge of the excess of the representative's authority must have existed before ratification can take place. Evidence of knowledge is deduced from facts:²⁴

It is enough to show the circumstances which are reasonably calculated to satisfy the court . . . that the thing to be ratified came to the knowledge of all who chose to enquire, by having full opportunity and means of enquiry.

²¹ *Gaudreau v. Canada Atlantic Railway Co.*, *supra*, footnote 13, at p. 348.

²² Mazeaud, *Leçons de droit civil* (1966), No. 31.

²³ In *Concrete Column Clamps Ltd. v. Compagnie de Construction de Québec* (1930), 77 S.C. 543; (1939), 67 Que. K.B. 536. In the Superior Court, Prévost J., held that ratification should result from the act of the board of directors, at p. 549. The Court of Appeal decided that the company had acquiesced in the act of its president by not raising any objection for over a year. Where a corporate representative executes a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, the board will be presumed to have ratified his act. *Montreal and St-Lawrence Light and Power Co. v. Robert*, *supra*, footnote 3, at p. 519; *E.B.M. Company Ltd. v. Weinfield* (1939), 66 Que. K.B. 60, at p. 62.

²⁴ *Hôpital du Sacré Coeur v. Lefèbvre*, *supra*, footnote 15, at p. 53, per Andrews J. citing Brice. On *Ultra Vires* (1893). Also *Banque Jacques-Cartier v. La Banque d'Epargnes de la Cité du District de Montréal*, *supra*, footnote 5, at p. 118; *Damien Lalonde Liée v. Les Galeries Parisiennes* (1917), 51 S.C. 134; *Concrete Column Clamps Ltd. v. Compagnie de Construction de Québec*, *supra*, footnote 23, at pp. 549-550.

Knowledge will be presumed in a case where a company has recognized the existence of its representative's contract in judicial proceedings,²⁵ where an employee has informed the management;²⁶ where one of the company's officers knew of the contract;²⁷ or, where the company, in silence, profited from the contract in circumstances which indicated that it had knowledge of the agent's transaction.²⁸ The courts in Quebec do not seem to insist that informal acquiescence by the board of directors be performed by a majority of the members informed of the unauthorized contract of the corporate representative.

4. *The company must have intended to ratify its agent's act.*

Just as the company's intention to be represented by an agent must be proved,²⁹ the intention to ratify the excess of authority must be equally established in evidence.³⁰ The intention is however usually inferred from the company's acquiescence or by its taking action consistent with ratification only.

5. *The company must possess the capacity and power legally to authorize the contract entered into by its representative.*

Because ratification depends on the consent expressed by the board of directors, the board must exercise its powers legally³¹ and *intra vires* the capacity of the company while ratifying the contract made by its representative:

²⁵ *Société de Construction d'Hochelaga v. S.C. Métropolitaine*, *supra*, footnote 5, at p. 202.

²⁶ *Gaudreau v. Canada Atlantic Railway Co.*, *supra*, footnote 13, at p. 348; *Zakibe v. Graf*, *supra*, footnote 18, at p. 61.

²⁷ *Cambridge Corporation Ltd. v. The Sovereign Bank of Canada* (1909), 18 Que. K.B. 423, at p. 426; *Damien Lalonde Ltée v. Les Galeries Parisiennes*, *supra*, footnote 24.

²⁸ In *Hôpital du Sacré Coeur v. Lefèbvre*, *supra*, footnote 15, the court held that the agent's act had been ratified where a corporation took possession of property purchased by its representative and paid instalments on it. In *Cassidy v. Montreal Fish and Game Club*, *supra*, footnote 19, ratification was upheld in a case when a corporation received invoices for merchandise it had received without repudiating its liability. In *Zakibe v. Graf*, *supra*, footnote 18, the acknowledgement of a cheque offered in payment for a debt due to the corporation was held as sufficient to ratify the act if an agent had accepted a reduction in the amount to be paid. See, also, *French Gas Saving Co. v. The Desbarats Advertising Agency Ltd.*, [1912] 1 D.L.R. 136 (Que. K.B.); *Concrete Column Clamps Ltd. v. Compagnie de Construction de Québec*, *supra*, footnote 23; *Société de Construction d'Hochelaga v. S. C. Métropolitaine*, *supra*, footnote 5.

²⁹ *Gibb v. Macadam* (1888), 16 R.L. 425 (Que. Q.B.).

³⁰ *Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co. Ltd.*, *supra*, footnote 13, at p. 64. Cf. *Dominion Gresham Guarantee and Casualty Co. v. Bank of Montreal*, [1929] S.C.R. 572, at p. 575 and *Grand Trunk Railway of Canada v. The Central Fruit Auction Co. Ltd.* (1921), 30 Que. K.B. 35.

³¹ *Lemaire v. La Banque Nationale* (1916), 25 Que. K.B. 259, at p. 270.

If an officer or agent has exceeded his powers in acting for the company, but has not exceeded the powers of the company, his act may be ratified by the company affirming the unauthorized act.³²

6. *The company must have existed at the time when the agent entered into the contract.*

Because ratification has a retroactive effect,³³ and, therefore, requires the existence of the principal at the time when the agent entered into the contract, ratification is impossible if the contract was concluded prior to the incorporation of the company.³⁴

Thus, a company, through its active or passive response, may ratify a legal contract made on its behalf by an unauthorized representative, provided that it is incorporated when the contract is made, that it intends, with knowledge, to ratify the contract, and that the corporate organ which acted on its behalf did so legally and *intra vires* the capacity of the company.

B. *Other Mandate Principles.*

The Civil Code mandate principles afford to the third party means of protection other than ratification. For instance, article 1718 C.C. provides that:

[A mandatary] is not held to have exceeded his powers when he executes the mandate in a manner more advantageous to the mandator than specified by the latter.

This principle was followed in the case of *Brown v. Security Life Assurance Co.*³⁵ In this case, the secretary was authorized to make the necessary arrangements for the hiring of a person as a manager of the company. Mr. Justice Bruneau, in the Court of Review, held that the secretary was not exceeding his authority when he arranged to pay the prospective employee's expenses to come to the head office instead of going to see him personally as he had been instructed. The learned judge referred to article 1718 C.C. and considered that the secretary had fulfilled in a more advantageous manner the mandate he had been given.

³² *Grand Trunk Railway of Canada v. The Central Fruit Auction Co. Ltd.*, *supra*, footnote 30, Greenshields J., at p. 43, citing *Grant v. U.K. Railways Co.* (1888), 40 Ch. D. 135. *Concrete Column Clamps Ltd. v. Compagnie de Construction de Québec Ltée*, *supra*, footnote 23, at p. 547. In *Banque Jacques-Cartier v. La Banque d'Épargnes de la Cité du District de Montréal*, *supra*, footnote 5, the Privy Council refused ratification in a case where it would be *ultra vires* of those representing the bank in liquidation when their duty was to protect the shareholders and pay the creditors and not to pay a debt to a person who already owed a large amount to the corporation. *Ruby Foo's Enterprises Ltd. v. American Chibougamou Mines Ltd.*, [1965] R.L. 424 (C.M.).

³³ *Clarisse*, *op. cit.*, footnote 10, p. 206.

³⁴ *Duquenne v. La Compagnie Générale des Boissons Canadiennes* (1907), 31 S.C. 409 (C.R.).

³⁵ (1914), 46 S.C. 276 (C.R.).

Another principle of mandate which may be invoked by a third party dealing with a company is the one contained in article 1728 C.C. whereby a mandatary "is bound toward third persons for all acts of the mandatary done in execution and within the powers of the mandate after it has been extinguished, if its extinction be not known to such third persons". The policy underlying this article is identical to that of article 1730 C.C. A third party has a reasonable cause to believe that the agent has authority when he has not been informed that the mandate relationship has ended. This principle has been applied to corporate representatives in at least one case.³⁶

Had article 1730 C.C. not been introduced in the Quebec Civil Code, as is the case with the Code Napoléon, the courts in Quebec would most probably have applied more often the article which follows it in order to protect third parties where a representative acts without authority or exceeds his authority. Article 1731 C.C. provides that a mandator "is liable for damages caused by the fault of the mandatary". In France, the courts have often relied on the principles of delictual responsibility to hold a *société* liable for the loss caused to a third party as a result of the unauthorized acts of its representatives.³⁷ For instance, principles of delictual responsibility have been invoked in France where the indoor

³⁶ *Galibert v. Compagnie Etienne Dussault* (1922), 60 S.C. 522 (C.R.), at p. 524. Art. 1729 C.C. could also be invoked where the corporate representative exercises a power which he had before his mandate terminated when such an act "is a necessary consequence of business already begun" or "for the completion of a business, where loss or injury might have been caused by delay".

³⁷ For an excellent article on the development of apparent authority in France, see Lescot, *Le mandat apparent*, [1964] J.C.P. 1. 1826. It is interesting to notice also that an article similar to art. 1731 C.C. does not exist in the Code Napoleon. The basis of vicarious responsibility in this context is more restrictive in France than it is in Quebec; art. 1384 of the Code Napoleon is applicable merely where the representative is an employee of the *société*, whereas in Quebec the mandator is liable for the delictual or quasi-delictual offence of the mandatary. Again, the introduction of Article 1731 C.C. is due mainly to the influence of common law authors such as Bell and Storey who were preferred to Pothier's doctrine which limited the application of this principle to employees as the Code Napoleon does. De Lorimier, *Bibliothèque du Code Civil de la Province de Québec* Vol. 14 (1885), pp. 193-205. A third party should be able to claim successfully from the company for the loss he has suffered as a result of its representative breach of warranty of authority. See, *Ward v. Montreal Cold Storage and Freezing Co.* (1904), 26 S.C. 310, at pp. 327, 334 and 346; *Re Stadacona Rouyn Mines Ltd.*, [1945] D.L.R. 420 (Que. K.B.), at pp. 427 and 429; *National Real Estate & Investment Company of Canada v. Meloche* (1917), 26 Que. K.B. 212, at p. 216; Cf. Pourcelet, *La responsabilité du mandant* (1963), 66 R. du N. 411, at p. 414. As for the personal responsibility of the corporate representative in such cases see, *Molsons Bank v. Stoddart* (1890), 6 M.L.R. 18 (S.C.), at pp. 19-23; *Ontario Bank v. Merchants Bank of Halifax* (1901), 7 R. de J. 56; *Talbot v. Le Parc Richelieu* (1917), 51 S.C. 87 (C.R.), at p. 93; *Kerr v. Brown* (1878), 23 L.C.J. 227 (Que. Q.B.).

management rule would have been applied in England.³⁸ Recently, the *Cour de cassation* held that a mandator could be bound by an offence committed by his mandatary, where circumstances relieved a third party of his duty to investigate the exact limits of the authority of the mandatary.³⁹ The court did not say what it meant by these circumstances but legal commentators in France have suggested that the courts had in mind situations where a third party would be able to establish what has been called in this article "usual or apparent authority".⁴⁰

Reverting to the situation in Quebec, an interesting question is whether a third party will be able to claim damages on the basis of article 1731 C.C. where he is unable to hold the company bound on the contract of its representative for want of establishing the usual or apparent authority of the representative. A court in Quebec could possibly come to the conclusion that, in certain circumstances, it was not imprudent for a third party to rely on representations of authority coming from an agent instead of insisting as in the case of apparent authority that such manifestation came from the company. Probably it will not after all be necessary to indulge in such legal niceties because of the protection afforded to third parties in Quebec by quasi-contracts and the doctrine of unjustified enrichment.

II. Obligations Created by Quasi-contracts.

Chapter 11 of title 111 of the Civil Code concerning the creation

³⁸ See, Cass. civ. 29 janvier 1934, S. 1934, 1. 181.

³⁹ Cass. Ass. plen. 13 décembre, 1962, J.C.P. 1963, 11, 13105 et note Esmein. An interesting aspect of this decision was that the doctrine of apparent authority was followed even though the limitations on the authority of the *président directeur-général* could have been ascertained by third parties in a public register. This is in sharp contrast with the operation of the doctrine of constructive notice in England where third parties dealing with a company agent have notice of the company's articles. *Freeman and Lockyer v. Buckhurst Park Properties (Magnal) Ltd.*, [1964] 2 Q.B. 480, at p. 506.

⁴⁰ See, Cornu, (1963), 61 Rev. trim. dr. civ. 572 who wrote about this decision "Voilà solennellement affirmé, au moins pour le mandat, l'autonomie de l'apparence comme source d'obligation." Lescot, *op. cit.*, footnote 37, while recognizing that the doctrine of apparent mandate had been recognized went further, and said that the decision also established the principle that restrictions placed on the representative's authority whether or not they are publicized cannot be invoked against a third party where a third party is able to establish apparent authority: "En réalité, sous le couvert de la théorie du mandat apparent et contrainte en quelque sorte par les exigences de la pratique qu'elle n'a pas voulu encourir le reproche de méconnaître, l'assemblée plénière de la Cour de cassation a consacré ce qui est, selon nous, la solution de l'avenir: l'inopposabilité aux tiers des clauses statutaires restrictives des pouvoirs des gérants et administrateurs de sociétés commerciales."

of quasi-contractual obligations begins with article 1041 C.C. which establishes the general principle that:⁴¹

A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them.

Obligations created by quasi-contracts do not arise from a contractual relationship between the parties but they result from a beneficial act on the part of one of the parties.

The Civil Code sets out two specific kinds of quasi-contractual obligations; the *negotiorum gestio* or *gestion d'affaires* and the obligation which arises from the payment of a thing not due or *paiement de l'indu*.⁴² The underlying principle in both these quasi-contracts is that no one should benefit at another's expense. However, at no point in the Civil Code is this principle specifically stated.

In France the *Chambre des Requêtes* in *l'affaire Bourdier*⁴³ held that the principle of *l'enrichissement sans cause* was one of general application. Subsequently the conditions to the action which may be brought on the basis of this general principle (often called in France *l'action de in rem verso*) were developed by the courts.

A similar jurisprudential development has taken place in Quebec. Mr. Justice Chailles has argued persuasively in his book, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec*, that this doctrine originated from the law of quasi-contracts. He wrote:⁴⁴

⁴¹ The article has not been applied very often without referring to the Civil Code quasi-contracts. Faribault, *Traité de droit civil de Québec*, Vol. 7 (1957), p. 24, has found that it was only used once in Quebec. Another case which applied this article to corporations: *De Bellefeuille v. La Municipalité du Village de St-Louis du Mile-End* (1880), 25 L.C.J. 18, 14 L.N. 42 and commentary at la Rédaction, *Les corporations peuvent-elles être obligées par quasi-contract* (1880), 2 La Thémis 193.

⁴² Arts 1043-1046 C.C. deal with the quasi-contract of *negotiorum gestio* and arts 1047-1052 C.C. with the quasi-contract resulting from "the reception of a thing not due". One learned commentator has criticized the definition of quasi-contracts by art. 1041 C.C. as meeting only the requirements of *negotiorum gestio* and considered that the second quasi-contract defined in the Code is based on the general civil law doctrine of unjustified enrichment, Perrault, *Des quasi-contrats et de l'action "de in rem verso"* (1939), 8 R. du D. 449, at pp. 451 and 513. This is not said to be an exhaustive definition of quasi-contracts in French law. Chailles, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (1940), pp. 47-48. But, these other quasi-contracts are of no immediate relevance to the present study.

⁴³ Req. 15 juin 1892. D. 1.596. S. 1893.1.281, note Labbé; see, Mazeaud, *Leçons de droit civil* (2nd ed., 1962), pp. 655-659; also Amos and Walton, *Introduction to French Law* (3rd ed., 1969), pp. 192-199.

⁴⁴ *Op. cit.*, footnote 42, p. 52. The expression "unjustified enrichment" is the translation suggested by Mr. Justice Chailles for the French civil law concept of *enrichissement sans cause*. The suggestion that the doctrine of

The theory that the action *de in rem verso* is of quasi-contractual origin has the advantage of attaching the doctrine of unjustified enrichment to an existing legal institution rather than to a vague principle of morality or equity, without however so rigidly determining it as to impair its development.

Because it would be outside the scope of the present article to analyse in any detail the whole civil law of quasi-contracts, the following study will be limited to the particular problems raised by the application of the law of quasi-contracts to companies. Accordingly, only certain aspects of *negotiorum gestio* and the doctrine of unjustified enrichment will be examined.

A. *Negotiorum Gestio in a Company Law Context.*

Broadly speaking there is a *gestion d'affaires* or a quasi-contract of *negotiorum gestio* whenever a person, *le gérant d'affaire* or the *gestor* performs an act on behalf of and in the interest of another, *le maître de l'affaire* or the principal, without that other's authority. In order to explain more fully the implication of *negotiorum gestio* as applied to companies, it is necessary to examine this legal concept in the light of certain problems created by the representation of companies and to discuss certain of the essential elements of such a quasi-contractual relationship. It is only after such an inquiry, that the application of *negotiorum gestio* may be adequately discussed.

a) *Negotiorum Gestio and Representation of Companies.*

The quasi-contract of *negotiorum gestio* offers a tool of great flexibility in the field of company representation. On the one hand, the *gestor* "of his own accord assumes the management of any business of [the company]".⁴⁵ He may, therefore, render services for or represent the company as though he was authorized to do so,⁴⁶ provided he acts voluntarily, legally and in the interests

unjustified enrichment is based on quasi-contracts has given rise to considerable discussion in Quebec. See, Billette, *L'enrichissement sans cause* (1932), 10 R. du D. 583, at p. 597. Several authors have criticized Challies' thesis and have suggested an alternative basis: Faribault, *op. cit.*, footnote 41, p. 31, while accepting the importance of art. 1041 C.C. refers to another provision, art. 1057 C.C. in order to explain the doctrine. See, also, Morel, *L'évolution de la doctrine de l'enrichissement sans cause* (1954), pp. 51-55, and Gendron, *Nature de l'enrichissement sans cause* (1962), 5 C. de D. 104, at pp. 105-106. Despite the strength of certain objections, Challies' thesis was chosen as the basis of the present discussion because it appeared the most adequate to explain the attitude of the courts in Quebec in the decisions which will be examined and because the legal concept of quasi-contracts was a determining factor in the development of the doctrine of unjustified enrichment.

⁴⁵ Art. 1043 C.C.

⁴⁶ This is one of the differences which exist between *negotiorum gestio* and mandate, which does not allow a person to act on behalf of another in material acts such as rendering services. Mazeaud, *Leçons de droit civil* (1969), No. 1391, p. 588.

of the company.⁴⁷ As in the case of apparent authority and ratification, representation is possible pursuant to the conditions of *negotiorum gestio* without authority having been previously conferred upon a representative. The *gestor* takes full initiative to conclude a legal contract without the company knowing of the contract, or without the *gestor* having received the necessary authority to represent the company.

On the other hand, the company "is bound to fulfil the obligations that the person acting for [it] has contracted in [its] name, to indemnify him for all the personal liabilities which he has assumed, and to reimburse him for all the necessary or useful expenses".⁴⁸ But one of the conditions to such a claim requires that evidence be adduced showing that the *gestor* has "well managed" the affairs of the company.⁴⁹

1. *The condition that the affairs of the company must be "well managed"*.

It is through operation of law alone that representation takes place, but, it is only where the *gestor* has "well managed" the affairs of the principal that the obligations entered into by the *gestor* will bind the company.

⁴⁷ The expression "voluntarily" refers to the condition that the *gestor* must not have been otherwise legally obliged to act in the interests of the company: (for example by contract) Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law* (1927-28), 13 Cornell L.Q. 190, at p. 192. Article 13 C.C. establishes the general principle of the legality of contractual relations. It states what is meant by the expression "illegal": "no one can by private agreement, validly contravene the laws of public order and good morals". The condition that the *gestor's* administration must not be illegal means that he must not enter into a contract which is void *ab initio*. Contracts which are voidable are not illegal under the definition of article 13 C.C. Furthermore, even where a contract is void because the representative acted *ultra vires* the powers of the company, it will be argued that the quasi-contract of *negotiorum gestio* could bind the company. In the case of the doctrine of unjustified enrichment one learned judge went as far as to hold the doctrine applicable in the case of illegality save when the act is against "*les bonnes moeurs*". The condition that the *gestor* must act in the interest of the company does not mean that he must enter into a contract in the name of the company nor does it mean that the *gestor* may not act in the interests of other persons. The *gestor* must be able to establish that he acted primarily in the company's interests; see Faribault, *op. cit.*, footnote 41, at p. 70. Cf. Trudel, *The Usefulness of Codification: A Comparative Study of Quasi-Contract* (1954-55), 29 Tulane L. Rev. 311.

⁴⁸ Art. 1046 C.C.

⁴⁹ In order to determine whether the business has been "well managed" it is necessary to evaluate the act of the *gestor* at the time it took place. Even though the advantage realized might disappear, or, the anticipated advantage might not have materialized, the *bona fide gestor* will still be able to claim compensation. This is the feature of the *negotiorum gestio* which "is its most distinctive characteristic and stands out in striking contrast with Anglo-American Law" and, indeed, with common law generally. Lorenzen, *op. cit.*, footnote 47, at p. 209.

L'effet de l'acte du gérant se produit dans le patrimoine du maître en raison de l'utilité qu'elle lui procure; cette utilité supplée au défaut de pouvoir du représentant, elle justifie l'engagement du maître.⁵⁰

In effect, the company is made a debtor without having an opportunity of repudiating the contract.

Such a legal concept must have clashed with the strongly developed individualistic features of the early nineteenth century. Demogue has noticed that the hesitation of the legislature to accept such an unauthorized interference by the *gestor* in the management of the affairs of another is indicated by the use of the word "*quelquefois*" [sometimes] in article 1371 of the Code Napoleon which inspired the use of the same word in article 1041 of the Quebec Civil Code half a century later.⁵¹ But since then, there has been, in France as well as in Quebec, a definite progress towards the protection of third party interests.

The Codes of both countries state as a condition to *negotiorum gestio* that the business of the principal must be "well managed".⁵² In France at first, the courts required that the act of the *gestor* be "necessary and indispensable",⁵³ or at least, "greatly urgent".⁵⁴ This restrictive interpretation has been abandoned by the more recent jurisprudence and doctrine. A more liberal attitude has been adopted. In both France and Quebec, the principal's business will be sufficiently "well managed" if the *gestor's* act was "useful" to the principal at the time it was undertaken.⁵⁵ Moreover, in Quebec, there appears to be a tendency to regard the quasi-contractual remedy of *negotiorum gestio* as a corollary of the more general principle of unjustified enrichment,⁵⁶ which requires only that a person be enriched. By putting more emphasis on the unjustified enrichment which may result from the *gestor's* act, the interpretation given by the courts to the term "well managed" might gradually move from the meaning of "useful management" to the more equitable meaning of "profitable management".

⁵⁰ Art. 1046 C.C. Clarisse, *op. cit.*, footnote 10, p. 123; see, also, Perrault, *op. cit.*, footnote 42, at pp. 475-476. Baudouin, *Le droit civil de la province de Québec modèle vivant de droit comparé* (1953), p. 741.

⁵¹ Demogue, *De la gestion d'affaires* (1937), 15 R. du D. 449, at pp. 451-452.

⁵² Art. 1375 Code Napoleon identical to art. 1046 C.C.

⁵³ Civ. 12 mai 1953, D. 1953. 517.

⁵⁴ Paris, 17 juin 1935, Rec. Gaz. Pal. 1935. 2. 453; Dijon, 13 juin 1927, J.C.P. 1219. Cf. an earlier decision which had not laid such a requirement Civ., 21 mai 1890, S. 91. 1. 8.

⁵⁵ Faribault, *op. cit.*, footnote 41, pp. 104-106; Perrault, *op. cit.*, footnote 42, at p. 460.

⁵⁶ Faribault, *op. cit.*, *ibid.*, p. 106 has suggested that even if the court came to the conclusion that the act of a *gestor* did not meet the "usefulness" test that a claim could be brought by an action *de in rem verso*.

2. Application of *negotiorum gestio*.

As we have seen, *negotiorum gestio* makes representation effective in spite of the *gestor's* lack of authority. The company does not in any way have to intervene in the contract or to give authority to the *gestor* to act on its behalf. For this reason, many of the problems which arise when a company representative exceeds his authority, or when a company lacks the capacity to contract, may be remedied provided the conditions to *negotiorum gestio* are satisfied.

i) Where representatives exceed their authority.

The quasi-contract of *negotiorum gestio* should be very useful, along with the doctrines of apparent mandate and of ratification, in allowing effective representation by an unauthorized agent.

The applicability of *negotiorum gestio* to a situation where a mandatary exceeds his authority has, however, been contested in the past. Faribault has argued, unconvincingly, that this quasi-contract is not applicable in such a situation for two reasons.⁵⁷ Firstly, he says that a mandator knows necessarily that a mandatary is acting on his behalf since there exists a contract of mandate. The mandator might not know that the mandatary in any given transaction has exceeded his authority but this ignorance, argues Faribault, does not suffice to say that the *gestor* acted without his knowledge. This argument is obviously wrong. There is no rule of law which allows such a presumption; on the contrary, a court has stated that "a mandatary who does an act in excess of his powers, is not a mandatary at all *quoad* that act".⁵⁸ It is equally untenable to argue that the mandator has given a tacit mandate to his agent to exceed his authority under normal circumstances.

His second argument has more substance. A mandatary who exceeds the authority imparted to him by a contract of mandate acts against the will of his principal; this has the effect of preventing the application of the rules of *negotiorum gestio*. It is true that in civil law there is a doctrine to the effect that the *gestor* should not have acted against the will of the principal;⁵⁹ but, for

⁵⁷ Faribault, *op. cit.*, *ibid.*, pp. 68-69.

⁵⁸ *Ward v. The Montreal Cold Storage and Freezing Co.* (1904), 26 S.C. 310 (C.R.), at pp. 335-336.

⁵⁹ Lorenzen, *op. cit.*, footnote 49, at pp. 194 and 203; a claim based on an action *de in rem verso* would not appear to be possible in a case where the act was done by the agent against the principal's prohibition: See, *Adams v. Adams* (1919), 28 Que. K.B. 278, at p. 281 and *Côté et Levasseur v. Curé et Marquilliers de l'Oeuvre et Fabrique de la Paroisse de St Valère* (1940), 69 Que. K.B. 189, at p. 190. However, this proposition had been criticized by a well-known author: Pothier, *Oeuvres* (ed. Bugnet, 1861), Vol. 5, p. 247. Cf., also, Challies, *op. cit.*, footnote 42, p. 104.

this doctrine to operate something more is required than a restriction which is merely to be implied from the definition of the agent's authority.

In the past, the courts in Quebec have upheld the existence of the quasi-contract in cases where a representative exceeded his authority.⁶⁰ Surprisingly, however, this remedy has not often been invoked in the context of the representation of companies.⁶¹ It is submitted that the quasi-contract of *negotiorum gestio* could be upheld by a third party seeking to hold a company liable on a contract entered into on its behalf by a representative who exceeded his authority in a situation where the third party had not satisfied his civil law duty to ascertain the representative's authority or he had been put on notice to do so. *Bona fides* is not a condition to *la gestion d'affaires*⁶² and, therefore, a third party who has knowledge of the excess of authority can invoke, as a *gestor*, the rules of *negotiorum gestio* to seek a remedy against the company,⁶³ provided, of course, he meets the other conditions of this quasi-contract. Finally, this remedy would equally exist in a situation where the third party had constructive notice of the authority imparted to the representative by letters patent or by supplementary letters patent.⁶⁴

⁶⁰ Faribault, *op. cit.*, footnote 41, pp. 69-70. The author himself did recognize that there existed at least two decisions in which the courts in Quebec have applied the quasi-contract of *negotiorum gestio* in a case where an agent exceeded his authority. See, *Forest v. Cadot* (1895), 1 R.J. 173; *Chevalier v. Municipalité de la Paroisse St-François de Sales* (1886), 9 L.N. 290 and other cases that follow in the text.

⁶¹ The quasi-contract of *negotiorum gestio* has been used extensively to protect the interests of third parties dealing with the *sociétés anonymes* in France. See, e.g., Cass. juillet 1968, D. 1969. 1. 319. Perrault, *op. cit.*, footnote 42, at p. 459, has considered that *negotiorum gestio* could be applied when a contract of mandate is void, expired (*cf.* art. 1709 C.C. which deals specifically with such a situation) or when an agent exceeds his authority. See, also, Castro, *Negotiorum Gestio in Louisiana* (1932-33), 7 Tulane L. Rev. 253, at p. 254. In *Allard v. La Compagnie Cinéma Maisonneuve* (1923), 29 R.L. n.s. 53 (S.C.), at p. 56, *negotiorum gestio* was considered as an alternative remedy to the protection afforded by the indoor management rule.

⁶² Compare with the doctrine of holding out where the third party must be *bona fides*. See e.g. *Dominion Gresham Guarantee and Casualty v. Bank of Montreal*, [1929] S.C.R. 572.

⁶³ The intention of the representative to act in the interests of the company is essential in the quasi-contract of *negotiorum gestio*. See, Civ. 25 juin 1919, D.P. 1923. 1. 223. It is possible for a third party, dealing with an agent without authority, to rely on this quasi-contract. In this case, the third party will be considered assuming of his own accord the management of the business of the company (art. 1043 C.C.) and will be able to claim compensation (art. 1046 C.C.). See, Naguet, S. 1912. 1. 305; Req. 16 juillet 1890, D.P. 91. 1. 40, note Planiol.

⁶⁴ This point has not been decided by the courts in Quebec. The constructive notice does not render the contract void but merely voidable at the option of the company that can ratify the unauthorized act of its agent.

Recently, in the case of *Ruby Foo's Enterprises v. American Chibougamou Mines Ltd.*,⁶⁵ Simard J. declared, in an *obiter dictum*, that he would have been ready to hold a company liable for the meals taken by its president at a restaurant even though the provider of these meals had been put upon notice to ascertain the authority of the president. To come to such a conclusion, he required evidence that the company had benefited by the meals taken at the restaurant.⁶⁶

La responsabilité de la défenderesse aurait pu néanmoins être engagée si la preuve nous avait été apportée que les dépenses effectuées par son président au restaurant de la demanderesse ont pu lui profiter ou pouvait lui bénéficier; ainsi, par exemple, le cas d'une régalade dans le but d'attirer ou d'assurer une clientèle importante à la compagnie. . . . La corporation peut être liée lorsqu'un acte *ultra vires* de ses officiers lui a bénéficié parce qu'alors il se forme un quasi-contrat qui oblige la corporation.

La gestion d'affaires should prove useful in a case where a company has been divested accidentally or otherwise of the decision-making power of the board of directors. For example, in the event of a failure to constitute a *quorum* in a case requiring an urgent decision, a director could, in such circumstances, act in the interests of the company by seeing to the urgent business, and the contract could bind the company.⁶⁷

ii) *Where a contract is ultra vires the powers of the company.*

The contract entered into by the board of directors or any corporate representative will not be valid if *ultra vires* the powers of the company.⁶⁸ In so far as this doctrine applies to companies in Quebec, it is at least arguable that a third party could rely on a *negotiorum gestio* relationship to render the company liable. A company which acts *ultra vires* its powers, acts beyond its capacity and a quasi-contractual action may be brought against anyone whether capable or incapable of contracting. Article 1042 C.C. states as a general principle that:

A person incapable of contracting may, by the quasi-contract which results from the act of another, be obliged toward him.

A recourse would also be possible following the rules of an action *de in rem verso*.⁶⁹

⁶⁵ *Supra*, footnote 32.

⁶⁶ *Ibid.*, at p. 429.

⁶⁷ Planiol et Ripert, *Traité pratique de droit civil français, Contrats civils* (1954), No. 1232, p. 471.

⁶⁸ This doctrine is still applicable to companies incorporated under Part II of the Companies Act, *supra*, footnote 1.

⁶⁹ This is studied in Part II, B of this article.

iii) *Other defects in the exercise of company powers.*

The exercise of certain of the powers of a company may be restricted to the board of directors only, or they may be made conditional on the approval of the general meeting.⁷⁰ If the powers of the company are used in a manner incompatible with the legislative allocation of power, a third party, who chose to invoke *negotiorum gestio* as a protection, would have to meet the objection that his act of management was contrary to a legal prohibition or represented an unjustified interference into the affairs of the company. Such objections should not be sustained by the courts in Quebec in view of the decision of Mr. Justice Bossé in *Roland v. La Caisse d'Economie Notre Dame de Québec*⁷¹ which will be discussed in this text further on.

However, before studying the application of this doctrine, it would be well to notice the influences under which quasi-contract has developed, and to identify the infiltration of legal concepts foreign to those of the Quebec Civil Code.

b) *Influence of French Civil Law and Common Law on Negotiorum Gestio in Quebec.*

The interpretation given by the courts in Quebec to *negotiorum gestio* has been influenced by the laws both of France and of England. In Quebec, French doctrine and jurisprudence are an important source of inspiration, but common law has been at the origin of the introduction of legal concepts foreign to the Civil Code.

More than any other country, France has influenced the development of *negotiorum gestio* principles because its legislation is very similar to that of Quebec.⁷² There is however one important difference. Article 1043 C.C. requires that the principal should be unaware of the action taken by the *gestor* on his behalf, whereas, article 1372 of the Code Napoleon makes no such requirement. In Quebec, the principal, who has knowledge of the intention of the agent to contract on his behalf, will be held to have given him a tacit mandate to do so in the absence of positive action to prevent him. The principal will be held to have ratified a contract entered into on his own behalf by an unauthorized person, if he does not repudiate it within a reasonable period of time after he learns of the contract. The quasi-contract of *negotiorum gestio*

⁷⁰ See e.g. ss 45, 52, 54, 60, 74 and 84 of the Quebec Companies Act, *supra*, footnote 1.

⁷¹ (1894), 3 Que. Q.B. 315.

⁷² Arts 1044 and 1046 C.C. are identical to arts 1373 and 1375 of the Code Napoleon; arts 1043 and 1045 C.C. are similar to arts 1372 and 1374 of the Code Napoleon.

will be converted thereby into a contract of mandate.⁷³ The close relationship between these two legal concepts has caused some confusion in France,⁷⁴ a danger which is avoided by the more precise drafting of the Quebec Civil Code.

Negotiorum gestio is not accepted as a general principle of law in England, the United States or the common law jurisdictions in Canada.⁷⁵ The common law refuses to force a person to accept a benefit or incur an obligation against his will.⁷⁶ There is no general principle whereby a quasi-contract may be established; it is merely in certain given circumstances that the courts will uphold the existence of a quasi-contract. The law of the Province of Quebec provides a striking difference of principle; it accepts that a person may, without knowledge, incur an obligation through the useful act of another person accomplished on his behalf.

The law of quasi-contract in the common law developed in a manner completely different from that of the civil law. In common law, it grew out of the ingenious use of the action of *indebitus assumpsit*,⁷⁷ although other quasi-contractual relations may be found to exist.⁷⁸ This form of action was based on an implied promise which was frequently a complete fiction introduced "to allow a remedy in accordance with procedural forms, where the

⁷³ Once a ratification has been established it ceases to be a quasi-contract and becomes a contract of mandate. Perrault, *op. cit.*, footnote 42, at p. 458, cites in support of the proposition the unreported case of *Maple Leaf v. Robitaille*, [1938] C.S. Montreal, No. 146 754; in Appeal Court No. 1300.

⁷⁴ Clarisse, *op. cit.*, footnote 10, pp. 125-126.

⁷⁵ Challies, *op. cit.*, footnote 42, p. 171; Nicholls, *The Doctrine of Quasi-Contract in the Province of Quebec in Journées de droit civil* (1936), p. 227; Baxter, *Unjust Enrichment in Canadian Common Law and in Quebec Law: Frustration of Contract* (1954), 32 Can. Bar Rev. 855, at pp. 862-863; Gutteridge, and David, *The Doctrine of Unjustified Enrichment* (1933-34), 5 Camb. L.J. 204, at p. 227; *Cf.* Powell, *The Law of Agency* (2nd ed., 1961), pp. 416-425. This author suggests that the doctrine of *negotiorum gestio* in common law has been clearly recognized in the cases of salvage, acceptance of a bill of exchange for honour, and performance of another person's duty. He also suggests other cases where this quasi-contract might apply. *Negotiorum gestio* as defined by common law is much more restricted in its application than it is in civil law where a general principle covers every situation that satisfies the conditions established by the Civil Code. See, analysis by Morel, *op. cit.*, footnote 44, p. 148. Concerning the common law of the United States, see, Lorenzen, *op. cit.*, footnote 47, at pp. 209-210 and Castro, *op. cit.*, footnote 61, at p. 258.

⁷⁶ Gutteridge and David, *op. cit.*, *ibid.*, at p. 227; Challies, *op. cit.*, *ibid.*, p. 171; Morel, *op. cit.*, *ibid.*, pp. 147-149. *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, at p. 248, per Bowen L.J.: "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

⁷⁷ Goff and Jones, *The Law of Restitution* (1966), pp. 4-11.

⁷⁸ Morel, *op. cit.*, footnote 44, pp. 147-158; Powell, *The Law of Agency*, (2nd ed., 1961), pp. 416-432. The common law effort to infer an overriding principle of unjust enrichment will be discussed.

instincts of justice required one and the law of the time did not provide it".⁷⁹

At the outset, it must be pointed out that what common law terms a quasi-contract is not always a quasi-contract in a civil law context.⁸⁰ Unlike common law, it is not necessary to imply a contract in order to establish a quasi-contract in civil law. The Civil Code states the necessary conditions to the creation of a quasi-contractual obligation without any reference to the existence of an express or implied contract. Undoubtedly, the English concept of quasi-contract has been used in many situations that would have equally constituted a quasi-contract in civil law; but there are other situations where it is clearly impossible to establish a common law quasi-contract and care must be taken not to confuse the principles of both legal systems.

The discussion of the application of the doctrine of quasi-contract where an agent exceeds his authority illustrates this. In common law the doctrine of "agency of necessity" has been stated in the following terms:⁸¹

Where there is a contractual or other relationship between two parties P and A, and there occurs an emergency under the stress of which A, acting outside the scope of his authority, reasonably intervenes on P's behalf, A will be treated as P's agent for the purposes of the intervention provided that it is impractical at the time for A to communicate with P, and that the action was taken by A *bona fide* in the interests of P.

In at least one case, a court in Quebec has applied the common law concept of "agency of necessity", a legal notion which does not exist as such in civil law.

In *Gaudreau v. Canada Atlantic Railway Co.*,⁸² the facts were similar to other common law cases where servants of a railway company were held to have authority to bind their company by contracts for surgical attendance on injured passengers without evidence of express or apparent authority of such servants to employ the surgeons in a case of necessity. Mr. Justice St-Pierre was strongly influenced by the case of *Langan v. Great Western Railway Company*⁸³ and cited Bromwell B. who had said:⁸⁴

⁷⁹ Baxter, *op. cit.*, footnote 75, at p. 859.

⁸⁰ Morel, *op. cit.*, footnote 44, pp. 157-158. The meaning of quasi-contract in common law has been the object of close consideration by authors seeking to clarify the relationship between unjust enrichment and quasi-contracts in order to establish a basis for the law of restitution. Samek, *Unjust Enrichment, Quasi-Contract and Restitution* (1969), 47 Can. Bar Rev. 1, at pp. 4 and 29-30. Goff and Jones, *op. cit.*, footnote 77, pp. 3-5.

⁸¹ Goff and Jones, *op. cit.*, *ibid.*, pp. 231-232.

⁸² *Supra*, footnote 13.

⁸³ (1874), 30 T.L.R. n.s. 173 (Ex. Ch.).

⁸⁴ *Ibid.*, at p. 176.

As I understand the recent decisions on this subject he (the officer of the company) had what might be called a necessary authority to do so. He was the chief person there. It was in the interests of the company that the mischief resulting from the accident should be the smallest possible if the company were liable, and the company might be. Then there is a necessity under the circumstances such as those for what may be called instantaneous action. Surely it is reasonable to say that the person who is chief in the office where the accident takes place should have authority to do those things which might be done at once, and which are for the benefit of the company. . . .

This concept of "agency of necessity" finds its origin in English maritime law which recognized the power of a ship master to act beyond the scope of his authority in an emergency.⁸⁵ It has subsequently been extended to other areas of the common law and finally in *Prager v. Blatspield Stamp and Heacock Ltd.*,⁸⁶ the doctrine was considered to be applicable as a general rule of common law agency.

The doctrine of "agency of necessity" does not exist in Quebec. Instead, the Civil Code affords other methods of protecting third party rights such as the principles of quasi-contracts⁸⁷ or article 1718 C.C. which can successfully be invoked by a mandatary who executes his mandate in a manner more advantageous than that specified by his mandator.⁸⁸ This is but one illustration how Quebec courts follow common law doctrine rather than civil law principles in order to reach a decision involving a corporation.

The application of the quasi-contractual remedies is to be encouraged. Because of the eminently equitable principle upon which the quasi-contract of *negotiorum gestio* is based, and because it does not require any intervention by the decision-making powers of the company, this civil law concept is more than welcome in a commercial world growing increasingly conscious of third parties' interests. Another equally commendable remedy is the doctrine of unjustified enrichment which may be used as a mopping-up principle in the case where the requirements of *negotiorum gestio* are not satisfied.

⁸⁵ Goff and Jones, *op. cit.*, footnote 77, pp. 232-234; Powell, *op. cit.*, footnote 78, p. 410.

⁸⁶ [1924] 1 K.B. 566.

⁸⁷ The close relationship between the concept of "agency of necessity" and *negotiorum gestio* has been pointed out by Storey, *Agency* (1882), No. 142 "The same doctrine would seem to apply to the case of a mere stranger, acting for the principal without any authority, under circumstances of positive necessity; . . . In such cases he performs the function of *negotiorum gestor* of the civil law; and seems justified in doing what is indispensable for the preservation of the property or to prevent its total destruction."

⁸⁸ *Brown v. Security Life Assurance Co.*, *supra*, footnote 35.

B. The Doctrine of Unjustified Enrichment.

Nowhere in either the Code Napoleon or the Civil Code is there any general statement of principle to the effect that a person may not enrich himself at the expense of another. Such a rule is recognized implicitly, however, by several provisions of the Civil Code and was adopted by the courts in Quebec at the turn of the century. This principle is both general and autonomous; it applies to all appropriate situations, and it exists over and above the written law being subject to rules established by the courts.

What follows is an examination of the added protection which the doctrine of unjustified enrichment provides in the field of company representation, and the factors which have influenced the courts in molding this independent and eminently equitable rule.

a) The Doctrine of Unjustified Enrichment in a Company Law Context.

The courts in Quebec have always regarded the quasi-contract of *negotiorum gestio* and the doctrine of unjustified enrichment as very closely related⁸⁹ and have on some occasions confused these two different legal concepts,⁹⁰ each of which operates in a different way for the protection of third parties dealing with companies. The case of *Paquin v. Grand Trunk Railway Co.*⁹¹ illustrates this distinction. Here, a doctor had performed medical services for victims of a railway accident without having been authorized to do so by the agent representing Grand Trunk Railway Company. Even so, the company was called on by the Court of Review, reversing the decision of the Superior Court, to pay for the value of these services. Mr. Justice Larue indicated how *negotiorum gestio* and the doctrine of unjustified enrichment proceed on the same basis:⁹²

A vrai dire, l'action de gestion d'affaires et l'action *de in rem verso* procèdent de la même cause, d'une immixtion dans les affaires d'autrui; il résulte de cette immixtion un avantage pour celui dont l'affaire est gérée; l'équité exige qu'il tienne compte de ce profit à celui qui le lui a procuré . . . le profit que le maître retire de la gestion au moment de la demande.

⁸⁹ *Adams v. Adams*, *supra*, footnote 59, at p. 282; *Merchants Coal Supply v. Ellison* (1934), 40 R. de J. 4, at p. 15; *Marquis v. Rousseau* (1932), 70 S.C. 529 (C.N.), at p. 530; Cf. *Bilodeau v. Daoust, Lalonde Ltée* (1931), 52 Que. K.B. 22, at p. 35.

⁹⁰ Probably this confusion comes from the possibility of bringing an action *de in rem verso* in a case where an equally more effective action would lie, such as an action based on *negotiorum gestio*. Challies, *op. cit.*, footnote 42, pp. 140-141. Also, the doctrine of unjustified enrichment has emerged from the underlying principles found in *negotiorum gestio* and much confusion is found especially in the earlier cases.

⁹¹ (1896), 9 S.C. 336.

⁹² *Ibid.*, at p. 338, citing the French legal author, Laurent.

At this point, two remarks must be made about such an approach. Firstly, although the doctrine of unjustified enrichment may be amalgamated with *negotiorum gestio* without any apparent consequence in certain cases, confusion should be avoided. In *Paquin's* case it is submitted that the doctor acted as a *gestor* in the interests of Grand Trunk Railway; that the company profited by his initiative; and that *negotiorum gestio* could have been invoked to hold it liable. In this case it made no difference if the one form of action was used rather than the other. In other cases, however, there may be far-reaching legal consequences which determine what action should be taken. For example, in an action based on *negotiorum gestio*, the *gestor* is entitled to recover the total amount of the expense he incurs, whereas in an action *de in rem verso* the plaintiff has only a right to obtain an amount equal to the enrichment realised at the time the *de in rem verso* action is taken.⁹³ Conversely, the doctrine of unjustified enrichment does not impose any duty on the intervening party, whereas the *gestor* incurs the duties of a mandatary.⁹⁴ Secondly, there are other situations, where it is impossible to establish a *negotiorum gestio* relationship and where unjustified enrichment may be of great assistance. Unjustified enrichment applies, for instance, even to cases where the person acting on behalf of another was prohibited to do so, thereby giving an added protection to the third party in a case where *negotiorum gestio* could not be established.⁹⁵

The doctrine of unjustified enrichment allows recovery where a corporate representative acted *ultra vires*,⁹⁶ or has not respected

⁹³ Art. 1046 C.C.

⁹⁴ Art. 1043 C.C., para. 2.

⁹⁵ *Challies, op. cit.*, footnote 42, pp. 100-104. An action *de in rem verso* does not lie however if a person, acting in his own interests, procured incidentally a benefit to a third party. The intention to act on behalf of someone else is a condition to unjustified enrichment. Morel, *op. cit.*, footnote 44, pp. 78-79; Mignault, *L'enrichissement sans cause* (1934-35), 13 R. du D. 157, at p. 179.

⁹⁶ In the case of *Roland v. La Caisse d'Economie Notre Dame de Québec* (1895), 24 S.C.R. 405, an individual had borrowed money from a savings bank transferring in pledge letters of credit which were not listed as those which could be received by the bank as collateral security. Even though, Taschereau J., rendering a unanimous decision, was prepared to consider the loan and the receipt of the securities by the Bank as *ultra vires*, he refused to accept the plea of the third party who had received the bank's money. The injustice resulting from arguments based on *ultra vires* were described as "an attempt to plunder this bank in the name of public order and public policy. Such a self-constituted championship of public interests in order to defeat a legitimate claim cannot receive the countenance of a court of justice", at p. 408. One of the arguments he suggested against such a patent defeat of justice was based on estoppel: "A borrower cannot be allowed to cheat his lender, under the pretext that the lender had not the power to loan. Such a plea does not lie in his mouth; he is estopped from relying upon it", at p. 410. Although such a line of thinking may be used in a common law context (and indeed has been suggested in *Brecken-*

the restriction imposed on the exercise of the company's powers.⁹⁷ The courts are therefore ready to apply the doctrine of unjustified enrichment in cases where the legislative policy concerning the exercise of corporate powers has been violated. In *Roland v. La Caisse d'Economie Notre Dame de Québec*,⁹⁸ Mr. Justice Bossé introduced a distinction between contracts that are not binding because they are against *l'ordre public* and those which create no legal relationship because they are contrary to *les bonnes moeurs*. After having reviewed the law of different countries, he concluded that, even though a contract was illegal, or *contre l'ordre public*, because it was beyond the powers of a corporation, the doctrine of unjustified enrichment would still apply.

L'on voit qu'il y a concours d'opinions en France, en Angleterre et aux Etats-Unis pour déclarer absolument nuls et sans effet les contrats, soit contraires à l'ordre public, soit en excès des pouvoirs conférés aux corporations, mais que, chaque fois qu'il n'y a pas eu contrat immoral de la part des deux parties contractantes, la répétition a toujours été accordée, pour la raison d'équité; . . .⁹⁹

On the other hand this doctrine would offer no basis of recovery in a case where the contract was illegal through immorality, or because it was *contre les bonnes moeurs*.

Lorsque la cause est contraire aux bonnes moeurs, il y a pour la loi, une question de pudeur et d'indignité des parties. Le sentiment des bonnes moeurs, plus impressionnable, plus délicat, a déterminé la justice à se voiler dans un mouvement d'indignation et de dégoût.¹⁰⁰

ridge Speedway Ltd. v. Reginam (1967), 61 W.W.R. 257 (Alta.)), estoppel is unknown in civil law in the case of *ultra vires* transactions. This case could have also proceeded on the basis of an action *de in rem verso*. See Caron, *De l'action réciproque du droit civil et du common law dans le droit des compagnies de la province de Québec* in *Studies in Canadian Company Law* (1967), p. 110, who suggests that the doctrine of unjustified enrichment formed the basis of this decision. See, also, *Ville d'Iberville v. La Banque du Peuple* (1895), 4 Que. Q.B. 268, where the doctrine of unjustified enrichment is the basis of a claim made by a lender of money in an *ultra vires* transaction.

⁹⁷ In the case of a municipal corporation, there have been several cases where the doctrine has been applied where the municipal corporation did not respect the formalities which enabled them to make loans and where an action based on an illegal loan was not possible. *Corporation de la Paroisse de Ste-Elizabeth v. Lavallée* (1916), 25 Que. K.B. 507, at p. 509, per Archambault J.C.: "Il n'y a pas de doute que, si [une corporation] a bénéficié [d'un emprunt contracté contrairement aux formalités édictées par la loi], elle est responsable. Personne ne peut s'enrichir aux dépens d'autrui." *La Caille v. Commissaires d'Ecoles de Bellerive* (1930), 68 S.C. 495; *La Commission des Ecoles Catholiques de Montréal v. Leclaire & Dionne* (1917), 23 R.L. 252; *Péloquin v. Commissaires d'Ecoles pour la Municipalité de la Cité de Sorel*, [1942] S.C. 200; Gaudet, *Des emprunts municipaux* (1938-39), 17 R. du D. 261.

⁹⁸ *Supra*, footnote 71.

⁹⁹ *Ibid.*, at p. 328.

¹⁰⁰ *Ibid.*, at p. 323.

b) *Influence of Common Law on Unjustified Enrichment.*

This liberal application of the doctrine of unjustified enrichment to the illegal contract of corporations may have been considerably restricted recently by the controversial decision of *La Corporation Municipale de la Paroisse de la Visitation de Champlain v. Sauvageau*.¹⁰¹ This appeal court decision could well be read in many respects as a decision by a court of common law, even though civil law principles should have been followed.¹⁰²

In this case, the plaintiff municipal corporation had issued a promissory note without having satisfied certain legal formalities, which resulted in the court declaring the loan to be *ultra vires*. When considering the application of the doctrine of unjustified enrichment as a possible basis for granting recourse to the holder of the note, Mr. Justice Taschereau was influenced by the writings and the decisions of common law origin.¹⁰³ He based his decision squarely on common law considerations, particularly on Lord Haldane's decision in *Sinclair v. Brougham*¹⁰⁴ to the effect that the depositors in a building society which had embarked upon *ultra vires* banking activities could not succeed in that case,

... unless they are able to trace their money into the hands of the society or its agents as existing assets. The question is whether they are able to establish enough to succeed upon this footing. Their claim cannot be *in personam* and must be *in rem*, a claim to follow and recover property which, in equity at all events, they never really parted.¹⁰⁵

Even though the learned judge was prepared to accept, as an hypothesis, the allegation that the loan had been received by the corporation,¹⁰⁶ and, therefore had been enriched without justification, he was not prepared to uphold the action *de in rem verso*.

... la défenderesse n'a pas bénéficié des deniers du demandeur puisqu'il n'appert nulle part que le montant du prêt serait en la possession de la corporation municipale, ou qu'il aurait servi à acquitter une dette légalement exigible ou à acquérir des biens qui pourraient être encore identifiés entre les mains de la défenderesse.¹⁰⁷

His fellow judges concurred with Mr. Justice Taschereau's decision. However, those who gave reasons for their decision seemed to take

¹⁰¹ [1961] Que. Q.B. 147.

¹⁰² Art. 356 C.C. states that public corporations, such as a municipal corporation, "fall within the control of the civil law in their relations . . ., to individual members of the society".

¹⁰³ *Supra*, footnote 101, at p. 150. He cited Masten and Fraser, *Company Law of Canada* (1941), p. 359 and McQuilin, *The Law of Municipal Corporations* (1950), Vol. 14, p. 744 and more than half a dozen common law precedents.

¹⁰⁴ [1914] A.C. 398.

¹⁰⁵ *Supra*, footnote 101, at p. 151.

¹⁰⁶ *Ibid.*; Mr. Justice Taschereau thought, however, that this allegation was not substantiated by evidence.

¹⁰⁷ *Ibid.*, at p. 152.

the view that one of the essential elements of a *de in rem verso* action had not been proved in that no evidence had been adduced that the corporation had actually received the loan or been enriched by a corresponding amount. It is submitted that it was this element, that is, the fact that the corporation had not been enriched, that forms the *ratio decidendi* of the majority in the Court of Appeal.

The judgment of Taschereau J.—which is, therefore, *obiter*—provides a striking example of the confusion of principles which results when common law precedents are followed indiscriminately in the field of corporation law without drawing the vital distinctions which the civil law requires. The doctrine of unjustified enrichment is quite different from the common law action *in personam*, based on the doctrine of implied contract, or the action *in rem*, based on the doctrine of tracing, which were mentioned in *Sinclair v. Brougham*.¹⁰⁸

The House of Lords in this case refused to follow the civil law general principle that an action *in personam* lies in all cases against those who have enriched themselves without justification. In the words of Lord Haldane:¹⁰⁹

All analogies drawn from other systems, such as that of Roman Law, [must be] qualified in their application . . . so far as proceedings *in personam* are concerned, the common law of England really recognizes (unlike the Roman Law) only actions of two classes, those founded on contracts and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction law. The fiction can only be set up with effect if such a contract would be valid if it really exists.

In *Sinclair's* case, it was impossible to impute even a fiction or a promise because it would have been illegal for the company to make a promise to enter into an *ultra vires* transaction. As it was pointed out by Lord Parker:¹¹⁰

The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make.

As we have seen, the doctrine of unjustified enrichment in civil law, because it is not based on an implied contract, applies to cases where a contract is a nullity because *ultra vires*.¹¹¹ But, even if the common law concept of implied contract is inapplicable in the case of such an illegal transaction, was "English equity to retire defeated from the task which other systems of equity have

¹⁰⁸ *Supra*, footnote 104, at p. 418.

¹⁰⁹ *Ibid.*, at p. 415.

¹¹⁰ *Ibid.*, at p. 440.

¹¹¹ *Supra*, footnote 96.

conquered"?¹¹² Indeed not. The ingenuity of the courts in England developed two different methods of protecting the third party who had entered into an illegal contract; one based on law, the other on equity. Lord Parker has admirably summed up the right which is given to the lender under an *ultra vires* loan transaction to obtain a tracing order against the directors or the agents who receive on behalf of a company the money so lent.

At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors and agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who had not pleaded purchase for value without notice to retain an advantage derived from the misappropriation of trust money, it ended, as it was so often the case, in creating what were rights of property, though not recognized as such by the common law.¹¹³

To this right of property corresponds the action *in rem* which was the basis of the citation borrowed by Mr. Justice Taschereau from Lord Haldane in *Sauvageau's* case.¹¹⁴ This citation describes a right of action which is of common law origin, and which should never have influenced the courts' attitude toward unjustified enrichment. On the one hand, the civilian doctrine requires evidence that a person has been enriched, that is, that his assets have appreciated or his liabilities reduced;¹¹⁵ but, it does not require that the plaintiff in an action *de in rem verso* should adduce evidence such as is required in the case of a "tracing order" where the plaintiff must be able to identify his property in the hands of the defendant.¹¹⁶ On the other hand, the civil law of Quebec allows actions *in rem* to be undertaken only in certain situations which are restricted by legislation¹¹⁷ quite unlike the general accessibility of the common law doctrine of tracing. Furthermore, even though the Civil Code does recognize the existence of "trusts" in certain cases, the common law concept of "constructive trusts", which

¹¹² *Supra*, footnote 104, per, Lord Parker, at p. 435.

¹¹³ *Ibid.*, at pp. 441-442.

¹¹⁴ *Supra*, footnote 107.

¹¹⁵ *Challies, op. cit.*, footnote 42, pp. 60-63; *Morel, op. cit.*, footnote 44, pp. 80-82.

¹¹⁶ *Goff and Jones, op. cit.*, footnote 77, pp. 43-52.

¹¹⁷ An action in revendication may be taken by a person having the ownership of property. See, art. 2268 C.C. concerning corporal moveable property, arts 770 to 772 C.P. concerning immoveables. See also, *Amos and Walton, op. cit.*, footnote 43 who pointed out that where the bailee has parted with the chattel to a stranger the bailor loses his real action against the bailee.

has influenced the doctrine of tracing does not as such form part of the law of Quebec.¹¹⁸

Negotiorum gestio and the doctrine of unjustified enrichment are remedies which are readily available in civil law and which are used in situations where the law and the rules of equity in a common law jurisdiction have developed other means of protection such as tracing orders and the equitable rules of constructive trusts.¹¹⁹ The present state of what common law commentators call the "doctrine of unjust enrichment" or "restitution" may be compared to what existed in France before 1892, because it is only after the case of *Bourdier*,¹²⁰ that the highest court in France, *la Cour de cassation*, recognized for the first time the doctrine *de l'enrichissement sans cause*, even though this underlying principle was known to exist in several of the articles of the Code Napoleon.¹²¹ Although common law has developed many means of recovery which are based on the same principle that "no one be made richer through another's loss",¹²² the efforts of many jurists have not yet succeeded into creating "unjust enrichment" as an independent head of liability.¹²³ However, the courts in England and Canada are slowly drawing closer to a general principle and certain decisions appear to be eroding the basis of highly authoritative decisions which might have been thought to discourage any initiative.

¹¹⁸ There cannot be any "trusts" in Quebec unless they are constituted pursuant to legislation. The Civil Code recognizes the establishment of trusts only in the case of a valid donation or will. Certain statutes state that "trusts" may be established but they refer to very limited cases and have often been interpreted by civil law principles. Therefore, the scope of the development of trusts in common law is much wider than in Quebec. "Constructive trusts", "resulting trusts", "trusts by implication" and even "declaration of trusts" are unknown in Quebec unless related to specific legislation. *Masson v. Masson* (1913), 47 S.C.R. 42; Faribault, *Traité théorique et pratique de la fiducie et du trust du droit civil dans la Province de Québec* (1936), p. 226; Mankiewicz, *La fiducie et le trust de common law* (1952), 12 R. du B. 16, at p. 23; Graham, *Some Peculiarities of Trusts in Quebec* (1962), 22 R. du B. 137, at p. 137.

¹¹⁹ Lorenzen, *op. cit.*, footnote 49, at p. 210.

¹²⁰ 15 juin 1892, S. 1893. 1. 291; D. 1892. 1. 596.

¹²¹ Angus, *Restitution in Canada since the Deglman Case* (1964), 42 Can. Bar Rev. 529, at pp. 532-533; Morel, *op. cit.*, footnote 44, pp. 40 and 158.

¹²² Dawson, *Unjust Enrichment: A Comparative Analysis* (1951), p. 3.

¹²³ McClean, *Common Law Wine in Civil Law Bottles* (1969), 4 U.B. C.L. Rev. 1; Here the author has examined how common law could "draw on civil law experience" by using "the structure of Civil Law as the basis for organizing and developing existing" common law institutions. Goff and Jones, *op. cit.*, footnote 74, is the first English book dealing with many topics which fall under the basic principle of unjust enrichment. In Canada, some courts have shown themselves ready to accept this general principle but the battle is not yet won: Angus, *op. cit.*, footnote 121; Samek, *op. cit.*, footnote 79; Baxter, *op. cit.*, footnote 75; Fridman, *The Quasi-Contractual Aspects of Unjust Enrichment* (1956), 34 Can. Bar Rev. 393.

An example of this trend may be found in recent decisions dealing with *ultra vires* transactions. In the English case of *Bell Houses v. City Wall Properties Ltd.*¹²⁴ and in the Canadian case of *Breckenbridge Speedway Ltd. v. Reginam*,¹²⁵ certain judges appeared to be prepared to recognize the availability of an action for recovery of money paid out by a company to a third party as a result of an *ultra vires* transaction. Mr. Justice Porter of Alberta has stated that:¹²⁶

The cases on *ultra vires* are well founded on the principle that a person who deals with an entity of limited capacity cannot take advantage of its limitation for his own profit. The law does not enforce the contract; it treats it as nonexistent, and compels payment or return of property on the basis that it would be unconscionable to enrich a receiver of off the benefit.

This attitude is incompatible with the decision in *Sinclair v. Brougham*,¹²⁷ where the law Lords have stated that an action *in personam* for recovery did not exist in favour of a third party who had handed over money to a company in an *ultra vires* transaction; one would have thought, that, conversely, a company could not do the same in order to recover money handed over to third parties in similar circumstances. It might be that the foundation of *Sinclair's* case is being weakened in common law; certainly, any influence exercised by such a decision should be done away within the Province of Quebec.

¹²⁴ [1966] 1 Q.B. 207, rev'd [1966] 2 Q.B. 656. At first instance, Mocatta J. held that a plea for *ultra vires* is available as a ground for defence for a third party who dealt with the company. On appeal, Salmond J. expressed doubts whether a third party could take advantage of the doctrine of *ultra vires*: "It seems strange that third parties could take advantage of a doctrine manifestly for the protection of the shareholders, in order to deprive the company of money which in justice should be paid to it by the third parties. . . . I express no opinion on this point and leave it to be decided when it arises, for we have heard no argument upon it" at p. 694. Also in *Brougham v. Dwyer* (1913), 103 L.T. 504 where the liquidator of a building society which carried on an *ultra vires* banking business brought an action for money had and received in order to recover the amount of the customer's overdraft. The court sustained this claim but this decision seems to have been impliedly overruled by the case of *Sinclair v. Brougham*, *supra*, footnote 104. See, Goff and Jones, *op. cit.* footnote 77, p. 324 and n. 16.

¹²⁵ *Supra*, footnote 96.

¹²⁶ *Ibid.*, at p. 282.

¹²⁷ *Supra*, footnote 104.