

THE RIGHT OF RETENTION OF THE SELLER OF MOVEABLES IN QUEBEC

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The right of retention under articles 1496 and 1497 C.C.L.C. permits a seller of moveables to withhold delivery of them if he has reason to believe that he will not be paid the purchase price upon delivery or upon expiration of any term granted for payment. This right enables the seller to stop the process of delivery and, if necessary, to re-acquire custody of goods at any time until the buyer has participated in the process for the specific purpose of accepting delivery.

Despite its traditional classification as a contractual remedy, the seller's right of retention is a hybrid personal and real right, theoretically enforceable against all competing unsecured, secured and preferred creditors of the buyer. Doctrinal and judicial uncertainty regarding the enforceability of possessory, secured rights in Quebec make the seller's right of retention unreliable vis-à-vis competing claims. Nevertheless, the remedy is an essential link to other non-consensual remedies of the seller of moveables in Quebec.

Le droit de rétention en vertu des articles 1496 et 1497 du Code Civil du Bas Canada permet à un vendeur de biens meubles de ne pas livrer ces biens s'il a raison de croire que le prix d'achat ne lui sera pas versé à la livraison ou à l'expiration du délai qui a été accordé à l'acheteur pour le paiement. Ce droit permet au vendeur d'arrêter la livraison en cours ou, si nécessaire, de reprendre possession des biens tant que l'acheteur ne participe pas à l'opération dans le but précis d'accepter la livraison.

Le droit de rétention du vendeur est généralement considéré comme un recours contractuel, alors qu'il est en fait un hybride appartenant aux droits personnels et réels. Théoriquement, il est opposable à tous les créanciers chirographaires et privilégiés de l'acheteur. Néanmoins l'incertitude jurisprudentielle de l'opposabilité des recours possessoires dans le domaine de sûretés des meubles au Québec rend incertaine l'opposabilité du droit de rétention du vendeur des meubles. Ce recours sert malgré tout de lien essentiel avec les autres recours non-consensuels qui sont à la disposition du vendeur de biens au Québec.

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Introduction

The unpaid seller of moveables is an extraordinary participant in the Quebec moveable security model. His remedies of retention,¹ dissolution,² revendication³ and preference for payment on the proceeds of judicial sale⁴ are non-consensual. They arise by virtue of the contract of sale without the need for any specific agreement or stipulation as to their application.⁵ Together, these non-consensual remedies provide the unpaid seller, as regards the goods sold, with a status comparable to that of a secured creditor. This status is particularly well suited to the legal position of the unpaid seller of moveables. The primordial elements of moveable security mechanisms in Quebec—the title to⁶ and possession of⁷ identified moveable assets⁸—are inherent in the contract of sale. Further, as a contributor of new assets to his buyer's patrimony and, consequently to the common pledge of his buyer's creditors,⁹ the unpaid seller as a creditor himself merits some preferred status.¹⁰ The secured rights of the unpaid

¹ See arts 1496, 1497 C.C.L.C.

² See arts 1536 C.C.L.C. ff. and, in particular, arts 1543 and 1544 C.C.L.C.

³ See arts 1998, 1999 C.C.L.C.

⁴ See arts 1994(3), 1998, 2000 C.C.L.C.

⁵ A security device is consensual if the consent of the parties is required for it to apply to a particular transaction. Consensual security devices arise by agreement which is accessory to the contract creating a debtor's principal obligation. Most true security devices in Quebec are consensual.

⁶ The transfer of ownership is a legal effect of the contract of sale. See arts 1022, 1472 C.C.L.C.; T. Rousseau-Houle, *Précis du droit de la vente et du louage* (Presses de l'Université Laval, 2d ed., 1986), pp. 12, 83; M. Pourcelet, *La vente* (Les éditions Thémis, 4th ed., 1981), pp. 81-84; J.-L. Baudouin, *Les obligations* (Les éditions Yvon Blais Inc., 1983), pp. 174-175; J. Pineau, *Théorie des obligations* (Les éditions Thémis, 1979), p. 79; G. Trudel, *Traité de droit civil du Québec*, vol. 7 (Wilson & Lafleur, 1946), pp. 315-320, 347-354; L. Faribault, *Traité de droit civil du Québec*, vol. 7-bis, (Wilson & Lafleur, 1957), pp. 221-225; L. Faribault, *Traité de droit civil du Québec*, vol. 11 (Wilson & Lafleur, 1961), p. 24.

⁷ Possession is inherent in the seller's delivery obligation. See arts 1492, 1493 C.C.L.C.; Rousseau-Houle, *ibid.*, pp. 85-87; Pourcelet, *ibid.*, pp. 103-104; Faribault, *ibid.*, vol. 11, pp. 179-185. The role of possession in delivery under sale is analyzed in the text, *infra*, accompanying footnotes 34-61.

⁸ The primary effect of sale, the transfer of ownership, is subject to the minimum requirement that the goods become certain and determinate. See arts 1025, 1026, 1472, 1474 C.C.L.C.; Trudel, *op. cit.*, footnote 6, pp. 348-349, 357-358; Pourcelet, *op. cit.*, footnote 6, pp. 83-88.

⁹ See art. 1981 C.C.L.C.

¹⁰ See statements to this effect in civil law in *Mechanic Supply Co. v. Hudon* (1933), 71 C.S. 400, at p. 403; *Bushnell Co. v. Baldwin* (1894), 8 C.S. 395; *Re Rosenzweig: Hart v. Goldfine Ltd.* (1921), 2 C.B.R. 255 (B.R.); J. Blumenthal, *Droits du vendeur non payé* (Paris: A. Giard, 1880), pp. 1-2. See as regards justifications in common law for priorities in favour of a seller of moveables, T.H. Jackson and A.G. Kronman, *Secured Financing and Priorities Among Creditors* (1979), 88 Yale L.J. 1143, at pp. 1164-1178; F.H. Buckley, *The Bankruptcy Priority Puzzle* (1986), 72 Virginia L.R. 1393, at pp. 1462-1467.

seller are notably significant as regards the buyer's pre-existing creditors with security on future or after-acquired property.¹¹ These creditors are most likely to compete with the unpaid seller in that their secured rights extend to assets newly acquired by their debtor. Without some exceptional status in favour of the unpaid vendor, creditors with security on future property could endanger the viability of their debtor's enterprise by severely restricting his ability to acquire new assets.¹² In sum, the unpaid seller plays an important role in the circulation of moveable property as a secured creditor, over and above his role as a seller or transferor of title.

This article examines the non-consensual remedy commonly referred to as the unpaid seller's right of retention. The right of retention is intended to protect the seller by permitting him, under certain circumstances, to withhold delivery of goods to his buyer. The seller of moveables may exercise this remedy under articles 1496 and 1497 C.C.L.C. which provide:

Art. 1496. The seller is not obliged to deliver a thing if the buyer does not pay the price, unless a term has been granted for the payment of it.

Art. 1497. Neither is the seller obliged to deliver the thing, when a delay for payment has been granted, if the buyer since the sale has become insolvent, so that the seller is in imminent danger of losing the price, unless the buyer gives security for the payment at the expiration of the term.

According to these provisions, the seller's right of retention is subject to the following conditions that: 1. the thing purchased not have been delivered; 2. the price not have been paid; and 3. a term for payment not have been granted or, if granted, have been forfeited. In order to determine the scope of application of the seller's right of retention, the notions of delivery, payment and term for payment will be examined. Subsequently, the legal nature and enforceability of the right of retention will be considered.

I. *Delivery*

As stated previously, the essence of the seller's right of retention is the right to withhold delivery of the thing sold. While it is obvious that once delivery has occurred the right of retention is extinguished, in the context of sale in Quebec delivery is, at best, a multi-faceted concept and, at worse, uncertain.

¹¹ In Quebec, these creditors include a bank with s. 178 security (Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82, c. 40, s. 178 (hereinafter Bank Act)); a trustee for bondholders (Special Corporate Powers Acts, R.S.Q. 1977, c.P-16, ss. 27-30), a transferee of property in stock (An Act respecting bills of lading, receipts and transfers of property in stock, R.S.Q. 1977, c.C-53, ss. 11-44 (hereinafter Bills of Lading Act)), and an agricultural pledgee (arts 1979a-1979d C.C.L.C.).

¹² See Jackson and Kronman, *loc. cit.*, footnote 10, at pp. 1167-1175.

The codal provisions which define delivery in sale generate some uncertainty in this regard. According to article 1492 C.C.L.C., delivery is "the transfer of a thing into the power and possession of the buyer". This definition implies that delivery occurs only when the seller has materially transferred the thing to the buyer who has exercised "power and possession" over it. In other words, on the basis of article 1492 C.C.L.C., delivery requires the participation of both the seller and the buyer.

Article 1493 C.C.L.C., however, provides that the seller's obligation to deliver is satisfied

. . . when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed.

This provision indicates that from the perspective of the seller, delivery is complete when the buyer has actual possession or access to possession and, in both cases, the seller has removed all encumbrances for which he is responsible. Under article 1493 C.C.L.C., therefore, it is possible for a seller to have delivered by providing his buyer with mere access to possession without the necessity of the buyer actually participating in the delivery process. The result is that in cases in which access to possession does not coincide with the exercise of power and possession by the buyer, article 1493 C.C.L.C. would subject the right of retention to extinction at the former, earlier stage.¹³ Article 1492 C.C.L.C. would permit the right to subsist until the buyer has actually participated in the process of delivery.

The discrepancy between articles 1492 and 1493 C.C.L.C. as to the minimum requirements for delivery in sale can be resolved by distinguishing delivery *per se* from the seller's contractual, delivery obligation. Within an obligational framework, the contract of sale imposes delivery obligations upon both buyer and seller. As seen above, according to article 1493 C.C.L.C. the seller's obligation is fulfilled, *inter alia*, when he provides access to possession or actual possession to the buyer. The buyer's delivery obligation to which allusion is made in articles 1495¹⁴ and 1544 C.C.L.C.¹⁵ is to receive or remove the thing delivered by the seller. The buyer's obligation is anomalous because it is an

¹³ Access to possession arises distinctly from the exercise of power and possession by the buyer, primarily in cases of delivery by a third party carrier. See text, *infra*, accompanying footnotes 29-33.

¹⁴ Art. 1495 C.C.L.C. provides:

The expenses of the delivery are at the charge of the seller, and those of removing the thing are at the charge of the buyer, unless it is otherwise stipulated.

¹⁵ Art. 1544 C.C.L.C. provides:

In the sale of moveable things the buyer is obliged to take them away at the time and place at which they are deliverable. If the price has not been paid the dissolution of the sale takes place, in favour of the seller, of right and without the intervention of a suit, after the expiration of the delay agreed upon for taking them away, or

obligation to receive payment or performance of the seller's delivery obligation. As a rule, there is no express obligation imposed upon a creditor to receive payment of a debt and refusal to do so is regulated, *inter alia*, by the rules of tender and deposit.¹⁶ In the case of sale, the rationale for the buyer's obligation to receive delivery is to impose upon him liability for the expenses and storage costs suffered by a seller who, despite his readiness to deliver, is forced to retain goods due to his buyer's breach.¹⁷

In the context of the obligations arising from sale, a bipartite concept of delivery makes sense, as does article 1493 C.C.L.C. This provision equates readiness to perform the delivery obligation with actual performance of it. Hence, it permits a seller, in the event of default by his buyer, to establish his entitlement to a contractual remedy even though at the time of his buyer's default, the seller had custody of the goods sold. For example, where a seller sues his buyer for the purchase price or damages, he can rely upon article 1493 C.C.L.C. to rebut a defence of non-delivery or late delivery.¹⁸ Further, in the absence of any contractual stipulation to the contrary, article 1493 C.C.L.C. relieves the seller from the potentially costly burden of physically transporting the thing sold to the buyer. This latter consideration is reflected in article 1152 C.C.L.C. which implies that subject to contractual stipulations, delivery will generally take place at the domicile of the seller, and in article 1495 C.C.L.C. concerning the distinction between the costs of delivery and those of removal of the thing sold.¹⁹

Consequently, article 1493 C.C.L.C. merely defines the limits of the seller's obligation to deliver. For other purposes, delivery in sale is regulated and defined by article 1492 C.C.L.C. to which article 1493 C.C.L.C., as regards access to possession, appears to be an exception.

if there be no such agreement, after the buyer has been put in default in the manner provided in the title *Of Obligations*; without prejudice to the seller's claim for damages.

¹⁶ See arts 1162-1168 C.C.L.C.; L. Faribault, *Traité de droit civil du Québec*, vol. 8-bis (Wilson & Lafleur, 1959), pp. 466 *et seq.*; Baudouin, *op. cit.*, footnote 6, pp. 362-366; Pineau, *op. cit.*, footnote 6, p. 179.

¹⁷ See Faribault, *op. cit.*, vol. 11, footnote 6, pp. 359-360; Pourcelet, *op. cit.*, footnote 6, p. 165.

¹⁸ See *Paré v. Pelchat*, [1965] B.R. 786; *Faucher v. Brunet*, [1954] B.R. 737; *Cohen v. French Laboratories Ltd.*, [1947] C.S. 246; *Ranger v. Francoeur* (1942), 49 R.L.n.s. 435 (C.S.); *Interprovincial Lumber Co. v. Matapedia Co.*, [1973] C.A. 140; *V.O. Furniture and Television Co. v. Arpin*, [1960] C.S. 575; *Loyal Oil Co. v. Cousineau* (1926), 41 B.R. 300; *Duchaine & Boucher Inc. v. Bédard*, [1956] C.S. 394. These cases indicate that a seller who sues for the purchase price must tender and deposit the goods according to arts 1162 C.C.L.C. ff. In this regard, entitlement to a contractual remedy must be distinguished from the requirements relating to a particular remedy, such as tender and deposit in the case of the seller's specific performance remedy.

¹⁹ *Supra*, footnote 14.

Notwithstanding the reconciliation of the wording of articles 1492 and 1493 C.C.L.C., there remains the problem of defining delivery in the context of these provisions. For this purpose, the paradigm shall be the situation of sale with delivery by a third party carrier. This scenario best illustrates the separate roles of buyer and seller in the delivery process. Further, it provides a particularly good basis for analyzing possession as a component of the delivery of moveables.

The Quebec authorities concerning sale with delivery by carriage indicate that delivery, as a component of sale, serves two purposes, each apparently with its own definition.

First, by analogy to article 1493 C.C.L.C. discussed above, one notion of delivery serves to determine whether the seller has performed his contractual obligations. This notion applies to the transfer of ownership in a "vente à livrer",²⁰ and to ascertain whether a buyer or seller is entitled to a contractual remedy in the event of breach by the other party. Within this purely obligational context, the courts recur to the contract terms and, in particular to the parties' choice of shipping contract to determine the nature and scope of the seller's delivery obligation. Notwithstanding the variety of shipping contracts available to the parties, the Quebec cases have consistently held that in an action for the purchase price, a seller has performed his delivery obligation when he has placed the goods in the custody of a carrier who is the buyer's agent for carriage.²¹ In these cases and for the purposes of determining the seller's entitlement to a remedy, the courts state that delivery to the buyer's agent for carriage is completed delivery even if the appropriate documents of title such as bills of lading have not been transferred to the buyer.²² In other words, delivery is said to be complete as regards the goods although the documents of title are to be transferred on a C.O.D. basis.

The second role of delivery in sale relates to extinction of the unpaid seller's non-consensual remedies. In the case of the right of retention, completed delivery is incompatible with the right to withhold delivery.

²⁰ See Pourcelet, *op. cit.*, footnote 6, pp. 93-94; L. Fairbault, *Traité de droit civil du Québec*, vol. 12 (Wilson & Lafleur, 1951), pp. 419-421; M. Boodman, *The Prepaying Buyer of Corporeal Moveables in Quebec* (1987), 47 R. du B. 871, at p. 880; G. Dupré, *De la vente de la chose future et indéterminée au contrat mixte d'entreprise et de vente* (1965), 5 *Justinien* 42; F. Goré, *Le moment du transfert de propriété dans les ventes à livrer* (1947), 45 *Rev. trim. dr. civ.* 161.

²¹ See *Bivansa Inc. v. House of Bradley Inc.*, [1977] R.L. 373 (C.S.); *Mechutan Fur Corp. v. Carl Druker Furs Inc.*, [1962] C.S. 429; *Brace, McKay & Co. v. Schmidt* (1920), 31 B.R. 1, Greenshields J., Allard J., Howard J.; *Dolbec v. Lortie* (1920), 59 C.S. 267; *Grace & Co. v. Clogg* (1919), 57 C.S. 251 (Cour de révision); *Vipond v. Montefusco* (1917), 26 B.R. 490.

²² See *Brace, McKay & Co. v. Schmidt*, *ibid.*; *Grace & Co. v. Clogg*, *ibid.*; *Vipond v. Montefusco*, *ibid.*

As regards the unpaid seller's right of dissolution under article 1543 C.C.L.C., right to revendicate and preference for payment on judicial sale proceeds, in situations of buyer insolvency these rights are forfeited unless exercised within thirty days of delivery of the goods.²³ In non-insolvency situations, the unpaid seller's revendication right must be exercised within eight days of delivery.²⁴ In each of these instances, the notion of delivery is the same.²⁵ This is due to the common origin of the unpaid seller's non-consensual remedies in articles 176 and 177 of the *Coutume de Paris*²⁶ incorporated into the pre-codification law of Quebec by section 12, paragraph 1 of The Insolvent Act of 1864.²⁷ A number of authorities attest to the common origin of these remedies by classifying them all without distinction as stoppage in transit.²⁸ Hence, delivery as a

²³ See arts 1543, para. 2, 1998, para. 2 C.C.L.C.; *Re Dame Talbot: Antaya v. de Cotret*, [1958] C.S. 239; *Mercurie v. Philippe Beaubien et Cie*, [1966] B.R. 413; *Re Beatrice Pines Ltd.: Vendome Knitting Mills Ltd. v. Lawrence*, [1968] C.S. 351; *Peladeau Lumber Corp. v. Universal Wood Products Ltd.* (1928), 34 R.J. 122 (C.S.); *Re Iberville Furniture & Appliances Co.: Grobstein v. Facto* (1956), 4 C.B.R. (n.s.) 36 (C.S.); *Re Henning* (1921), 1 C.B.R. 461 (C.S.); *Re Canada Dress & Waist Manufacturing Co.* (1927), 8 C.B.R. 167 (C.S.); *Re Roulottes Eureka Ltée: Dionne v. Desroches* (1974), 19 C.B.R. (n.s.) 268 (C.S.); *Re Laporte, Hudon, Hébert Ltée* (1949), 30 C.B.R. 168 (C.S.); *Re Lasalle Factories Ltd.: Giroux v. Bellair Manufacturing Co.* (1982), 40 C.B.R.(n.s.) 255 (C.S.); *Petit v. Girard* (1930), 49 B.R. 542; *Labelle v. Flavelle Milling Co.* (1909), 37 C.S. 231 (Ct. of Review); K.S. Atlas, *The Vendor of Moveables in Quebec: His Protection and Privileges* (1982), 42 R. du B. 597, at pp. 606-611; Y. Goldstein, *A Bird's Eye View of Conflicting Claims*, [1981] Meredith Memorial Lectures (Toronto: DeBoo, 1982) 8, pp. 92, 99.

²⁴ See art. 1999(4) C.C.L.C.

²⁵ See *Pilkington Bros. (Canada) Ltd. v. Canadian Pacific Railway Co.*, [1958] C.S. 251; *Abinovitch v. Ehrenbach* (1911), 41 C.S. 55 (Ct. of Review); *Peladeau Lumber Corp. v. Universal Wood Products Ltd.*, *supra*, footnote 23; *Banque d'Ontario v. Gosselin* (1904), 14 B.R. 1.

²⁶ Article 176 reads: "Qui vend aucune chose mobilièresans jour et sans terme, espérant être payé promptement, il peut sa chose poursuivre, en quelque lieu qu'elle soit transportée, pour être payée du prix qu'il l'a vendue." Article 177 reads: "Et néanmoins encore qu'il eût donné terme, si la chose se trouve saisie sur le débiteur par autre créancier, peut empêcher la vente, et est préféré sur la chose aux autres créanciers."

²⁷ Statutes of the Province of Canada, 27-28 Vict., c.17. Section 12, para. 1 reads:

In all cases of sales of merchandise to a trader in Lower Canada subsequently becoming insolvent, the exercise of the rights and privileges conferred upon the unpaid vendor by the one hundred and seventy-sixth and one hundred and seventy-seventh articles of the *Coutume de Paris* is hereby restricted to a period of fifteen days from the delivery of such merchandise.

See also *Abinovitch v. Ehrenbach*, *supra*, footnote 25; *Rogers v. Mississippi & Dominion Steamship Co.* (1888), 11 L.N. 317 (C.S.); *Bank of Toronto v. Hingston* (1868), 12 L.C.J. 216 (C.S.); *Brown v. Hawksworth* (1869), 14 L.C.J. 114 (B.R.); *Peladeau Lumber Corp. v. Universal Wood Products Ltd.*, *supra*, footnote 23.

²⁸ See, for example, *Abinovitch v. Ehrenbach*, *ibid.*; *Bank of Toronto v. Hingston*, *ibid.*; *Brown v. Hawksworth*, *ibid.*; *Rogers v. Mississippi & Dominion Steamship Co.*, *ibid.*; *Florsheim Shoe Co. v. Boston Shoe Co.* (1913), 9 D.L.R. 602 (C.S.); *Re Roulottes Eureka Ltée: Dionne v. Desroches*, *supra*, footnote 23.

means of extinguishing a seller's remedies is best exemplified by reference to the remedy of stoppage in transit.

In a modern context, stoppage in transit is the application of the seller's right of retention under article 1497 C.C.L.C. to goods in transit to the buyer when the latter becomes insolvent. In this instance, the courts have held that custody of the goods by the carrier as agent for the buyer does not constitute delivery to him.²⁹ According to these decisions, delivery sufficient to be a basis for the extinction of the right of stoppage in transit occurs only when the goods have reached their final destination in that the buyer has custody of them personally or through an agent specifically authorized to receive delivery.³⁰ In the latter regard, the carrier as agent of the buyer is considered to be an agent only for the purposes of forwarding the goods and not for the purposes of receiving delivery of them.

The apparent contradiction, or dichotomy, as regards the notion of delivery by carriage is really a function of the legal issues raised in litigation and the custom of commercial trade. As a rule, delivery by carriage entails the issuance of documents of title such as bills of lading and warehouse receipts. These documents establish not only title and possession, but also entitlement to custody from the carrier or warehouseman.³¹ Hence, in delivery by carriage situations, the buyer or his agent for delivery will have neither possession nor custody of goods at least until he has possession of the appropriate documents of title. Given their importance, it is customary to deliver documents of title to the buyer only upon payment of the purchase price or the provision of adequate security such as a letter of credit.³² Where the seller sues for the purchase price and the goods have been delivered to a carrier as agent

²⁹ See *Dame Rose v. European Canadian Trading Co.* (1915), 21 R.L.n.s. 194 (C.S., C. of Revision); *Abinovitch v. Ehrenbach*, *ibid.*; *Bank of Toronto v. Hingston*, *ibid.*; *Hawksworth v. Elliott* (1866), 10 L.C.J. 197 (C.S.); *Rogers v. Mississippi & Dominion Steamship Co.*, *ibid.*; O.S. Tyndale, *Stoppage In Transitu* (1922-23), 1 R. du D. 117, at pp. 121-125; W. Morin, *Des ventes maritimes* (1945), 5 R. du B. 11, 53, 108 and 168, at p. 173.

³⁰ *Ibid.* See also P.-B. Mignault, *Droit civil canadien*, vol. 7 (Wilson & Lafleur, 1906), p. 148; *Acme Glove Workers v. Can. S.S. Lines*, [1924] 4 D.L.R. 448 (C.S.); *Re Thomson, Whitehead & Cie, Darling, Greenwood* (1877), 9 R.L. 379 (C.S.). As regards the notion of delivery in the context of a carrier's liability under arts 1672, 1674 and 1675 C.C.L.C., which is identical to the notion of delivery in the context of stoppage in transit, see *Pilkington Bros. (Canada) Ltd. v. Canadian Pacific Railway Co.*, *supra*, footnote 25; *Canadian Northern Railway Co. v. Greenshields Ltd.* (1920), 30 B.R. 302.

³¹ See Morin, *loc. cit.*, footnote 29, at pp. 114, 171; R.A. Macdonald, *Exploiting the Pledge as a Security Device* (1985), 15 R.D.U.S. 551, at pp. 580-581; *Taussig v. Baldwin* (1894), 6 C.S. 119; *Sapery v. Simon* (1908), 34 C.S. 329, at p. 333, *conf.* (1909), 15 R.L.n.s. 120 (C.S.); arts 1573, 2420-2422 C.C.L.C.

³² See *Brace, McKay & Co. v. Schmidt*, *supra*, footnote 21, p. 5; Morin, *loc. cit.*, footnote 29, at pp. 62, 180; L. Sarna, *Letters of Credit: Bankruptcy, Fraud and Identity*

for the buyer, the legal issue is limited to timely and proper delivery of the goods by the seller. Delivery of the documents which has been forestalled by the buyer's refusal or inability to pay or provide security is extraneous to the litigation. Similarly where the seller invokes his remedy of stoppage in transit, the buyer has refused or is unable to pay and has not received the documents of title. In the first case, the courts imprecisely describe fulfillment of the seller's delivery obligation as completed delivery essentially because he has done all that he can to deliver.³³ In the second case, delivery is said to be complete only when the goods are at their final destination, the implication being that at this stage the buyer or his agent has the documents of title. It thus appears that due to the fictional nature of documents of title and the custom to transfer them on a C.O.D. basis, the courts are called upon to consider delivery only *vis-à-vis* the goods purchased. Within this limited framework, the case law is, or appears to be, consistent in substance but misleading as to terminology.

There remains, however, a nagging doubt as to the precise role of documents of title in the delivery process. For reasons given above, the issue is largely academic and the authorities do not address the relationship between documents of title and the goods they represent. Nor do they address the larger and more fundamental question of possession and constructive possession as components of delivery. Therein, however, lies a paradox which challenges the bipartite notion of delivery as defined in the codal provisions and analyzed above.

In civil law, possession of moveables particularly is an indicator of title composed of two elements: *corpus* and *animus*.³⁴ The material element, *corpus*, signifies factual or physical control of a thing and is a signal to the world that the custodian holds the thing on his own behalf or on behalf of another. In other words, *corpus* or custody serves as a physical reminder or manifestation of the exclusivity of rights of

of Parties (1986), 65 Can. Bar Rev. p. 303; M. Pomerleau, La fraude du bénéficiaire du crédit documentaire irrévocable—Étude comparative en droit commercial international (1984), 44 R. du B. 113.

³³ See, for example, *Canadian Northern Railway Co. v. Greenshields Ltd.*, *supra*, footnote 25, *Greenshields J.*, at pp. 312-313; *Dolbec v. Lortie*, *supra*, footnote 21; *Brace, McKay & Co. v. Schmidt*, *ibid.*, at p. 16; *Vipond v. Montefusco*, *supra*, footnote 21.

³⁴ See arts 2194, 2268(1) C.C.L.C.; R.A. Macdonald, Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates, Part One (1986), 31 McGill L.J. 573, at pp. 590-592; W. de Marler, Law of Real Property: Quebec (Burroughs, 1932), p. 20; P. Martineau, La prescription (Presses de l'Université de Montréal, 1977), pp. 52-56; P. Martineau, Les biens (Les éditions Thémis, 5th ed., 1979), p. 52; H., L. & J. Mazeaud, Leçons de droit civil, t. 2, vol. 2, by F. Gianviti & M. de Juglart (Montchrestien, 6th ed., 1984), pp. 158-164; R. Rodière, Possession, in Rep. dr. civ., vol. 5 (Dalloz, 1983), nos. 11-17.

ownership.³⁵ The intentional element, *animus*, is the willingness to exercise the powers and accept the responsibilities of a right of ownership over a thing. It is a means of specifically identifying the possessor and distinguishing him from the custodian or *détenteur* who has the *corpus* without the *animus*.

While both the *corpus* and *animus* are necessary for possession, there is a doctrine of constructive possession in civil law by which the *corpus* or material element may reside with a third party on behalf of the possessor. In this case, a possessor is said to possess *corpore alieno*.³⁶ An example is the custody of a lessee on behalf of a lessor/owner of property.³⁷ Another example of possession *corpore alieno* is the mechanism of *constitut possessoire* by which a possessor, through a loss or interversion of title, becomes custodian on behalf of the acquirer of title, the new possessor.³⁸ The example of *constitut possessoire* consistently provided by French and Quebec doctrinal authorities is the seller who has custody of goods sold to a buyer.³⁹ In other words, it is generally accepted that once the ownership of goods has transferred under a contract of sale, the buyer is in possession of these goods and the seller is merely a custodian on his behalf. The seller cannot be a possessor because having disposed of title he lacks the requisite *animus*.

If this is the case, the concept of delivery becomes problematic in several respects. First, viewed as the transfer of possession or constructive possession according to articles 1492 and 1493 C.C.L.C., delivery becomes linked to and dependent upon the transfer of ownership. By analogy to the situation of the seller mentioned above, the buyer cannot have possession without title. The transfer of a thing into the "power" of the buyer in article 1492 C.C.L.C. merely denotes the transfer of ownership and, in a modern context, adds nothing to the concept of delivery.⁴⁰ The dependence of delivery upon the transfer of ownership

³⁵ As regards the exclusive nature of rights of ownership see P.-B. Migneault, *Droit civil canadien*, vol. 2 (Théoret, 1896), pp. 466-467, 477; A. Montpetit and G. Taillefer, *Traité de droit civil du Québec*, vol. 3 (Wilson & Lafleur, 1945), pp. 103, 110-111; F. Langelier, *Cours de droit civil de la province de Québec*, vol. 2 (Wilson & Lafleur, 1906), pp. 134-135; de Marler, *ibid.*, pp. 31-34; De Vareilles-Sommières, *La définition et la notion juridique de la propriété* (1905), 4 Rev. trim. dr. civ. 443, at pp. 482-483; Macdonald, *ibid.*, at p. 587.

³⁶ See art. 2192 C.C.L.C.; Mazeaud, *op. cit.*, footnote 34, p. 158; Martineau, *Les biens*, *op. cit.*, footnote 34, p. 52; Rodière, *op. cit.*, footnote 34, no. 20; Martineau, *La prescription*, *op. cit.*, footnote 34, p. 53.

³⁷ See Mazeaud, *ibid.*; Martineau, *Les biens*, *ibid.*; Martineau, *La prescription*, *ibid.*

³⁸ See Mazeaud, *ibid.*, pp. 159, 192-193; Rodière, *op. cit.*, footnote 34, no. 21.

³⁹ See Mazeaud, *ibid.*; Rodière, *ibid.*; Rousseau-Houle, *op. cit.*, footnote 6, pp. 85, 86-87; Migneault, *op. cit.*, footnote 30, p. 68.

⁴⁰ See Faribault, *op. cit.*, vol. 11, footnote 6, pp. 179-180.

would be ironic because, in a modern context, the flexibility of sale resides in the independence of its various components such as payment of price, delivery and the transfer of ownership.⁴¹

Second, possession and constructive possession as components of delivery render meaningless the distinction between articles 1492 and 1493 C.C.L.C. based on "access to possession" in the latter provision.⁴² This, in turn, renders unintelligible the body of case law analyzed above concerning delivery by carriage and stoppage in transit.⁴³

Finally, possession is a proprietary concept which does not really lend itself to an obligational framework. For example, as the basis for acquisitive prescription⁴⁴ possession exists or does not exist according to pre-determined, legal criteria. Although the parties to a contract may determine entitlement to possession, they cannot by contract modify its definition or characteristics.⁴⁵ By contrast, delivery at least insofar as it constitutes a reciprocal obligation in sale, must be subject to definition by the parties as regards adequate performance.

The ineluctable conclusion is that possession in its broadest sense which includes constructive possession is no longer, if it ever was, a component of delivery in sale. Nor for that matter can mere custody or *corpus* be the salient feature of delivery as suggested by some doctrinal

⁴¹ As regards the consensual nature of sale which permits the transfer of ownership without the necessity of payment of the price or delivery, see arts 1025, 1472 C.C.L.C.; Pourcelet, *op. cit.*, footnote 6, p. 83; Rousseau-Houle, *op. cit.*, footnote 6, pp. 4-5; D. Jacoby, *Le transfert contractuel de la propriété dans une perspective de réforme* (1970), 5 R.J.T. 65, at pp. 74-76; J.J. Gow, *Conveyance of Title in the Sale of Corporeal Moveables* (1967), 13 McGill L.J. 244, at pp. 248-251; D. Lefebvre, *La vente en droit québécois est-elle un contrat consensuel?* (1962), 22 R. du B. 181; H. Brun, *Les origines du consensualisme en matière de transfert de propriété et des mitigations apportées au principe par le droit civil québécois* (1967-68), 9 C. de D. 273; *Sauvé v. Hébert*, [1950] B.R. 275; *G.M.A.C. v. Riendeau*, [1953] C.S. 420; *Zusman v. Tremblay*, [1951] S.C.R. 659, at pp. 671-673, Taschereau J.; *Lodge v. Parker*, [1947] C.S. 48; *Mechutan Fur Corp. v. Carl Druker Furs Inc.*, *supra*, footnote 21; *Boulianne v. Cité de Sept-Iles*, [1975] C.S. 1103; *Soucy v. Filion*, [1976] C.A. 870; *Sous-ministre du revenu du Québec v. Coopérative fédérée du Québec*, [1984] C.A. 564, at p. 569, Rothman J.; *Conquet v. Hawley*, [1980] C.P. 140; *Lafleur v. Viens & St-Laurent Ltée*, [1984] C.S. 311.

⁴² See text, *supra*, footnotes 14-19.

⁴³ See text, *supra*, footnotes 20-33.

⁴⁴ See Martineau, *La prescription*, *op. cit.*, footnote 34, pp. 49-40; Mazeaud, *op. cit.*, footnote 34, pp. 201-203; G. de Lagrange and J. Radouant, *Prescription civile*, Rep. dr. civ., vol. 5 (Dalloz, 1983), nos 18-35.

⁴⁵ As examples of judicial scrutiny of possession in pledge, see *Marmette v. Villeneuve*, [1968] B.R. 841; *Grobstein v. A. Hollander & Son Ltd.*, [1963] B.R. 440; *Rousseau Inc. v. Boulanger*, [1952] B.R. 772; and under art. 1027, par. 2 C.C.L.C. see *Lauriault v. Lévesque*, [1944] C.S. 37; *Gallichan v. Rivard*, [1947] R.L. 1 and 4 (C.S.); *Broster v. Hall* (1866), 10 L.C.J. 205 (B.R.); *Lafleur v. Bélanger*, [1953] C.S. 181; *Drouin v. Lefrançois* (1892), 2 C.S. 128; *Tremblay v. Simard*, [1948] B.R. 505; *McGuire v. Dackus* (1870), 21 R.J.R.P. 132 (C.S.); *Tardif v. Fortier*, [1946] B.R. 356.

⁴⁶ See, for example, Rousseau-Houle, *op. cit.*, footnote 6, p. 85

authorities.⁴⁶ Custody is unacceptable because it is either too rigid to accommodate a notion of constructive delivery, or if flexible enough to do so, generates the same problems as possession.

There is no reason to doubt the validity of the dichotomy between delivery as an obligation and delivery as a means of extinguishing remedies. Delivery as an obligation should be regulated by the contract terms and by article 1493 C.C.L.C. insofar as it recognizes readiness to perform as a basis for a contractual remedy.⁴⁷

Delivery as a means of extinguishing the seller's remedies must be considered in its proper context—that of security on moveable property and specifically limitations upon the enforceability of the seller's remedies *vis-à-vis* third parties, namely the buyer's other creditors.⁴⁸ In this context, delivery transcends the contractual sphere and is intended to be a signal of rights to third parties, analogous to registration in the case of immoveable rights and certain moveable rights.⁴⁹ The signal function of delivery in sale and registration of rights is intended to provide easy access to information for interested third parties who take the trouble to investigate their debtor's position. Unlike registration, however, which denotes the commencement of third party enforceability of rights, delivery in sale is a signal pertaining to their extinction. The anomaly of a positive signal to denote a negative event—the termination of rights—is heightened by the absence of any signal to third parties of the creation of a seller's rights regarding moveables.⁵⁰ This anomaly raises doubts about the signal function of delivery in sale above and beyond those pertaining to its definition.

In theory, possession of moveables fulfils this signal function.⁵¹ However, constructive possession may render the signal misleading and,

⁴⁷ This reflects a general rule of the law of synallagmatic contracts. See Baudouin, *op. cit.*, footnote 6, p. 387.

⁴⁸ It must be recalled that the non-consensual remedies of the seller of moveables apply where there has been a transfer of ownership to a buyer. In this sense, and particularly in cases of buyer insolvency, the seller's remedies bring him into conflict with the secured and unsecured creditors of the buyer. See text, *supra*, footnotes 6-11.

⁴⁹ See, for example, the registration requirements of commercial pledge (art. 1979g C.C.L.C.), agricultural pledge (art. 1979b C.C.L.C.) and the transfer of property in stock (Bills of Lading Act, *supra*, footnote 11, ss. 22-24 and 45-46).

⁵⁰ The seller's remedies as regards corporeal moveables are non-consensual, that is inherent in the contract of sale which itself is not subject to formalities for third party enforceability. See text, *supra*, footnote 5. The sale of immoveables is subject to registration which indicates to third parties the existence of a seller's non-consensual remedies. See art. 2098 C.C.L.C. Further, the seller's right to dissolve the sale of an immoveable must be specified in the contract of sale and included in the registered deed. See arts 1536, 2102 C.C.L.C.

⁵¹ See text, *supra*, footnote 35. For an analysis of possession in common law see D.G. Baird and T.H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9* (1983), 35 *Stan. L. Rev.* 175.

therefore, useless.⁵² Consequently, as regards the seller's non-consensual remedies and in particular the right of retention, delivery is an event which, according to the circumstances, indicates to third parties that the buyer has control of the goods purchased.⁵³ The cases regarding stoppage in transit state that delivery occurs when the goods have reached their final destination or are in the hands of the buyer.⁵⁴ In other situations, delivery may be governed by a custom of trade such as the stamping or marking of raw lumber.⁵⁵ The result is that in sale delivery as a means of extinguishing remedies is a subset of possession free from the ambiguities of constructive possession and distinct from the notion of delivery in its obligational context.⁵⁶ Hence, delivery to a buyer cannot take place through *constitut possessoire* by which the goods remain in the hands of the seller.⁵⁷ Nor can delivery to a carrier as agent of either the

⁵² There appears to be a need for a general revision of the notion and scope of application of possession in Quebec. This is indicated by the present analysis and by the fact that revendication, a possessory remedy, is available to possessors and mere custodians alike. In the latter regard, see R.A. Macdonald, *Enforcing Rights in Corporeal Moveables: Revendication and its Surrogates*, Part One, *loc. cit.*, footnote 34, and Part Two (1986), 32 McGill L.J. 1.

The proposals for reform of the Civil Code of Quebec do not address the problems raised here. The proposed notion of possession is defined as follows: "La possession est l'exercice de fait, par soi-même ou par l'intermédiaire d'une autre personne qui détient le bien, d'un droit réel dont on se veut titulaire." See *Loi portant réforme au Code civil du Québec du droit des personnes, des successions et des biens*, S.Q. 1987, c.18, s.2, art. 961. However, at this time, the present articles 1493 and 1027, para. 2 C.C.L.C. remain unchanged in the Draft Civil Code, maintaining possession as an element of delivery in sale without qualification. See Quebec, *Civil Code Revision Office, Report on the Quebec Civil Code: Draft Civil Code*, vol. 1 (Éditeur officiel, 1978), art. 367, p. 389 and art. 385, p. 391.

⁵³ It might appear to be paradoxical that delivery be an indicator of the buyer's rights to third parties and that the seller be able to exercise certain non-consensual remedies after delivery. This inconsistency is explained partly by the time limitation imposed upon the exercise of these remedies and by other requirements such as the identification of the goods in question. While this problem is outside the scope of this article, it can be stated that the availability of remedies to the seller of moveables after delivery but within certain time restrictions is a means of balancing the preferred status of the seller and the interests of the buyer's other creditors, notably those who have security on future or after-acquired property. See text, *supra*, footnote 11-12 and 23-24.

⁵⁴ See authorities cited, *supra*, footnote 30.

⁵⁵ See cases cited *supra*, footnote 45, concerning art. 1027, para. 2 C.C.L.C.; G.E. LeDain, *The Transfer of Property and Risk in the Sale of Fungibles* (1954-55), 1 McGill L.J. 237, at p. 257.

⁵⁶ Although beyond the scope of this article, the concept of delivery as narrower than possession would likely apply to other areas concerning third party enforceability of rights, including the transfer of possession in pledge, promise of sale with tradition and actual possession under art. 1478 C.C.L.C. and successive sales with actual possession under art. 1027, para. 2 C.C.L.C. See as to the latter *Sapery v. Simon*, *supra*, footnote 31.

⁵⁷ See text, *supra*, footnotes 38-39.

seller or buyer constitute such delivery. As to the delivery of documents of title to the buyer while the goods themselves are in transit, the authorities are inconclusive. Although delivery cannot occur without the transfer of bills of lading,⁵⁸ delivery of these documents will not be sufficient if there are other impediments to the control of the goods.⁵⁹ Further, mere detention of goods by the buyer without the intention of receiving them as his own does not constitute delivery in its non-obligational context.⁶⁰ In this regard, the intentional element or *animus* is not necessarily synonymous with contractual acceptance of the goods.⁶¹

In summary, delivery is not defined by and does not necessarily coincide with the buyer's constructive possession, acceptance or detention of the goods purchased. Like possession, however, delivery comprises a material and intentional element. It can even be accomplished constructively by means of the appointment of a mandatary for reception where such agent obtains the requisite control of the goods.⁶² The possibilities for constructive delivery are as varied as potential factual circumstances and its limits are as yet undefined in law. As stated earlier, however, it does not appear that the buyer can validly appoint the seller his mandatary for delivery. At best in this situation, the seller who accepts the mandate would be relinquishing his possession and renouncing the possibility of acquisitive prescription by express recognition of the buyer's superior title.⁶³ Further, according to the present thesis which views delivery as a quasi-proprietary concept, even the express renunciation of his right of retention by a seller in favour of his buyer would not constitute completed delivery to the buyer. In this hypothetical case, the buyer would not have sufficient control of the goods and the renunciation would merely bar access to the contractual remedy.⁶⁴

The above analysis is based primarily upon the case law relating to stoppage in transit which is limited to situations of buyer insolvency.

⁵⁸ See *Banque d'Ontario v. Gosselin*, *supra*, footnote 25. See also authorities cited *supra*, footnote 31.

⁵⁹ See *Brossard v. Lacoste* (1916), 22 R.L.n.s. 371 (Cour de révision).

⁶⁰ See *Péladeau Lumber Corp. v. Universal Wood Products Ltd.*, *supra*, footnote 23; *Potato Distributors Ltd. v. Dionne*, [1959] C.S. 633.

⁶¹ See *Brossard v. Lacoste*, *supra*, footnote 59; *Arbenz v. Canadian Consolidated Rubber Co.* (1922), 29 R.L.n.s. 76 (C.S.); *Ness v. Cowan* (1894), 5 C.S. 423.

⁶² See *Florsheim Shoe Co. v. Boston Shoe Co.*, *supra*, footnote 28; *Re Assaly Bros.* (1926), 7 C.B.R. 511 (C.S.); *Mechutan Fur Corp. v. Carl Druker Furs Inc.*, *supra*, footnote 21; *Légaré v. Madore*, [1955] C.S. 186; *Abinovitch v. Ehrenbach*, *supra*, footnote 25.

⁶³ See, for example, *Weeks v. Bédard* (1916), 23 R.L.n.s. 94 (C.S.).

⁶⁴ This scenario would likely not suffice to give the buyer the status of a buyer in actual possession for the purposes of art. 1027, para. 2 C.C.L.C. See, however, regarding delivery of lumber, the authorities cited *supra*, footnotes 45 and 55. Theoretically, completed delivery might occur where the buyer has absolute access to and control of

The notion of delivery as a basis for extinguishing a seller's remedies is restricted to situations of insolvency except as regards the right of retention and the eight-day delay applicable to revendication in non-insolvency situations under article 1998(4) C.L.C.C.⁶⁵ There is no reason to apply a different notion of delivery to the latter two instances. Indeed, insolvency is irrelevant to the signal function of delivery *vis-à-vis* third parties. In other words, third party creditors of the buyer may have an interest in the extinction of the seller's remedies whether or not the buyer is insolvent.⁶⁶ Hence, the notion of delivery as applied to the doctrine of stoppage in transit will apply generally to determine the extinction of the seller's right of retention whether or not the buyer is insolvent.⁶⁷

Certain Quebec authorities give the impression that delivery obtained by the fraud of a buyer does not constitute valid delivery and does not extinguish the seller's right of retention.⁶⁸ However, several observations and qualifications are necessary in this regard.

There is a distinction between fraud as to the formation and execution of a contract. In the first instance, fraud vitiates consent and permits the victim of the fraudulent act *inter alia* to annul the contract and its legal effects.⁶⁹ In contracts translatif of ownership, once the contract is annulled based upon fraud the plaintiff revendicates the goods as owner.⁷⁰ Accordingly an extra-contractual or proprietary revendication

goods located on the seller's premises in a manner similar to field warehousing. This would require an ostensible and unequivocal separation of the delivered goods from others on the seller's premises. See Macdonald, *loc. cit.*, footnote 31, at footnotes 156, 157; G.E. LeDain, *Security upon Moveable Property in the Province of Quebec* (1956), 2 McGill L.J. 77, at pp. 98-100.

⁶⁵ See text *supra*, footnotes 23, 24.

⁶⁶ Nevertheless, it is acknowledged that the competition between a seller and a buyer's creditors will arise primarily in situations of the buyer's insolvency. See *supra*, footnote 48.

⁶⁷ This conclusion is consistent with the analysis of non-payment with and without a term as a basis for the seller's right of retention. See text, *infra*, footnotes 84-87, 134.

⁶⁸ See *Inns v. Gabriel Lucas Limitée*, [1963] B.R. 500, at pp. 506-509, Rivard J., and at p. 511, Taschereau J.; *Re Sunshine Fruit Co. v. Laporte, Hudon Hébert Ltée* (1949), 30 C.B.R. 170 (C.S.); *La Chaîne Coopérative du Saguenay Inc. v. Laberge*, [1959] C.S. 320; *Re Rosenzweig: Hart v. Goldfine Ltd.*, *supra*, footnote 10, at p. 257, Lamothe C.J. This proposition is given further support by authorities which hold that the right of retention *stricto sensu*, such as that accorded a mandatary (art. 1713 C.C.L.C.) and repairman (art. 441 C.C.L.C.), is not lost when the retention creditor releases possession based upon the fraud of his debtor. See *Kuhne and Nagel (Canada) Ltd. v. Polygraph-Export GMBH.*, [1963] C.S. 679; *Wilson v. Doyon*, [1964] C.S. 93; *Grstein v. Duket Auto Inc.*, [1978] C.P. 188.

⁶⁹ See art. 993 C.C.L.C.; Trudel, *op. cit.*, footnote 6, pp. 177-193; Baudouin, *op. cit.*, footnote 6, pp. 111-121; M. Tancelin, *Des obligations: contrat et responsabilité* (Wilson & Lafleur, 1984), pp. 63-68; Pineau, *op. cit.*, footnote 6, pp. 53-59.

⁷⁰ See R.A. Macdonald, *loc. cit.*, Part Two, footnote 52, at pp. 629-631; *Martineau v. Plante* (1916), 50 C.S. 102; *Keymar Equipment Ltd. v. Thomcor Holding Ltd.*, [1983] C.S. 326.

remedy would be available to a seller who delivers goods to a buyer who had fraudulently induced either the formation of the contract or the transfer of ownership of goods under a contract otherwise validly formed.⁷¹

The fraudulent acts of a buyer which merely induce delivery by a seller will inevitably constitute non-performance or inexecution by the former, specifically non-payment of the price.⁷² The most common example of this is the issuance of an N.S.F. cheque by a buyer upon receipt of goods.⁷³ In a contractual setting, there is no distinction between fraudulent non-performance and non-performance *per se*.⁷⁴ In this case, assuming that neither the formation of the contract nor the transfer of ownership is tainted by fraud, the seller is limited to his consensual and non-consensual, contractual remedies.⁷⁵ Hence, delivery obtained by fraudulent non-payment of the purchase price extinguishes the seller's right of retention.⁷⁶ Further, a seller could exercise his right to revendicate only within the conditions and appropriate post-delivery delays as set out in articles 1998 and 1999 C.C.L.C.⁷⁷ As a recourse for delivery obtained by fraudulent non-payment, the seller's revendication remedy is aptly viewed as an extension of his right of retention beyond delivery to the buyer.⁷⁸ Nevertheless, one must conclude that delivery obtained by the fraud of a buyer constitutes valid delivery for the purposes of extinguishing the seller's non-consensual remedies.

⁷¹ Fraud arising after the formation of the contract can vitiate the transfer of ownership where it affects the consent to the identification of uncertain and indeterminate goods or conditions for the transfer of ownership such as delivery and payment of the price. See Boodman, *loc. cit.*, footnote 20, at pp. 877-884; *Inns v. Gabriel Lucas Limitée*, *supra*, footnote 68; *Re Sunshine Fruit Co. v. Laporte, Hudon, Hébert Ltée*, *supra*, footnote 68; *La Chaîne Coopérative du Saguenay Inc. v. Laberge*, *supra*, footnote 68.

⁷² The notion of price in this context is taken in its broadest meaning so as to include payment of a sum of money, as well as obligations to do or to give. See L. Faribault, *op. cit.*, vol. 11, footnote 6, p. 310.

⁷³ See, for example, *Inns v. Gabriel Lucas Ltée*, *supra*, footnote 68; *Kuehne and Nagel (Canada) Ltd. v. Polygraph-Export GMBH*, *supra*, footnote 68; *Wilson v. Doyon*, *supra*, footnote 68. The order to "stop payment" of a cheque is another common form of fraudulent non-payment. See *Grstein v. Duket Auto Inc.*, *supra*, footnote 68; *Bonin v. Banque internationale de commerce S.A.* (October 22, 1986), Montreal 500-09-000772-830 (C.A.) (J.E. 86-1115).

⁷⁴ See *Inns v. Gabriel Lucas Ltée*, *ibid.*, at p. 517, Tremblay C.J. (dissenting); Tancelin, *op. cit.*, footnote 69, p. 229.

⁷⁵ See *Re Rosenzweig: Hart v. Goldfine Ltd.*, *supra*, footnote 10, at p. 257, Lamothe C.J., and pp. 259-260, Tellier J.

⁷⁶ See Macdonald, *loc. cit.*, Part Two, footnote 52, at p. 7; Rousseau-Houle, *op. cit.*, footnote 6, pp. 89-90.

⁷⁷ See text, *supra*, footnotes 23-24. It should be noted that the seller's revendication remedy is available in cases of non-payment whether fraudulent or not.

⁷⁸ See Macdonald, *loc. cit.*, Part Two, footnote 52, at p. 11; R.A. Macdonald, *Security under Section 178 of the Bank Act: A Civil Law Analysis* (1983), 43 R. du B. 1007, at pp. 1055-1056; R.A. Macdonald and R.L. Simmonds, *The Financing of Move-*

Finally, it is important to mention the effect of severability of contracts upon the notion of delivery and the seller's right of retention. If a contract calling for successive deliveries is severable into a series of distinct contracts, a right of retention will be associated with each contract. Accordingly each completed delivery will extinguish its correlative right of retention.⁷⁹ Hence, a seller who intends to rely upon his non-consensual remedies would be well advised to impose a non-severable structure upon his contracts.

II. *Payment*

Non-payment of the purchase price by the buyer is for obvious reasons an essential premise to this article, as well as a *sine qua non* to the exercise of all remedies or security mechanisms available to the seller of moveables, including the right of retention. Articles 1532 C.C.L.C. *et seq.* and articles 1139 C.C.L.C. *et seq.* regulate payment within the context of the contract of sale, and the legal notion of payment poses no substantial problems for present purposes. In this context, the notion of non-payment includes non-payment of a sum of money, as well as non-performance of any obligation imposed upon a buyer as a counter-prestation for delivery of the thing purchased. Technically, an obligation other than payment of a sum of money changes the contract from sale to exchange, lease and hire of services or an innominate contract, depending upon the nature of the obligation.⁸⁰ Nevertheless, given that the seller's right of retention is a specific application of the *exceptio non adimpleti contractus*,⁸¹ substantial breach of any of these obligations will activate the remedy.⁸²

The reciprocal and simultaneous nature of the obligations of delivery and payment dictates that a buyer pay the purchase price at the time and place of delivery of the thing sold.⁸³ Therefore, assuming that the parties have not altered the modalities for payment by contractual stipu-

ables: Law Reform in Quebec and Ontario, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 246, at p. 262; Rousseau-Houle, *op. cit.*, footnote 6, pp. 146-147; Pourcelet, *op. cit.*, footnote 6, p. 167; Mignault, *op. cit.*, vol. 7, footnote 30, p. 145.

⁷⁹ See *Arbenz v. Canadian Consolidated Rubber Co.*, *supra*, footnote 61; *Mercure v. Philippe Beaubien et Cie*, *supra*, footnote 23.

⁸⁰ See arts 1139, 1472, 1496-1599 C.C.L.C.; Rousseau-Houle, *op. cit.*, footnote 6, p. 80; Faribault, *op. cit.*, vol. 11, footnote 6, pp. 25, 310; Pourcelet, *op. cit.*, footnote 6, p. 77.

⁸¹ See text, *infra*, footnote 136.

⁸² See, for example, art. 1597 C.C.L.C. regarding the contract of exchange.

⁸³ See arts 1152 and 1533 C.C.L.C.; Rousseau-Houle, *op. cit.*, footnote 6, pp. 196-197; Pourcelet, *op. cit.*, footnote 6, p. 162; Faribault, *op. cit.*, vol. 11, footnote 6, p. 311; Baudouin, *op. cit.*, footnote 6, pp. 47-48, 259; Pineau, *op. cit.*, footnote 6, p. 20; Tancelin, *op. cit.*, footnote 69, p. 32; *Lebel v. Commissaire d'école pour la municipalité de la Ville de Montmorency*, [1955] S.C.R. 299; *Superior Leather Goods Co. v. Advanced Fur Mfg. Co.*, [1948] C.S. 198; *Cusson v. Phillon*, [1959] C.S. 248.

lation, the buyer will not be bound to pay the purchase price until the seller delivers. However, given that the right of retention entails withholding performance of the legal catalyst to payment, the exercise of the remedy becomes logically impossible. The seller will not be entitled to withhold delivery for non-payment until payment is due which occurs only when the seller delivers, thereby precluding recourse to the remedy.

This logical vicious circle which results from a literal interpretation of articles 1496 and 1533 C.C.L.C. and is common to all synallagmatic contracts has been avoided by the courts by recourse to the notion of anticipated breach or non-payment as a basis for the *exceptio non adimpleti contractus*.⁸⁴ In other words, in synallagmatic contracts neither party can insist upon execution of his co-contractant's obligation unless he himself is ready and willing to perform. Further, if one party demonstrates that he is not ready and willing the other may withhold performance of his obligations. Hence, if at any time before completed delivery the seller has just cause to fear that upon delivery he will not be paid, he may exercise his right of retention. The remedy by its nature is only available to the seller on the basis of reasonably imminent or hypothetical non-payment of the purchase price.

The hypothetical characteristic of non-payment upon delivery is present, though least evident, where the buyer refuses to pay at the time final delivery is offered by the seller. It is perhaps most evident where the buyer becomes insolvent before delivery.⁸⁵ Other than these two extremes, it appears that nothing short of a clear indication by the buyer that he will not pay or will not be able to pay upon delivery will suffice to establish reasonably, imminent non-payment.⁸⁶ The notion of anticipated non-payment is restricted in order to maintain contractual stability and to prevent potential abuse based upon a seller's subjective view of his buyer's financial status.⁸⁷

In summary, non-payment of the purchase price as a pre-condition to the exercise of the seller's right of retention consists of either the insolvency of the buyer at any time before final delivery or the indication by the buyer at any time before final delivery that he will not pay or will not be able to pay the price upon delivery. It is noteworthy that

⁸⁴ See art. 1497 C.C.L.C.; *Whitehead (Laisterdyke) Ltd. v. Eastern Woolen and Worsted Mills Ltd.*, [1955] C.S. 31; *Campbell v. Marazza* (1922), 29 R.L.n.s. 38 (B.R.), at p. 43, *Bernier J.*; *Pauzé v. Gordon* (1920), 31 B.R. 439; *Interprovincial Lumber Co. v. Matapedia Co.*, *supra*, footnote 18; *Baudouin, ibid.*, pp. 262-263; *Tancelin, ibid.*, p. 352.

⁸⁵ See as regards the notion of insolvency the text, *infra*, footnotes 107-117.

⁸⁶ See cases cited, *supra*, footnote 84.

⁸⁷ The restricted notion of anticipated non-payment as the basis for the right of retention is offset by the seller's right of revendication which is available after delivery as a remedy for non-payment. See arts 1998 and 1999 C.C.L.C.

where a term for payment has not been granted to a buyer insolvency is a basis for anticipated non-payment whether it exists at the time of the contract of sale or arises later.⁸⁸ By contrast, according to article 1497 C.C.L.C. where a term has been accorded only supervening insolvency activates the right of retention.⁸⁹

As a rule, an obligation to pay a sum of money is indivisible.⁹⁰ Consequently, within the context of sale, anything short of full payment of the purchase price constitutes non-payment and gives rise to the seller's right of retention. The implication here is that partial payment is a serious enough breach of the buyer's payment obligation to sustain the *exceptio non adimpleti contractus*. Where non-payment results from non-performance of an obligation other than payment of a sum of money, the retention remedy will be available only if the breach amounts to a substantial breach according to the circumstances.⁹¹

The indivisibility of the buyer's obligation to pay the purchase price, however, does not preclude the application of severability of contracts to the contract of sale. The doctrine of severability may cause the purchase price to be redefined as several smaller debts within several contracts of sale, thereby transforming apparent partial payments into payments in full.⁹²

Finally, the issuance or transfer of a negotiable instrument such as a cheque is not valid payment and need not be accepted by a seller.⁹³ Hence, a seller can refuse payment and withhold delivery of goods where a buyer offers an uncertified cheque as payment of the purchase price.⁹⁴ Presumably, a seller could accept such a cheque and still withhold delivery until the cheque has been honoured for payment. If, on the other hand, a seller accepts an uncertified cheque in return for delivery of goods, he implicitly waives his right to payment with delivery and consequently his right of retention.⁹⁵ The subsequent dishonour of cheque

⁸⁸ See *Labelle v. Flavelle Milling Co.*, *supra*, footnote 23.

⁸⁹ See as regards the timing of insolvency where a term has been given to the buyer the text, *infra*, footnotes 124-129.

⁹⁰ See arts 1122, 1149 C.C.L.C.; Faribault, *op. cit.*, footnote 16, pp. 249, 377-382; Baudouin, *op. cit.*, footnote 6, p. 358; Pourcelet, *op. cit.*, footnote 6, p. 123; *Saunders v. Harvey* (1912), 43 C.S. 54 (Ct. of Review).

⁹¹ See Baudouin, *ibid.*, p. 262; Pineau, *op. cit.*, footnote 6, p. 240.

⁹² See authorities cited, *supra*, footnote 79.

⁹³ See *Dame Matte v. Dame Roger* (1923), 35 B.R. 198; *Lavimodière v. Garipey* (1917), 51 C.S. 471; Baudouin, *op. cit.*, footnote 6, p. 356; Tancelin, *op. cit.*, footnote 69, pp. 420-421; Faribault, *op. cit.*, footnote 16, p. 380.

⁹⁴ See *Drouin v. Bertrand* (1917), 24 R.J. 29 (C. de circuit).

⁹⁵ See *Allard v. Lebel*, [1972] C.S. 260; *Ouellette v. Lepine*, [1953] C.S. 244; *Commonwealth & Color Chemical Co. v. Blais* (1918), 55 C.S. 419; *Tremblay v. Mutual of Omaha Insurance Co.* (14 March 1983), Quebec 200-05-005933-788 (C.S.) (J.E. 83-348). As to the effect of delivery obtained by fraud see text, *supra*, footnotes 68-78.

would activate the remaining non-consensual remedies of the unpaid seller.

III. *Term for Payment*

The requirement in articles 1496 and 1497 C.C.L.C. that a term for payment has not been granted or, if granted, has been forfeited by the buyer, is attenuated by the classification of the right of retention as an *exceptio non adimpleti contractus*. As such an exception, the seller's retention remedy is available only if the price is due before or at the time of delivery and the buyer defaults as to his payment obligation before completed delivery. Hence, these codal provisions insofar as they concern terms for payment must be restricted to suspensive terms for the benefit of the buyer, which make the price payable after delivery, thereby precluding recourse to the right of retention. For example, a term for payment unaccompanied by a term for delivery falls within this aspect of articles 1496 and 1497 C.C.L.C.⁹⁶ The granting of such a term by a seller constitutes an implied renunciation to the right of retention.⁹⁷ By contrast, a term for delivery unaccompanied by a term for payment merely delays both obligations without affecting their reciprocal and simultaneous nature.⁹⁸ Consequently, a term for delivery alone does not affect the right of retention.

A term for payment can be express or implied.⁹⁹ An express stipulation that a price is payable "net 30 days" has been interpreted as granting to a buyer a term for payment of thirty days.¹⁰⁰ The unconditional acceptance of an uncertified cheque by a seller implies that payment is due after a reasonable delay for presentment for payment and honour of the negotiable instrument.¹⁰¹ Similarly, the fact of delivery of goods by a seller without a demand for or receipt of payment from a buyer likely implies the granting of an uncertain term for payment.¹⁰² In

⁹⁶ See *Paré v. Pelchat*, *supra*, footnote 18; *Dufour v. Côté* (1925), 33 R.L.n.s. 242; Faribault, *op. cit.*, vol. 11, footnote 6, p. 313.

⁹⁷ See Faribault, *ibid.*, p. 197; *Labelle v. Flavell Milling Co.*, *supra*, footnote 23, Bernier J.

⁹⁸ See art. 1533 C.C.L.C.; Pourcelet, *op. cit.*, footnote 6, p. 162; Rousseau-Houle, *op. cit.*, footnote 6, p. 197; Faribault, *ibid.*, pp. 311, 313.

⁹⁹ See Faribault, *op. cit.*, footnote 16, pp. 97-98; Pineau, *op. cit.*, footnote 6, p. 201.

¹⁰⁰ See *Fiducie du Québec v. Fabrication Précision Inc.*, [1978] C.A. 255; *Pépin v. Feeney* (1936), 44 R.L. 74 (C.S.); *Re Roulottes Eureka Ltée: Dionne v. Desroches*, *supra*, footnote 23; *Alcools de Commerce Inc. v. Corporation de Produits Chimiques de Valleyfield* (1985), 56 C.B.R. (n.s.) 225, [1985] C.A. 686, McCarthy J.; Goldstein, *loc. cit.*, footnote 23, at p. 97; Atlas, *loc. cit.*, footnote 23, at p. 608.

¹⁰¹ See authorities cited, *supra*, footnote 95.

¹⁰² See Baudouin, *op. cit.*, footnote 6, p. 439; *Cardie v. Vaillant*, [1969] C.S. 284; *St-Gelais v. Gagnon*, [1953] C.S. 247; *Bisaillon v. Héritiers de feu Pierre Roy*, [1977] C.P. 172.

this case, however, the right of retention would be extinguished by delivery.¹⁰³

Where an express or implied term for payment initially precludes the right of retention, forfeiture of the term by the buyer may reactivate the right if it occurs before completed delivery and if the seller is not in default under the contract of sale.¹⁰⁴ According to article 1498 C.C.L.C., the seller may exercise his right of retention notwithstanding the existence of a term for payment if, since the sale, the buyer has become insolvent. The insolvency of the buyer has the dual effect of accelerating the term and reactivating the right of retention. The former is an application of article 1092 C.C.L.C. concerning forfeiture of the benefit of term.¹⁰⁵ The latter is an application of the above described notion of reasonably imminent non-payment of the purchase price as applied under article 1496 C.C.L.C.¹⁰⁶

As the primary factor giving rise to non-payment of debts and basic component of the "30 day" rule in sale, insolvency plays a pivotal role regarding the seller's right of retention and other non-consensual remedies. Nevertheless, there are serious terminological inconsistencies in the codal provisions concerning insolvency and bankruptcy in relation to the contract of sale. The major problem in this regard is that the relevant provisions translate the English words "insolvency" and "insolvent" into French indiscriminately by reference to the words "insolvabilité" or "insolvable"¹⁰⁷ and "faillite".¹⁰⁸ In contemporary legal parlance, "insolvency" or "insolvabilité" denotes the inability to meet or cessation of payment of one's debts as they fall due, or the state of one's debts exceeding one's assets.¹⁰⁹ "Bankruptcy" or "faillite" denotes the status of one whose assets are administered for the benefit of his creditors

¹⁰³ The problem here, which is beyond the scope of this article, is that an express or implied term for payment irrevocably extinguishes the seller's right to revendicate according to judicial interpretation of art. 1999, para. 1 C.C.L.C. See authorities cited, *supra*, footnote 100.

¹⁰⁴ As an *exceptio non adimpleti contractus*, the right of retention is available only if the seller is not in default under the contract at the time of exercising his right. See text, *infra*, footnote 138.

¹⁰⁵ Art. 1092 C.C.L.C. reads: "A debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract."

¹⁰⁶ See text, *supra*, footnotes 84-87.

¹⁰⁷ See art. 1497 C.C.L.C.

¹⁰⁸ See arts 1998, para. 3, 1999, para. 4 and 1543, para. 2 C.C.L.C.

¹⁰⁹ See *Beaudry v. Kelly* (1889), 17 R.L. 370 (C.S.); *Duro-Lak Inc. v. Lullaby Products Inc.*, [1981] C.P. 386; *Pauzé v. Gordon*, *supra*, footnote 84; *Beaudry v. Lanouette*, [1950] R.L. (n.s.) 446 (C.S.); *Re Pacific Mobile Corp.: Robitaille v. Les Industries l'Islet Inc.* (1979), 32 C.B.R. (n.s.) 209 (C.S.); *Gravel v. Amorosa*, [1971] C.S. 251; *Corcoran v. Montreal Abattoirs Co.* (1882), 6 L.N. 135 (C.S.); *Takefman v. Hofeller* (1908), 18

under the appropriate federal legislation.¹¹⁰ The former is a factual state. The latter is a legal state in that its existence requires sanction by the appropriate legal authority.

The interchangeability of these terms in the context of sale and where the Civil Code of Lower Canada refers to "insolvent traders"¹¹¹ derives from the pre-codal, Quebec antecedent to the present federal bankruptcy legislation. Under the Insolvent Act of 1864 or *Acte concernant la Faillite*, 1864,¹¹² "insolvent" and "insolvency" are generally, though not exclusively, translated by the words "failli" and "faillite" respectively. As noted above, section 12, paragraph 1 of that legislation adopts with some modification the non-consensual remedies of the unpaid seller under the *Coutume de Paris*.¹¹³ Hence, from an historical perspective, "insolvency" in the context of sale appears to refer only to a legal status analogous to bankruptcy. This interpretation is consistent with the definition of "bankruptcy" or "faillite" in article 17, paragraph 23 C.C.L.C. as "the condition of a trader who has discontinued his payments". In a modern context, it implies that acceleration of a term and revival of the right of retention under article 1497 C.C.L.C. would occur only if the buyer were bankrupt under the federal Bankruptcy Act.¹¹⁴

Despite the historical analysis, the case law concerning, *inter alia*, articles 1497, 1543, 1998 and 1999 C.C.L.C. has not imposed a restrictive interpretation upon the concept of insolvency. Instead, the notion of insolvency in the context of sale has been interpreted uniformly to include both the above described factual circumstances and legally sanctioned state of bankruptcy.¹¹⁵ A wide interpretation of "insolvency" in article 1497 C.C.L.C. is warranted by the narrow notion of imminent non-payment as a basis for the exercise of the right of retention.¹¹⁶ Furthermore, this view of article 1497 C.C.L.C. is consistent with article 1092 C.C.L.C. under which a term is forfeited in cases of bankruptcy and insolvency.¹¹⁷

B.R. 112; *Keymar Equipment Ltd. v. Thomcor Holding Ltd.*, *supra*, footnote 70; Bankruptcy Act, R.S.C. 1970, c.B-3, s.2; Faribault, *op. cit.*, footnote 16, p. 111.

¹¹⁰ See *Bankruptcy Act*, *ibid.*; *Re Hil-A-Don Ltd.*: *Bank of Montreal v. Kwiat*, [1975] C.A. 157; Faribault, *ibid.*, p. 109; Baudouin, *op. cit.*, footnote 6, p. 441.

¹¹¹ See arts 347, para. 5, 803, para. 2, 1038 and 2085 C.C.L.C.

¹¹² *Supra*, footnote 27.

¹¹³ See text, *supra*, footnotes 26-27.

¹¹⁴ *Supra*, footnote 109.

¹¹⁵ See *Keymar Equipment Ltd. v. Thomcor Holding Ltd.*, *supra*, footnote 70; *Inns v. Gabriel Lucas Ltée*, *supra*, footnote 68; *Thibeau v. Mills* (1885), 1 M.L.R.Q.B. 326; *Atlas*, *loc. cit.*, footnote 23, at p. 612; and cases cited *supra*, footnote 23. *Cf. Roy v. Bois Ste-Lucie Inc.*, [1977] C.S. 845.

¹¹⁶ See text, *supra*, footnotes 84-87.

¹¹⁷ Art. 1092 C.C.L.C. is reproduced, *supra*, footnote 105.

A procedural distinction between insolvency and bankruptcy under article 1092 C.C.L.C. highlights an important difference between that provision and article 1497 C.C.L.C. Within the context of article 1092 C.C.L.C., forfeiture of a term resulting from the insolvency of a debtor does not operate as of right but requires the intervention of suit in order to substantiate the insolvency.¹¹⁸ The creditor invoking forfeiture must adduce evidence of his debtor's insolvency and proof of default as to one instalment, for example, will not suffice.¹¹⁹ Where the debtor's insolvency is established, the term is forfeited only from the date of the judgment. By contrast, once bankruptcy is established by the appropriate proceedings no further judicial intervention is required for the purposes of article 1092 C.C.L.C. and forfeiture takes place from the date of bankruptcy.¹²⁰

Despite the link between articles 1092 and 1497 C.C.L.C., the seller's right of retention does not require judicial intervention to substantiate the buyer's insolvency or any other basis for the remedy. As an *exceptio non adimpleti contractus*, the retention remedy is a basis for non-performance by a seller where the buyer's imminent non-payment is a repudiation of the contract of sale.¹²¹ Further, it is a means of defending or excusing the seller's non-performance where the buyer initiates litigation.¹²² The exercise of the right of retention by its passive nature eschews court intervention. By contrast, enforcement of payment due to acceleration of a term under article 1092 C.C.L.C. is an active remedy pursued in the judicial arena. In this context, a creditor must allege and establish his entitlement to payment whether it be insolvency, bankruptcy, diminution of security or a contractually stipulated basis for forfeiture.

Consequently, the procedural distinction between insolvency and bankruptcy under article 1092 C.C.L.C. does not apply to article 1497 C.C.L.C. Further, these provisions operate differently in a remedial perspective and one could consider article 1497 C.C.L.C. as an expressly stated codal exception to the rules of article 1092 C.C.L.C.

¹¹⁸ See Faribault, *op. cit.*, footnote 16, p. 112; Baudouin, *op. cit.*, footnote 6, p. 441; Pineau, *op. cit.*, footnote 6, p. 204; *Dalrymple v. Simms* (1918), 58 C.S. 194; *Arpin, Gendron & Beauregard Ltée v. Tremblay*, [1960] C.S. 577; *Cie Légaré Ltée v. St-Amant*, [1962] C.S. 29.

¹¹⁹ See *Gravel v. Amorosa*, *supra*, footnote 109; *Gravel v. Dame Joncas*, [1971] C.S. 301; *Larose v. Desrochers* (1928), 34 R.J. 178 (C.S.); *Re Hil-A-Don Ltd.: Bank of Montreal v. Kwiat*, *supra*, footnote 110.

¹²⁰ See Faribault, *op. cit.*, footnote 16, p. 110; Baudouin, *op. cit.*, footnote 6, p. 441; Pineau, *op. cit.*, footnote 6, pp. 203-204; *Re Hamel: Trottier v. Mathieu*, [1964] B.R. 831; Bankruptcy Act, *supra*, footnote 109, s. 85(3).

¹²¹ See *Whitehead (Laisterdyke) Ltd. v. Eastern Woolen and Worsted Mills Ltd.*, *supra*, footnote 84; *Pauzé v. Gordon*, *supra*, footnote 84; *Dame Balthazar v. Drouin*, [1946] B.R. 325.

¹²² Any judicial review of the basis for the *exceptio non adimpleti contractus* will initiate with the buyer. See text, *infra*, footnote 139.

The timing of insolvency under article 1497 C.C.L.C. raises another problem. According to this provision, forfeiture of term and revival of the right of retention occur "if the buyer *since the sale* has become insolvent".¹²³ The rationale for limiting article 1497 C.C.L.C. to supervening insolvency is that a seller who extends credit by granting a term without having verified his buyer's financial situation is deemed to have acquiesced in the buyer's pre-contractual state.¹²⁴ In this context, the granting of a term for payment is exceptional in that it alters the reciprocal and simultaneous nature of payment and delivery in sale. Further, it is, as stated above, a renunciation to the right of retention by the seller.¹²⁵

The rule regarding the timing of insolvency only makes sense, however, in its historical context where "insolvency" was analogous to present-day bankruptcy.¹²⁶ Historically, a seller would have notice or easy access to notice of his prospective buyer's legally pronounced insolvency. In a modern context, where insolvency is a mere state of fact, it would be unfair to require a seller to investigate fully the financial status of his buyer before granting a term for payment. Even if such an investigation were undertaken, it would likely be impossible for an individual seller to determine the solvency of his buyer at any given time.¹²⁷ In the context of the seller's right of retention, deemed acquiescence to a state of fact such as insolvency is unreasonable unless the seller knew or is presumed to know of the insolvency when he grants a term. Hence, one must interpret article 1497 C.C.L.C. so that where a term has been granted only pre-contractual insolvency known to the seller and pre-contractual bankruptcy whether known or not extinguish definitively the right of retention.¹²⁸

This interpretation of article 1497 C.C.L.C. as regards the timing of insolvency where a term has been granted widens the scope of the seller's retention remedy modestly, at best. Practically speaking the remedy will be available only if the seller discovers the buyer's insolvency before completed delivery has occurred.¹²⁹

¹²³ (Emphasis added).

¹²⁴ See Faribault, *op. cit.*, vol. 11, *supra*, footnote 6, p. 198; F. Langelier, *Cours de droit civil*, vol. 5 (Wilson & Lafleur, 1909), p. 37.

¹²⁵ See text, *supra*, footnote 97.

¹²⁶ See text, *supra*, footnotes 107-114.

¹²⁷ See *Re Hil-A-Don Ltd.: Bank of Montreal v. Kwiat*, *supra*, footnote 110, at p. 159, Bernier J.

¹²⁸ See Pourcelet, *op. cit.*, footnote 6, p. 123, footnote 234.

¹²⁹ If the purchase by an insolvent buyer is considered to be fraud which vitiates the formation of the contract or transfer of ownership, the seller would be able to annul the sale and revendicate the goods as owner. See text, *supra*, footnotes 69-71.

A further condition is attached to insolvency as a means of reviving the right of retention under article 1497 C.C.L.C. The provision requires that the buyer's insolvency be such that "the seller is in imminent danger of losing the price, unless the buyer gives security for the payment at the expiration of the term". Despite the wording of article 1497 C.C.L.C., the insolvency or bankruptcy of a buyer creates a presumption of imminent non-payment of the purchase price.¹³⁰ The presumption is displaced and the term reinstated if the buyer provides adequate security to ensure payment at term.

In theory, the security may be in the form of real security such as pledge or hypothec, or personal security or suretyship under articles 1929 C.C.L.C. *et seq.*¹³¹ In practice, however, only suretyship is truly adequate security in cases of a buyer's insolvency or bankruptcy. Real security granted after insolvency or immediately prior to bankruptcy would be liable to attack as fraudulent *vis-à-vis* the buyer's other creditors under the codal provisions regulating the paulian action¹³² or fraudulent preferences provisions of the Bankruptcy Act.¹³³ The practical limitation of adequate security to suretyship is consistent with article 1092 C.C.L.C. whereby insolvency and bankruptcy cause forfeiture of the term as regards both secured and unsecured debts.¹³⁴

In summary, article 1497 C.C.L.C. permits a seller to withhold delivery despite the existence of a term for payment if before completed delivery the buyer is insolvent or bankrupt and thereby creates an imminent danger of non-payment of the price. As an *exceptio non adimpleti contractus*, the remedy under articles 1496 and 1497 C.C.L.C. is exercised without court intervention based on the premise that the buyer's insolvency and bankruptcy constitute acts of repudiation of the contract including the benefit of the term. Without court intervention, a buyer's insolvency is really a seller's perception of his buyer's unwillingness or inability to pay the purchase price at term. This perception is based upon the behaviour and statements of the buyer. In the context of article 1497 C.C.L.C., a buyer who during the term expressly refuses to pay the price at term must be viewed as having renounced to the benefit of the term in his favour. The result is that articles 1496 and 1497 C.C.L.C.

¹³⁰ See *Pauzé v. Gordon*, *supra*, footnote 84; Faribault, *op. cit.*, vol. 11, footnote 6, p. 198.

¹³¹ See Rousseau-Houle, *op. cit.*, footnote 6, p. 89.

¹³² See arts 1032-1040 C.C.L.C.; R.A. Macdonald, Privileges and other Preferences upon Moveable Property in Quebec: Their Impact upon the Rights and Recourses of Execution Creditors, in M.A. Springman and E. Gertner (eds.), *Debtor-Creditor Law: Practice and Doctrine* (Butterworths, 1985), p. 255, at pp. 269-271; Baudouin, *op. cit.*, footnote 6, pp. 335-350.

¹³³ *Supra*, footnote 109, s. 73.

¹³⁴ See Faribault, *op. cit.*, footnote 16, pp. 110, 112.

apply in identical circumstances notwithstanding that the seller has granted a term for payment. The relatively narrow notion of imminent non-payment of the purchase price as described above¹³⁵ is the basis for the remedy under both articles.

IV. *Nature and Enforceability of the Right of Retention*

The seller's right of retention under articles 1496 and 1497 C.C.L.C. is classified as an *exceptio non adimpleti contractus*.¹³⁶ This classification accurately reflects the reciprocal and simultaneous nature of the delivery and price obligations in sale.¹³⁷ It also accurately describes the operation of the seller's remedy.

As an *exceptio non adimpleti contractus*, the seller's right of retention depends upon the buyer's non-payment of the price as a legal justification for non-performance of the seller's delivery obligation. Assuming the seller is not in default under the contract, the retention remedy provides a defence or exception to any action by the buyer in this regard.¹³⁸ The exercise of the right of retention alone does not terminate the contractual relationship of the parties or the buyer's title to the thing sold. Nor does it remedy the buyer's refusal or inability to pay the purchase price. It merely suspends indefinitely the exigibility of the seller's obligation to deliver and hence, prolongs the seller's custody of the goods sold.¹³⁹

¹³⁵ See text, *supra*, footnotes 84-87.

¹³⁶ See Faribault, *op. cit.*, vol. 11, footnote 6, pp. 196-197; Pourcelet, *op. cit.*, footnote 6, p. 123; Rousseau-Houle, *op. cit.*, footnote 6, pp. 89, 200; Macdonald, in Springman and Gertner, *op. cit.*, footnote 131, p. 339; F. Frenette, *Le droit de rétention* in Répertoire de droit: Sûretés (Chambre des Notaires, 1980), Doctrine: Document 5 at nos. 19 and 20; J. Auger, *Les sûretés mobilières sans dépossession sur des biens en stock en vertu de la Loi sur les banques et du droit québécois* (1983), 14 R.D.U.S. 221, at p. 298, note 141; T. Rousseau-Houle, *Les récents développements dans le droit de la vente et du louage des choses au Québec* (1985), 15 R.D.U.S. 307, at p. 376; Macdonald, *loc. cit.*, Part Two, footnote 52, at pp. 6-7; F. Derrida, *Retention* in Rep. dr. civ., Vol. 7 (Dalloz, 1976), nos. 13 and 14; N. Catala-Franjou, *De la nature juridique du droit de rétention* (1967), 65 Rev. trim. dr. civ. 9, at pp. 18-20; Baudouin, *op. cit.*, footnote 6, p. 260; Pineau, *op. cit.*, footnote 6, p. 239; Tancelin, *op. cit.*, footnote 69, p. 350; *Drouin v. Gilbert* (1937), 63 B.R. 174; *Viens v. Choinière*, [1945] C.S. 106; *Lebel v. Commissaires d'école pour la municipalité de la Ville de Montmorency*, *supra*, footnote 83.

¹³⁷ See text, *supra*, footnote 83.

¹³⁸ See Baudouin, *op. cit.*, footnote 6, pp. 260-261, 263; Pineau, *op. cit.*, footnote 6, pp. 240-241; *Dumas v. Ostiguy*, [1950] C.S. 60; *Eugène Falardeau Ltée v. O.M.H.Q.*, [1976] C.A. 244.

¹³⁹ See Baudouin, *ibid.*, p. 263; *Robert v. Sarrault* (1913), 53 C.S. 484; *Di Paolo General Building Contractors Ltd. v. Boulanger*, [1962] B.R. 73; *Drouin v. Gilbert*, *supra*, footnote 136; *Eugène Falardeau Ltée v. O.M.H.Q.*, *ibid.*; *Pelland v. Feldman*, [1946] R.L. 153 (C.S.).

A seller can exercise the right of retention without the intervention of suit in that his withholding delivery is not subject to any prior judicial authorization or scrutiny. It is a rare example of a self-help remedy which is subject to judicial scrutiny only at the initiative of the buyer. This initiative arises primarily where the buyer sues for damages, specific performance or dissolution of the contract and alleges that the seller's retention of goods was unjustified. Similarly, it can occur where the retaining seller sues the buyer and the latter raises the invalidity of the retention remedy with or without a counterclaim.

As a rule, only a substantial contractual breach can sustain the *exceptio non adimpleti contractus*.¹⁴⁰ In the context of sale, imminent non-payment of the price in whole or in part constitutes a serious enough breach to give rise to the remedy.¹⁴¹ If non-payment results from non-performance of an obligation other than payment of a sum of money the substantial breach rule applies to the right of retention.¹⁴² Nevertheless, in both cases, the seller's right of retention imposes a standard of absolute liability upon the party in default as does any *exceptio non adimpleti contractus*. The anticipated breach upon which the remedy is based can be intentional, negligent or caused by *cas fortuit* or *force majeure*.¹⁴³ The fortuitous nature of his breach might relieve the buyer from liability in damages.¹⁴⁴ However, it will not permit him to exact delivery from his seller.¹⁴⁵

The theoretical basis for the *exceptio non adimpleti contractus* is unclear. It has been suggested that the remedy is based on cause, equity and good faith in contracts, the presumed intention of the parties and the notion of security for performance of obligations in synallagmatic contracts.¹⁴⁶ All of these interrelated justifications are sufficient to iso-

¹⁴⁰ See Baudouin, *ibid.*, p. 262; Pineau, *supra*, footnote 6, p. 240.

¹⁴¹ See text, *supra*, footnotes 90-91.

¹⁴² *Ibid.*

¹⁴³ See C. Boisclair, L'exceptio non adimpleti contractus en droit français et en droit québécois et la distinction entre l'exception d'inexécution et le droit de rétention (Faculté de droit, Université de Sherbrooke) (unpublished), Civil Code Revision Office, Document B/C/74, pp. 96-97; R. Cassin, L'exception tirée de l'inexécution dans les rapports synallagmatiques (Sirey, 1914), p. 571.

¹⁴⁴ See art. 1072 C.C.L.C.

¹⁴⁵ See Baudouin, *op. cit.*, footnote 6, pp. 275-282; Pineau, *op. cit.*, footnote 6, pp. 232-238; Tancelin, *op. cit.*, footnote 69, pp. 131-135. It is important to note that the present scenario does not concern loss or destruction of the goods sold, but is limited to non-payment caused by fortuitous event. Hence, the theory of risk and the rule *res perit domino* do not apply. In the contract of exchange, where the payment obligations of the parties are in substance delivery obligations, the loss or destruction of one of the exchange objects likely would bring into play the theory of risk and *res perit domino* to determine who bears the loss as regards that object.

¹⁴⁶ See Beaudouin, *ibid.*, p. 261; Pineau, *ibid.*, p. 239; Boisclair, *op. cit.*, footnote 143, pp. 62-68; Catala-Franjou, *loc. cit.*, footnote 136, at p. 18; *Lebel v. Commissaires*

late the seller's retention remedy within a model restricted to the buyer and seller. However, they do not really explain the operation of the seller's right of retention with respect to interested third parties such as the secured creditors of the buyer. Hence, it is necessary to consider the retention remedy within the general theoretical framework of security on moveables in Quebec.

The seller's right of retention is based on custody as opposed to title or possession. It is a non-consensual right as opposed to one arising by the specific consent of parties to an accessory security contract.¹⁴⁷ As a consequence, the most apt comparison is between the seller's right of retention and the right of retention *stricto sensu* accorded a repairman, mandatary, depositary, carrier *et al.*¹⁴⁸

Within a contractual framework these two retention rights are distinguished on the basis of the causal link between each retention creditor's delivery obligation and the debt secured by his right.¹⁴⁹ For example, as explained above, the seller's delivery obligation is the *quid pro quo* or direct cause of the buyer's obligation to pay the price.¹⁵⁰ Hence the former's right to withhold delivery is classified as an *exceptio non adimpleti contractus*. By contrast, the obligation of the repairman, for example, to return the object of his labour is secondary or accessory to the repair contract. The principal obligations in the contract are those of repair and payment for the completed repair. These obligations are reciprocal but by the nature and custom of trade are not simultaneous. Payment is exigible only after the service has been rendered, and in default of payment the repairman is accorded a right of retention. The repairman's delivery obligation and consequently his right of retention are not really inherent in the principal bargain between the parties. Further, there is a material as opposed to a contractual link between the retention of the improved or repaired goods and the debt owed. Hence, the right of

d'école pour la municipalité de la Ville de Montmorency, *supra*, footnote 83; *Robert v. Sarault*, *supra*, footnote 139; *Faucher v. Brunet*, *supra*, footnote 18; *Duchaîne & Boucher Inc. v. Bédard*, *supra*, footnote 18; *Drouin v. Gilbert*, *supra*, footnote 136.

¹⁴⁷ See text, *supra*, footnote 5.

¹⁴⁸ See respectively arts 441, 1713, 1812, 1679 C.C.L.C. See also arts 1994(4), 2001 C.C.L.C.; Frenette, *op. cit.*, footnote 136; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 307-313; Catala-Franjou, *loc. cit.*, footnote 136; P. Ciotola, *Droits des sûretés*, (Les éditions Thémis, 1984), pp. 47-54; Derrida, *op. cit.*, footnote 136; Boisclair, *op. cit.*, footnote 143, pp. 121-136; Macdonald, *loc. cit.*, footnote 78, at pp. 1094-1096.

¹⁴⁹ See Frenette, *ibid.*, pp. 3-4; Derrida, *ibid.*, no. 5; Catala-Franjou, *ibid.*, at pp. 17-27; Boisclair, *ibid.*; Tancelin, *op. cit.*, footnote 69, pp. 350-351; *Lachapelle v. Lymburner* (1925), 31 R.L.n.s. 1 (C.S.). See also the analysis in J.-F. Durand, *Le droit de rétention*, thèse pour le doctorat en droit, vol. 2, (Université de Paris, 1979, unpublished), pp. 982-1008.

¹⁵⁰ See text, *supra*, footnote 83.

retention *stricto sensu* is theoretically distinct from the *exceptio non adimpleti contractus* and does not help to situate the seller's right within the Quebec moveable security model. This can only be accomplished by considering the role of the seller's right of retention in situations of competition between the seller and interested third parties over the buyer's assets.

For the purposes of this analysis, it is assumed that the buyer has ownership of the goods sold and the seller has custody pursuant to his right of retention. Consequently, excluded from competition with the seller are all of the buyer's potential, secured creditors whose rights depend on either their own custody of the goods sold or that of the buyer. The potential "possessory" secured creditors are the pledgee,¹⁵¹ documentary pledgee,¹⁵² and those with a right of retention *stricto sensu*.¹⁵³ The potential, secured creditor of the buyer whose rights require that the latter have custody of the goods is the lessor of the buyer's premises.¹⁵⁴

The remaining creditors of the buyer who could challenge the seller's right of retention are his chirographic and preferred judgment creditors, the subsequent acquirer of the goods and various, non-possessory, secured creditors. For present purposes, the preferred judgment creditors of a buyer include creditors whose rights are limited to a preference on judicial sale proceeds.¹⁵⁵ A buyer's secured creditors include those accorded rights above and beyond a preference on judicial sale proceeds.¹⁵⁶ The competition between a seller in retention and his buyer's creditors will be examined first from a substantive point of view. Subsequently, the procedural aspect of the enforceability of the seller's retention remedy will be considered.

The substantive enforceability of the *exceptio non adimpleti contractus vis-à-vis* third parties is determined by the principle of indivisi-

¹⁵¹ See arts 1966 C.C.L.C. ff; LeDain, *loc. cit.*, footnote 64, at pp. 78-79; Ciotola, *op. cit.*, footnote 148, pp. 54-98; C. Demers, *Traité de droit civil du Québec*, vol. 14 (Wilson & Lafleur, 1950), p. 11 ff.; Macdonald, *loc. cit.*, footnote 31; E.E. Saunders, *Pledge, Commercial Pledge Sale with a Right of Redemption Similar Security Device*, [1967] Meredith Memorial Lectures (Wilson & Lafleur, 1967), p. 16, at pp. 17-18.

¹⁵² See LeDain, *ibid.*, at pp. 95-103; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 302-305; Ciotola, *ibid.*, pp. 66-67; Saunders, in Meredith Memorial Lectures, *ibid.*, p. 21; Macdonald, *loc. cit.*, footnote 31, at pp. 580-581 and *passim*; Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 23, pp. 260-261.

¹⁵³ See authorities cited *supra*, footnote 148.

¹⁵⁴ The lessor's privilege is restricted to goods which are or have been situated on the leased premises, in this case the premises occupied by the buyer. See arts 1637 to 1640 C.C.L.C.

¹⁵⁵ See, for example, art. 1994, paras 1, 2, 5, 6, 7, 9 and 10 C.C.L.C.

¹⁵⁶ See creditors mentioned in the text, *supra*, footnote 11.

bility of contracts.¹⁵⁷ According to this principle, a contract is an integral juridical act and one cannot claim its advantages without also accepting its disadvantages.¹⁵⁸ In the present context, this implies that the seller's right of retention is enforceable against all third parties whose rights are dependent upon those of the buyer under the contract of sale. For example, in the process of compulsory execution of judgments in personal actions, the buyer's chirographic and preferred creditors rely upon the principle that the buyer's patrimony is the common pledge of his creditors as enunciated in articles 1980 and 1981 C.C.L.C. To do so, they must invoke the buyer's title acquired through the contract of sale. Since the buyer is an owner without custody or possession, his title cannot be sustained on any non-contractual basis such as acquisitive prescription.¹⁵⁹ Hence, the seller's right of retention is or should be enforceable against the buyer's execution creditors, whether chirographic or preferred, unless there is a codal or statutory provision to the contrary. Similarly, the seller's right is enforceable *vis-à-vis* the buyer's trustee in bankruptcy.¹⁶⁰

The issue of codal or statutory exceptions to the priority of the seller's right of retention *vis-à-vis* his buyer's ordinary and preferred execution creditors is problematic. In the Quebec moveable security model, there is no general codal or statutory regime which regulates all priority problems among secured creditors. For example, the rules in articles 1983 C.C.L.C. *et seq.* are limited to competing privileges or preferred claims on judicial sale proceeds. Issues of competition between possessory and non-possessory secured rights or possessory secured rights *inter se* are decided on an individual basis, sometimes with reference to the codal priority scheme of privileges and sometimes according to a specific statutory ranking scheme.¹⁶¹ The result is that there is no apparent

¹⁵⁷ See Cassin, *op. cit.*, footnote 143, pp. 688-707; Durand, *op. cit.*, footnote 149, pp. 1056-1060; Boisclair, *op. cit.*, footnote 143, pp. 118-120.

¹⁵⁸ The principle of indivisibility of contracts is distinguished from the principle *nemo dat quod non habet* in that the former is limited to the enforceability of prior contractual rights *vis-à-vis* third parties. The *nemo dat* rule and its exceptions appear to be limited to the transfer and enforceability of real rights. Further, they focus upon contractual and other circumstances relating to the subsequent acquisition of rights. Nevertheless, in contracts translatif of ownership, the two rules can overlap. See Cassin, *ibid.*, pp. 700, 702, 704.

¹⁵⁹ See text, *infra*, footnotes 166-172.

¹⁶⁰ See Cassin, *op. cit.*, footnote 143, pp. 697-698; Boisclair, *op. cit.*, footnote 143, p. 118; Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 99; *Re Iberville Furniture & Appliance Co.*; *Grobstein v. Facto*, *supra*, footnote 23; *Re Rosenzweig: Hart v. Goldfine Ltd.*, *supra*, footnote 10.

¹⁶¹ See Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 337-344, 344-350; *Sous-Ministre du revenu du Québec v. Total Rental Equipment Inc.*, [1979] C.S. 840; *Elliott Krever & Assoc. Ltd. v. Montreal Casting Repairs Ltd.*, [1969] C.S. 6; *Gagnon v. Banque Nationale* (1919), 29 B.R. 166; Macdonald, *loc. cit.*, footnote 78, at pp. 1061 *et seq.*

and coherent mechanism in Quebec for determining the exceptions to the ostensible priority of the seller's right of retention *vis-à-vis* his buyer's execution creditors. To complicate matters further, as will be seen, the Code of Civil Procedure establishes a separate and controversial body of rules which can affect the enforceability of the seller's remedy.¹⁶²

Notwithstanding these uncertainties and ignoring for the moment questions of procedure, it appears that the seller's right of retention is enforceable against all of his buyer's chirographic and preferred execution creditors. There are several justifications for this priority. First, as discussed above, there is the rule of indivisibility of contracts. Second, there is no firm basis for excluding the application of this rule from the seller's right of retention. By contrast, there is authority that the enforceability of a pledgee's right of retention under article 1975 C.C.L.C. is governed by the codal priority system for privileges.¹⁶³ Third, numerous authorities indicate that the right of retention *stricto sensu* transcends the domain of personal and real remedies in civil law, including the process of execution of judgments in personal actions.¹⁶⁴ Hence, it seems that without a specific legislative exception, the execution process is finessed by custody-based remedies such as the right of retention *stricto sensu* and by analogy the seller's right of retention.¹⁶⁵

The seller's right of retention is also enforceable against the good faith, subsequent acquirer of the goods from the buyer.¹⁶⁶ In the present context, the subsequent acquirer is an owner without custody or possession. Like the execution creditors of the buyer, he cannot claim the goods without relying upon the contract between the buyer and seller. His lack of possession prevents him from acquiring title to the goods

¹⁶² See text, *infra*, notes 233-252.

¹⁶³ See art. 1977 C.C.L.C.; *Sous-Ministre du Revenu du Québec v. Total Rental Equipment Inc.*, *supra*, footnote 161; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, p. 340. See also *Gagnon v. Banque Nationale*, *supra*, footnote 161, which held that a pledgee's right of retention is enforceable against his pledgor's ordinary creditors.

¹⁶⁴ See Macdonald, in Springman and Gertner, *ibid.*, p. 338; Ciotola, *op. cit.*, footnote 148, p. 53; Frenette, *op. cit.*, footnote 136, nos. 46 and 47; Catala-Franjou, *loc. cit.*, footnote 136, at pp. 37-39; Cassin, *op. cit.*, footnote 143, pp. 671-679; *Elliot Krever & Assoc. Ltd. v. Montreal Casting Repairs Ltd.*, *supra*, footnote 161; *Lortie v. Bédard* (1921), 60 C.S. 299; *Pacific Finance Credit Ltd. v. Faucher*, [1974] R.P. 381 (C.P.); *Laurentide Finance Co. v. Paquette*, [1967] C.S. 62; *Morisset Ltée v. Castonguay* (1939), 68 B.R. 128; *Standard Credit Corp. v. Nadeau*, [1956] R.L.n.s. 127 (C.S.); *Dumoulin v. Giard*, [1951] R.L.n.s. 172 (C.S.).

¹⁶⁵ It is acknowledged that the right of retention *stricto sensu* is distinct from the seller's right of retention. See text, *supra*, footnotes 149-150. The argument made here is that these rights within their respective spheres of enforceability override the process of execution of judgments. See as to the procedural aspects of enforceability text, *infra*, notes 233 ff.

¹⁶⁶ See Cassin, *op. cit.*, footnote 143, p. 703; Boisclair, *op. cit.*, footnote 143, p. 119; Faribault, *op. cit.*, vol. 11, footnote 6, p. 322 by analogy.

independently by prescription.¹⁶⁷ His right to possession is really the contractual right to enforce his seller's delivery obligation.¹⁶⁸ In and of itself, it is not a real right and not subject to acquisitive prescription.¹⁶⁹ Even if prescription might apply in the abstract to the right to possession, the subsequent acquirer could not fulfill the "possessory" requirements for the acquisition of incorporeals.¹⁷⁰

Finally, any purported sale by the buyer of an unencumbered right to possession would not be enforceable against the seller in retention. In the case of incorporeal moveables the *nemo dat* exception of article 1488 C.C.L.C. regarding commercial matters is unenforceable *vis-à-vis* third parties unless acquisitive prescription applies.¹⁷¹ Article 1489 C.C.L.C. could not apply because without "possession" of the right to possession by the subsequent acquirer, the seller's corresponding right to withhold delivery could not be viewed as lost or stolen.¹⁷²

The status of the agricultural and commercial pledgee as potential, non-possessory secured creditors of the buyer is analogous to that of the subsequent acquirer in good faith described above. According to the principle of indivisibility of contracts, to the extent that a commercial or agricultural pledgee relies upon the title of the buyer, his pledgor, to validate his security, he will be bound by the seller's right of retention.

It is not always necessary, however, for a pledgee to rely upon his pledgor's title. Article 1966a C.C.L.C. validates the pledge of a thing which does not belong to a pledgor in cases where sales by a non-owner would be valid under articles 1488, 1489 or 2268 C.C.L.C.¹⁷³ Hence, it is theoretically possible for a commercial or agricultural pledgee to rely on article 1966a C.C.L.C. to validate his pledge and free his security interest from any deficiencies or restrictions linked to the contractually acquired title of his pledgor.¹⁷⁴

¹⁶⁷ See Martineau, *La prescription*, *op. cit.*, footnote 34, p. 51.

¹⁶⁸ See Boodman, *loc. cit.*, footnote 20, at pp. 885-886.

¹⁶⁹ See Martineau, *La prescription*, *op. cit.*, footnote 34, p. 50.

¹⁷⁰ See Y. Caron, *La vente et le nantissement de la chose mobilière d'autrui*, Première partie and Deuxième partie (1977), 23 McGill L.J. 1 and 380, at pp. 418-419; arts 1494, 2252, 2219 C.C.L.C. by analogy.

¹⁷¹ See Caron, *ibid.*, at p. 395.

¹⁷² See Caron, *ibid.*, at pp. 38-40, 418-419.

¹⁷³ Art. 1966a C.C.L.C. provides: "Articles 1488, 1489 and 2268 apply to the contract of pledge." See Boodman, *loc. cit.*, footnote 20, at pp. 899 *et seq.*; Caron, *loc. cit.*, footnote 170; Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 78, pp. 265-267; A. Mayrand, *Nantissement de la chose d'autrui* (1943), 3 R. du B. 313; Pourcelet, *op. cit.*, footnote 6, pp. 54-76; Rousseau-Houle, *op. cit.*, footnote 6, pp. 49-62; G.S. Challies, *The Sale of a Thing Not Belonging to the Seller in the Law of Quebec* (1936), 14 Can. Bar Rev. 801.

¹⁷⁴ See *Re Bertrand: Trans-Canada Credit Corp. v. Savage*, [1967] C.S. 596; *Re Bourcier: Super Marché Lefort Inc. v. Maheux, Noiseux Inc.* (23 May 1984), Montreal

In the present context, neither the pledgor-buyer nor the commercial or agricultural pledgee has possession of the goods. Nor does any of these have sufficient physical access to the goods to exercise a right to possession over them. The result is that, as explained regarding the subsequent acquirer in good faith,¹⁷⁵ it is impossible for either the pledgor-buyer or commercial or agricultural pledgee to acquire an unencumbered right to possession of the goods with or without title under articles 1488 or 1489 C.C.L.C. Article 2268 C.C.L.C. could not apply to enhance the rights of any of these parties because it requires possession by one of them. This is rendered impossible by the seller's custody of the goods. Consequently, on a substantive basis the seller's right of retention is enforceable against the agricultural and commercial pledgee of the buyer. Further, there is no express statutory or codal exception to this priority. On the contrary, the codal priority system for privileges ranks an agricultural and commercial pledgee below an unpaid seller.¹⁷⁶

On a practical level, a seller exercising a right of retention will likely not compete with his buyer's commercial or agricultural pledgee. Each of these security mechanisms presupposes a pledgor who retains possession of the pledged assets.¹⁷⁷ Further, each requires a deed describing, *inter alia*, the location of the pledged assets,¹⁷⁸ implying that they must remain on the premises exploited by the pledgor. It appears that possession by a pledgor is a formal requirement for commercial and agricultural pledge.¹⁷⁹ Hence, it is unlikely that a creditor would knowingly accept a commercial or agricultural pledge of undelivered goods without some added assurance that delivery will be made.

500-11-001426-838 (C.S.) (J.E. 84-677); *Pétroles Irving Inc. v. Machineries B.D.M. Inc.*, [1984] C.S. 511; *Bo-Less Inc. v. Boily* (27 Dec. 1979), Quebec 200-03-000192-770 (C.A.); *Caisse Populaire Notre-Dame d'Hébertville v. Encans de la Ferme Inc.*, [1973] R.L. 292 (C.P.).

¹⁷⁵ See text, *supra*, footnotes 166-172.

¹⁷⁶ An agricultural and commercial pledgee is assimilated to a pledgee under art. 1994(4) C.C.L.C. See art. 1979h C.C.L.C.; *Elliot Krever & Assoc. Ltd. v. Montreal Casting Repairs Ltd.*, *supra*, footnote 161; *R. v. Restaurant & Bar La Seigneurie de Sept-Iles Inc.*, [1977] 2 F.C. 207; R. Comtois, Une nouvelle législation: Le nantissement commercial (1963), 9 McGill L.J. 261, at p. 269; Saunders, in Meredith Memorial Lectures, *op. cit.*, footnote 151, p. 20; Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 259; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, p. 307; Ciotola, *op. cit.*, footnote 148, p. 109. Hence, the codal priority system might apply to determine the enforceability of these creditors' rights *vis-à-vis* the seller in retention. See text, *supra*, footnote 161, and authorities cited therein.

¹⁷⁷ See arts 1979a and 1979e C.C.L.C.

¹⁷⁸ See arts 1979b and 1979f C.C.L.C.

¹⁷⁹ See *G. Doyon & Fils Inc. v. Gestion B. Rest Inc.*, [1986] R.J.Q. 2395 (C.P.); *Fiducie du Québec v. Entreprises R. Chainey & Fils Inc.*, [1983] C.S. 241; Comtois, *loc. cit.*, footnote 176, at p. 265; Saunders, in Meredith Memorial Lectures, *op. cit.*,

The remaining creditors of a buyer who might compete with the seller in retention are those secured by a trust deed under the Special Corporate Powers Act,¹⁸⁰ security under section 178 of the Bank Act¹⁸¹ or transfer of property in stock under the Bills of Lading Act.¹⁸² These mechanisms permit, *inter alia*, the creation of non-possessory security on future or after-acquired property. In other words, they permit the designation of collateral property to include the present assets of a debtor, as well as those acquired by him at some future date.¹⁸³ As a result, it is most likely for creditors with security on future or after-acquired property to compete with their debtor's unpaid seller.¹⁸⁴

Article 1966a C.C.L.C. does not apply to trust deed security,¹⁸⁵ security under section 178 of the Bank Act¹⁸⁶ or a transfer of property in stock.¹⁸⁷ Each of these mechanisms is subject to the condition that the debtor be, or in the case of future property, become owner of the collat-

footnote 151, p. 19. Cf. Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 23, note 32.

¹⁸⁰ *Supra*, footnote 11, ss. 27-30.

¹⁸¹ *Supra*, footnote 11.

¹⁸² *Supra*, footnote 11, ss. 11-44.

¹⁸³ There is a controversy as to the timing of attachment of secured rights to future property under s. 178 of the Bank Act, trust deed security and a transfer of property in stock. See Auger, *loc. cit.*, footnote 136, at pp. 276-286, 292; R.A. Macdonald, Inventory Financing in Quebec after Bill 97 (1984), 9 Can. Bus. L.J. 153, at pp. 154, 159 and 172; Y. Renaud, La cession de biens en stock: deux régimes, deux sûretés de même nature (1984), 86 R. du N. 253, 409, 509, at pp. 426-427; Macdonald, *loc. cit.*, footnote 78, at pp. 1066-1067. As will be seen, the timing of these rights is irrelevant to their enforceability *vis-à-vis* the seller's right of retention.

¹⁸⁴ See text, *supra*, footnotes 11-12.

¹⁸⁵ See Auger, *loc. cit.*, footnote 136, at pp. 236-237; Macdonald, *loc. cit.*, footnote 78, at p. 1066. Section 27 of the Special Corporate Powers Act, *supra*, footnote 11, permits the creation of trust deed security by a corporation on property "which it may own in Quebec", implying that ownership is a *sine qua non* and that art. 1966a C.C.L.C. is not applicable.

¹⁸⁶ *Supra*, footnote 11. This results from the restrictive interpretation of art. 1966a C.C.L.C. and the express requirement of s. 178(2) that the debtor be owner of the collateral at some time before the release of the security by the bank. See Macdonald, *ibid.*, at pp. 1019-1020, 1051-1052; Auger, *ibid.*, at pp. 235-237; LeDain, *loc. cit.*, footnote 64, at p. 104; Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 266; Caron, *loc. cit.*, footnote 170, at pp. 412-413; L. Payette, Nantissement commercial—chose d'autrui (1980), 40 R. du B. 677, at p. 680; *Union Sulphur Co. of New York v. Riordan Co.* (1922), 30 R.L.N.s. 144 (C.S.); *Chaîne Coopérative du Saguenay Inc. v. Laberge*, [1959] C.S. 320, at pp. 326-330; *Ackroyd Brothers (Canada) Ltd. v. Brackon Products Inc.*, [1948] C.S. 407, at pp. 408-409.

¹⁸⁷ Section 13 of the Bills of Lading Act *supra*, footnote 11, states that a transfer is without effect unless the transferor is or becomes owner of the collateral security. See also Auger, *ibid.*, at pp. 235, 237; Macdonald, *loc. cit.*, footnote 183, at p. 159; Renaud, *loc. cit.*, footnote 183, at p. 286.

eral during the existence of the security. As stated earlier,¹⁸⁸ the buyer as owner without possession cannot enhance his title so as to negate his seller's right of retention. Consequently, in principle these creditors with security on after-acquired or future property must rely upon the contractually acquired title of their debtor, the buyer, to validate their security interests. Hence, in principle, they are bound by the seller's right of retention.

In the case of trust deed security, there is no legislative exception to the priority of the seller's remedy. The privilege of the trustee for bondholders as regards moveables ranks after those enumerated in articles 1994, 1994a, 1994b and 1994c C.C.L.C.¹⁸⁹ The scope of enforceability of the trustee's rights to possession, administration and realization of the collateral is not regulated by statute. However, the few authorities that exist assimilate the trust deed security to pledge and indicate that the scope of enforceability of these rights is linked to that of the privilege.¹⁹⁰ Consequently, even applying the combined statutory and codal priority scheme, the seller's right of retention has priority over the rights of creditors secured by a trust deed under the Special Corporate Powers Act.¹⁹¹

The enforceability of the seller's retention remedy *vis-à-vis* creditors with secured rights under section 178 of the Bank Act,¹⁹² or a transfer of property in stock under the Bills of Lading Act,¹⁹³ is complicated by these statutes' ambiguity towards an unpaid seller. As a rule, a temporal priority scheme gives these security mechanisms priority over all rights subsequently granted in the collateral.¹⁹⁴ In cases of competition with an unpaid seller, the legislation enunciates a special rule. Section 179(1) of the Bank Act¹⁹⁵ provides, *inter alia*, that the rights and powers of the bank have priority,

. . . over the claim of any unpaid vendor, but this priority does not extend over the claim of any unpaid vendor who had a lien on the property at the time of the acquisition by the bank of the . . . security, unless the same was acquired without knowledge on the part of the bank of such lien. . .

¹⁸⁸ See text, *supra*, footnotes 159, 166-172, 175.

¹⁸⁹ See Special Corporate Powers Act, *supra*, footnote 11, s. 29.

¹⁹⁰ See *Affiliated Factors Corp. v. Rosco Metal Products Ltd.* (1974), 18 C.B.R. n.s. 58 (C.S.); *Sous-Ministre du revenu du Québec v. Total Rental Equipment Inc.*, *supra*, footnote 161; J.R. Hannan, *Trust Deed Security and Competing Creditors*, [1976] Meredith Memorial Lectures (Richard DeBoo, 1978), p. 29, at pp. 33 and 38; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, p. 343; L. Payette, *La charge flottante*, [1976] Meredith Memorial Lectures, *supra*, p. 43, at pp. 59-60.

¹⁹¹ Special Corporate Powers Act, *supra*, footnote 11.

¹⁹² Bank Act, *ibid.*

¹⁹³ Bills of Lading Act, *ibid.*

¹⁹⁴ See Bank Act, *ibid.* s. 179, para. 1; Bills of Lading Act, *ibid.*, s. 27, para. 2.

¹⁹⁵ Bank Act, *ibid.*

Section 27, paragraph 1 of the Bills of Lading Act¹⁹⁶ provides:

The transferor must indicate to the transferee in the writing evidencing the transfer the claim of an unpaid vendor affecting the transferred property, and any claim so indicated takes precedence over the rights of the transferee.

These provisions specify that an unpaid seller's pre-existing claim takes priority over the rights of a bank with section 178 security or a transferee of property in stock only if these secured creditors had knowledge or notice of the seller's claim at the time of the creation of their security. In Quebec, given that the unpaid seller's remedies are not subject to any registration requirement, the likelihood of notice to a bank or transferee of property in stock is remote. Further, the Bills of Lading Act¹⁹⁷ does not provide any sanction or disincentive for the transferor who is remiss in his duty to indicate the claims of an unpaid vendor in a security agreement.

While the result is the almost certain subordination of a seller's right *vis-à-vis* these secured creditors, there is some ambiguity as to precisely which rights of the unpaid seller these statutes regulate. Both sections 179(1) of the Bank Act¹⁹⁸ and 27, paragraph 1 of the Bills of Lading Act¹⁹⁹ speak of the "claim" of an unpaid vendor. Despite some authority to the contrary,²⁰⁰ it is now fairly well settled that a seller's dissolution remedy particularly that under article 1543 C.C.L.C. is not such a "claim".²⁰¹ In other words, it is clear that the dissolution remedy of a seller, if available, will take precedence over the rights of a bank and transferee of property in stock.

Otherwise, there is little consistency in the interpretations of sections 179(1) of the Bank Act²⁰² and 27, paragraph 1 of the Bills of

¹⁹⁶ Bills of Lading Act, *ibid*.

¹⁹⁷ *Ibid*.

¹⁹⁸ Bank Act, *ibid*.

¹⁹⁹ Bills of Lading Act, *ibid*.

²⁰⁰ See *Re Paramount Leather Goods Co.: Druker v. Service Backing and Coating Corp.*, [1959] C.S. 42; *Bock et Tétreau Ltée v. Fonderie de l'Islet Ltée*, [1971] C.S. 379; *Chaîne Coopérative du Saguenay Inc. v. Laberge*, *supra*, footnote 186, at p. 327; *Re 93788 Canada Ltd.: Stendall v. Chemises Davelli Shirts Inc.* (5 June 1984), Montreal 500-11-001452-834 (C.S.); Rousseau-Houle, *op. cit.*, footnote 6, pp. 207-208; Rousseau-Houle, *loc. cit.*, footnote 136, at pp. 385-387.

²⁰¹ See Macdonald, *loc. cit.*, footnote 78, at p. 1058; Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 96; Auger, *loc. cit.*, footnote 136, at p. 299; Macdonald, *loc. cit.*, footnote 183, at p. 173; *Knitrama Fabrics Inc. v. K. & A. Textiles Inc.*, [1984] C.S. 1202; *Ménard v. Latulipe, Renaud, Bourque Ltée*, [1986] R.J.Q. 657 (C.S.); *Keymar Equipment Ltd. v. Thomcor Holding Ltd.*, *supra*, footnote 70; *Re Wm. A. Marsh Co. & Buzzell* (1930), 11 C.B.R. 436 (C.S.); LeDain, *loc. cit.*, footnote 64, at pp. 108-109.

²⁰² Bank Act, *supra*, footnote 11.

Lading Act.²⁰³ Certain authorities suggest that these provisions merely regulate the seller's claim for the purchase price without affecting his other non-consensual remedies.²⁰⁴ Another authority based on an historical analysis suggests that section 179(1) of the Bank Act²⁰⁵ is intended to subordinate only the unpaid seller's right of revendication.²⁰⁶ Goldstein²⁰⁷ and Macdonald²⁰⁸ state that the meaning of the term "claim of any unpaid vendor" in section 179(1) of the Bank Act²⁰⁹ is attenuated by the word "lien" used later in the sub-section. Accordingly, Goldstein appears to limit the "claim" of an unpaid vendor under section 179(1) to his "liens" or privileged rights in Quebec—the right of revendication and privilege on the proceeds of judicial sale.²¹⁰ Unfortunately, he does not address the enforceability of the seller's right of retention when he concludes that:²¹¹

... it remains very arguable that the unpaid vendor whose rights fall within C.C. 1543 (as opposed to the unpaid vendor exercising another one of his recourses), ought to be able to assert a claim to the goods ranking prior to that of a bank holding section 178 security.

By contrast, Macdonald concludes that the seller's right of retention, as well as his right of revendication and preference on the proceeds of a judicial sale, are subordinated to the rights of the bank under section 179(1).²¹² In his view, the claim of an "unpaid vendor" must be restricted to a seller's remedies for breach of a buyer's payment obligation.²¹³ Hence, dissolution for refusal to take delivery under article 1544 C.C.L.C., for example, is not the claim of an "unpaid vendor" in the context of section 179(1). Further, the notion of a "lien" in Quebec includes the seller's privileged rights of revendication and preference on judicial sale proceeds.²¹⁴ Macdonald also includes the seller's right of retention in this category by reference to the common law in which the expression "lien" refers to "a possessory right to resist the claim of another"²¹⁵

²⁰³ Bills of Lading Act, *ibid.*

²⁰⁴ See *Ménard v. Latulipe, Renaud, Bourque Ltée*, *supra*, footnote 201; Renaud, *loc. cit.*, footnote 183, at p. 526.

²⁰⁵ Bank Act, *supra*, footnote 11.

²⁰⁶ See M. Patenaude, *L'origine de la primauté du privilège d'une banque sur les droits d'un vendeur impayé* (1981), 22 C. de D. 667, at pp. 678-680.

²⁰⁷ See Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, pp. 93-94.

²⁰⁸ See Macdonald, *loc. cit.*, footnote 78, at pp. 1054, 1058.

²⁰⁹ Bank Act, *supra*, footnote 11.

²¹⁰ See Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 93.

²¹¹ See Goldstein, *ibid.*, p. 96.

²¹² See Macdonald, *loc. cit.*, footnote 78, at p. 1060. See also Rousseau-Houle, *loc. cit.*, footnote 135, at pp. 376-383; LeDain, *loc. cit.*, footnote 64, at p. 109.

²¹³ See Macdonald, *ibid.*, at pp. 1059, 1060.

²¹⁴ *Ibid.*, at pp. 1055-1056, 1058.

²¹⁵ *Ibid.*, at p. 1058.

and the expression "unpaid vendor's lien" refers to "the seller's right not to deliver the goods purchased until payment".²¹⁶ Finally, Macdonald excludes from the "claims" of an unpaid vendor all contractual and legal dissolution remedies because they are limitations on the rights of the buyer inherent in the contract of sale²¹⁷ and because the bank cannot acquire greater rights in the collateral than were vested in its debtor.²¹⁸

It is submitted that Macdonald's analysis of section 179(1) goes too far in subordinating the seller's right of retention to the rights of the bank. The goal of Macdonald's analysis is "to develop a genuine civil law characterization of section 178 security and to trace out its implications in respect of other civil law security devices".²¹⁹ To this end, for example, he characterizes section 178 security as a form of documentary pledge comprising a non-codal, statutory, accessory real right.²²⁰ As mentioned above, within a civil law framework, the seller's right of retention is a classic example of the *exceptio non adimpleti contractus*.²²¹ Like the seller's dissolution remedy under article 1543 C.C.L.C., the right of retention is inherent in the contract of sale and according to the principle of indivisibility of contracts binds all parties whose rights depend upon that contract. By contrast, the seller's right to revendicate and preference on judicial sale proceeds are extraordinary, privileged rights without any basis in the contract of sale other than the buyer's contractual breach.²²² If, as suggested by most authors including Macdonald,²²³ the word "lien" in section 179(1) signifies for the purposes of Quebec law the privileged, as opposed to purely contractual, claims of an unpaid vendor, it must be restricted to the revendication remedy and preference on judicial sale proceeds. If "lien" refers to the Quebec equivalent of the unpaid seller's lien in the common law, it must be restricted to the seller's right of retention under articles 1496 and 1497 C.C.L.C. While the revendication remedy is considered to be an extension of the right of retention beyond delivery to the buyer,²²⁴ it is nonetheless a distinct remedy without a common law counterpart.²²⁵ The unpaid seller's privi-

²¹⁶ *Ibid.*, at p. 1055.

²¹⁷ *Ibid.*, at p. 1058.

²¹⁸ *Ibid.*, at p. 1060.

²¹⁹ *Ibid.*, at p. 1015.

²²⁰ *Ibid.*, at pp. 1023-1028.

²²¹ See text, *supra*, footnote 136.

²²² See Boodman, *loc. cit.*, footnote 20, at p. 920. The characterization of the revendication remedy as a codal extension of the right of retention supports its extraordinary and privileged nature. See authorities cited *supra*, footnote 78.

²²³ See Macdonald, *loc. cit.*, footnote 78, at p. 1058; Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 93; LeDain, *loc. cit.*, footnote 64, at p. 108.

²²⁴ See authorities cited *supra*, footnote 78.

²²⁵ The common law provides the unpaid seller with a remedy of stoppage *in transitu* which is distinct from the unpaid seller's lien. This remedy is extinguished by delivery

lege replaces the right of revendication in certain circumstances. Hence, the two are inextricably linked, though mutually exclusive.²²⁶

The result is that it is not possible to interpret the word "lien" in section 179(1) so as to designate the seller's rights of retention, revendication and preference on the proceeds of a judicial sale and thereby subordinate all of these rights to those of the bank. Admittedly, the wording of section 179(1) is obscure. The legislative history of the provision indicates that it was intended to protect a bank as a documentary pledgee of a bill of lading or warehouse receipt from an unpaid vendor's lien on goods in the common law²²⁷ and an unpaid seller's right of revendication in the civil law.²²⁸ As indicated earlier, a seller in retention could not compete with a documentary pledgee who is a constructive possessor.²²⁹ Hence, historically it would not be necessary to give a documentary pledgee priority over a seller exercising his right of retention. Further, the historical analysis is supported by an *obiter dictum* in the case of *Knitrama Fabrics Inc. v. K. & A. Textiles Inc.*²³⁰ in which it is stated that the "claim" of an unpaid vendor in section 179(1) designates the seller's right of revendication.²³¹ Hence, while there is no judicial authority directly on point, there is a reasonable argument that the seller's right of retention, like that of dissolution, is enforceable *vis-à-vis* a bank with section 178 security. This priority would apply by analogy *vis-à-vis* the rights of a transferee of property in stock under the Bills of Lading Act.²³²

In summary, it appears that from a substantive point of view, a seller's right of retention is arguably enforceable *vis-à-vis* all of the poten-

and thus is not analogous to revendication in Quebec. See G.H. Fridman, *Sale of Goods in Canada* (Carswell, 3d ed., 1986), pp. 309-329; P.S. Atiyah, *The Sale of Goods* (Pitman, 5th ed., 1975), pp. 252-267; M.G. Bridge and F.H. Buckley, *Sales and Sales Financing in Canada* (Carswell, 1981), pp. 375-376. In Quebec, the remedy of stoppage in transit is subsumed by the right of retention under arts 1496 and 1497 C.C.L.C. See text, *supra*, footnotes 29-30.

²²⁶ See art. 2000 C.C.L.C.

²²⁷ See J.D. Falconbridge, *The Law of Banks and Banking* (Canada Law Book, 5th ed., 1935), pp. 262-263; I.F.G. Baxter, *The Law of Banking* (Carswell, 5th ed., 1981), pp. 210-211; R.C.C. Cuming and R.J. Wood, *Compatibility of Federal and Provincial Personal Property Security Law* (1986), 65 Can. Bar Rev. 267, at pp. 273-274.

²²⁸ See Patenaude, *loc. cit.*, footnote 206, at pp. 678-680; Cuming and Wood, *ibid.*, at p. 273, note 25.

²²⁹ See text *supra*, footnote 152.

²³⁰ *Supra*, footnote 201.

²³¹ *Ibid.*, at pp. 1208-1209. Unfortunately, the weight of this *obiter dictum* is questionable because O'Connor J. erroneously states that the right of revendication is recognized by both common and civil law systems.

²³² Bills of Lading Act, *supra*, footnote 11.

²³³ See *R. v. Restaurant and Bar La Seigneurie de Sept-Iles Inc.*, *supra*, footnote 176; *Bensol Customs Brokers Ltd. v. Faucher*, [1974] R.P. 381 (C.P.); *Ville de Montréal*

tially competing ordinary and secured creditors of his buyer. However, in order to be truly effective, this right must also be enforceable from a procedural perspective.

As mentioned earlier, the absence of any coherent system to determine priorities between competing secured, possessory rights in Quebec is exacerbated by a number of procedural problems which affect the enforceability of the seller's right of retention.

Primary among these problems is whether a seller can on the basis of his right of retention resist a seizure in execution initiated by a judgment creditor of the buyer. The issue arises out of a controversy regarding the scope of article 597 C.C.P. in light of the wording of article 604 C.C.P. Article 597 C.C.P. regulates oppositions by third parties to withdraw goods from the execution process. It states:

The opposition may also be taken by a third party who has a right to revendicate any part of the property seized.

Article 604 C.C.P. provides, *inter alia*:

The creditors of the debtor, for any reason, even for rental, cannot oppose the seizure or the sale; they can only exercise their privilege upon the proceeds of the sale, by opposition for payment.

The specific problem of interpretation is to determine the degree to which, if any, article 604 C.C.P. limits the notion of "a third party who has a right to revendicate" in article 597 C.C.P. The various authorities provide a number of interpretations. The most restrictive is that article 604 C.C.P. prevents any third party who is a creditor of the execution debtor from invoking article 597 C.C.P. to oppose a seizure in execution.²³³ According to this interpretation, article 597 C.C.P. is available only to a third party owner or person whose rights derive from a third party owner of goods seized. Other authorities would permit any third party with a right to revendicate—an owner, as well as non-possessory secured creditors—to invoke article 597 C.C.P.²³⁴ Still others would limit this provision as regards non-owners to third parties with a right to revendi-

v. *Groupe des Dix Inc.*, [1982] R.P. 290 (C. mun.); Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 278-279, 339, 340, 357-358; Macdonald, *loc. cit.*, Part Two, footnote 52, at p. 82; Frenette, *op. cit.*, footnote 136, no. 49; Macdonald, *loc. cit.*, footnote 31, at pp. 612-613.

²³⁴ See *B. Fabian Inc. v. Restaurant Le Carafon de Vin Ltée*, [1980] C.S. 768; *Russelsteel Ltée v. Danitech Inc.* (16 May 1979), Montreal 05-000162-790 (C.S.) (J.E. 79-670); *Jean-Talon Auto Parts Ltée v. Funaro Station Service Inc.* (29 November 1984), Montreal 500-02-015943-843 (C.P.) (J.E. 85-9); *Sous-Ministre du revenu du Québec v. Bédard* (15 July 1985), Chicoutimi 150-05-000014-839 (C.S.) (J.E. 85-788); *Sous-Ministre du revenu du Québec v. Studio Angers Inc.* (11 December 1980), Montreal 500-05-009790-807 (C.S.) (J.E. 81-171); *Doyle, Dane, Bernbeck Advertising Ltd. v. Réserve Expertise* (1978) *Ltée*, [1980] C.S. 772; *Service Finance Corp. v. Decca Radar Canada (1967) Ltd.*, [1971] C.A. 664.

cate who also have possession of the goods at the time of the seizure in execution.²³⁵ Finally, there is authority which indicates that a pledgee with a right to revendicate can make an opposition to withdraw under article 597 C.C.P. only against a lower ranking execution creditor of his pledgor.²³⁶

While most authorities tend to permit creditors with a right to revendicate to avail themselves of article 597 C.C.P., complete analysis of this controversy is beyond the scope of this article. The problem is raised here to indicate the dichotomy between the substantive and procedural enforceability of secured rights in Quebec including the unpaid seller's right of retention. More importantly, the controversy surrounding article 597 C.C.P. demonstrates that despite its substantive priority the seller's retention remedy may not be enforceable at all once the goods have become implicated in the execution process. This results from the fact that a purchaser in a judicial sale acquires clear and enforceable title.²³⁷ As mentioned earlier, the process of seizure and sale in execution of a judgment is available not only to ordinary creditors, but also to preferred or secured creditors intending to exercise their preference on the proceeds of a judicial sale.²³⁸ Hence, these creditors will prevail if article 597 C.C.P. is not available to a seller exercising a right of retention.

To complicate matters further, it seems that article 597 C.C.P. with all of its uncertainty may apply where the goods held by the seller are seized before judgment by a creditor of the buyer. According to article 737 C.C.P., seizure before judgment is governed by the same rules as seizure after judgment so far as they are applicable.²³⁹ Article 738 C.C.P. states that the defendant to a seizure before judgment may demand that

²³⁵ See *Sous-Ministre du revenu du Québec v. Fountainhead Fun Center Ltd.*, [1981] R.D.F.Q. 105 (C.S.); *Sous-Ministre du revenu du Québec v. Transport Sirois Ltée*, [1983] C.P. 145; *Sous-Ministre du revenu du Québec v. Restaurant Chez Gisèle Forget Ltée*, [1984] C.S.488; L. Payette, *Opposition afin de distraire—Nantissement commercial—Droit de rétention* (1979), 39 R. du B. 1032; L. Payette, *Charge flottante: Privilège de la Couronne et saisie entre les mains du fiduciaire* (1980), 40 R. du B. 337.

²³⁶ See *Sous-Ministre du revenu du Québec v. Total Rental Equipment Inc.*, *supra*, footnote 161. The addition of the comparative rank of creditors as a factor in the interpretation of art. 597 C.C.P. appears to be misguided. Based on this test, any preferred or secured creditor would be able to invoke art. 597 C.C.P. against a chirographic, execution creditor. According to its facts, this case is best interpreted to indicate that art. 597 C.C.P. is in principle available to a creditor in possession. However, if the creditor is a pledgee the substantive enforceability of his rights will be affected by the preferred rank, if any, of the creditor who has initiated the execution process. See Payette, *Charge flottante*, *ibid.*, at pp. 342-343.

²³⁷ See arts 577, 612 C.C.P.; arts 1490, 2268(5) C.C.L.C.; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 280-281.

²³⁸ See text *supra*, footnote 155.

²³⁹ See, for example, *Cie de construction Belcourt Ltée v. Bronzage 3 Soleils*, [1986] R.D.J. 26 (C.A.).

the seizure be quashed on the basis of the insufficiency or falsity of allegations made in support of it. Recent cases have stated that the term "defendant" in article 737 C.C.P. includes any third party whose rights could be affected by the seizure.²⁴⁰ It has been held that since third parties may avail themselves of a motion to quash a seizure before judgment under article 738 C.C.P., they may also take an opposition to withdraw goods from such a seizure under article 597 C.C.P.²⁴¹ While this is ostensibly consistent with article 737 C.C.P. mentioned above, it raises a number of problems. For example, seizure before judgment is not limited to ordinary or preferred claims which lead to a judicial sale. It is also a conservatory measure available in support of purely possessory remedies.²⁴² By contrast an opposition to withdraw under article 597 C.C.P. is limited to the execution process leading to a judicial sale. Should the remedy of article 597 C.C.P. as applied to seizures before judgment be restricted to an eventual judicial sale context?²⁴³ If not, it becomes necessary to impose a coherent standard for determining the substantive priorities between competing secured, possessory rights.²⁴⁴ As stated before, no such standard yet exists.²⁴⁵ Assuming article 597 C.C.P. applies to all instances of seizure before judgment, does a "defendant" *lato sensu* have the option of opposing under article 597 C.C.P. or taking a motion to quash under article 738 C.C.P.? If so, are the grounds for the remedy under article 597 C.C.P. limited by article 738 C.C.P. which refers to the insufficiency and falsity of the allegations made in support of a seizure before judgment?²⁴⁶ The terms of article 738 C.C.P. do not appear to address issues of priority of competing rights, but only entitlement to seizure before judgment.

²⁴⁰ See *Merton v. Vetemode International Marketing Inc.*, [1984] R.D.J. 467 (C.A.); *Pavall/Sabrice Entreprises Conjointes v. Iberville Lumber Inc.*, [1985] R.D.J. 653 (C.A.); *Banque de Commerce Canadienne Impériale v. Knitrama Fabrics Inc.*, [1983] R.D.J. 417 (C.A.), [1983] C.A. 565.

²⁴¹ See *Banque de Commerce Canadienne Impériale v. Knitrama Fabrics Inc.*, *ibid.*; *Schenker of Canada Ltd. v. Corby Import Inc.*, [1975] C.S. 235; *Quevillon v. Chionis*, [1973] R.P. 365 (C.S.); *Vachon v. Area Decal Inc.*, [1971] R.P. 27 (C.P.). See also Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, p. 283.

²⁴² See art. 734(1) C.C.P. which permits a plaintiff to seize before judgment "the moveable property which he has a right to revendicate as owner, pledgee, depositary, usufructuary, institute, substitute or unpaid vendor".

²⁴³ See, for example, arts 733 and 734(2), (4) C.C.P.

²⁴⁴ In its context of execution of judgments leading to a judicial sale, art. 597 C.C.P. entails competition between a possessory right and an ordinary or preferred judgment creditor seeking payment. The interpretation of art. 597 C.C.P. determines the enforceability of the possessory right.

²⁴⁵ See text *supra*, footnotes 161-162.

²⁴⁶ See as to the notion of insufficiency and falsity under article 738 C.C.P., *Corp. Municipale de Granby v. Cadorette*, [1986] R.D.J. 326 (C.A.).

These problems result from the marked differences between the post-judgment context of article 597 C.C.P. and the pre-judgment context of the seizure before judgment.²⁴⁷ Ignoring these differences, certain authorities have argued that any desired consistency in the notion of a person with a right to revendicate in articles 734(1) and 597 C.C.P. supports a wide interpretation of the latter provision.²⁴⁸ On the other hand, functional consistency between articles 738 C.C.P. and 597 C.C.P. is achieved when the basis for objection to either seizure before or after judgment is restricted to third party ownership or a right derived from a third party owner.²⁴⁹ In this case, the alleged insufficiency of the allegations in support of a seizure before judgment would be based on third party ownership which would correspond with the third party owner's right to oppose a seizure after judgment under article 597 C.C.P.

Given these unresolved problems, it is uncertain whether a seller can oppose his right of retention to annul a seizure before judgment taken by a creditor of the buyer. Unlike the case of seizure and judicial sale after judgment,²⁵⁰ it seems that seizure before judgment itself does not cause a seller to lose his right of retention.²⁵¹ Nevertheless, it may restrict severely his ability to deal with the goods.²⁵² Of course, the uncertainty associated with seizure before judgment is compounded by the interpretation problems regarding article 597 C.C.P. discussed above.

Another procedural problem concerns the defences available to the seller in retention as defendant in a revendication action initiated by a creditor of the buyer. Assuming as discussed above that the seller's retention remedy is substantively enforceable against third parties, what is the proper defence position? In cases concerning the right of retention *stricto sensu*, the tendency is for retention creditors to confess judgment conditional upon payment.²⁵³ In other words, it is permissible for a reten-

²⁴⁷ For judicial recognition of these differences, see *Quevillon v. Chionis*, *supra*, footnote 241.

²⁴⁸ See *Service Finance Corp. v. Decca Radar Canada (1968) Ltd.*, *supra*, footnote 234; *Sous-Ministre du revenu du Québec v. Fountainhead Fun Center Ltd.*, *supra*, footnote 235; *Doyle, Dane, Bernbeck Advertising Ltd. v. Réserve Expertise (1968) Ltée*, *supra*, footnote 234; Payette, *Opposition afin de distraire*, *loc. cit.*, footnote 235, at p. 1034.

²⁴⁹ See text *supra*, footnote 233.

²⁵⁰ See text *supra*, footnote 237.

²⁵¹ This results from the fact that according to art. 737 C.C.P. seizure before judgment merely places property "in the hands of justice" and, for example, does not cause a creditor with a right of retention *stricto sensu* to lose that secured status. See *Entreprises Jean-Claude Lalonde Ltée v. Blanchette*, [1980] C.S. 509.

²⁵² Presumably art. 583 C.C.P. which prohibits removal and damage of property under seizure in execution applies to seizure before judgment by virtue of art. 737 C.C.P.

²⁵³ See *Standard Credit Corp. v. Nadeau*, *supra*, footnote 164; *Atlas Thrift Plan Corp. v. Lussier*, [1955] R.P. 181 (C.S.); *Gagné v. Daigle* (1918), 54 C.S. 239; *Lortie*

tion creditor to admit the rights of a plaintiff in revendication while steadfastly refusing to give up possession of the goods until he is paid in full. Further, he may, at his option, use this defence position instead of resorting to an opposition to withdraw where the goods have been seized before or after judgment.²⁵⁴ By analogy, this strategy should be available to a seller exercising a right of retention. However, its availability in the context of seizure before and after judgment further complicates the procedural aspects of the seller's retention remedy because it obscures the role of an opposition to withdraw under article 597 C.C.P.

The uncertainty regarding both the substantive and procedural enforceability of the seller's right of retention *vis-à-vis* third parties raises serious questions about its usefulness as an interim or conservatory remedy. In particular, it seems that where third party competition is likely, the seller's preference on judicial sale proceeds and right of dissolution coupled with a seizure before judgment are more effective than the prolonged use of the right of retention.

The seller in retention would likely fulfill the conditions under article 2000, paragraph 1 C.C.L.C. for a preference on the proceeds of a judicial sale ranked at article 1994(3) C.C.L.C. These conditions are that the seller fulfill the requirements for revendication under article 1999 C.C.L.C.,²⁵⁵ but be prevented from exercising the revendication remedy by the seizure or judicial sale of the goods initiated by a third party. It has been suggested that a seller in retention can seize the goods before or after judgment in his own hands in order to provoke an eventual judicial sale and exercise a preference on its proceeds.²⁵⁶ A seller in retention could also seize before or after judgment to exercise a lower ranking preference on judicial sale proceeds under article 2000, para-

v. Bédard, *supra*, footnote 164; *Pacific Finance Credit Ltd. v. Faucher*, *supra*, footnote 164; *Elliot Krever & Associates Ltd. v. Montreal Casting Repairs Ltd.*, *supra*, footnote 161; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, at p. 338; Ciotola, *op. cit.*, footnote 148, p. 49.

²⁵⁴ See *Laurentide Finance Co. v. Paquette*, *supra*, footnote 164; *Mercier v. Pigeon & Tourville* (1909), 36 C.S. 324; *Atlas Thrift Plan Corp. v. Lussier*, *ibid.*; *Gringras v. Maher* (1917), 53 C.S. 289; Macdonald, *ibid.*

²⁵⁵ The conditions for revendication under art. 1999 C.C.L.C. are that (1) the sale not have been made on credit; (2) the thing be entire and in the same condition; (3) the thing not have passed into the hands of a third party who has paid for it; and (4) the right be exercised within eight days after delivery except in the case of the buyer's insolvency where this delay is extended to thirty days. See Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 305-306.

²⁵⁶ See Macdonald, *ibid.*, p. 342; Rousseau-Houle, *loc. cit.*, footnote 136, at pp. 376-377; Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 97; Rousseau-Houle, *op. cit.*, footnote 6, p. 203; Ciotola, *op. cit.*, footnote 148, p. 173; *Jocami Inc. v. Joly*, [1982] C.S. 637; *Thibault v. Dame Perron-Lanthier*, [1969] B.R. 138; *Sichelschmidt v. H. Nickel Industries of Canada Ltd.*, [1966] C.S. 143. See also art. 734, paras 1 and 4 C.C.P.

graph 2 C.C.L.C. where he has lost the right to revendicate because he has given a term for payment in the contract of sale.²⁵⁷

The seller in retention could also dissolve the contract of sale and reacquire ownership of the goods with retroactive effect. Whether a dissolution remedy is exercised without court intervention under article 1544 C.C.L.C.²⁵⁸ or with court intervention under articles 1543 or 1065 C.C.L.C., at present it is by far the best remedy available to the unpaid seller and, in particular, the unpaid seller in retention.

From the point of view of substantive enforceability, the dissolution remedy may be opposed to all creditors of the buyer potentially in competition with the seller in retention. The retroactive loss of ownership by the buyer deletes the goods from his patrimony and invalidates *vis-à-vis* these goods the claims of the buyer's chirographic and preferred creditors. This loss of ownership combined with the seller's custody of goods invalidates the potential claims of a subsequent acquirer from the buyer and commercial and agricultural pledgee for reasons described above.²⁵⁹ Similarly, a corporate buyer could not validly create trust deed security over goods which it does not own.²⁶⁰ Further, the dissolution remedy of a seller in retention is enforceable against a bank with section 178 security and transferee of property in stock.²⁶¹

From a procedural perspective, there is no doubt that an opposition to withdraw under article 597 C.C.P. is available to a third party owner of goods seized before or after judgment.²⁶² This would include a seller in retention whose ownership is or will be re-established by a dissolution remedy. Further, a seller in retention intending to dissolve a contract of sale could seize before judgment under article 734(1) C.C.P. as an eventual owner, as opposed to an unpaid vendor, with a right to revendicate.²⁶³

²⁵⁷ See art. 734(4) C.C.P. The lower ranking preference on judicial sale proceeds which results from not having exercised the right of revendication within eight days of delivery according to art. 1999(4) C.C.L.C. does not apply to the seller in retention who, as explained above, has not yet delivered the goods. See art. 2000, para. 2 C.C.L.C.

²⁵⁸ The Quebec doctrine states that a seller with custody of goods by virtue of a right of retention or right of revendication can dissolve the contract of sale without court intervention under art. 1554 C.C.L.C. See Rousseau-Houle, *op. cit.*, footnote 6, pp. 200, 202, 205; Goldstein, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 92; Macdonald, in Springman and Gertner, *op. cit.*, footnote 131, pp. 339-340, 341; Macdonald and Simmons, in Meredith Memorial Lectures, *op. cit.*, footnote 78, p. 263; Rousseau-Houle, *loc. cit.*, footnote 136, at pp. 376-377.

²⁵⁹ See text *supra*, footnotes 166-172, 175-176.

²⁶⁰ See text *supra*, footnote 185.

²⁶¹ See text *supra*, footnote 201, and authorities cited herein.

²⁶² See text *supra*, footnotes 233-235 and authorities cited therein. See also *Théberge-Brochu v. Morin*, [1980] C.A. 193.

²⁶³ See *Thibault v. Dame Perron-Lanthier*, *supra*, footnote 256; *Sichelschmidt v. H. Nickel Industries of Canada Ltd.*, *supra*, footnote 256; *Jocami Inc. v. Joly*, *supra*, foot-

In summary, a seller in retention who retroactively reacquires ownership by dissolving the contract of sale prevails both procedurally and substantively over all potentially competing creditors of his buyers. As shown above, despite arguments in support of a similar priority for the seller's right of retention, there is too much uncertainty surrounding the status of the remedy for it alone to be a completely reliable conservatory measure in the face of competing secured or preferred creditors of the buyer.

Nonetheless, the right of retention is an important, even essential, element of the scheme for protecting the unpaid seller of moveables in Quebec. As a remedy which permits the seller to withhold delivery of goods, the right of retention prevents the buyer from acquiring possession of them and transferring possession to a third party. Not only does this eliminate the possibility of competing possessory, secured creditors,²⁶⁴ it also helps conserve the seller's dissolution remedies and preference on judicial sale proceeds. These remedies require that the goods not be delivered to the buyer²⁶⁵ or, if delivered, not have been sold and delivered by him to a third party.²⁶⁶ Further, the retention remedy ensures the physical integrity of the goods which is a requirement for a dissolution remedy under article 1543 C.C.L.C. and a preference on the proceeds of judicial sale.²⁶⁷ Consequently, if challenged by a third party creditor, a seller in retention can without difficulty convert his retention remedy to one of dissolution or a preference on the proceeds of judicial sale, whichever is most beneficial to him.

The enforceability and usefulness of the seller's right of retention are enhanced indirectly by the second paragraph of article 1027 C.C.L.C. which provides:

But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith.

This provision permits a seller in retention to transfer a valid and enforceable title to a third party in good faith provided that delivery is made to him. This application of the maxim *possession vaut titre* is extraordinary in that it validates the sale of a thing technically not belonging to the seller without the restrictions imposed by articles 1488 C.C.L.C. *et seq.*

note 256; Rousseau-Houle, *op. cit.*, footnote 6, p. 207; Rousseau-Houle, *loc. cit.*, footnote 135, at pp. 384-385.

²⁶⁴ See text *supra*, footnotes 151-154.

²⁶⁵ See art. 1544 C.C.L.C.

²⁶⁶ See arts 1543 and 1999(3) C.C.L.C.

²⁶⁷ See art. 1999(2) C.C.L.C.; *Mechanic Supply Co. v. Hudon* (1933), 71 C.S. 400; *Mercure v. Philippe Beaubien et Cie*, *supra*, footnote 23; *Roy v. Bois Ste-Lucie Inc.*, *supra*, footnote 115; Macdonald and Simmonds, in Meredith Memorial Lectures, *op. cit.*, footnote 23, p. 262; Rousseau-Houle, *op. cit.*, footnote 6, pp. 204, 206; Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 306, 333-334.

and 2268 C.C.L.C.²⁶⁸ and without rupturing the contractual relationship between the seller and his original buyer. In the latter regard, article 1027, paragraph 2 C.C.L.C. would be unnecessary if the first contract of sale were no longer in existence.

The result is that a seller in retention can attempt to mitigate the damages caused by the buyer's non-payment without potential interference from the buyer's secured or unsecured creditors. Article 1027, paragraph 2 C.C.L.C. also implies that the voluntary loss of detention to a third party in good faith does not extinguish the seller's right of retention in that he will still have a valid defence against any action for delivery taken by the buyer. Further, this codal provision as applied to the seller's right of retention distinguishes the remedy from the right of retention *stricto sensu*. A creditor exercising the latter remedy cannot validly transfer title in the thing retained save as permitted by the exceptional rules for private realization²⁶⁹ and sale of a thing not belonging to a seller.²⁷⁰ In this regard, the second paragraph of article 1027 C.C.L.C. elevates the seller's retention beyond mere custody and certainly closer to possession than that of a creditor exercising a right of retention *stricto sensu*.²⁷¹

The analysis of the seller's right of retention as an *exceptio non adimpleti contractus*, its enforceability and utility as a link to the seller's other non-consensual remedies indicate that it is essentially a hybrid real and personal right. The role of possession in a seller's obligation to deliver provides a real right or proprietary component to the right of retention. The extensive enforceability of the remedy proposed here also denotes its "real" nature. By contrast, the primarily contractual setting of the right of retention and its classification as an *exceptio non adimpleti contractus* lead to its characterization as a personal right or purely contractual remedy. To say that the right of retention is a hybrid in nature is to say that it defies classification based on the traditional taxonomy of the civil law. Where, as in the case of the seller's right of retention, this taxonomy would be misleading, it is possible and preferable to obtain a precise understanding of a legal mechanism by a description of its attributes.²⁷²

Finally, the present analysis of the seller's right of retention demonstrates that a buyer with title but without custody and, hence, without

²⁶⁸ See text *supra*, footnotes 166-175, and authorities cited therein.

²⁶⁹ See Macdonald, in Springman and Gertner, *op. cit.*, footnote 132, pp. 345-347.

²⁷⁰ See arts 1488 C.C.L.C. *et seq.*, and 2268 C.C.L.C. See also authorities cited, *supra*, footnote 173.

²⁷¹ For a statement that a retention creditor does not acquire possession *vis-à-vis* the owner of the goods retained, see *Rickner v. Picard*, [1945] C.S. 432, at p. 434.

²⁷² This methodology is exemplified by Macdonald, *loc. cit.*, footnote 78, and Auger, *loc. cit.*, footnote 136. See also Boodman, *loc. cit.*, footnote 20, at p. 889.

possession of goods is or may be legally paralysed in his use and exploitation of them. This results primarily from the analysis of the substantive enforceability of the right of retention and demonstrates the correlative importance of custody and possession within the law of security on moveable property in Quebec.²⁷³

Conclusion

The right of retention under articles 1496 and 1497 C.C.L.C. permits a seller of moveables to withhold delivery of them if he has a reason to believe that he will not be paid the purchase price upon delivery or upon expiration of any term granted for payment. This right enables a seller to stop the process of delivery and, if necessary, to re-acquire custody of goods at any time until the buyer has participated in the process for the specific purpose of accepting delivery.

Despite the traditional classification of the seller's right of retention as an *exceptio non adimpleti contractus*—a purely contractual remedy—its potential enforceability goes beyond the contractual sphere to include all competing secured and preferred creditors of the buyer. However, doctrinal and judicial uncertainty regarding the substantive and procedural enforceability of possessory, secured rights in Quebec make the seller's right of retention unreliable in the face of claims by competing creditors of the buyer. Nevertheless, the remedy is an essential link to other non-consensual remedies of the seller of moveables and for the mitigation of damages by him.

The seller's right of retention is a hybrid real and personal right an understanding of which is best acquired through detailed analysis of its attributes as opposed to traditional civil law classifications. Aside from an understanding of the scope and nature of the right of retention, the present analysis illustrates the profound importance of both custody and possession within the Quebec moveable security model.

²⁷³ For an analysis of the legal position of the preparing buyer who has acquired ownership but not possession of moveables *vis-à-vis* the secured creditors of his seller, see Boodman, *ibid.*, at pp. 885 *et seq.*