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CONTRACT LAW REFORM IN QUEBEC

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I. Introduction.

Most of the law of contractual obligations in Quebec is contained in the Civil Code of Lower Canada of 1866.¹ As is the case with the large majority of civil codes in the world, the Civil Code of Quebec was conceived, written and brought into force in a pre-industrialized environment. Its philosophy is one of individualism and economic liberalism. Much has changed in the socio-economic conditions of Quebec since 1866. The state now plays a far more active and important role in socio-economic life than it did in the nineteenth century. More particularly in the field of contracts, the principle of equality of contracting parties or in other words the principle of equal bargaining power has been severely undermined. Economic distribution channels have become much longer than in 1866, which has had a profound influence especially on the contract of sale. Today products are rarely bought directly from their producer, but are purchased through one or more intermediaries so that there will then be no direct contractual link between producer (manufacturer) and user (consumer).² Furthermore, the Civil Code of 1866 is much more preoccupied with immoveables (land and buildings) than it is with moveables (chattels). Twentieth century commercial transactions, however, more often involve moveable than immovable objects.

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¹ Civil Code, Arts 761-830, 984-1040e, 1257-1979k, 2037-2046, 2407-2711.

² See, however, *General Motors Products of Canada Ltd v. Leo Kravitz*, [1979] 1 S.C.R. 790; and *infra*, footnotes 59, 101 and text thereto.

How has the law reacted to these and other changes in the socio-economic environment in which the law of contracts operates? First of all there have been numerous amendments to the Civil Code. Among the more important ones are the addition of articles 1040a-1040e in the section entitled "Of equity in certain contracts";³ the reform of the contract of lease and hire in general⁴ and of lease and hire of dwellings in particular;⁵ the addition of special rules on the pledge of agricultural property⁶ and commercial pledge;⁷ and finally the large scale reform of insurance law.⁸

In addition to amending the Civil Code many special statutes have been passed which supplement its provisions. The most important provincial statutes having a bearing upon the law of contractual obligations are the following: an Act respecting the Class Action,⁹ the Automobile Insurance Act,¹⁰ the Charter of the French Language,¹¹ the Charter of Human Rights and Freedoms,¹² the Consumer Protection Act,¹³ the Labour Code,¹⁴ and, of much longer standing, the Workmen's Compensation Act.¹⁵

Apart from amendments to the Civil Code and the enactment of special statutes supplementing it, the courts have also contributed to the development of the law of contracts. According to traditional civil law principles the role of the courts should be limited to the interpretation of the Code and statutes. In the words of Montesquieu:¹⁶

Les juges de la nation ne sont que les bouches, qui prononcent les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur.

The truth, however, is different. Often civilian courts will go beyond mere interpretation and do in fact create law. In Quebec the road hereto is opened by the words of article 11 of the Preliminary Title of the Civil Code:¹⁷

³ S.Q., 1964, c. 67.

⁴ S.Q., 1973, c. 74.

⁵ S.Q., 1979, c. 48.

⁶ S.Q., 1974, c. 79.

⁷ S.Q., 1962, c. 57.

⁸ S.Q., 1974, c. 70; S.Q., 1979, c. 33.

⁹ R.S.Q., 1977, c. R-2.1.

¹⁰ R.S.Q., 1977, c. A-25, in particular ss 84-121.

¹¹ R.S.Q., 1977, c. C-11, in particular s. 55.

¹² R.S.Q., 1977, c. C-12, in particular ss 10-20, 49.

¹³ R.S.Q., 1977, c. P-40.1.

¹⁴ R.S.Q., 1977, c. C-27, in particular ss 52-73.

¹⁵ R.S.Q., 1977, c. A-3, in particular ss 1-51.

¹⁶ *De l'Esprit des lois* (1737-1743), VI, p. 5.

¹⁷ See also Code Napoléon, art. 4.

A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.

Furthermore, it is often said that the decisions of the Supreme Court of Canada on the private law of Quebec have the force of binding precedent. The decisions are not only *res judicata* between the parties, but their *ratio* will also be binding in subsequent cases.¹⁸

The most comprehensive reform of contract law in Quebec lies in the framework of an overall revision of the Civil Code, proposed by the Civil Code Revision Office in 1977.¹⁹ To date only Book II on Family Law of the proposed Draft Civil Code²⁰ has been brought into force.²¹ The remaining parts of the Draft Civil Code have not yet been acted upon by the Quebec National Assembly. Contract law is contained in Book V of the Draft Civil Code together with the whole law of obligations, that is, obligations arising out of contract on the one hand and obligations arising out of the law on the other.²²

II. *Contract Law Reform: Methodology.*

In the preceding paragraphs several methods of contract law reform have been identified: amendments to the civil code, the enactment of special statutes, overall civil code revision and judicial reform. Should particular preference be given to any of these methods?

1. *The Civil Code and Special Statutes.*

The first question which arises in this context relates to the relationship between a Civil Code and special statutes. Should the whole law of contractual obligations be contained in a civil code or should certain parts be kept separately from the code in special statutes? In order to answer this question it seems appropriate to look first of all at the nature of a code. Historically, a code in the civil law tradition is intended to give rather general rules of a permanent nature dealing more or less exhaustively and in a systematic manner with a whole branch of law, such as civil law, commercial law, criminal law, civil procedure or criminal procedure.²³ Special statutes on the other

¹⁸ Louis-Philippe Pigeon, *Rédaction et interprétation des lois* (1964), reprinted in 1978 by l'Éditeur officiel, p. 36. See also *Daoust v. Ferland*, [1932] S.C.R. 343, at p. 351. For a different opinion see *Lavallé v. Bellefleur*, [1958] B.R. 53, at pp. 57-60. Strictly speaking the decisions of the Cour de Cassation in France do not have the force of binding precedent: Art. 5 of the Code Napoléon forbids this (Art. 5 was not taken over in the Civil Code of Lower Canada).

¹⁹ Report on the Québec Civil Code, Civil Code Revision Office (1977).

²⁰ *Ibid.*, Vol. I.

²¹ S.Q., 1980, c. 39.

²² Report on the Québec Civil Code, *op. cit.*, footnote 19, Vol. I, Book V, Art. 3.

²³ Civil and commercial law are subdivisions of the more general category of private law. Most civilian jurisdictions have both a civil and a commercial code. In

hand are *ad hoc* legislation dealing with narrowly defined subject matters and containing very detailed rules, often combining private, administrative and penal law provisions on one particular subject.

The next step to take is to look at codes and statutes in the hierarchy of sources of law. Do they have equal legislative force or does a code have superior force? Historically it is probably correct to say that codes were intended to have a force superior to that of special statutes and this because of their rather general rules of a lasting nature. Today, however, there has been such a proliferation of special statutes in the civilian world that this argument no longer holds true. Modern writers therefore tend to put codes and special statutes on an equal legislative footing.²⁴ In this context it should be noted that in two Privy Council decisions in the twenties the character of the Quebec Civil Code was held to be that of an ordinary statute.²⁵

Another point to be raised is the different interpretation given to codes and statutes. Nobody denies that a special rule, be it in the code or a statute, prevails over a general codal rule.²⁶ Without clear authority, however, the Quebec courts have had the tendency to interpret special statutes more restrictively than the Civil Code. In doing so they probably followed the Anglo-Canadian tradition that statutes derogating from the common law — in Quebec the Civil Code is the “*droit commun*”—should be construed restrictively.²⁷ This judicial approach should be rejected; first, because of the general argument, made earlier, that in the hierarchy of sources of law, codes and special statutes have equal legislative force; secondly and more specifically, because this approach seems to violate section 41(2) of the Interpretation Act of Quebec²⁸ which states that:

A statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

From the foregoing it appears that the law of contractual obligations should in as much as possible be contained in the Civil Code. Only those parts requiring very detailed legislative regulation should

Quebec, however, there is only one code for these two subject matters, the Civil Code. Commercial law is contained in Book 4 of the Civil Code.

²⁴ René David and John E.C. Brierley, *Major Legal Systems in the World Today* (2nd ed., 1978), pp. 101-104.

²⁵ *Quebec Railway, Light, Heat & Power Co. Ltd v. Vandry*, [1920] A.C. 662, at pp. 671-672 (P.C.); *Despatie v. Tremblay*, [1921] 1 A.C. 702, at p. 709 (P.C.).

²⁶ Pigeon, *op. cit.*, footnote 18, pp. 32, 38.

²⁷ F.P. Walton, *Le domaine et l'interprétation du Code civil du Bas-Canada*, introduction et traduction par Maurice Tancelin (1980), pp. 14-15. See also Maurice Tancelin, *La justice contractuelle: expériences et perspectives au Québec* (1978), 30 *Rev. int. de dr. comp.* 1009, at pp. 1024-1025.

²⁸ R.S.Q., 1977, c. 1-16.

be dealt with in special statutes. This also seems to be the attitude adopted by the *Report* of the Civil Code Revision Office.²⁹ By way of example, it is interesting to look at the legislative history of Quebec's Consumer Protection Act³⁰ and its new landlord and tenant legislation, Bill 107.³¹ All new consumer protection law was kept outside the Civil Code. It seems, however, that the general provisions of the Consumer Protection Act with respect to consumer contracts relating to goods and services,³² are of such a general nature and of such a universal application that they should have been included in the Civil Code by way of amendment.³³ On the other hand, when Bill 107 was passed, the Civil Code was amended by the introduction of 135 new articles on the lease of dwellings.³⁴ Many of the new articles contain such very detailed rules or are of such an administrative law nature that one wonders whether it would not have been better to have kept them outside the Civil Code in the special statute itself.³⁵ This, for instance, was done in France.³⁶

2. Amendments to the Civil Code and Civil Code Revision.

Periodical amendments to a civil code are inevitable if one wants to keep up with new socio-economic developments requiring legislative intervention. In making *ad hoc* amendments to a civil code utmost care should be taken in preserving the system, harmony and language of the code. An example of a violation of this rule in the contractual field is the introduction of article 1040c into the Civil Code of Lower Canada in 1964.³⁷ The article allows judicial reduction or annulment of the monetary obligations under a loan of money if,

...they make the cost of the loan excessive and the operation harsh and unconscionable.

²⁹ *Op. cit.*, footnote 19, Vol. I, p. xxviii.

³⁰ *Supra*, footnote 13.

³¹ *Supra*, footnote 5.

³² S. 8-22; see also the related definitions in s. 1 and the general provisions on proof, procedure and sanctions in ss 261-263, 271-273 and 276.

³³ See more generally Paul-A. Cr peau, *Le droit civil et le droit de la protection du consommateur* (1979), 10 *Rev. g n. de dr.* 13.

³⁴ Civil Code, Arts 1650-1665.6.

³⁵ The constitutionality of the *R gie du logement*, the administrative tribunal created by Bill 107, *supra*, footnote 5, is uncertain.

³⁶ Loi du 1er septembre 1948 portant modification et codification de la l gislation relative aux rapports des bailleurs et locataires ou occupants de locaux d'habitation ou   usage professionnel et instituant des allocations de logement, as am., D.1949.93.

³⁷ *Supra*, footnote 3.

These words are taken from The Unconscionable Transactions Relief Act³⁸ and, in a civil law context, can only be understood and interpreted by reference to the civilian concept of "lesion".³⁹

Overall civil code revision as carried out in Quebec today is a rare occurrence. Only very few civilian jurisdictions embarked upon such a large scale reform.⁴⁰ Most civilian jurisdictions have contented themselves with partial civil code revision, for instance in the field of family law,⁴¹ with *ad hoc* amendments to the civil code or with the proliferation of special statutes outside the code. The main purposes of Civil Code revision in Quebec can perhaps be best summarized as follows:⁴²

- (a) revision and reorganization of the whole body of private law;
- (b) reform and modernization;
- (c) codification and clarification of certain judge-made (in civilian terminology "jurisprudential") rules;
- (d) repatriation of the substance of certain special statutes into the Draft Civil Code;
- (e) "civilianization" of certain common law notions which over the years have penetrated Quebec's civil law.

Some examples of these purposes in the field of contractual obligations are the following:

- (a) revision and reorganization: all the codal rules pertaining to contracts in general can be found in Book V of the Draft Civil Code.⁴³ In the present Civil Code these rules on contracts are spread over several titles in Books 3 and 4.⁴⁴ Furthermore, the Draft Civil Code contains fewer rules on certain nominate contracts, such as sale, than there are in the present Civil Code thereby leaving more room for the application of the general contractual rules applicable to all contracts; on the other hand, the number of nominate contracts has increased in the Draft Civil Code, for instance, the addition of the contract for services and the contract of arbitration.

³⁸ R.S.O., 1970, c. 472, s. 2, now R.S.O., 1980, c. 514, s. 2.

³⁹ *The Attorney-General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570, at p. 577; see also *infra*, footnote 130 and text thereto. On lesion in general see *infra*, Section III.4.

⁴⁰ *E.g.*, Italy in the forties, Portugal in the seventies, Quebec and the Netherlands today.

⁴¹ *E.g.*, France, West Germany.

⁴² Report on the Québec Civil Code, *op. cit.* footnote 19, Vol. I, pp. xxiii-xxxvii.

⁴³ *Ibid.*, pp. 333 *et seq.*

⁴⁴ *Supra*, footnote 1.

- (b) reform and modernization: examples will be given later.⁴⁵ It suffices to say here that many proposals for reform and modernization were made after a comparative analysis of solutions adopted in other (civilian) jurisdictions.
- (c) codification and clarification of certain jurisprudential rules: the present general codal rules on formation of contracts, articles 984-1012, are, perhaps with the exception of article 988, silent on the mechanism of offer and acceptance. The courts, however, have developed an elaborate set of rules on this subject which with some modifications and innovations have been codified in articles 11-26 of Book V of the Draft Civil Code.⁴⁶ Another example is the codification of the judge-made rules on exoneration clauses.⁴⁷
- (d) repatriation of the substance of certain special statutes into the Draft Civil Code: whereas the Draft Civil Code does not propose to repatriate an important special statute such as the Consumer Protection Act,⁴⁸ certain provisions in Book V will make some of the more general provisions of the Consumer Protection Act superfluous.⁴⁹
- (e) "civilianization" of certain common law notions: in the absence of specific codal provisions on the formation of contracts *inter absentes* there was, at one time, much confusion in Quebec on this subject. The courts now use the common law doctrine of expedition (dispatch)⁵⁰ at the same time as the traditional civilian doctrine of reception.⁵¹ Article 19 of Book V of the Draft Civil Code chooses the doctrine of reception.

3. Judicial Reform.

It was pointed out earlier that civilian courts do not always limit themselves to the interpretation of codes and statutes, but also, on certain occasions, create law. For Quebec, reference has already been made to the case law on offer and acceptance. A brief reference was also made to the judicial decisions on exoneration clauses. The Civil Code does not deal with exoneration clauses specifically. The only

⁴⁵ *Infra*, Section III.

⁴⁶ Report on the Québec Civil Code, *op. cit.*, footnote 19, Vol. II, t. 2, p. 553 (commentary).

⁴⁷ *Infra*, section II.3.

⁴⁸ *Supra*, footnote 13.

⁴⁹ Report on the Québec Civil Code, *op. cit.*, footnote 19, Vol. II, t. 2, p. 562 (commentary). See also *infra*, Section III.4.

⁵⁰ *Magann v. Auger* (1901), 31 S.C.R. 186.

⁵¹ *Charlebois v. Baril*, [1928] S.C.R. 88.

general codal provisions which may be applied to them are articles 13 and 1019. Article 13 in the Preliminary Title of the Civil Code declares that contracts which are contrary to public order and good morals are null. Although exoneration clauses are not by definition contrary to public order and good morals,⁵² they do not afford protection against what the writers and the courts call "dol" and "faute lourde", or intentional or gross fault.⁵³ Such clauses would be contrary to public order.⁵⁴ Article 1019 in the section on interpretation of contracts states that:

. . . in cases of doubt the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation.

This article has often been used to interpret exoneration clauses in favour of the economically weaker party.⁵⁵ Furthermore, like in the common law provinces the courts construe exoneration clauses restrictively.⁵⁶ Finally, they require that the party invoking an exoneration clause prove that the party against whom it is invoked had knowledge of it at the time of contracting. A signed contract or clause or previous business dealings may reverse this burden of proof and create a presumption of knowledge; the presumption, however, is rebuttable.⁵⁷

Notwithstanding the above mentioned examples Quebec courts and the Supreme Court of Canada have been less willing to "create law" than their counterparts in many other civilian jurisdictions. Most of the time, the attitude of the courts has been one of restrictive interpretation, not only of special statutes as mentioned earlier, but to a large extent of the Civil Code itself and this notwithstanding the text of article 12(1) of the Preliminary Title of the Civil Code:⁵⁸

⁵² *The Glengoil Steamship Co. v. Pilkington* (1897), 28 S.C.R. 146.

⁵³ *Ceres Stevedoring Co. Ltd v. Eisen und Metall A.G.*, [1977] C.A. 56, at pp. 63-64.

⁵⁴ *Ibid.*, at p. 63. See also Art. 300 of Book V of the Draft Civil Code.

⁵⁵ *Claude Talbot v. Commission Scolaire Régionale Lapointe*, [1976] C.S. 938, at p. 941; Art. 68 of Book V of the Draft Civil Code takes over the rule of Art. 1019 of the Civil Code. Art. 69 of the Draft, however, adds more specifically for exoneration clauses: ". . . a clause drawn up by or for one party must be interpreted in favour of the person obliged to adhere to it. This provision is imperative." See also s. 17 of the Consumer Protection Act, *supra*, footnote 13, which provides that contracts governed by the Act are interpreted in favour of the consumer.

⁵⁶ *Canada Steamship Lines Ltd v. The King*, [1952] A.C. 192; *Zurich. Compagnie d'Assurance v. Tellier*, [1971] C.S. 13.

⁵⁷ *Garage Touchette Ltée v. Métropole Parking Inc.*, [1963] C.S. 231; *Demers v. Garnier*, [1970] C.A. 484; *Girard v. National Parking Ltd*, [1971] C.A. 328, conf. C.S. (Montréal—671,390), Dec. 20th, 1968. See also Art. 320 of Book V of the Draft Civil Code.

⁵⁸ *Cf. Tancelin, op. cit.*, footnote 27. Art. 12 has no equivalent in the Code Napoléon and has not been taken over in the Draft Civil Code (which has no Preliminary

When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed.

Perhaps, the tide is changing. Thus, in the field of contracts one could mention the landmark decision of the Supreme Court of Canada in *General Motors Products of Canada Ltd v. Leo Kravitz*,⁵⁹ the decision of the Court of Appeal in *The National Drying Machinery Co. v. Wabasso Ltd*,⁶⁰ and, in a field closely related to that of contracts, the decision of the Supreme Court of Canada on the general doctrine of unjust enrichment in *Cie. Immobilière Viger Ltée v. Lauréat Giguère Inc.*⁶¹

It is to be hoped that with the introduction of the Draft Civil Code courts will not again, in a spirit of "positivism", fall back upon a restrictive interpretation of the new Code presuming wrongly that the Code will necessarily contain answers to all legal questions which may arise. Perhaps it would have been better if the Draft Civil Code had specifically provided for this contingency. It could have followed the well-known solution adopted by the Swiss legislator in article 1 of the Swiss Civil Code of 1907. Where the Code is silent the judge must render a decision according to customary law or in the absence thereof according to the rule which he would have enacted had he been the legislator. In doing so he must find his inspiration in doctrine and jurisprudence.⁶²

III. Contract Law Reform: Substance.

This article does not purport to provide an exhaustive review of the substance of contract law reform in Quebec, be it by amendments to the Civil Code, by the enactment of special statutes or by the proposed Draft Civil Code. It will rather address itself to the more limited question of how contract law reform has influenced or will influence the three guiding principles of the law of contractual obligations, namely the autonomy of the will; the binding force of contracts; and the relativity of contracts. In addition, it will deal with the "renais-

Title). It is submitted that the interpretation of the new Civil Code of Québec will be governed by the rule of s. 41(2) of the Interpretation Act, *supra*, footnote 28. Cf. s. 1 of Bill 89, *supra*, footnote 21.

⁵⁹ [1979] 1 S.C.R. 790. See *infra*, Section III.3.

⁶⁰ [1979] C.A. 279. The decision deals, *inter alia*, at p. 286, with the obligation of the vendor to provide certain information to the buyer and contains a liberal and extensive interpretation of Art. 1024 of the Civil Code. On different grounds the Court of Appeal decision was reversed by the Supreme Court: *Wabasso Ltd v. National Drying Machinery Co* (1982), 19 C.C.L.T. 177.

⁶¹ [1977] 2 S.C.R. 67.

⁶² The French text of Art. 1 reads: "A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. Il s'inspire des solutions consacrées par la doctrine et la jurisprudence."

sance" of the doctrine of "lesion" as a powerful tool for re-establishing a certain measure of social and economic justice in contractual relations.

1. *Autonomy of the Will*.⁶³

At the time of codification the autonomy of the will was no doubt the leading of the three guiding principles of the law of contractual obligations. It is the ultimate reflection of the philosophy of individualism and economic liberalism. Assuming that contracting parties act upon a footing of equality, the principle of the autonomy of the will dictates that contracting parties are completely free to regulate their contractual relations as they wish. The only limitation to this freedom is that in doing so they may not "contravene the laws of public order and good morals".⁶⁴

The practical consequences of the principle of the autonomy of the will are fourfold. First, contractual stipulations prevail over codal provisions which are not held to be of public order. In the Civil Code of 1866, there are very few provisions in the field of contractual obligations which are of public order and therefore *imperative*. Most provisions are *suppletive* in nature, which means that parties may deviate from them by contract. Secondly, consent between contracting parties suffices to create a contract,⁶⁵ provided that parties are capable of contracting and that the contract has an object and a lawful cause.⁶⁶ In other words, *no particular formality* is required for contracting save the few exceptions indicated in the Civil Code.⁶⁷ Thirdly, contractual stipulations agreed upon by the parties are deemed to be just and equitable;⁶⁸ hence the rejection by the codifiers of "lesion" as a cause of nullity in contracts entered into by persons

⁶³ See generally Jean-L. Baudouin, *Les Obligations* (1970), pp. 33-48.

⁶⁴ Civil Code, Art. 13; Draft Civil Code, Book V, Art. 8(2). See also *supra*, Section II.3. A well-known example of the public order test in contracts can be found in the field of restrictive covenants in the contract of employment: see *Robert H. Cameron v. Canadian Factors Corporation Ltd.*, [1971] S.C.R. 148; codified in Draft Civil Code, Book V, Arts 681-683.

⁶⁵ *Solus consensus obligat*.

⁶⁶ Civil Code, Art. 984.

⁶⁷ There are certain contracts, called *formal* contracts, where an authentic (notarial) deed is required for the formation of the contract: contracts of donation in general (Art. 776(1)); marriage covenants (Art. 1264); the contract of hypothec (Art. 2040). In addition, there are certain contracts, called *real* contracts, where delivery of the object of the contract is required for the formation of the contract: *e.g.*, contracts of donation of moveable property (Art. 776(2)); loan for use (Art. 1763); the contract of simple deposit (Art. 1797). The Draft Civil Code abolishes the anachronistic institution of real contracts.

⁶⁸ *Qui dit contractuel dit juste*.

of the age of majority.⁶⁹ Also the Civil Code contains no provisions allowing the courts to revise contractual obligations if unforeseen circumstances make the performance of the obligations far more onerous than foreseeable at the time of the contracting.⁷⁰ Fourthly, where ownership of a thing is transferred by contract, the general rule is that consent suffices to transfer ownership; delivery is not required.⁷¹ There are, however, exceptions.⁷² Furthermore, this rule is not of public order. Contracting parties may deviate from it. An example is the conditional sales agreement where the transfer of ownership is postponed until such time as the purchaser has fulfilled all his obligations under the contract.⁷³

Since codification, the first three practical consequences of the principle of the autonomy of the will have already been somewhat modified by amendments to the Civil Code or by special statutes or will be modified by the Draft Civil Code. Changes relating to the third consequence will be discussed later.⁷⁴ No change is envisaged for the fourth consequence.⁷⁵

It now seems appropriate to look at the partial return of formalism and at the proliferation of imperative provisions of law which have changed the first two consequences.

Formalism is brought back into the law of contractual obligations, it seems, as a means to protect a contracting party from too readily entering into a contract. By requiring a certain formality to be fulfilled the moment of contracting is postponed from the moment of reaching consent to the moment of complying with the formality. The formality may be the signing of either a deed by private writing or an authentic (notarial) deed. Most contracts governed by the Consumer

⁶⁹ Civil Code, Art. 1012. In this respect the Québec codifiers went further than their French counterparts who retained four instances of lesion as a cause of nullity in contracts entered into by persons of the age of majority: Code Napoléon, Arts 783, 887, 1078, 1674 (see also Art. 1313). See also *infra*, Section III.4.

⁷⁰ I.e., the doctrine of "imprévision": see *infra*, Section III.2.

⁷¹ Civil Code, Arts 1025, 1472.

⁷² Civil Code, Art. 1026. Also, in the contract of "work by estimate and contract" (enterprise) ownership passes from contractor to client upon *delivery* of the work: see *Inns v. Gabriel Lucas Ltée*, [1963] B.R. 500.

⁷³ In consumer transactions the conditional sales agreement is now governed by the detailed rules of ss 132-149 of the Consumer Protection Act, *supra*, footnote 13.

⁷⁴ *Infra*, Section III.2, and 4.

⁷⁵ It is interesting to note that the Committee on the Contract of Sale of the Civil Code Revision Office had proposed that for the sale of *immoveable* property ownership would not pass until *receipt* of an *authentic* deed of sale. See Civil Code Revision Office, Report on Sale, t. XXXI (1975), pp. 72-75. In the final version of the Draft Civil Code this proposal was abandoned in favour of the traditional rule that ownership passes once there is consent between vendor and purchaser. See Draft Civil Code, Book V, Art. 390.

Protection Act, for instance, are formed upon the signing of a deed by private writing.⁷⁶ In addition, the Draft Civil Code recognizes the return of formalism in article 9 of Book V, which is the general provision on the formation of contracts.⁷⁷ Besides a meeting of minds (*consensus*), parties capable of contracting and an object, the formation of a contract requires "a particular form when required for that purpose".⁷⁸

The "particular form" replaces "cause or consideration" as a requirement for contracting.⁷⁹ It is also to be noted that under the regime of the Draft Civil Code the contract of suretyship will become a formal one requiring a deed by private writing for its formation.⁸⁰

The increase of *imperative* provisions of contract law from which contracting parties may not deviate is not only evident when reading through the Draft Civil Code,⁸¹ but also when looking in the Civil Code at the contract of lease and hire of dwellings and the contract of insurance, the two as amended in respectively 1979 and 1974.⁸² Outside the Civil Code the Consumer Protection Act is a good example.⁸³ In fact, in the fields of lease and hire of dwellings, insurance law and consumer law, so many codal or statutory provisions are of an imperative nature that it can be said that it is the *legislator* rather than contracting parties who drafts a standard form

⁷⁶ *Supra*, footnote 13, s. 30. This requirement is to be distinguished from the one of Art. 1651-1 of the Civil Code (introduced by Bill 107, *supra*, footnote 5) or of Arts 2476-2477 of the Civil Code (introduced into insurance law in 1974, *supra*, footnote 8), where the contract is formed upon reaching consent, but must subsequently be evidenced in writing.

⁷⁷ *Cf.* Civil Code, Art. 984.

⁷⁸ See also Draft Civil Code, Book V, Arts 42-46.

⁷⁹ *Cf.* Civil Code, Arts 984, 989-990. Cause and consideration are one and the same civilian notion (*James Hutchison v. The Royal Institution for the Advancement of Learning*, [1932] S.C.R. 57) which has outlived its usefulness (Jean-L. Baudouin, *op. cit.*, footnote 63, pp. 127-139) and which a number of civilian jurisdictions have dropped (*e.g.*, West Germany, Switzerland) or will drop (*e.g.*, the proposed new Civil Code of the Netherlands) as a requirement for a valid contract. Cause or consideration in the civil law has never had the same connotation of an exchange of values as it does in the common law. Hence the civil law knows so-called *gratuitous* contracts such as the contract of donation (Civil Code, Arts 761 *et seq.*). On a comparison of cause and consideration see René David, *Cause et considération*, Mélanges Maury (1960), t. 2, pp. 111 *et seq.*

⁸⁰ Draft Civil Code, Book V, Art. 848. The Draft Civil Code retains the already existing formal contracts requiring an authentic (notarial) deeds: see *supra*, footnote 67, and Draft Civil Code, Book II, Art. 75 (now Art. 471 of the Civil Code: Bill 89, *supra*, footnote 21); Book IV, Art. 314 and Book V, Art. 480.

⁸¹ *E.g.*, Book V, Arts 69(2) (see also *supra*, footnote 55), 75(2), 275, 283, 360-361, 401, 489, 537-538, 683, 687-688, 862, 891, 1180, 1182, 1196.

⁸² *Supra*, footnotes 5 and 8 and Civil Code, Arts 1664-1664.11, 2500.

⁸³ *Supra*, footnote 13, ss 261-262.

contract in these fields. Contracting parties are only rarely allowed to deviate from the extensive contractual provisions adopted by the legislator.

2. *Binding Force of Contracts.*

The principle of the binding force of contracts⁸⁴ flows directly from the principle of the autonomy of the will. The two are interrelated. Once contracting parties have had complete freedom to enter into a contract, and also to set up their contractual relations as they wish, they must be held to their agreement. Validly created contractual obligations can only be set aside by the mutual consent of contracting parties.⁸⁵ As said earlier,⁸⁶ unforeseen circumstances which make the performance of contractual obligations considerably more onerous than foreseeable at the time of contracting, do not give rise to annulment or revision of the contract. This will change with the Draft Civil Code which very cautiously introduces a hitherto unknown doctrine into the Quebec law of contractual obligations. This doctrine is the one of "imprévision" and can perhaps be compared with the common law notion of frustration.⁸⁷ Article 75(2) of Book V of the Draft Civil Code provides that:

In exception circumstances and notwithstanding any agreement to the contrary, the court may resolve, resiliate or revise a contract the execution of which would entail excessive damage to one of the parties as a result of unforeseeable circumstances not imputable to him.

In addition, the Draft Civil Code provides for judicial power to annul or revise *abusive* clauses.⁸⁸

The doctrine of "imprévision" with its judicial power to revise, resolve⁸⁹ or resiliate⁹⁰ a contract should be distinguished from the judicial power to *reduce* the obligations of one contracting party flowing from a bilateral contract, where the other party through his *fault* fails to execute his obligations. This remedy is now only avail-

⁸⁴ *Pacta sunt servanda.*

⁸⁵ Civil Code, Art. 1022(2); Draft Civil Code, Book V, Art. 72.

⁸⁶ *Supra*, Section III.1.

⁸⁷ Cf. S.M. Waddams, *The Law of Contracts* (1977), pp. 214 *et seq.*

⁸⁸ Book V, Art. 76. This article also applies to penal clauses: see Book V, Art. 306. The Civil Code already provides for the annulment or reduction of "unreasonable" clauses in the contract of lease and hire of dwellings: Art. 1664-11 (introduced by Bill 107, *supra*, footnote 5).

⁸⁹ The term "resolution" is used for the annulment of contracts of instantaneous performance (e.g., sale).

⁹⁰ The term "resiliation" is used for the annulment of contracts of successive performance (e.g., lease and hire).

able for certain bilateral contracts;⁹¹ the Draft Civil Code will generalize it and make it applicable to all bilateral contracts.⁹²

3. *Relativity of Contracts.*

The principle of the relativity of contracts, the civilian counterpart of the doctrine of privity, means that contracts can only create rights and obligations for the contracting parties. Third persons cannot derive rights or obligations from a contract to which they are not a party.⁹³ The Civil Code, however, recognizes at least one specific exception to the principle of relativity, namely the stipulation for a third party whereby under certain conditions a contracting party may stipulate a benefit for a third party.⁹⁴ The stipulation for a third party can be viewed as the basis for, *inter alia*, the right of the beneficiary under a contract of life insurance⁹⁵ and the right of the consignee under a contract of carriage of goods.⁹⁶ In addition to this stipulation, the Civil Code recognizes a number of other apparent or real exceptions to the principle of relativity.⁹⁷ On the basis of these other exceptions and, it seems, in particular on the basis of article 1030, the courts have developed a number of interesting exceptions to the rule of relativity. In doing so they mainly followed French precedent. At a rather early stage it was recognized that the warranty which under a contract of enterprise the contractor, architect and engineer owe to the client⁹⁸ passes on from the client to a subsequent acquirer of the thing which was the object of the contract of enterprise.⁹⁹ Later it was recognized by the Supreme Court of Canada that the benefits under a contract for water services are so closely attached to the land that they may be claimed not only by the person who has stipulated them, but also by a subsequent purchaser of the land.¹⁰⁰ Finally and most

⁹¹ Sale: Civil Code, Art. 1526; lease and hire: Civil Code, Arts 1610, 1656; Consumer Protection Act, *supra*, footnote 13, s. 272 c.

⁹² Book V, Arts 254, 272-273. The Draft Civil Code also introduces another new remedy, namely punitive damages (Book V, Art. 290): they can be awarded in the event of breach of obligations by intentional or gross fault. At the present time punitive damages are available under the Human Rights Charter, *supra*, footnote 12, s. 49(2) and the Consumer Protection Act, *supra*, footnote 13, s. 272 *in fine*.

⁹³ Civil Code, Art. 1023; Draft Civil Code, Book V, Art. 72.

⁹⁴ Civil Code, Art. 1029; Draft Civil Code, Book V, Arts 85-93 (largely a codification of existing case law on Art. 1029 of the Civil Code).

⁹⁵ Civil Code, Arts 2540 *et seq.*

⁹⁶ Draft Civil Code, Book V, Art. 626.

⁹⁷ Civil Code, Arts 1028, 1030-1031; Draft Civil Code, Book V, Arts 73, 83-84. On whether these exceptions are real or apparent ones, see Jean-L. Baudouin, *op. cit.*, footnote 63, pp. 167-179.

⁹⁸ Civil Code, Art. 1688; Draft Civil Code, Book V, Arts 687-689.

⁹⁹ *McGuire v. Fraser* (1908), 17 C.B.R. 449; codified in Draft Civil Code, Book V, Art. 691.

¹⁰⁰ *Cie. d'Aqueduc du Lac St-Jean v. Fortin*, [1925] S.C.R. 192.

importantly, in 1979, the Supreme Court of Canada decided that the warranty which the manufacturer of a product owes to the first purchaser passes on with the object of the sale to a subsequent acquirer thereby giving the ultimate user of the product, provided that he is its owner, a direct *contractual* action against the manufacturer.¹⁰¹ The common theme in these decisions seems to be that there are certain *personal* rights resulting from contracts, which are so closely attached to the things which form the objects of such contracts that they do not stay with the persons who had originally stipulated them, but pass on with the things themselves to subsequent acquirers. One could almost say that they would acquire the character of accessory *real* rights.

With respect to manufacturers' liability the aforementioned reasoning of the Supreme Court can still be used under article 73 of Book V of the Draft Civil Code. A stronger remedy against manufacturers, however, is given in articles 102 and 103 of Book V. That remedy will not be of a contractual, but of a purely *legal* nature and will benefit not only subsequent acquirers of a product, but *any* victim of damage caused by a product, whether or not he is the owner of the product.¹⁰² The same road toward a *legal* rather than a contractual remedy against manufacturers for defective or dangerous products, but this time only for subsequent acquirers, had already been followed by the Consumer Protection Act.¹⁰³

4. *Lesion*.¹⁰⁴

Lesion (*laesio*) in a strict or objective sense means that there is a disproportion between the "prestations",¹⁰⁵ of contracting parties. Lesion in a wide or subjective sense means any prejudice suffered by a contracting party as a result of a contract. The history of lesion goes back to Roman law where, in the classical period, the notion of objective lesion with a serious disproportion between the prestations of contracting parties (*laesio enormis*) prevailed. In the later Roman times and under Canon law, it was the subjective notion of lesion

¹⁰¹ *General Motors Products of Canada Ltd v. Leo Kravitz*, *supra*, footnote 2. For comments see Special Issues on the *Kravitz* Decision (1980), 25 McGill L.J. 296, *et seq.* See also *Fiat Motors of Canada Ltd v. Desnoyers*, [1980] C.A. 613.

¹⁰² Art. 102 of Book V of the Draft Civil Code contains a rule of *strict* liability. The article is somewhat loosely drafted and the commentaries (Report on the Québec Civil Code, *op. cit.* footnote 19, Vol. II, t. 2, pp. 623-624) are unclear as to whether a foreign source, such as s. 402A of the Restatement (Second) of Torts (1965), has been used as a model.

¹⁰³ *Supra*, footnote 13, ss 53-54.

¹⁰⁴ See generally Jean-L. Baudouin, *op. cit.*, footnote 63, pp. 90-105; Pierre-G. Jobin, *La rapide évolution de la lésion en droit québécois* (1977), 29 Rev. int. de dr. comp. 331.

¹⁰⁵ The "prestation" of a contracting party is that what he has obliged himself to give, to do or not to do. Cf. Civil Code, Art. 1058; Draft Civil Code, Book V, Arts 1-2.

which prevailed. It was used amongst other things to combat usurious contracts and to enforce the doctrine of "just price" (*iustum praetium*). Pothier seems to have adopted both the objective and subjective version of lesion. Lesion entered the Code Napoléon as a defect of consent¹⁰⁶ together with error, fraud and violence. Its sanction was annulment of the lesionary contract. The technical term for annulment for reasons of lesion is *rescission*. In the few cases where the Code Napoléon allowed lesion to rescind contracts between persons of the age of majority,¹⁰⁷ the objective notion of lesion was adhered to. For instance, in the contract of sale of land (immoveables) the vendor is allowed to rescind the sale if the purchase price which he has received is inferior to seven-twelfths of the value of the property at the time of sale.¹⁰⁸ On the other hand, for lesionary contracts entered into by minors¹⁰⁹ the Code Napoléon is less clear whether objective or subjective lesion is meant.

The Quebec codifiers, inspired by the doctrine of the autonomy of the will and in an effort to promote the stability of contracts, barred lesion as a cause of nullity in contracts entered into by persons of the age of majority.¹¹⁰ They retained lesion as a cause of nullity in contracts entered into by minors and certain interdicts¹¹¹ (for instance persons of diminished mental capacity).¹¹² The courts have interpreted this form of lesion as a subjective one.¹¹³ As in the Code Napoléon lesion in Quebec was considered to be a defect of consent giving rise to rescission of the contract.¹¹⁴

Little by little the Quebec legislative has reintroduced the notion of lesion for contracts entered into by persons of the age of majority.¹¹⁵ In 1939, article 1056b(4) was added to the Civil Code by amendment:¹¹⁶

In the case of a recourse in damages for bodily injuries, the releases and settlements and the written declarations obtained, within fifteen days of the offence or

¹⁰⁶ Code Napoléon, Art. 1313.

¹⁰⁷ See *supra*, footnote 69.

¹⁰⁸ Code Napoléon, Arts 1674 *et seq.*

¹⁰⁹ Code Napoléon, Arts 1305 *et seq.*

¹¹⁰ Civil Code, Art. 1012.

¹¹¹ Civil Code, Arts 334, 1001-1011.

¹¹² Civil Code, Arts 325 *et seq.*

¹¹³ *E.g.*, *Marcel Grenier Automobile Enrg. v. Thauvette*, [1969] C.S. 159.

¹¹⁴ Civil Code, Arts 991, 1001.

¹¹⁵ Notwithstanding the text of Art. 1012 of the Civil Code, which was never amended: "Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only."

¹¹⁶ 3 Geo. VI, c. 95.

quasi offence, from the person injured, cannot be set up against him if *he suffer harm thereby*.¹¹⁷

Again, this seems to be the subjective notion of lesion. In 1964, the Civil Code was further amended by the introduction of articles 1040a-1040e.¹¹⁸ Article 1040c allows lesion to annul or reduce the monetary obligations under a loan of money.¹¹⁹ The article is remarkable in two respects: first, it seems to contain both the subjective and objective notion of lesion. It refers to "all the circumstances", a subjective element, and the "excessiveness" of the loan, an objective element. Secondly, it introduces a new remedy for lesion: reduction of the obligations of the contracting party who has suffered lesion instead of merely the annulment of the monetary obligations.

All three subsequent forms of lesion for contracts entered into by persons of the age of majority have retained this duality of objective and subjective lesion and of two remedies, namely rescission or reduction of obligations: section 118 of the Consumer Protection Act of 1971,¹²⁰ sections 8 and 9 of the Consumer Protection Act of 1978¹²¹ and article 37 of Book V of the Draft Civil Code.¹²² Of the texts of these three provisions the one of the Draft Civil Code seems the most appropriate one. It contains substance as well as a rule of proof:

Lesion vitiates consent when it results from the exploitation of one of the parties by the other,¹²³ and brings about a serious disproportion between the prestations of the contract.¹²⁴

Serious disproportion creates a presumption of exploitation.¹²⁵

The Draft Civil Code's remedies for lesion are the same as for the other defects of consent (error, fraud, fear):¹²⁶ annulment of the contract, reduction of obligations¹²⁷ and damages where lesion has

¹¹⁷ Underlining supplied. Cf. the corresponding provision of the Draft Civil Code, Book V, Art. 202, which dropped the requirement of proof of harm (lesion).

¹¹⁸ *Supra*, footnote 3.

¹¹⁹ See *supra*, footnotes 37-39 and text thereto.

¹²⁰ R.S.Q., 1977, c. P-40.

¹²¹ *Supra*, footnote 13.

¹²² For minors and persons under curatorship, however, the Draft Civil Code seems to adhere to the *subjective* notion of lesion: see Book I, Arts 114(1) and 193.

¹²³ Subjective notion.

¹²⁴ Objective notion.

¹²⁵ Rule of proof.

¹²⁶ Book V, Arts 27-40.

¹²⁷ *Ibid.*, Art. 38(1). See also Art. 40, which for lesion alone provides that annulment of the contract may be avoided. "if the defendant offers a reduction of his claim or an equitable monetary supplement".

been caused by the *fault* of the other contracting party.¹²⁸ The last remedy is new and does not exist now.

In its modern version lesion seems to have parallels with the notions of unconscionability and undue influence in the common law.¹²⁹ As early as 1963, Judson J. described, in the same judgment,¹³⁰ article 1040c of the Civil Code as an extension of the doctrine of lesion and the corresponding section 2 of The Unconscionable Transactions Relief Act¹³¹ as an extension of the doctrine of undue influence.¹³² It should be kept in mind, however, that lesion remains, at least theoretically, a defect of consent. It can therefore only provide relief when the causes of subjective or objective lesion existed *at the time of contracting*.¹³³ When a contracting party suffers harm or his obligations become disproportionate to the ones of his co-contracting party as a consequence of circumstances which arise *after* the conclusion of the contract, recourse may perhaps be had to the doctrine of "imprévision"¹³⁴ but *not* to lesion.

IV. Conclusion.

Overall civil code revision gives an excellent and rare opportunity to bring the law of contractual obligations into line with present day socio-economic conditions and to incorporate into a systematic, written document some of the judge-made rules on contracts. As to substance, some of the new ideas espoused by the Draft Civil Code have already been brought into force in fields governed by special statutes and amendments to the existing Civil Code. The relationship between the (new) Civil Code and special statutes will probably always remain a difficult one. Special statutes are attractive in that they may provide a rapid legislative response to a pressing problem. They have the disadvantage of disunifying the law of contractual obligations and indeed the whole law of obligations. Be that as it may, both the new Civil Code and statutes are entitled to a fair, large and

¹²⁸ Book V, Art. 38(2).

¹²⁹ On these two subjects, see S.M. Waddams, *op. cit.*, footnote 87, pp. 266 *et seq.*, in particular pp. 318-340.

¹³⁰ *The Attorney-General for Ontario v. Barfried Enterprises Ltd*, *supra*, footnote 39.

¹³¹ *Supra*, footnote 38 and text thereto.

¹³² *The Attorney-General for Ontario v. Barfried Enterprises Ltd*, *supra*, footnote 39, at p. 577.

¹³³ This is probably true for the common law notions of unconscionability and undue influence as well: see *Lloyd's Bank v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at p. 334, per Lord Denning M.R. and *Barton v. Armstrong*, [1976] A.C. 104 (P.C., N.S.W.), at p. 121, per Lords Wilberforce and Simon, dissenting.

¹³⁴ See *supra*, Section III.2.

liberal interpretation by the courts. They too must contribute to the rapid development of the law of contractual obligations and attempt to fill the *lacunae* left by the legislator.