

FLEXIBILITY AND CERTAINTY AS COMPETING CONTRACT VALUES: A CIVIL LAWYER'S REACTION TO THE ONTARIO LAW REFORM COMMISSION'S RECOMMENDATIONS ON AMENDMENTS TO THE LAW OF CONTRACT

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Introduction

It is evident upon reading the *Report on the Amendment of the Law of Contract* that the tension between the competing contract values of certainty and flexibility was a primary concern of the Ontario Law Reform Commission. The introduction to the Report states that:¹

Insofar as a common thread runs throughout our recommendations, it is that certainty is not the only important value in contract law and that frequently it must be matched by flexibility in devising appropriate solutions where past doctrines have proved too rigid or, in some cases, have become obsolete, or where public policy militates against enforcement of all the terms of a bargain.

There exists, in Quebec law, a similar tension between the competing values of certainty and flexibility, and the concerns of the Ontario Law Reform Commission reflect concerns in Quebec law as well. However, given the differences in our respective legal traditions, the precise areas of concern are not always co-extensive. In certain instances, the civil law of Quebec already possesses a great deal of the flexibility that the Report is proposing to introduce into the common law of Ontario. Areas illustrative of such flexibility in the civil law include consideration, third party benefits and good faith. However, this flexibility does not extend to many other subjects in the Quebec law of contractual obligations. The area most reflective of inflexibility present in Quebec contract law is that of unconscionability or, as it is known in Quebec, *lesion*.

My paper will first give a broad overview of the areas in which the OLRC is trying to achieve the flexibility already present in Quebec law and will then discuss, in greater detail, a problematic area in both the civil and common law systems, unconscionability, an area where Quebec law has been traditionally inflexible. The paper will conclude by addressing the manner in which the OLRC is seeking to reform Ontario contract law and how the Quebec civil law experience can provide some helpful insights into the implications of its recommendations.

¹ Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987), p. 2 (hereafter referred to as the OLRC Report or Report). In this paper, I will use the terminology adopted in the OLRC Report rather than the terminology used in the civil law.

1. Elements of Flexibility in Quebec Contract Law

(1) Consideration

One example of flexibility in the civil law of Quebec is in the area of consideration. The civil law has avoided many of the problems encountered by the common law because the civil law has more flexible and less stringent requirements regarding consideration. Quebec law, unlike the common law, recognizes and enforces gratuitous contracts. The only caveat is that gratuitous contracts which have the effect of passing ownership, *e.g.* donations, must be evidenced in a notarial deed or, if relating to corporeal movable property, the property must actually be handed over, or the contracts will not be valid.² While art. 984 of the Civil Code lists "a lawful cause or consideration" as one of the four requisites to the validity of a contract, the requirement is a very weak one since "intention libérale" or benevolent intention is recognized as a valid cause of a gratuitous contract.

Several problematic issues relating to consideration in the law of Ontario, which are the subject of specific recommendations in the OLRC Report,³ simply do not arise in Quebec. There is no doubt that in Quebec law, a later agreement to accept part performance of an obligation in place of full performance, an agreement to waive performance of an obligation altogether, or an agreement to modify a contract needs no consideration in order to be binding.⁴ Nor is the concern expressed in the Report regarding firm offers a problematic area in Quebec law. Offers with a term, as they are known in Quebec, are enforceable and need not be supported by any consideration.⁵ Finally, regarding past consideration, in civil law, a pre-existing natural obligation (for example, the alimentary obligation to support needy relatives, the obligation of a discharged bankrupt or the obligation of a debtor whose debt has been prescribed) can form the cause or consideration of a subsequent legal obligation. This transforms an otherwise bare promise into an onerous contract and relieves the parties of the need to fulfil any formal requirement, such as the execution of a notarial deed.⁶

² Article 776 C.C.

³ Report, at pp. 32-4.

⁴ See arts. 1022 and 1169 C.C.

⁵ See *Renfrew Flour Mills v. Sanschagrin* (1928), 45 Que. K.B. 29.

⁶ See *Re Ross: Hutchison v. Royal Institute for the Advancement of Learning*, [1931] 4

The notion of cause has had such a minor role to play in Quebec contract law that the Civil Code Revision Office's *Report on the Quebec Civil Code* has even proposed its abolition as a necessary condition to the formation of a contract.⁷ It can therefore be seen that, in the area of consideration, the OLRC recommendations evidence a move away from the rigidity of the existing common law rules towards the more flexible attitude already present in the law of Quebec.

(2) Third Party Benefits

Another notable example of how the Report's recommendations seek to approximate the more flexible position existing in Quebec civil law is that of third party benefits. As noted in the Report itself, the recommendation to enforce contracts for the benefit of third parties is something that the civil law already does through art. 1029 C.C., a provision which specifically gives the right to stipulate in any contract, including a gift, for the benefit of a third person, even if that third party is not privy to the contract or has not given any consideration for the benefit.⁸

The civil law, therefore, has never had to perform the legal gymnastics required of the common law courts seeking to find ways around the problem of privity and to enforce certain stipulations for the benefit of third parties.⁹

The OLRC recommendation should therefore be applauded as a welcome addition of flexibility in Ontario's contract law. Perhaps the provision could be drafted in a somewhat more elaborate fashion to make reference to certain potential difficulties with which Quebec law has already had to grapple. For instance, the provision might deal with the issue of revocability: who can revoke the benefit and when does it become irrevocable?

D.L.R. 689, [1932] S.C.R. 57; *Pesant v. Pesant*, [1934] 2 D.L.R. 623, [1934] S.C.R. 249; *Rouleau v. Poulin*, [1965] Que. Q.B. 292.

⁷ Quebec, Civil Code Revision Office, *Report on the Quebec Civil Code: Draft Civil Code*, Vol. 1 (Québec, Editeur Officiel, 1978) (hereafter "D.C.C."). See art. 9 D.C.C. and Quebec, Civil Code Revision Office, *Report on the Quebec Civil Code: Commentaires*, Vol. 2 (Québec, Editeur Officiel, 1978) (hereafter the *Commentaires*), p. 554.

⁸ Article 1029 reads: "A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it."

⁹ *New Zealand Shipping Co. Ltd. v. Satterthwaite & Co. Ltd.*, [1975] A.C. 154 (P.C.); *Port Jackson Stevedoring Pty Ltd. v. Salmond and Spraggon (Australia) Pty Ltd. (the New York Star)* (1978), 18 A.L.R. 333.

Article 1029 C.C. states that "he who makes the stipulation cannot revoke it, if the third person have signified his assent to it." Rinfret J., in *Hallé v. Canadian Indemnity Co.*,¹⁰ stated that the assent of the third party is not necessary to bind the promisor and that any manifestation of "intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour"¹¹ has the effect of rendering the stipulation irrevocable.

Another aspect that could be clarified is the question of who can sue to enforce the stipulation. There has never been any doubt in Quebec law that the third party has a direct action against the promisor. However, certain cases precluded the stipulator (promisee) from enforcing the promise against the promisor,¹² and it is only recently that courts have upheld the stipulator's right to enforce the promise in favour of the third party.¹³

For reasons of clarity, it may also be helpful to provide that in addition to the possibility of a positive third party benefit, to do or to give something, the benefit may also take the form of a negative obligation not to do something. This clarification would recognize the ability of third parties to benefit from exclusion clauses stipulated in their favour and from undertakings by promisors not to sue third parties.¹⁴

A final area, still controversial in Quebec, which could be addressed in the recommended provision is whether the stipulation need be express or whether it can be tacit. In particular, can a third party benefit arise simply from the nature of the contract?¹⁵

While most of these questions are no longer troublesome in Quebec law, the OLRC would be well advised to recommend the inclusion of such details to avoid potential difficulties in the future when courts will be called upon to interpret any provision recognizing the validity of third party benefits.

¹⁰ [1937] 3 D.L.R. 320, [1937] S.C.R. 368.

¹¹ *Ibid.*, at p. 328 D.L.R., p. 377 S.C.R. In that case, a notice of accident given by the third party to the promisor insurance company was sufficient to render the stipulation irrevocable.

¹² *Lacasse v. Poulin*, [1953] Que. Q.B. 125.

¹³ *Pisapia Construction v. St. Fabien Industriel*, [1977] Que. C.A. 528.

¹⁴ As in *Ceres Stevedoring Co. Ltd. v. Eisen and Metall*, [1977] Que. C.A. 56.

¹⁵ If it can be tacit, it could provide a theoretical explanation for the decision in *General Motors Products of Canada v. Kravitz* (1979), 93 D.L.R. (3d) 481, [1979] 1 S.C.R. 790. See J. Ghestin, "L'arrêt Kravitz et le droit positif français sur la garantie des vices cachés" (1980), 25 McGill L.J. 315, at pp. 330-2.

(3) Good Faith

Another move towards flexibility in the OLRC Report is found in its recommendation that legislation be enacted to recognize a doctrine of good faith in the performance and enforcement of contracts. Although there is no explicit doctrine of good faith in Quebec law,¹⁶ there are numerous instances where Quebec courts have employed flexibility and have used the notion of good faith to extend parties' obligations in the execution of contracts. The codal basis for this obligation is found in art. 1024 C.C., which states:

The obligation of a contract extends not only to what is expressly in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

It is the notion of "equity" in art. 1024 C.C. which has enabled doctrinal writers and judges to assert that there exists an obligation of good faith in Quebec law. As Professor Cr  peau has stated:¹⁷

Aussi croyons-nous que tout contrat doit comporter, sur la base de l'article 1024 du Code civil et de l'ancien droit, une obligation implicite pour les parties de se conformer, dans l'ex  cution des prestations, aux exigences de la bonne foi.

The most notable Quebec case which used art. 1024 C.C. to imply an obligation of good faith in the execution of a contract is the Supreme Court case of *Banque Nationale du Canada v. Soucisse*.¹⁸ The Bank, which had entered into a contract of suretyship (guarantee), sued the heirs of the surety (guarantor) for repayment of debts which had been incurred after the surety's death. Three salient facts were that the heirs were unaware of the suretyship, the Bank was aware of the surety's death, and the suretyship was revocable. Beetz J, speaking for a unanimous Supreme Court, held that the Bank was estopped from claiming payment from the heirs because it had not fulfilled its obligation, once it learned of the surety's death, to inform the heirs of the existence of the suretyship and of its revocable character before it

¹⁶ As there is in art. 1134 of the French Civil Code, art. 242 of the German Civil Code, art. 1-203 of the Uniform Commercial Code and s. 205 of the American Second Restatement of the Law of Contracts.

¹⁷ P.-A. Cr  peau, "Le Contenu Obligatoire d'un Contrat" (1965), 43 R. du B. Can. 1, at p. 26. See also J. Ghestin, *Le Contrat* (Montreal, Harpell, 1982), p. 75: "Je n'ai pas besoin d'insister sur le fait que le droit positif — le droit fran  ais, mais aussi, j'en suis convaincu, le droit qu  b  cois — consacre le principe de bonne foi, au moins dans l'ex  cution des contrats."

¹⁸ [1981] 2 S.C.R. 339, 43 N.R. 283.

advanced money to the debtor. This lack of disclosure had the effect of unilaterally altering the revocable character of the suretyship and rendering it essentially irrevocable.

What is important about this judgment is that this duty to inform was nowhere to be found in the wording of the contract itself, nor could it be extrapolated therefrom using ordinary rules of interpretation of contracts. In fact, the contract actually provided that the suretyship would be binding on the surety's heirs.¹⁹ It was for this very reason that, in the Superior Court, Archambault J. had held in favour of the Bank and had enforced the suretyship against the heirs. He found it impossible to read an obligation into the contract whereby the heirs would only be liable for debts incurred before the surety's death or thereafter with their knowledge.²⁰ Beetz J., on the other hand, found it possible to imply such an obligation stating that it "results from the principle that agreements must be performed in good faith."²¹ ... This is in keeping with art. 1024 of the *Civil Code*.²²

The *Soucisse* case is not an isolated decision. Article 1024 C.C. has been used, for example, to imply a good faith obligation in a contract of suretyship, requiring sureties to be informed of those financial operations of the debtor which could affect considerably the extent of the guarantee.²³ Article 1024 C.C. has also been used in the context of employment contracts. In *Rondeau v. Lamarre Valois Int'l Ltée*,²⁴ a clause in a contract of employment provided that if an employee posted abroad was dismissed, he would be reimbursed his return airfare to Canada. The court denied the dismissed employee the right to claim reimbursement, using art. 1024 C.C. to read the clause as not applying where the dismissal was with cause and was due to the incompetence, intransigence and general lack of good faith execution of the employee's obligations. Another decision implying a good faith obligation is *Ouellette v. Séguin-Dansereau*,²⁵ where the Superior Court used art. 1024 C.C. in the context of a land transaction. The plaintiff

¹⁹ The contract of suretyship is reproduced in the judgment, *ibid.*, at pp. 342-3 S.C.R., pp. 286-7 N.R.

²⁰ [1970] Que. S.C. 116 at pp. 124-5.

²¹ *Supra*, footnote 18, at p. 356 S.C.R., p. 300 N.R.

²² *Ibid.*, at p. 357 S.C.R., p. 300 N.R.

²³ *Ballas v. Grenier* (August 1, 1986), Frontenac 235-02-000413-847 (Prov. Ct.), J.E. 86-918.

²⁴ [1975] Que. S.C. 805.

²⁵ [1976] Que. S.C. 1405.

had signed an offer to buy an immovable property which was accepted by the defendant. The offer required the plaintiff to obtain financing within 60 days. The plaintiff, who evidenced intent to buy the immovable, only obtained such financing 180 days later. The defendant, who had never even put the plaintiff into default, used this omission as an excuse to renege on the signed offer and to sell the property to her husband. The court held in favour of the plaintiff, enabling him to obtain title to the immovable, on the ground that the actions of the defendant amounted to bad faith, contrary to the dictates of art. 1024 C.C.

The use of art. 1024 C.C. and the flexibility it brings to the enforcement of contracts has not gone without criticism. Academic writers and judges alike have pointed out the dangers inherent in implying obligations of good faith performance into a contract. Girard, commenting on the *Soucisse* case, has stated that "[a]ny gains affected by the imposition of a general good faith obligation would seem to be more than outweighed by the ensuing lack of certainty."²⁶ In *Place Lebourgneuf Inc. v. Autodrome de Val Bélair Inc.*,²⁷ Nichols J. of the Quebec Court of Appeal recognized the tension between the imposition of a good faith obligation and the principle of freedom of contract. The case concerned a contract of lease of land for a term of six months with a clause entitling the lessee to renew the lease for two additional six-month periods on such terms as would be agreed upon by the parties: "chacun des termes et conditions" de ces renouvellements 'devant faire l'objet d'une entente entre les parties'.²⁸ L'Heureux-Dubé J. held, in her dissenting opinion, that this clause included the obligation to negotiate the terms of the renewal of the lease in good faith.²⁹ Nichols J. disagreed and held that since no new agreement was reached between the parties to renew the lease, the contract was at an end and the good or bad faith of the lessor was irrelevant: "Lorsqu'une personne est libre de se lier par contrat ou de ne pas le faire, sa bonne ou mauvaise

²⁶ P. Girard, "Good Faith in Contract Performance: Principle or Placebo?" (1983), 5 S. C. L. Rev. 309, at p. 323, emphasis added.

²⁷ [1985] Que. C.A. 364.

²⁸ *Ibid.*, at p. 365.

²⁹ See also L'Heureux-Dubé J.'s dissenting opinion in *Godbout v. Provi-Soir Inc.*, [1986] R.L. 212, where she held that a franchisee was entitled to damages following the franchisor's bad faith refusal to consent to the sale of the franchise to the franchisee's prospective purchaser for \$45,000 when the franchise was subsequently sold to a purchaser chosen by the franchisor for \$10,000.

foi importe peu. La liberté de contracter transcende la motivation."³⁰

Recognition of an obligation of good faith generates problems of vagueness in definition,³¹ uncertainty in application, and disruption of the principle of freedom of contract that accompanies the *imposition* of obligations that are nowhere to be found in the parties' contract. Nonetheless, Quebec courts, through the mechanism of art. 1024 C.C., have decided numerous cases on the *explicit* basis of a good faith obligation.³² This demonstrates a flexible approach towards the enforcement of contracts, such approach being the one recommended by the Ontario Law Reform Commission.

2. A Major Element of Inflexibility in Quebec Contract Law

It can be seen from the foregoing comments that, in at least the three areas of consideration, third party benefits and good faith, Quebec law already has the flexibility that the OLRC is trying to achieve through its recommendations.

It would not, however, be accurate to assert that flexibility extends throughout the system governing contractual obligations. On the contrary, in instances where a contracting party seeks to have his contract annulled or his obligations reduced, by asserting that the enforcement of the contract as concluded would be inequitable or unjust, Quebec law has proven to be inflexible. Whenever the substantive content of a contract is called into question by a contracting party, the value of certainty, and the stability of contractual relations it is thought to produce, has superseded the competing value of flexibility. The maxim "a contract is a contract" is alive and well in the civil law. This is most evident in the area of lesion.

(1) The Quebec Position with Respect to Lesion

Trudel, in his treatise on lesion, has stated that "Le contrat nord-américain ou de droit anglais diffère donc du nôtre: il est certainement plus humain, plus moral."³³ His statement reflects

³⁰ *Supra*, footnote 27, at p. 368.

³¹ See M.G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 C.B.L.J. 385, and Girard, *supra*, footnote 26.

³² Although no definition of good faith has emerged from this case law.

³³ G. Trudel, *Lésion et Contrat* (Montreal, Les Presses de l'Université de Montréal, 1965), p. 74.

the fact that Quebec law, much more than the common law, has been rigid in its application of the principles of certainty, stability and the binding nature of contracts, even where their application has led to unjust situations. The primary reason for this attitude lies with the provisions of the Civil Code itself. The codifiers must be blamed for tying the hands of the judiciary and precluding any equitable development of the law of lesion by inserting provisions such as art. 1012 and 1135 into the Civil Code. Article 1012 C.C. states that,

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

Article 1135 C.C., in the section of the Code treating penalty clauses states:³⁴

The amount of penalty cannot be reduced by the court.

No matter how inclined a judge is to set aside or modify the terms of a contract on the basis of equitable considerations, surely he cannot fly in the face of such express legislative pronouncements.

While the codifiers in 1866 precluded any lesionary remedy, except for minors,³⁵ the Quebec legislator began, in the mid-1900s, to realize that due to a proliferation of adhesion and standard form contracts and to the fact that contracting parties increasingly found themselves in unequal bargaining positions, contracting parties needed help. It was recognized that the judiciary could provide that help by being empowered to do what would at times amount to the destabilization of contractual relations. The Quebec legislator therefore began the piecemeal introduction of provisions enabling courts to annul or reduce overly onerous obligations in cases where there was a situation of contractual injustice.

Two important legislative enactments in the field of lesion are worthy of study. The first provision, enacted in 1964, is art. 1040c C.C.,³⁶ an article similar in substance to s. 2 of the Ontario Uncon-

³⁴ Article 1135 C.C. precludes the revision of penalty clauses unless there has been part performance. See *Boretsky v. Amherst Bowling Recreation Inc.*, [1965] Que. S.C. 521 at p. 524, where Perrier J. stated:

La susdite clause pénale constituait la loi entre les parties. D'après la doctrine et la jurisprudence, il n'y a pas lieu d'établir si le créancier souffre ou non un dommage par suite de l'inexécution de l'obligation. La convention entre les parties a justement pour but de supprimer tout examen de ce genre; la clause pénale s'applique dès que le débiteur est responsable de l'inexécution.

See also *Caisse Populaire Ste-Ursule (Ste-Foy) v. Centre d'achats Neilson*, [1986] R.D.I. 78 (C.A.).

³⁵ Articles 1001 to 1011 C.C.

³⁶ Article 1040c C.C. reads:

scionable Transactions Relief Act.³⁷ This provision gave the judiciary the power to revise or annul unconscionable contracts of loan. The second provision is s. 8 of the 1978 Consumer Protection Act,³⁸ which will be discussed later in the text.

Article 1040c C.C. is the primary unconscionability provision in the Civil Code and was the first major erosion of the principle contained in art. 1012 C.C. that persons of the age of majority cannot annul contracts for lesion. The Quebec judiciary, however, was not particularly receptive to art. 1040c C.C. and quickly read down, read out and, in the author's opinion, read badly that unconscionability provision so as to render it effectively toothless.

In *Dame Marois v. Dallaire*,³⁹ Pelletier J. refused to apply art. 1040c C.C., even though he acknowledged that the cost of the loan in that case was not 10%, as the contract stipulated it to be, but was really 18.5% due to misleading drafting which disguised the fact that the stipulated interest was to be compounded. In addition, the borrower was illiterate and was compelled to borrow money from the defendant in order to pay off another loan owing to a finance company. Despite these factors, the court declined to revise the contract pursuant to art. 1040c C.C. Pelletier J. held that even though the legislator may have introduced art. 1040c C.C. to ensure greater equity in certain contracts and to give revisionary powers to judges,⁴⁰

[o]n ne saurait cependant interpréter cet article comme devant être le remède à tous les maux: les textes de loi et la convention des parties doivent demeurer la règle ...

Pelletier J. then totally discounted art. 1040c C.C. as a true lesionary provision when he stated:⁴¹

On peut se demander si le législateur n'a pas voulu assimiler le tout à une transaction malhonnête en vue de permettre à l'autorité judiciaire d'y apporter le correctif qui s'impose.

So entrenched is the reluctance by the judiciary to meddle with contracts, no matter how unjust, that a Quebec judge went so far

The monetary obligations under a loan of money may be reduced or annulled by a court so far as it finds that, having regard to the risk and to all the circumstances, they make the cost of the loan excessive and the operation harsh and unconscionable.

³⁷ R.S.O. 1980, c. 514.

³⁸ L.R.Q., c. P-40.1.

³⁹ [1970] Que S.C. 634.

⁴⁰ *Ibid.*, at p. 641, emphasis added.

⁴¹ *Ibid.*, emphasis added.

as to read a requirement of dishonesty into art. 1040c C.C., a provision that was clearly intended by the legislator to remedy more than cases of fraud, since fraud is already covered by art. 993 C.C.⁴²

Another tactic used by the courts to minimize the impact of art. 1040c C.C. was to exclude anything that did not fall strictly within the wording "monetary obligations under a loan of money". Quebec courts refused to apply art. 1040c C.C. to a myriad of situations where its application would have been extremely useful to the debtor and necessary to import "equity in certain contracts".⁴³ In *Roynat Ltée v. Les Restaurants La Nouvelle-Orléans Inc.*,⁴⁴ Bernier J. refused to apply art. 1040c C.C. to reduce a penalty of \$148,887 payable in the event of prepayment of a \$750,000 loan⁴⁵ on the ground that the penalty clause was found in a contract separate from the contract of loan and that art. 1040c C.C. only contemplated the judicial revision of contracts of loan *per se*.

This restrictive reading of 1040c C.C. was reasserted as recently as 1986 in the case of *Eiffel Construction (Quebec) Ltd. v. Morguard Trust Co.*,⁴⁶ where the Superior Court refused to apply art. 1040c C.C. to reduce excessive costs of a loan on the ground that such costs were not monetary obligations under the terms of the deed of loan, but were incurred under transactions made prior to and subsequent to the signing of the deed.⁴⁷ The court did not look at the transactions as a whole, as one business deal, but rather, followed the restrictive interpretation of art. 1040c C.C. and read the words "monetary obligations under a loan of money" very narrowly.

In addition, art. 1040c C.C. has not been used to annul or reduce excessive penalties exacted by the creditor in exchange for a delay granted to the debtor to pay the balance of the debt.⁴⁸ Nor

⁴² A similar requirement of dishonesty was introduced in the interpretation of s. 118 of the 1971 Consumer Protection Act, L.Q. 1971, c. 74 (the forerunner to s. 8 of the 1978 Consumer Protection Act, *supra*, footnote 38). In the case of *Paré v. Vic Tanny Ltée* (1976), 17 C. de D. 242, at p. 247, Beaudet J., in rejecting the consumer's claim of lesion stated: "L'analyse de la preuve ne fait rien voir de malhonnête, d'injustice ou de contraire à l'équité dans le contrat auquel a souscrit la demanderesse."

⁴³ "Equity in Certain Contracts" is the title the legislature chose for Section VII of the Chapter of Contracts of the Civil Code, the section which includes art. 1040c C.C.

⁴⁴ [1976] Que. C.A. 557, *affd* [1978] 1 S.C.R. 969.

⁴⁵ The trial judge had ruled the penalty excessive, abusive and exorbitant and reduced it to \$30,000. *Ibid.*, at p. 559.

⁴⁶ [1986] R.J.Q. 879.

⁴⁷ *Ibid.*, at p. 883.

⁴⁸ *Imperial Oil Ltd. v. Le Domaine Gatineau Inc.*, [1977] Que. S.C. 212.

was it applied to reduce excessive obligations under a hypothec, the court relying on the fact that the hypothec was registered in the place of a construction privilege and that there was no actual loan of money.⁴⁹ Article 1040c C.C. was also unavailable to reduce excessive costs exacted by a creditor who lent money to a debtor in return for an assignment by the debtor of his claims against third parties, the reasoning being that this arrangement was not a true contract of loan but a contract *sui generis* involving credit and lease of services.⁵⁰ Nor was it used to reduce the costs of a loan in favour of a surety, on the ground that sureties are not borrowers *per se* and cannot avail themselves of the benefit of art. 1040c C.C.⁵¹

This is not to say that art. 1040c C.C. has been a totally fruitless attempt by the legislator to introduce flexibility into contract law. It has succeeded in introducing some flexibility in the enforcement of unconscionable contracts of loan but, because of the judiciary's continued adherence to the competing contract value of certainty, art. 1040c C.C. has been read restrictively and has only been successfully invoked in those limited circumstances where the excessive obligation was contained in a deed of loan and was not composed purely of interest charges.⁵²

As can be seen from these cases, the judiciary in Quebec has not been sympathetic to the legislator's attempt to introduce a flexible approach to remedy certain contractual injustices. Judges have found it difficult to apply these new flexible norms at the point of enforcement when they still operate within a framework which rests on certainty and stability of contracts at the point of formation.

This attitude is consistent with the general civil law preoccupation with the formation of a contract. Under classical civil law, as long as there is no defect of consent such as error (mistake),

⁴⁹ *Construction St-Hilaire Ltée v. Les Immeubles Fournier Inc.*, [1972] Que. C.A. 35, rev'd on other grounds [1975] 2 S.C.R. 2.

⁵⁰ *Simard v. Royer*, [1978] Que. C.A. 219.

⁵¹ *Tremblay v. Trans-Canada Crédit Inc.* (May 28, 1982), *Hauterive* (Baie-Comeau) 655-05-000045-823 (Sup. Ct.), J.E. 82-698.

⁵² See, for example, *Boutin v. Belvedere Finance Co.*, [1970] Que. C.A. 389; *Canadian Acceptance Corp. v. Larochelle*, [1972] R.L. 268 (Prov. Ct.); *Lemieux v. Fortin*, [1973] Que. S.C. 25; *Drummond v. Canadian Consumers Loan and Finance Corp.*, [1975] Que. S.C. 819; *Les Entreprises Loyola Schmidt Ltée v. Cholette*, [1976] Que. S.C. 557; *Household Finance of Canada v. Ouellette*, [1977] Que. Prov. Ct. 228; *Zaor v. Thibault*, [1982] Que. S.C. 843.

fraud or violence (duress) at the point of formation of a contract, the contract will be binding on the parties and the courts and will not be subject to review at the point of enforcement.

(2) The Reasons for Inflexibility

One must examine the reasons why certainty as a contract value has defeated the competing contract value of flexibility in the area of lesion. The reasons involve both the traditional philosophical framework of the civil law of contract and, at a more practical level, problems caused by poor legislative drafting.

The first reason for the triumph of certainty over flexibility involves one of the primary goals of contracts in our society. If the purpose of contract law is to render the future more certain,⁵³ by a prior assignment of risk, a flexible approach to the enforcement of contracts, with the result that some of these contracts would be set aside or judicially rewritten, would jeopardize this goal. The fear of attenuating the certainty of future obligations has been expressed both doctrinally and jurisprudentially. In 1965, Mayrand, in discussing the newly enacted art. 1040c C.C., anticipated that many jurists would not welcome this new judicial power to revise and annul unconscionable contracts of loan on the ground that it would lead to uncertainty.⁵⁴

En permettant au juge de substituer sa volonté à celle des cocontractants, l'on affaiblit la valeur de la parole donnée et l'on rend incertains les droits respectifs des parties. La certitude des droits et la sécurité qui en découle peuvent être des nécessités de la vie juridique, plus essentielles encore que le respect constant de l'équité.

The judiciary has echoed this reluctance to upset the certainty and stability of future obligations. In *Paré v. Vic Tanny Ltée*,⁵⁵ Mr. Justice Beaudet rejected a consumer's claim of lesion under s. 118 of the 1971 Consumer Protection Act⁵⁶ and stated:⁵⁷

⁵³ According to J. Ghestin, "L'utile et le juste dans les contrats" in *Archives de Philosophie de Droit*, t. 26 (Paris, Editions Sirey, 1981), p. 35, at p. 44: "Le contrat est tout d'abord l'instrument indispensable des prévisions individuelles. Comme on l'a observé, il assure une 'emprise sur l'avenir'. C'est là l'utilité économique du contrat qui est un acte de prévision." See also Professor Waddams, "The Modern Role of Contract Law" (1983-84), 8 C.B.L.J. 2, at pp. 8-9: "the purpose of contract law is to enable persons to exercise some control over the uncertainties of the future. ... One of the chief uses of contract law ... is to make the future more predictable."

⁵⁴ A. Mayrand, "De l'équité dans certains contrats: Nouvelle section du Code civil" in *Lois Nouvelles* (Montreal, Les Presses de l'Université de Montréal, 1965), at pp. 70-1, emphasis added.

⁵⁵ (1976), 17 C. de D. 242.

⁵⁶ *Supra*, footnote 42.

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A second approach to lesion is a legalism that understands that such flexibility parties' freedom. Freedom of contract, autonomy of subjectively parties being autonomy of applied by the requires the courts to tamper would undermine will theory.⁶⁰

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⁵⁷ *Supra*, footnote 53.

⁵⁸ See, for example, MacNeil, *The New Haven, Yale University*.

⁵⁹ Article 1022(3) C.C. of the parties or for

⁶⁰ The only recognized art. 13 C.C., contract provision has been has not been used

⁶¹ *Roynat Ltée v. Les*

⁶² *Ibid.*, at pp. 559-60.

L'article 118 de la Loi de la protection du consommateur conduirait à une dangereuse instabilité des activités commerciales si une partie pouvait répudier ses obligations par simple caprice.

A second reason for the reluctance to employ a flexible approach to the enforcement of contractual relations in the field of lesion is a continuing commitment to the principle of consensualism that underlies classical contract theory. In particular, it is felt that such flexibility at the point of enforcement would damage the parties' freedom of contract that exists at the point of formation. Freedom of contract is the fundamental corollary to the theory of autonomy of the will, according to which the contract is the subjectively created law between the parties, such law of the parties being sacrosanct. While there are doctrinal dissents to the autonomy of the will theory,⁵⁷ it remains the prevailing theory applied by the courts in Quebec. The notion of *pacta sunt servanda* requires the courts, as well as the contracting parties, to be bound by the parties' voluntarily assumed obligations.⁵⁸ To allow the courts to tamper with the parties' contract, for whatever reason, would undermine this important corollary to the autonomy of the will theory.⁶⁰

The persistent reluctance on the part of the Quebec courts to step in and remedy contractual injustices has been justified by the judiciary, in large part, by the notion of freedom of contract. This is evident in the art. 1040c C.C. cases. In *Roynat*,⁶¹ Bernier J. refused to apply art. 1040c C.C. on the ground that it constitutes an exception to the parties' freedom of contract and must therefore be interpreted restrictively.⁶²

La liberté des conventions est la règle; la convention est la loi des parties. Les Tribunaux ne peuvent y déroger (sauf s'il s'agit d'un cas de vice de consentement, art. 991 et seq. C.C. ce qui n'est pas ici le cas) que dans la mesure où une disposition spécifique de la Loi les y autorise: une telle disposition en étant une d'exception devra quant à la portée de son application recevoir une interprétation stricte.

⁵⁷ *Supra*, footnote 55 at p. 247, emphasis added.

⁵⁸ See, for example, J. Ghestin, *Traité de Droit Civil*, Vol. II (Paris, L.G.D.J., 1980); I. MacNeil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, Yale University Press, 1980).

⁵⁹ Article 1022(3) C.C. states: "They [contracts] can be set aside only by the mutual consent of the parties or for causes established by law."

⁶⁰ The only recognized exception to the parties' freedom of contract is that, according to art. 13 C.C., contracts must not be contrary to public order and good morals. This provision has been used primarily to control the moral and licit character of contracts and has not been used to annul unconscionable contracts.

⁶¹ *Roynat Ltée v. Les Restaurants La Nouvelle-Orléans Inc.*, [1976] Que. C.A. 557.

⁶² *Ibid.*, at pp. 559-60.

The court reached the same conclusion in *Eiffel Construction*⁶³ on the basis that "an exception to the fundamental principle of freedom of contract ... must be interpreted restrictively".⁶⁴

These Quebec cases indicate how freedom of contract and stability of contractual relations are such strong and important contract values that flexibility and equity must yield to certainty coupled, at times, with rigidity and injustice.

Unlike the common law, where there now exists a substantial volume of cases where courts have applied a certain degree of flexibility in order to avoid injustice, the civil law has not developed any general doctrine of unconscionability. To illustrate the position in Quebec jurisprudence, one need only look to the case of *Eiffel Construction* and the words of Riopel J.:⁶⁵

Mr. Feig's cry for mercy before the Court must not be answered in equity, but only in regard to the provisions of the *Interest Act* and those of Section 1040c of the *Civil Code*.

While the judiciary's restrictive reading of art. 1040c C.C. has certainly been a major factor in its failure to introduce a satisfactory degree of flexibility and fairness into the enforcement of contracts, the Quebec legislator must also share part of the blame. The legislator made critical mistakes in both the drafting of art. 1040c C.C. and its placement in the Code itself.

The major problem is that art. 1040c C.C. is so obviously a copy of s. 2 of the Ontario Unconscionable Transactions Relief Act,⁶⁶ transplanted into the Civil Code. Both the concept of unconscionability and the specific expression "harsh and unconscionable" were borrowed directly from the common law. It is not surprising, therefore, that the reaction of the Quebec judiciary has been, at best, wary. Quebec judges, like their common law counterparts, do not always react favourably to a foreign intrusion into their own legal tradition. As Professor Bridge has stated, in the context of good faith:⁶⁷

... it is dangerous and disruptive to believe that the comparative legal method can be used to justify highly selective legal transplants without regard to the whole of a country's legal tradition.

⁶³ *Eiffel Construction (Quebec) Ltd. v. Morguard Trust Co.*, [1986] R.J.Q. 879.

⁶⁴ *Ibid.*, at p. 882.

⁶⁵ *Ibid.*, at p. 881. A similar pronouncement was made by Pelletier J. in *Dame Marois v. Dallaire*, [1970] Que. S.C. 634 at p. 636: "[L]es sentiments ne sauraient constituer un argument juridique et ... c'est la seule interprétation de la loi qui doit servir de base aux décisions des tribunaux."

⁶⁶ *Supra*, footnote 37.

⁶⁷ Bridge, *supra*, footnote 31 at p. 414.

Apart from the problem of the drafting of the provision itself, art. 1040c C.C. was not properly placed in the Civil Code. If the legislator had intended it to be an attenuation of the principle of art. 1012 C.C. and to provide persons of the age of majority with relief from lesionary contracts, it should have been placed in the section of the Code dealing with lesion, namely subsec. 4 of s. II in the Chapter of Contracts which includes arts. 1001 to 1012 C.C. Furthermore, in conjunction with the enactment of art. 1040c C.C., art. 1012 C.C. should have been amended to reduce the conflict between the two opposing principles found in these two articles, that is, the principle in art. 1012 C.C. that "a contract is a contract" and the new idea introduced in art. 1040c C.C. that some flexibility should be introduced into the law to mitigate against the rigours of unconscionable contracts. Presently, art. 1012 C.C. is drafted negatively stating that "persons of the age of majority are *not* entitled to relief from their contracts for cause of lesion only" (emphasis added). It would have been better if the legislator had reformulated art. 1012 C.C. and had drafted it positively. One possible formulation is: "In instances provided for by law, persons of the age of majority are entitled to relief from their contracts for cause of lesion." Had art. 1012 C.C. been amended, perhaps it would have avoided art. 1040c C.C.'s current status as an exceptional provision.⁶⁸

(3) A Move Towards Flexibility in the Area of Lesion

The one area where Quebec law has succeeded in introducing flexibility in the area of lesion is in the consumer setting. Section 8 of the 1978 Consumer Protection Act⁶⁹ states:

8. The consumer may demand the nullity of a contract or a reduction in his obligations thereunder [1] where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or [2] where the obligation of the consumer is excessive, harsh or unconscionable.

In the first part of s. 8, lesion is presented as a purely objective notion. Inequality in the respective obligations of the merchant and the consumer, looked at in the context of the whole contract, is enough to justify a finding of lesion because where there is an unjustifiably serious disproportion in the prestations of the parties, exploitation seems to be irrebuttably presumed.⁷⁰

⁶⁸ See Bernier J.'s comments in *Roynat, supra*, text at footnote 62.

⁶⁹ *Supra*, footnote 38.

⁷⁰ L. Perret, "L'Incidence de la Nouvelle Loi sur la Protection du Consommateur sur le

The second notion of lesion in s. 8 is more subjective and allows a court to annul or revise contracts in which obligations are "excessive, harsh or unconscionable" for the particular consumer in question. Perret has defined this notion of lesion as follows:

Cette deuxième forme de lésion consisterait pour le consommateur à avoir contracté une *obligation excessive* du fait qu'elle n'est pas utile et qu'elle est *trop lourde pour ses moyens*, de telle sorte qu'elle met en péril son patrimoine et devient pour lui une source d'embarras très sérieux.⁷¹

On se rapproche en fait de l'une des formes de lésion développée par la jurisprudence dans le but d'assurer la protection du mineur.⁷²

In contrast to the judicial reaction to art. 1040c C.C., the reaction to s. 8 of the Consumer Protection Act has been more favourable towards the legislator's attempt to introduce an effective lesionary provision for certain persons of the age of majority.⁷³ Decisions have been rendered advocating a liberal and flexible approach to the enforcement of consumer contracts. Consumers have been awarded a reduction in obligations when the court has found that the consumer paid an excessive purchase price.⁷⁴ Courts have also annulled contracts which had been entered into at a fair price if the contract proved overly onerous for the particular consumer.⁷⁵

In recent consumer cases, there are no lengthy discussions advocating a restrictive interpretation of the lesionary provision on the ground that it clashes with the principle of freedom of contract⁷⁶ or because it would undermine certainty and stability of

Droit Positif des Contrats et Perspectives de Réforme du Code Civil" (1985), 15 R.D.U.S. 251, at p. 265.

⁷¹ *Ibid.*, at pp. 266-7, emphasis added.

⁷² *Ibid.*, at p. 267. The provisions in the Civil Code on lesion for minors, arts. 1001 to 1010 C.C., involve a very subjective notion. In effect, a minor can be relieved from his contract for lesion even where he does not demonstrate that he contracted an objectively unfair bargain. He need only show that, in his particular case, given his personal financial position, the contract would put him into a situation of financial embarrassment. This purely subjective notion of lesion is said to be justifiable in the case of minors because of their inexperience and lack of maturity. Lesion in this sense falls outside the realm of unconscionability and is really a question of capacity to contract. See generally, *Marcel Grenier Automobile Enrg. v. Thauvette*, [1969] Que. S.C. 159, and *Côté v. Larouche Auto Ltée*, [1977] Que. Prov. Ct. 163.

⁷³ It should be noted that this reaction is much more liberal and flexible than the judiciary's reaction to s. 8's precursor, s. 118 of the 1971 Consumer Protection Act, *supra*, footnote 42. See *Paré v. Vic Tanny*, *supra*, footnote 42 and text at footnote 57.

⁷⁴ *Leclerc v. Chevalier* (November 21, 1983), Abitibi 615-32-000265-833 (Que. Prov. Ct.), J.E. 84-38.

⁷⁵ *Banque Canadienne Impériale de Commerce v. Carbonneau*, [1985] Que. Prov. Ct. 65.

⁷⁶ Reminiscent of the statements in *Roynat*, *supra*, text at footnote 62, and *Eiffel Construction*, *supra*, text at footnote 64.

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contractual relations.⁷⁷ The judicial reaction has been different, perhaps because judges feel that flexibility is more justifiable in the consumer setting. However, while s. 8 of the Consumer Protection Act has succeeded in introducing some flexible remedies for consumers who enter into unconscionable contracts, the drafting of the section and its interpretation by the courts are not without problems. These will be discussed later in the context of whether the OLRC has chosen the ideal way to legislate an unconscionability provision.

3. The OLRC Approach to the Introduction of Flexibility in Contract Law

(1) Legislative Drafting Styles

Not being an Ontario lawyer, it is not for the author to pass judgment on the laudable efforts of the OLRC. Suffice it to say that codifiers and law reformers face a very difficult task; legislating on broad areas of the law such as good faith and unconscionability is not without its risks. It is especially difficult and risky because these are areas of the law incapable of precise definition. Imprecision results necessarily from the evolutionary roles of these concepts which are called upon to adapt to changes in social values and economic realities. It also results from the fact that these concepts can be applied to an infinite range of factual situations. As the Earl of Halsbury L.C. stated in the *Clydebank* case, regarding unconscionability:⁷⁸

My Lords, it is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case.

Regarding good faith, Summers has stated that,⁷⁹

... any but the most vacuous general definitions of good faith will fail to cover all the many and varied specific meanings that it is possible to assign to the phrase.

Because legislators must shape the law without hampering its evolution,⁸⁰ there is always the risk that in years to come society

⁷⁷ Reminiscent of the statements in *Paré v. Vic Tanny Ltée*, *supra*, text at footnote 57.

⁷⁸ *Clydebank Engineering and Shipbuilding Co. Ltd. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A.C. 6 (H.L.), at p. 10.

⁷⁹ R.S. Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L.R. 195, at p. 206.

⁸⁰ See Julliot de la Morandière, "Preliminary Report of the Civil Code Reform Commission of France" (1955-56), 16 La. L. Rev. 1 at p. 25.

will be saddled with legislation that no longer reflects social values and that hinders the development of the law. Trudel points out this risk:⁸¹

La loi, une fois formulée, devient immobile et tend à moins bien exprimer les faits sociaux et à se voir distancée par la conscience humaine toujours en marche, en quête de ses buts lointains, magnifiques et mystérieux. Le légiste doit déceler toute discordance qui serait une sorte de contradiction; sinon la loi n'est plus la règle, mais la contrainte, l'exception.

There is no better example of this risk than art. 1012 C.C. which, in its preclusion of a lesionary remedy for persons of full age, has created a conceptual hurdle for the judiciary, making *effective* law reform that much more difficult.

The OLRC has not adopted a uniform approach in drafting provisions of contract law. In this regard, it is interesting to contrast the approaches taken by the Commission with respect to its recommendations on good faith and those on unconscionability. While the Commission chose to propose elaborate recommendations with respect to unconscionability, including a non-exhaustive enumeration of 12 factors, the good faith recommendation is very broad and open-ended, with no elaborate definition or enumeration of decisional criteria. The Commission's approach reflects two very different styles and philosophies of legislative drafting. The recommended provisions on unconscionability are more faithful to the modern common law method of statutory drafting,⁸² whereas the recommended provision on good faith is more in the civil law tradition of drafting general and open-ended provisions.⁸³

In the section of the Report dealing with unconscionability, the Commissioners oppose the drafting of an open-ended unconscion-

⁸¹ *Supra*, footnote 33, at p. 77. See also S. Stoljar, "Codification and the Common Law" in S.J. Stoljar, ed., *Problems of Codification* (Canberra, Department of Law, Research School of Social Sciences, the Australian National University, 1977), p. 1:

... it is of codes that we can more aptly say that, as fixed and dated documents or statements, they can become old and stale, or can be overtaken and outdated by subsequent events, quite unlike case-law which can always remain as up-to-date as the most recent case or latest wave of precedents.

⁸² See L.-P. Pigeon, *Rédaction et Interprétation des Lois* (Quebec, Collection Etudes Juridiques, 1978), p. 6: "Le style législatif anglais subordonne toute autre considération à la recherche de la précision. On s'efforce de tout dire, de tout définir".

⁸³ According to Portalis, cited by A. Tunc in "Codification: the French Experience" in Stoljar, *supra*, footnote 81, at p. 65: "L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière." A classic example is the drafting of the general delictual provision, art. 1053 C.C.

ability provision, with no criteria to guide the courts, on the ground that, in the United States, such a general provision has produced less than satisfactory results.⁸⁴ The Commissioners therefore advocate a detailed provision on unconscionability including decisional criteria to guide the courts. It is peculiar that the concern expressed over a general provision in the unconscionability section of the Report did not carry through to the section on good faith and did not influence the drafting of the recommended provision on good faith. The Commissioners have recommended that the provision on good faith take the form of s. 205 of American Second Restatement of the Law of Contracts,⁸⁵ which contains no definition or decisional criteria and is as open-ended and general a provision as one can imagine.

Being a civilian used to working with private law legislation based on broad "*principes fructueux*",⁸⁶ the provision on good faith is, to me, less problematic than the suggested provisions on unconscionability. Perhaps my increased concerns over the unconscionability provisions reflect the fact that Quebec civil law has a somewhat troubled history with respect to lesion and because a civilian is more sensitive to problems with proposed legislation in that area. The Quebec experience can shed some light on the manner in which the OLRC has chosen to introduce flexibility in the area of unconscionability.

(2) What Can Ontario Lawyers Learn from the Quebec Experience?

The Report recommends that there be both a general provision allowing courts to relieve contracting parties from unconscionable bargains and a non-exhaustive enumeration of 12 factors which the court may take into consideration when determining an issue of unconscionability.^{86a}

There are two problems with this method of drafting an unconscionability provision. The first issue involves the list of factors in

⁸⁴ Report, at pp. 128-9.

⁸⁵ Section 205 states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

⁸⁶ "*Principes fructueux*" is the term used by Portalis to describe the ideal way to legislate. Legislating "*principes fructueux*" enables "the judge to adapt the law to changing conditions, the code simply giving guidance to judges over long periods of time". See H. Coing, "An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries" in Stoljar, *supra*, footnote 81, at pp. 21-2.

^{86a} Report, at pp. 129-30.

the recommendation. The 12 criteria comprise both objective factors, such as the disparity between the respective obligations of the contracting parties, and subjective factors, such as the relative bargaining strength of the parties and the degree to which one party has taken advantage of the inability of the other party reasonably to protect his or her interests because of infirmity, illiteracy, and lack of experience. However, the numerous factors listed appear to have been placed in an arbitrary order,⁸⁷ important factors being buried in the mass of less important ones. With no rationality to the ordering of the decisional criteria,⁸⁸ courts will not be able to evaluate which factors are intended to be the truly central criteria of unconscionability.

It is submitted that the central factors which indicate a situation of unconscionability should be (1) the gross disparity between the respective obligations of the parties; (2) the inequality in bargaining strength of the parties; and (3) the setting, purpose and effect of the contract and the manner in which it was formed. These three factors combine both objective and subjective notions of unconscionability. Inequality in the substance of the parties' bargain, an objective criterion, and inequality in the bargaining power of the parties, a subjective criterion, seem to be the central factors used by the courts to find a situation of unconscionability. According to Waddams,⁸⁹

... a large inequality of exchange combined with inequality of bargaining power, the twin criteria adopted by the modern Canadian cases, goes a long way to suggest a case for relief.

These are also the criteria for a finding of lesion recommended in the Civil Code Revision Office's Draft Civil Code.⁹⁰ Article 37 of Book V of the D.C.C. states that,

⁸⁷ It is interesting to note, in this regard, that subsec. 31(2) of the Uniform Sale of Goods Act, drafted by the Uniform Law Conference Committee on Sale of Goods (see Uniform Law Conference of Canada, *Proceedings of the Sixty-Fourth Annual Meeting* (Montebello, 1982), Appendix HH) placed identical factors of unconscionability in a very different order to that in the OLRC Report. For example, the first two factors listed in the Uniform Act were the commercial setting, purpose and effect of the contract (factor (k) in the OLRC Report), and the bargaining strengths of the parties (factor (h) in the OLRC Report).

⁸⁸ Does the fact that the relative bargaining strength of the parties appears as factor (h) mean that it is not as important as, for example, factor (c), the degree to which a contract requires a party to waive rights? See, in a similar vein, A. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U.T.L.J. 487, who, in a constitutional context, doubts the coherence of the lists of subject-matters in ss. 91 and 92 of the then BNA Act.

⁸⁹ S.M. Waddams, *The Law of Contracts*, 2nd ed. (Toronto, Canada Law Book Inc., 1984), p. 401.

⁹⁰ *Supra*, footnote 7.

⁹¹ *Comm.*

⁹² *Ibid.*

⁹³ *Supra*.

⁹⁴ (Nov.

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

Serious disproportion creates a presumption of exploitation.

The Commentaries to the Report state that:⁹¹

This article is thus limited in scope, since lesion results not only from disproportion between the prestations (an objective concept), but also from one party's exploitation of the other (a subjective concept).

The Commentaries define exploitation as one party "taking advantage of an unfavourable position (poor economic condition, inexperience, senility and so on)"⁹² of the other party. The combination of "inequality in bargaining strength" and "the setting, purpose and effect of the contract and the manner in which it was formed" amount to the factor of exploitation as defined in the Draft Civil Code.

It is therefore suggested that, if a list of factors is to be provided, the factors presently listed in the Report as factors (a), (b) and (c) should be replaced with the factors mentioned above, namely, inequality in respective obligations, inequality in bargaining power and the setting, purpose, effect and formation of the contract.

The second potential difficulty with a list of factors is that a judge, in a given case, may isolate just one of the 12 factors and use it alone to pronounce a finding of unconscionability. There is no indication in the recommendations as to whether one factor alone can suffice or whether a cumulation of factors is required. If one factor alone is sufficient, this can lead, potentially, to abuse of the unconscionability provision, giving protection to contracting parties where they should be responsible for fending for themselves. In this regard, the Quebec judicial experience in interpreting s. 8 of the 1978 Consumer Protection Act⁹³ is instructive. An examination of the lesionary provision in this Act, and its interpretation by the courts, will illustrate how far-reaching the results can be when legislation allows the court to apply only one factor to find a situation of unconscionability.

The case of *Leclerc v. Chevalier*⁹⁴ demonstrates what can occur when a judge is empowered to use only one factor, here the

⁹¹ Commentaries, *supra*, footnote 7, at p. 605.

⁹² *Ibid.*, at p. 604.

⁹³ *Supra*, footnote 38.

⁹⁴ (November 21, 1983), Abitibi 615-32-000265-833 (Que. Prov. Ct.), J.E. 84-38.

objective factor of inequality in prestations, to find lesion. A consumer who had bought a washing machine pump from the defendant merchant for \$84.45 sought a reduction in price pursuant to s. 8 of the Consumer Protection Act. After the purchase, the consumer had discovered that two other stores sold the identical pump for \$39 and \$42 respectively. The Provincial Court judge granted the consumer a reduction of \$26.65 on the ground that, since the merchant sold the pump for more than double the amount it sold for elsewhere, there was such a serious disproportion in the prestations of the parties so as to constitute a lesionary contract. St. Pierre J. stated that,⁹⁵

même si le consommateur consent au contrat, on présume qu'il n'est pas en mesure d'apprécier la valeur économique réelle de ce qu'il achète et que le commerçant a abusé de sa position dominante.

This decision confirms the fears of those who see the destruction of the values of certainty and stability of contractual relations as the necessary consequence of the introduction of unconscionability and lesionary provisions into the law. One must question whether this is the type of transaction the law ought to remedy. The judgment is open to criticism on two bases. First, it is very impressionistic and its reasoning is unsophisticated. The judge never considered whether the higher price charged by this merchant was perhaps due to *bona fide* marketing choices: for example, the fact that the store provided personalized service, or that the store was not a "bargain basement" but was located in high rent premises. Nor did the judge take into account the net profits made by the various merchants who sold the pump.

Secondly, and more dangerously, this decision turns the judge into a policeman of the market-place and sanctions price control. Should courts be asked to take the place of a prudent consumer who "shops around"? It is submitted that this decision takes the notion of lesion too far because the judge did not find any subjective factor to complement the objective factor of inequality in prestations so as to make this a case of unconscionability, justifying intervention by the judiciary. There was no evidence of abuse of the dominant bargaining position of the merchant, no monopolistic situation. As Waddams has stated, "inequality of values exchanged cannot in itself be enough"⁹⁶ to constitute

⁹⁵ *Ibid.*

⁹⁶ *Supra*, footnote 89, at p. 400 in discussing *Adams v. Fahrngruber* (1975), 62 D.L.R. (3d) 256, 10 O.R. (2d) 96 (H.C.J.).

unconscionability. Without specifying whether or not one of the listed factors alone is enough to constitute a finding of unconscionability, the OLRC recommendations, as presently drafted, risk leading to decisions such as *Leclerc v. Chevalier* which could only serve to discredit a legislative attempt to introduce a doctrine of unconscionability. Even if this decision may be appropriate in a consumer setting, given the special protection consumers are deemed to need, it is certainly not justifiable in a general contractual setting.

Similar difficulties arise when a court applies a purely subjective notion of unconscionability. The case of *Banque Canadienne Impériale de Commerce v. Carbonneau*,⁹⁷ decided under the second part of s. 8 of the Consumer Protection Act, demonstrates the danger of applying a broad subjective notion of lesion to persons of full age. In *Carbonneau*, a consumer purchased a boat for \$8,500, a price not disputed to be objectively fair. However, in this particular consumer's situation, the contract was found to be excessively onerous because, at the time, he was only receiving workman's compensation and not a full salary, he was experiencing marital difficulties, and he could not afford to buy a boat when his only asset was a house valued at \$11,800 carrying a hypothec of \$5,000. Despite the substantive fairness of the bargain, Bélanger J. annulled the contract on the basis that the consumer's obligation was "excessive, harsh and unconscionable" in his particular circumstances.

This is another case which goes too far in applying the notion of lesion as a protective device for contracting parties. It cannot be the job of our legal system to protect people who foolishly buy goods they can ill afford from merchants who sell at fair prices without any oppressive conditions or tactics. As the OLRC Report states: "[L]egislative recognition of the doctrine of unconscionability should not be construed as a life jacket for persons who have entered into a bad bargain."⁹⁸ Like *Leclerc v. Chevalier*, the case of *Carbonneau* serves only to give ammunition to those who oppose the introduction of a general unconscionability provision and who favour certainty over flexibility as a contract value.

In summary, the OLRC can learn several things from the

⁹⁷ [1985] Que. Prov. Ct. 65.

⁹⁸ Report, at p. 127.

Quebec experience in drafting lesionary provisions. The Quebec experience shows how legislation must be drafted fairly broadly and generally to avoid the trap into which Quebec fell in the case of art. 1040c C.C. It must avoid giving ammunition to those who fear that the stability and certainty of contracts may be undermined. Drafting an unconscionability provision too narrowly may preclude any substantial alteration in the law because judges may use it as an excuse to decide cases within the strict linguistic confines of the provision. Fortunately, the OLRC proposals do not appear to have succumbed to this temptation.

As for the enumeration of factors recommended by the Report, two things ought to be reconsidered. First, the present list of factors should be shortened and re-ordered so as to reveal more clearly their underlying logic and, secondly, some indication should be given to the judiciary that a cumulation of factors is desirable before a finding of unconscionability is appropriate. The Quebec experience under the lesionary provision in the Consumer Protection Act shows that applying a purely subjective test or purely objective test of lesion can lead to absurd and unintended results.

Conclusion

There is little doubt that the OLRC recommendations, if implemented, would introduce a greater degree of flexibility into Ontario contract law. Opponents of legislation which enhances flexibility will undoubtedly argue that it will lead to uncertainty both in the application of the new rules themselves and, more importantly, in the enforcement of contracts generally. This could ultimately lead, it would be said, to the destabilization of contractual relations. To rebut these arguments, one need only look to the experience of Ontario's neighbouring province. Quebec law already displays elements of the flexibility recommended in the OLRC Report, and in those instances we have not been overburdened with problems of uncertainty and instability nor has our whole system of contract law been destabilized. On the other hand, where Quebec law is inflexible, judicial decisions have not produced happy results. When legal concepts are applied narrowly and in an inflexible manner, the result is not necessarily

certainty, but rather unequal treatment and inconsistent justice. Quebec contract law has never been severely criticized for its flexibility. It has been criticized, and rightly so, for displaying reluctance to import flexibility into the enforcement of unfair contracts.