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## CASE COMMENTS

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## CHRONIQUES DE JURISPRUDENCE

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### *Banque Nationale du Canada v. Houle* (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law

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#### Introduction

If one were asked to list rapidly developing areas of Quebec civil law, one would surely include the doctrine of abuse of rights in contractual matters. It was only twenty-five years ago that Professor Crépeau expressed the hope that art. 1024 *C.C.L.C.*,<sup>1</sup> with its reference to equity, could be used as a generally applicable mechanism for controlling abusive exercises of contractual power:

On pourrait, croyons-nous, lui [article 1024 *C.C.L.C.*] réserver un rôle plus utile et fécond dans l'élaboration d'une théorie de l'abus des droits contractuels tout comme l'article 1053 du Code civil sert aujourd'hui de fondement à la théorie de l'abus des droits sur le plan extracontractuel.<sup>2</sup>

It was only in 1971 that the Quebec Superior Court in *Fiorito v. Contingency Insurance Co.*<sup>3</sup> recognized that the theory of abuse of rights could encompass contractual rights, thereby mitigating the absolutist view of contracts. The absolutist view of contracts dictates that the holder of a contractual right cannot be held to have abused that right as long as its exercise falls within the strict terms enunciated in the contract, no matter how unreasonable the exercise of the right may be.<sup>4</sup> The *Fiorito* decision marked the beginning of an era of judicial

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<sup>1</sup>Art. 1024 *C.C.L.C.* reads: "The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by *equity*, usage or law, are incident to the contract, according to its nature" (emphasis added).

<sup>2</sup>P.-A. Crépeau, "Le contenu obligationnel d'un contrat" (1965) 43 Can. Bar Rev. 1 at 24.

<sup>3</sup>[1971] C.S. 1 [hereinafter *Fiorito*].

<sup>4</sup>According to G. Ripert, *La règle morale dans les obligations civiles*, 4th ed. (Paris: L.G.D.J., 1949) at 159, it is only the malicious exercise of a contractual right that can lead to abuse of rights. Any other exercise of that right, no matter how unreasonable on the part of the creditor must be

recognition that the absolutist view of contracts and the sacrosanct nature of contractual obligations could be tempered by the notion that abusive or unreasonable exercises of contractual rights would not be tolerated.

In the last twenty years, a wealth of jurisprudence and doctrinal articles has appeared on the subject.<sup>5</sup> Of particular interest is the most current discussion on abuse of contractual rights in an article by Professor P.-G. Jobin entitled "Grands pas et faux pas de l'abus de droit contractuel."<sup>6</sup> The recent Supreme Court decision in *Banque Nationale du Canada v. Houle*,<sup>7</sup> delivered for the Court by L'Heureux-Dubé J., firmly and indelibly entrenches the doctrine of abuse of rights into Quebec contract law.

### I. Facts of the *Houle* Case

Four Houle brothers were the sole shareholders of Hervé Houle Limited ("Company"), a corporation specializing in the slaughter and sale of pork. In January of 1972, the Company approached the National Bank of Canada ("Bank"), with which it had done business for fifty-eight years, in order to obtain additional credit to finance the modernization of its factory. By October of 1973, the Company had obtained from the Bank a rotating line of credit in the amount of \$700 000 and a letter of credit of \$100 000 secured by *Bank Act* security, letters of personal surety signed by the Houle brothers and other family members and, at a later date, a trust deed. It is to be noted that all loans to the Company were demand loans which, by the strict terms of the contract, contained no specific requirement of notice before a loan could be called.

In December of 1973, with the Bank's full knowledge, negotiations commenced between the Houle brothers and an interested corporation for the sale of the shares of the Company. The brothers hoped to obtain a \$1 000 000 purchase price.

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tolerated. See also the discussion of the absolutist view of rights in P.-G. Jobin, "Grands pas et faux pas de l'abus de droit contractuel" (1991) 32 C. de D. 153 at 156.

<sup>5</sup>See, most notably, J.-L. Baudouin, "Contrat — Application de la théorie de l'abus de droit en matières contractuelles" (1971) 31 R. du B. 335; A. Mayrand, "L'abus des droits en France et au Québec" (1974) 9 R.J.T. 321; R. Soucy, "Étude sur les abus de droit," [1979] R.L. 1; E. Colas, "La notion d'équité dans l'interprétation des contrats" (1981) 83 R. du N. 391; R. Demers, "L'obligation de bonne foi du créancier face à l'entreprise en difficulté en droit québécois et canadien" (1981) 22 C. de D. 561; J.-F. Desbiens, "L'abus de droit en matière contractuelle au Québec" (1987) 1 R.J.E.L. 81. See also an article written before the notion of abuse of contractual rights developed in the courts: D. Angus, "Abuse of Rights in Contractual Matters in the Province of Quebec" (1962) 8 McGill L.J. 150.

<sup>6</sup>*Supra*, note 4.

<sup>7</sup>[1990] 3 S.C.R. 122, 74 D.L.R. (4th) 577, [1990] R.R.A. 883 [hereinafter *Houle* cited to S.C.R.].

At the end of January 1974, while these negotiations were still taking place, the Company requested an increase in its rotating line of credit to \$900 000. Unbeknownst to the Company's shareholders, the reaction of the Bank's head office was to commission an accounting firm to prepare a report on the financial situation of the Company. On February 19, 1974, the Bank, based on the verbal report of the accounting firm, took the following actions which were at the heart of the litigation between the parties:

1. the Bank's head office decided to recall the loans immediately and realize on its guarantees;
2. immediately thereafter, the local branch of the Bank demanded repayment of the loans from the Company, giving no notice period to the Company to effect such repayment;
3. only three hours later, the Bank took possession of the Company's assets and proceeded to liquidate them in order to realize on its security.

The result of the Bank's precipitous actions was to inpair significantly the bargaining position of the shareholders with regard to the proposed sale of the Company. On March 14, 1974, one week after the Bank stepped in to realize on its security, the Company was sold to the corporation with whom negotiations had previously taken place for only \$300 000.

The shareholders sued the Bank for damages representing the difference between the purchase price they obtained for the Company's shares and the price they alleged they could have obtained had the Bank not acted abusively in the manner in which it had called the loan and realized on its security. The fact that it was the shareholders, and not the Company with whom the Bank had contractual relations, who launched the action was a complicating factor. The reasons for this were obvious. By the time any legal action was contemplated, the Company had been sold. The only parties still interested in legal action were the individual shareholders who wanted redress for what they felt was an inadequate purchase price for the sale of the Company's shares.

The Courts, at all three levels,<sup>8</sup> were unanimous in their condemnation of the Bank's behaviour. The Bank was uniformly criticized for demanding repayment of the loans suddenly and without prior notice and, in particular, for realizing on the securities without giving the Company any time to attempt repayment.

Both the Superior Court and the Court of Appeal held that the Bank had abused its rights contained in the loan contracts and that as a result, the share-

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<sup>8</sup>The Superior Court decision of Deslongchamps J. is unreported: (16 May 1983), Montreal 500-05-013683-758. The Court of Appeal decision of Malouf J. is reported in [1987] R.J.Q. 1518. The Supreme Court decision of L'Heureux-Dubé J. was rendered on November 22, 1990 (*ibid.*).

holders of the Company were entitled to \$250 000 in damages representing the difference in the purchase price actually received (\$300 000) and the evaluated worth of the Company's shares at the date of liquidation (\$550 000). The Supreme Court affirmed this damage award and added the additional indemnity of interest pursuant to article 1056c *C.C.L.C.*

While the actual damages awarded remained virtually identical in all three courts, the juridical bases of the decisions, particularly those of the Court of Appeal and Supreme Court, differ in substance, meriting more detailed analysis.

## II. The Court of Appeal Decision

The Court of Appeal decision is very important for both corporate law and civil law contracts, and has been the subject of several commentaries.<sup>9</sup> It has been celebrated as breaking "new ground with the expansion of the notion of abuse of rights"<sup>10</sup> and applauded for no longer requiring proof of "la mauvaise foi, la malice ou l'intention de nuire"<sup>11</sup> to make out a case of abuse of rights. At the same time, it has not escaped criticism regarding the corporate law aspect of the decision — namely the Court's finding of the appropriateness of piercing the corporate veil so that the individual shareholders could sue the Bank directly in damages.<sup>12</sup>

In the Court of Appeal, Malouf J. did indeed face these two problems head on. Confronting first the issue of interest to sue, and the traditional impenetrability of the corporate veil, Malouf J. held that despite the notion of distinct personality enunciated in the celebrated *Salomon* decision,<sup>13</sup> this was a case in which it would be just to pierce the corporate veil.<sup>14</sup> The family nature of the business, the personal suretyships required by the Bank and the inequity which would have resulted had the corporate veil not been pierced led Malouf J. to

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<sup>9</sup>P. Martel, "L'arrêt *Banque Nationale du Canada c. Houle*: Lumières nouvelles sur l'abus de droit et le «voile corporatif»" (1987) 33 McGill L.J. 213; T. Scassa, "The Bank as Creditor" (1988) 3 National Creditor/Debtor Rev. 41; C. Vennat, "Commentaire d'arrêt: *Banque Nationale du Canada c. Houle*" (1988) 22 R.J.T. 387.

<sup>10</sup>Scassa, *ibid.* at 43.

<sup>11</sup>Martel, *supra*, note 9 at 217. A small sampling of cases rendered before the Court of Appeal decision in *Houle* which required proof of malice are: *Banque Provinciale du Canada v. Martel*, [1959] B.R. 278; *Sarvey Inc. v. B.C.N.*, [1981] C.S. 1122; *Automobiles de Montréal-Ouest Inc. v. General Motors du Canada Liée*, [1986] R.J.Q. 1431 (C.S.); *White v. Banque Nationale du Canada*, [1986] R.R.A. 207 (C.S.); *Faule v. Sun Life du Canada* (28 March 1984), *Terrebonne* 700-05-001272-792, J.E. 84-363 (C.S.); *Equipements Sélect Inc v. Banque Nationale du Canada*, [1987] R.R.A. 99 (C.S.).

<sup>12</sup>Scassa, *supra*, note 9 at 43.

<sup>13</sup>*Salomon v. A. Salomon and Co.*, [1897] A.C. 22, [1895-9] All E.R. 33 (P.C.) [hereinafter *Salomon*].

<sup>14</sup>For a detailed discussion of the *Salomon* decision and an analysis on the piercing of the corporate veil, see J.W. Durnford, "The Corporate Veil in Tax Law" (1979) 27 Can. Tax J. 281.

allow the individual shareholders to sue the Bank directly, even though the actions of the Bank caused damage to the Company with whom it had contractual dealings and not to the individual shareholders. This holding has led one commentator to assert that "this type of reasoning does much to undermine the traditional notion of the separation of identities of the company and its shareholders."<sup>15</sup> Even a commentator who argued that the Court properly lifted the corporate veil in order to correct an unfair situation admitted that:

[L]a décision ... a été largement motivée par un souci d'équité plutôt que par une stricte application des principes de droit corporatif.<sup>16</sup>

The second aspect of the decision related to the scope of the doctrine of contractual rights. Malouf J. held that a delictual fault, actionable under art. 1053 *C.C.L.C.*, had been committed by the Bank against the shareholders. Despite the absence of any requirement in the contract between the Bank and the Company to give the latter a reasonable time for repayment of the loans, an abuse of the Bank's contractual rights had been committed: the Bank had acted unreasonably and unjustifiably by calling the loans suddenly and without notice, and by then proceeding to liquidate the Company within three hours. Despite the absence of malice or intention to harm, the Court of Appeal held that such actions fell within the general notion of fault pursuant to art. 1053 *C.C.L.C.*, according to which the abuse of rights should be judged. In the words of the Court, this gave the notion of abuse of rights a new dimension, adding to its traditional role of protecting against the malicious exercise of rights.<sup>17</sup>

While art. 1024 *C.C.L.C.* was referred to in Malouf J.'s judgment, the gist of his decision was that "[I]abus de droit en matière contractuelle constitue une faute délictuelle."<sup>18</sup> As such, the source of the fault which is committed in abusing a contractual right seems to be delictual and not contractual.

### III. The Supreme Court Decision

Despite an almost identical result in the Supreme Court of Canada, L'Heureux Dubé J.'s reasoning differs substantially from that of Malouf J. in the Court of Appeal, with major implications for both corporate law and contract law.

Whereas the lower courts were prepared to pierce the corporate veil in order to create a *lien de droit* between the individual shareholders and the Bank, the Supreme Court was not inclined to overturn a long line of corporate law precedents beginning with *Salomon*, and was not prepared to undermine the concept of distinct legal personality. According to L'Heureux-Dubé J.,

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<sup>15</sup>Scassa, *supra*, note 9 at 42.

<sup>16</sup>Martel, *supra*, note 9 at 222.

<sup>17</sup>*Supra*, note 8 at 1529.

<sup>18</sup>*Ibid.* at 1527.

[t]here would be no value to the corporate structure if whoever does business with a corporation would at the same time become liable not only to the company but also to every shareholder for any damage that may be caused to the company.<sup>19</sup>

As such, the shareholders had no direct right of action against the Bank based on the contract itself.

Given the criticism that had been directed against the lower court decisions on this matter, this aspect of the Supreme Court decision will likely be a welcome addition to corporate law jurisprudence regarding the limits on a court's ability to pierce the corporate veil especially where, as in this case, the shareholders themselves had chosen the corporate structure. The following statement by L'Heureux-Dubé J. makes eminent sense: "by choosing the benefits of this business structure, individuals must be prepared to accept the necessary consequences."<sup>20</sup> Nevertheless, the Court found an alternative basis for a finding in favour of the shareholders.<sup>21</sup>

The most important implications of the Supreme Court decision, however, relate to the doctrine of abuse of rights in contractual matters. It is here that L'Heureux-Dubé J. seizes the opportunity to enunciate clear legal principles regarding the state of the law on this subject, as well as the juridical basis of the doctrine of abuse of rights.

While it may already seem trite in 1992 to say that the Supreme Court has firmly entrenched the doctrine of abuse of rights into Quebec contract law, one need only consider the relative youth of this doctrine in Quebec and the uncertainty regarding the extent of its applicability<sup>22</sup> to appreciate the significance of a decision of the final court of appeal on this matter. The importance is underlined by the fact that Quebec law is still being interpreted and developed by a judiciary whose general philosophical standpoint continues to reflect notions of autonomy of the will and the sacrosanct nature of contractual obligations.<sup>23</sup> The concept of abuse of rights clearly clashes with the doctrine of autonomy of the will, a doctrine which calls for the courts to be bound by the subjective will of the parties as evidenced in their contractual agreement. According to Soucy:

lorsqu'en effet on invoque la théorie de l'abus de droit c'est afin de restreindre le domaine de la liberté contractuelle et de limiter l'autonomie de la volonté qui était auparavant un champ sacro-saint où le consensualisme régnait en maître.<sup>24</sup>

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<sup>19</sup>*Supra*, note 7 at 179.

<sup>20</sup>*Ibid.* at 178.

<sup>21</sup>See text accompanying notes 36-39.

<sup>22</sup>In particular, whether malice or intent to harm are necessary ingredients of an abuse of rights or whether mere unreasonableness will suffice.

<sup>23</sup>See discussion *infra*, notes 68-75 and accompanying text.

<sup>24</sup>*Supra*, note 5 at 71.

L'Heureux-Dubé J. makes it clear in her judgment that the autonomy of the will theory will not stand in the way of an expanded doctrine of abuse of rights:

[t]he doctrine of abuse of contractual rights today serves the important social as well as economic function of a necessary control over the exercise of contractual rights. While the doctrine may represent a departure from the absolutist approach of previous decades, consecrated in the well-known maxim "la volonté des parties fait loi" (the intent of the parties is the governing factor), it inserts itself into today's trend towards a just and fair approach to rights and obligations ...<sup>25</sup>

The following categorical assertion leaves little doubt about the status of the doctrine in contemporary civil law: "If this doctrine were not already part of Quebec civil law, there should be no hesitation to adopt it."<sup>26</sup>

Another very important aspect of the Supreme Court decision in *Houle* is the affirmation of Malouf J.'s expansion of the doctrine of abuse of rights to encompass not only malicious and intentionally harmful exercises of contractual rights, but unreasonable exercises of such rights as well. L'Heureux-Dubé J. explicitly rejects the previous limitations that had been placed on the doctrine:

In accordance with the evolution of the Quebec doctrine and jurisprudence on this issue, the time has come to assert that malice or the absence of good faith should no longer be the exclusive criteria to assess whether a contractual right has been abused. ... there can no longer be a debate in Quebec law that the less stringent standard of "the reasonable exercise" of a right, the conduct of the prudent and reasonable individual, as opposed to the more stringent test of malice and the absence of good faith, can ground liability resulting from an abuse of contractual rights.<sup>27</sup>

Although the concept of enlarging the ambit of abuse of rights so as to encompass unreasonableness in addition to malice and intentional bad faith is not novel, it is important to stress the value of having it stated authoritatively by the Supreme Court. Before the expansion of the abuse of rights doctrine in the Court of Appeal decision in *Houle*, there was great uncertainty in Quebec jurisprudence over the standard of behaviour required for a finding of an abuse of a contractual right.<sup>28</sup> And, despite Malouf J.'s expansion of the notion of abuse of rights in his 1987 Court of Appeal decision, Quebec courts continued to vacillate between the requirements of malice on the one hand, and unreason-

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<sup>25</sup>*Supra*, note 7 at 145.

<sup>26</sup>*Ibid.* at 146.

<sup>27</sup>*Ibid.* at 154-55.

<sup>28</sup>For a sampling of cases rendered before the Court of Appeal decision in *Houle* which required malice see *supra*, note 11.

A small sampling of cases rendered before the Court of Appeal decision in *Houle* which did not require malice are: *Pole Lite Ltée v. Banque Provinciale du Canada*, [1984] C.A. 170; *Gignac v. Radio Future Ltée*, [1986] R.J.Q. 866 (C.S.); *Caisse Populaire de Baie St.-Paul v. Simard* (9 September 1985), Saguenay (La Malbaie) 240-05-000043-845, J.E. 85-943 (C.S.), appeal desisted (19 June 1986), Quebec 200-09-000701-851 (C.A.).

ableness on the other. For example, in the 1988 Court of Appeal decision in *Nikolopoulos v. Cie Trust Royal*, Lebel J. asserted that despite the recent pronouncement of the Court of Appeal in *Houle*, bad faith was required before the plea of abuse of a contractual right could be upheld:

Cependant, dans un cas comme celui-ci, sans qu'il soit besoin de réexaminer toutes les formes possibles de l'abus de droit, il fallait retrouver un élément de *mauvaise foi* dans le comportement des appelants pour établir que leur but principal était d'éviter le paiement de la commission de l'intimée. *La démonstration du caractère intentionnel de l'abus de droit était essentielle pour soutenir les moyens de plaidoirie des intimés.*<sup>29</sup>

The Supreme Court decision in *Houle* injects certainty into this area of the law by enunciating clearly that the standard of behaviour required of contracting parties in the exercise of their contractual rights is reasonableness. This represents a clear rejection of the absolutist view of contracts which would limit judicial intervention to cases of malice and bad faith.

Where the Supreme Court and Court of Appeal part ways is with respect to the foundation of the doctrine and the nature of the liability that results from the abuse of a contractual right. The Court of Appeal in *Houle* established *delictual* liability on the part of the Bank for its unreasonable actions regarding the exercise of its contractual rights.

Elle [the Bank] a commis une faute et cette faute constitue un délit donnant droit à réparation en vertu de l'article 1053 du *Code civil*.<sup>30</sup>

The delictual fault lay in the Bank's failure to act as an ordinarily prudent person by not allowing the debtor a reasonable time for repayment.

Malouf J. is entirely correct in his assertion that the existence of contractual relations does not preclude delictual liability as long as the fault committed by the contracting party would, in the absence of contractual dealings, constitute a delict.<sup>31</sup> It is regrettable, however, that although Malouf J. did cite art. 1024 *C.C.L.C.* in his judgment, he did not seize upon it as the contractual foundation of the doctrine of abuse of rights. As Scassa, in her comment on the Court of Appeal decision stated: "The Court, however, steered the discussion away from any concept of an implied contractual term."<sup>32</sup>

Article 1024 *C.C.L.C.* tells us that obligations can be implied into contracts by various means, one of which is "equity." In the celebrated decision of *Ban-*

<sup>29</sup>(7 March 1988), Montreal 500-09-000697-847, J.E. 88-521 (C.A.) at 2 of Lebel J.'s judgment (emphasis added).

<sup>30</sup>*Supra*, note 8 at 1529.

<sup>31</sup>*Ibid.* at 1527. See *Wabasso v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, 38 N.R. 224 [hereinafter *Wabasso*], and *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 [hereinafter *Air Canada*].

<sup>32</sup>*Supra*, note 9 at 43.



*que Canadienne Nationale v. Soucisse*,<sup>33</sup> the Supreme Court of Canada asserted that this notion of equity imports a duty of good faith in the performance of contractual obligations. When a creditor abuses a contractual right by exercising it in an unreasonable and harmful fashion, there occurs a breach of the duty of good faith performance implied into all contracts by art. 1024 C.C.L.C. It does not require a quantum leap to then assert that this *contractual* breach affords the basis of the general theory of abuse of rights in contractual matters.

Doctrinal writers have long asserted that the foundation of liability for abuse of contractual rights lies in contract and not delict.<sup>34</sup> Quebec courts, on the other hand, have vacillated between imposing contractual and delictual responsibility in cases where a contracting party abused his or her rights.<sup>35</sup> L'Heureux-Dubé J. specifies that the foundation of the doctrine is contractual,

since implicitly, in every contract, according to the civil law, parties undertake to act in the prudent and diligent manner of a reasonable individual and within the confines of fair play when exercising their contractual rights. If this implicit obligation is breached, then contractual liability is engaged with regard to the other contracting party.<sup>36</sup>

While thus far the Supreme Court judgment in *Houle* seems a model of clarity, the decision in favour of the plaintiffs seems surprising when one combines the finding of contractual liability for an abuse of a contractual right with the finding that a piercing of the corporate veil was unjustified in the circumstances of the individual case. Had the Company, which was a contracting party, taken the action against the Bank for abuse of rights, the liability of the Bank would certainly have been contractual. Given, however, that the Company itself was not involved in the litigation and that the shareholder-plaintiffs were held not to be entitled to pierce the corporate veil and step into the Company's shoes, the shareholders' action seems, at first glance, unsustainable by the very reasoning of the Supreme Court. It is at this stage that the Court introduces a novel aspect to the *Houle* case so as to create a basis of recovery for the individual

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<sup>33</sup>[1981] 2 S.C.R. 339 [hereinafter *Soucisse*]. Although there is no explicit duty of good faith performance in the *Civil Code* in force in Quebec, as there is, for example, in Art. 1134 of the French *Code civil* or s. 242 of the German *Civil Code*, the judiciary has created such an obligation in Quebec civil law. See text accompanying note 57 for a discussion of the facts of *Soucisse*.

<sup>34</sup>Mayrand, *supra*, note 5 at 336; Crépeau, *supra*, note 2 at 24; Baudouin, *supra*, note 5 at 335; Jobin, *supra*, note 4 at 163.

<sup>35</sup>Cases imposing delictual liability include: *Banque Nationale du Canada v. Houle* (C.A.), *supra*, note 8; *Lefrançois v. Crane Canada Inc.* (28 March 1988), Montreal 500-05-005768-856, D.T.E. 88T-574 (C.S.); *Stewart v. Standard Broadcasting Corp.* (21 September 1989), Montreal 500-05-008666-875, J.E. 90-75 (C.S.).

Cases imposing a contractual basis for liability include: *Marcotte v. Assomption Cie Mutuelle d'assurance-vie*, [1981] C.S. 1102; *Macaulay v. Imperial Life Assurance Company of Canada* (19 April 1984), Montreal 500-05-015231-804, J.E. 84-423 (C.S.); *Drouin v. Electrolux Canada Ltée*, [1988] R.J.Q. 950 (C.A.).

<sup>36</sup>*Supra*, note 7 at 164.

shareholders without compromising the theoretical holdings of the decision. In order to find liability on the part of the Bank against the non-contracting shareholders, L'Heureux-Dubé J. held that the contractual breach committed by the Bank against the Company constituted an independent fault, actionable under art. 1053 *C.C.L.C.*, *vis à vis* the shareholders.

The breach of a contractual obligation ordinarily leads to contractual liability towards the co-contractant. But the Supreme Court, in the cases of *Wabasso*<sup>37</sup> and *Air Canada*<sup>38</sup> held that a contractual breach may, in the alternative, lead to delictual liability towards the co-contractant. Finally, the same contractual breach may entail the delictual liability of the contracting party who has committed the breach against third parties who are strangers to the contract. The fact that a contracting party may commit a delict against a third party through the breach of a contractual obligation allowed the Supreme Court in *Houle* both to anchor the doctrine of abuse of rights in contract and to find liability on the part of the Bank in relation to the shareholder-plaintiffs, who were strangers to the contract.

There is ample authority in Quebec law to support the imposition of delictual liability under art. 1053 *C.C.L.C.* where the fault committed has, as its origin, a breach of a contractual obligation.<sup>39</sup> It should be noted, however, that the contractual breach which gave rise to the delict *vis à vis* the third parties in this case was not the breach of an explicit contractual obligation but an implicit one, imposed by the court, *ex post facto*, pursuant to art. 1024 *C.C.L.C.*

This aspect of the decision demonstrates how far-reaching the consequences of a doctrine of abuse of contractual rights can be. Not only can it create contractual liability for a party who exercises an explicit contractual right unreasonably, albeit within the letter of the contract, it can also give rise to that party's delictual liability towards persons outside the contract. It is not difficult to imagine that the majority of contracting parties would be surprised, not to say aghast, at the prospect of being delictually liable towards strangers to the contract, in addition to their co-contractant, for doing something their contract states explicitly they may do.

#### IV. A Comparison with the Common Law

In asserting that a creditor must give reasonable notice before requiring payment of a demand loan, or else be liable in damages for abusing his or her contractual rights, L'Heureux-Dubé J. made explicit reference to the Supreme

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<sup>37</sup>*Supra*, note 31.

<sup>38</sup>*Ibid.*

<sup>39</sup>See, for example, *Alliance Assurance Co. v. Dominion Electric Protection Co.*, [1967] C.B.R. 767, aff'd [1970] S.C.R. 168; *Placements Miracle v. Larose*, [1978] C.S. 318; *Caisse Populaire De Charlesbourg v. Michaud*, [1990] R.R.A. 531 (C.A.).

Court decision of *Lister v. Dunlop*,<sup>40</sup> a decision emanating from the province of Ontario and reflecting the common law position of the requirement of reasonable notice. While it may be comforting to know that uniform results are achieved in all parts of Canada on a given legal issue, it is submitted that this is one area of the law where resort to the common law is neither necessary nor warranted. First, there is eminent civilian authority on abuse of rights in both France and Quebec.<sup>41</sup> There is, as well, an explicit codal basis in art. 1024 C.C.L.C. to support the doctrine of abuse of contractual rights. While it may be worth mentioning, as indeed l'Heureux-Dubé J. did, that the application of abuse of rights in contractual matters produces the same result as that in the common law, *Lister* should be reserved for comparative interest only and cannot constitute supporting authority for the *Houle* decision without invading an area of civil law already rich in theory and precedent.

A second reason why a civilian court should not rely on *Lister* as support for a doctrine of abuse of contractual rights is that while it is hailed as a very important Supreme Court decision and has been followed in many subsequent cases,<sup>42</sup> it fails to enunciate, at least explicitly, any general underlying theory which can support the decision and transform the holding into a broad proposition applicable to contract law in general.

In *Lister*, Estey J. held that even in a demand loan, reasonable notice to repay must be given to the debtor. Unlike l'Heureux-Dubé J. in *Houle*, however, Estey J. did not attempt to relate the decision to any general contract principle such as good faith or abuse of rights. The result is that although common law Canada has maintained the reasonable notice requirement in contracts of loan since 1982, there is no unanimity regarding a general underlying theory of good faith or abuse of rights which can support the result achieved in *Lister*. While it has taken almost ten years for the Supreme Court to enunciate a similar proposition with respect to a reasonable notice requirement in contracts of loan in the civil law, civilian lawyers are better off with the reasoning in *Houle* because the case does more than simply create a precedent limited to the behaviour required of creditors recalling loans. Rather, it seeks to establish a general theory of abuse of contractual rights dictating the parameters of the exercise of *all* contractual rights by creditors and the extent to which the judiciary can intervene in the sacrosanct arena of subjective rights.

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<sup>40</sup>[1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1 [hereinafter *Lister* cited to S.C.R.]. Several Quebec abuse of rights cases have done so as well. See, for example, *Caisse Populaire de Baie St.-Paul v. Simard*, *supra*, note 28, where the court stated at 7 that art. 1024 C.C.L.C. is the civil law equivalent to the rule of reasonable delay as provided in *Lister*, *ibid*.

<sup>41</sup>*Supra*, note 5.

<sup>42</sup>See, for example, *Mister Broadloom Corp. (1968) Ltd v. Bank of Montreal* (1984), 44 O.R. (2d) 368 (C.A.); *Kavcar Investments Ltd v. Aetna Financial Services Ltd* (1989), 70 O.R. (2d) 225 (C.A.); *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd* (1990), 105 A.R. 161 (Q.B.) [hereinafter *Dunphy*].

After the Supreme Court decision in *Houle*, it cannot be disputed that in Quebec, there is a limit on the exercise of contractual rights and that liability will be imposed if a creditor exercises those rights within the letter of the contract but in a manner which is unreasonable and causes harm to the debtor. The common law of contract in the rest of Canada is far from evidencing a similar consensus. While certain case law and some authors have attempted to rationalize *Lister* on the basis of a duty of good faith,<sup>43</sup> it cannot be said with any certainty that such a duty presently exists in the Canadian common law of contracts. One need only look to Professor Waddams' oft-cited textbook on contract law to appreciate the lack of such a general theory in common law Canada.

A word must be said at this point about the concepts of "good faith in performance" and "abuse of rights." It is always difficult to oppose so attractive sounding a concept as "good faith" or to favour anything so unpleasant as an "abuse." But the concept of "abuse of rights" raises difficult conceptual problems. If we prohibit A from exercising a right on the ground that its exercise is an "abuse" is it not more accurate to say that A has no right, or that it does not apply in the circumstances? In the contractual context, good faith is ... a relevant factor in determining the true meaning of the parties' agreement. When that has been determined the agreement can be tested for unconscionability, but if it passes that test it seems doubtful that there is any further scope for a doctrine of good faith in performance.<sup>44</sup>

Professor Bridge echoes this view: "it is probably accurate to say that our contract law contains little more than intermittent, discrete and superficial references to a good faith standard of behaviour."<sup>45</sup> Even Professor Belobaba, who argues that Anglo-Canadian law does have a *de facto* doctrine of good faith, asserts that "[t]he judicial recognition of an independent doctrine of good faith is long overdue."<sup>46</sup> The preceding quotes illustrate that the common law has not, at least explicitly, progressed from the absolutist view of contractual obligations reminiscent of Ripert.<sup>47</sup> In the area of abuse of contractual rights,<sup>48</sup> the civil law in France and Quebec has now abandoned that concept of contracts and evolved

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<sup>43</sup>In *Dunphy, ibid.*, Power J. stated that: "[t]he essence of the decision by the Supreme Court in *Lister v. Dunlop* is that lenders must act in good faith and give bona fide consideration to the requirement of reasonable notice" (*ibid.* at 211). In "The Duty to Act in Good Faith, Tort and Fiduciary Liabilities" (1990) 5 National Creditor/Debtor Rev. 53 at 60, D.G. Cowper stated that: "an implied duty to give notice of default under a lending agreement represents a partial acceptance of the same doctrine [of good faith] in substance if not in name."

<sup>44</sup>S.M. Waddams, *The Law of Contracts*, 2nd ed. (Toronto: Canada Law Book, 1984) at 404.

<sup>45</sup>M.G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can. Bus. L.J. 385 at 385.

<sup>46</sup>E.P. Belobaba, "Good Faith in Canadian Contract Law" in *Special Lectures of the Law Society of Upper Canada, Commercial Law: Recent Developments and Emerging Trends* (Toronto: De Boo, 1985) 73 at 91.

<sup>47</sup>*Supra*, note 4.

<sup>48</sup>But, as will be seen later in this comment, the absolutist view of contracts has not been abandoned in other areas of Quebec civil law, such as lesion and *imprévision*.

to a point where it is clear that good faith in the performance of contracts exists<sup>49</sup> and that creditors can be liable for exercising explicit contractual rights in an abusive manner.<sup>50</sup>

## V. The Impact of the *Houle* Decision in Civil Law Generally

The inevitable result of the Supreme Court decision in *Houle* will be a gradual increase of judicial intervention in the contractual sphere.<sup>51</sup> This creates an obvious conflict with one of the pillars of civilian contract law, namely, the doctrine of autonomy of the will as the underlying philosophical basis of contractual obligations. Simply put, this doctrine posits that the contracting parties' will is the unique source of contractual obligations and is the reason that contracts are binding. A contract, under this theory, is seen to be an instrument of self-government, in which the parties' subjective law reigns supreme, binding the parties and the courts.

*Pacta sunt servanda*, which refers to the binding nature of the parties' subjective wills, is a corollary to the doctrine of autonomy of the will and demands that not only are contracting parties bound, *vis à vis* each other, to their initial expression of will which becomes frozen in the contract, but that the judiciary as well is limited by this will thereby making judicial revision of contracts very difficult and unusual.

The conflict between the notion of abuse of contractual rights and autonomy of the parties' will is explicitly recognized in the Supreme Court judgment in *Houle*. L'Heureux-Dubé J. stated:

I must note that the contract regarding the rights of the bank to realize its securities stipulates, in paragraph 4, that it can do so without notice. Nonetheless, this seemingly absolute right must be tempered by the principle of reasonable delay ...<sup>52</sup>

The Court also explicitly admitted that "the doctrine [of abuse of rights in contractual matters] may represent a departure from ... the well-known maxim 'la volonté des parties fait loi.'"<sup>53</sup>

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<sup>49</sup>See *Soucisse*, *supra*, note 33. See also the recent decision of *Bank of Montreal v. Ng*, [1989] 2 S.C.R. 429 at 436, 62 D.L.R. (4th) 1, where the Supreme Court noted (*per* Gonthier J.) the "policy of the civil law for the protection of honesty and good faith in the execution of contracts."

<sup>50</sup>See, in particular, *Aselford Martin Shopping Centres Ltd v. A.L. Raymond Ltée*, [1990] R.J.Q. 1971 (C.S.) [hereinafter *Aselford*]. See text accompanying notes 63-67 for a discussion of *Aselford*.

<sup>51</sup>*Houle* has already been cited with approval and followed in *Banque Nationale du Canada v. Couture*, [1991] R.J.Q. 913 (C.A.), in *120804 Canada Inc. v. La Caisse Populaire Sacré-Coeur de Montréal*, [1991] R.J.Q. 1049 (C.S.), and *St-Eustache Auto Location Inc. v. Location A & C Inc.*, [1991] R.J.Q. 1325 (C.S.).

<sup>52</sup>*Supra*, note 7 at 176.

<sup>53</sup>*Ibid.* at 145.

Contract doctrine, in both civil law and common law traditions, has long been wary of attempts to undermine the absolute power of contracting parties to regulate their contractual relationship as they see fit without court intervention. Professor Jobin offers the following comments regarding the imposition of a notion of abuse of rights based on a good faith obligation in civil law:

Toute utile qu'elle soit, la théorie de l'abus de droit constitue aussi un instrument puissant qui n'est pas sans danger. Il y a certes des "risques de dérapage" à vouloir interpréter et appliquer le contrat conformément à la bonne foi. ... [une] interprétation divinatoire de la volonté des parties et "forçage" du contrat selon les convictions personnelles du juge. Cette théorie se révèle pourtant utile et opportune dans la mesure où elle est employée avec prudence.<sup>54</sup>

In "Good Faith in Canadian Contract Law," Belobaba reports a similar anxiety of legal academics within the Canadian common law tradition:

They worry that an undefined good faith doctrine would jeopardize such Anglo-Canadian contractual traditions as individual autonomy and freedom of contract, and fundamentally undermine values of certainty and predictability in contractual dealings and commercial adjudication.<sup>55</sup>

The concern with undermining the autonomy of the will theory has been expressed by Quebec judges as well. Several cases have refused to accede to the plea of abuse of rights on the ground that the judiciary cannot contradict a clear term of the contract, the contract representing the freely chosen and therefore sacrosanct law of the parties.<sup>56</sup>

However, even before the Supreme Court pronouncement in *Houle*, art. 1024 C.C.L.C. and the obligation to act in good faith in the performance of contractual duties was wreaking havoc with the hitherto inviolable nature of the parties' voluntarily created obligations. Article 1024 C.C.L.C. was, for the most part, being used by the Quebec courts to *add* to or *vary* clearly drafted contractual arrangements which had been created by the will of the parties. In *Soucisse*,<sup>57</sup> the Supreme Court used art. 1024 C.C.L.C. to *impose* an additional obligation on the part of the Bank to inform a surety's heirs of the existence of the suretyship agreement and its revocable character before it advanced money to the debtor for which such heirs would potentially be liable. What is very important about this judgment is that the obligation to inform was nowhere expressed

<sup>54</sup>*Supra*, note 4 at 176.

<sup>55</sup>*Supra*, note 46 at 77-78. See also K. Doerksen & M. Rudoff, "Business Issues: Reconsidering *Lister v. Dunlop*" (1989) 53 Sask. L. Rev. 262 at 275, where the authors state that "[w]hat alarmed the lending community about *Lister* was the uncertainty it introduced."

<sup>56</sup>See, for example, *Cartier Structural Steel Ltd v. Rose Enterprises Ltd*, [1976] C.S. 335; *Banque Nationale du Canada v. Manufacture Roland Couture Inc.* (26 August 1982) Quebec 200-09-000505-823, J.E. 82-876 (C.A.); *Drouin v. Electrolux Canada Ltée* (24 November 1983), Beauce 350-05-000374-809 (C.S.), rev'd [1988] R.J.Q. 950 (C.A.).

<sup>57</sup>*Supra*, note 33.

in the contract between the Bank and the surety, nor could it be extrapolated therefrom using the ordinary rules of interpretation of contracts.<sup>58</sup>

Many abuse of rights cases have had the same effect of judicially overriding the express will of the parties. Where the parties' will was somewhat ambiguous, then one could safely argue that the judiciary was merely performing its role of interpreting contracts in a manner consistent with good faith and reasonableness. However, most cases where a court has found an abuse of a contractual right involve contracts in which the parties' will was explicitly stipulated in unambiguous terms. In such cases, the clash with the doctrine of autonomy of the will and the binding nature of the parties' contract is indisputable. *Houle* is one such case. Despite clear contractual entitlement to demand and execute repayment of a loan, the doctrine of abuse of rights was applied to *add* an obligation to give notice. In a similar vein, in cases where the parties stipulate clearly that their contract can be resolved unilaterally and without cause, Quebec courts have held that the party attempting to exercise such termination rights can be liable under the doctrine of abuse of rights, notwithstanding that he or she is acting within the strict confines of the contract.<sup>59</sup>

In the above cases, the doctrine of abuse of rights has been used to vary the parameters of an existing obligation by adding a requirement of reasonable notice before an existing contractual right may be exercised. In a very recent decision, the Quebec Superior Court took the notion of abuse of rights one step further and used it to *create* an entirely new obligation in a contract of lease. The case is *Posluns v. Entreprises Lormil Inc.*,<sup>60</sup> and the relevant contract was one of lease of space in a shopping mall. The contract limited the lessee's right to use the leased premises to serve a restricted list of food. The lessor then opened a competing restaurant in the same shopping mall and proceeded to serve two of the same items of food allowed the lessee. In an action by the lessor for unpaid rentals, the lessee successfully argued that the actions of the lessor constituted an abuse of rights, and that notwithstanding the lack of any express clause to that effect, an implicit guarantee of exclusivity was read into the contract in favour of the lessee. Goodwin J. stated:

Dans leurs relations avec leurs locataires, ils ne peuvent signer un bail et obliger le locataire à servir un menu principal précis sans assumer une certaine obligation réciproque, même en l'absence de toute clause spécifique d'exclusivité.<sup>61</sup> Le Tribu-

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<sup>58</sup>See, in the same vein, *Rondeau v. Lamarre Valois Int'l Ltée*, [1975] C.S. 805; *Ouellette v. Séguin-Dansereau*, [1976] C.S. 1405; *Godbout v. Provi-Soir Inc.*, [1986] R.L. 212 (C.A.), L'Heureux-Dubé J.A. dissenting; *Bussières v. Syndicat des employés du Centre Hospitalier Robert Giffard et annexes (C.S.N.)*, [1986] R.J.Q. 586 (C.S.).

<sup>59</sup>See, for example, *Noivo Automobile Inc. v. Mazda Motors Canada Ltd.*, [1974] C.S. 385; *Gignac v. Radio Futura Ltée*, [1986] R.J.Q. 866 (C.S.); *Drouin v. Electolux Canada Ltée*, [1988] R.J.Q. 950 (C.A.).

<sup>60</sup>(4 July 1990), Quebec 200-05-001584-858, J.E. 90-1131 (C.S.).

<sup>61</sup>*Ibid.* at 14 (emphasis added).

nal se garde d'imposer une clause d'exclusivité là où les parties n'en ont pas prévu.<sup>62</sup>

Another very interesting case which illustrates the extent to which art. 1024 *C.C.L.C.* and the doctrine of abuse of rights can be used to contradict the express will of the parties and severely undermine the notion of autonomy of the will is the recent decision of *Aselford*.<sup>63</sup> The case involved the sale of a shopping centre where, in order to secure the unpaid balance of purchase price, the deed of sale contained, *inter alia*, an assignment of rentals clause in favour of the vendor. The clause was drafted, however, in such a broad way as to entitle the vendor to exercise the assignment of rentals clause even in the absence of any default. The relevant clause was stipulated in the following unambiguous terms:

Le Vendeur pourra même en l'absence de tout défaut de la part de l'Acquéreur signifier cette cession aux locataires.<sup>64</sup>

When the purchaser took an action to try to end a lessee's lease, the vendor treated this as a "default" and proceeded to exercise the assignment of rentals clause. Frenette J. disagreed with the vendor's course of action and enjoined him from exercising the assignment of rentals clause on the ground that such exercise would be tantamount to abusing his contractual rights. According to Frenette J., if all the principal obligations (namely the repayment of principal and interest) are fulfilled, it would not be just or logical for a creditor to be able to arbitrarily and without valid reason exercise a collateral guarantee. In order to justify his decision to disregard an explicit clause in the parties' contract, Frenette J. stated that although the principle of freedom of contract is "quasi-absolute," it remains subject to other basic principles such as equity.<sup>65</sup>

*Aselford* is an interesting case for two reasons. First, it shows just how far the courts can go in using art. 1024 *C.C.L.C.* and the doctrine of abuse of contractual rights to undermine, indeed virtually ignore, the express will of the parties on the ground that equity ought to be the over-riding norm. The *Aselford* decision does exactly what Soucy, in his article on abuse of rights in 1979, suggested be done:

De même, la notion d'équité ne doit demeurer inconditionnellement subordonnée à la volonté des parties: dans certains cas d'espèce nous devrons bien lui restituer son sens de notion supérieure à la volonté des parties.<sup>66</sup>

Moreover, it does so explicitly. It does not seek to ignore the consequences of the decision. Frenette J. states blatantly that this decision will necessarily con-

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<sup>62</sup>*Ibid.* at 15.

<sup>63</sup>*Supra*, note 50.

<sup>64</sup>*Ibid.* at 1974.

<sup>65</sup>*Ibid.* at 1976.

<sup>66</sup>Soucy, *supra*, note 5 at 73.



flict with the parties' autonomy of the will and freedom of contract. Nonetheless, equity forms part of every contract *notwithstanding* the doctrine of autonomy of the will:

L'équité fait donc partie intégrante de tous les contrats civils, *malgré la doctrine fondée sur l'autonomie de la volonté en matière contractuelle*. Elle permet au juge un pouvoir discrétionnaire de corriger les conséquences des iniquités les plus graves dans les contrats.<sup>67</sup>

There is in Quebec today a substantial body of jurisprudence in which courts are altering parties' contracts on the ground that equity cannot allow the parties to exercise even express contractual rights abusively. The implication of this jurisprudential trend, now confirmed by the Supreme Court of Canada in *Houle*, is undoubtedly a move away from the notions of autonomy of the will, freedom of contract and *pacta sunt servanda*. What is ironic, however, is that Quebec law remains wedded to the notion of autonomy of the will in other aspects of contract law, in particular, lesion and *imprévision*.

Even more ironic is that in many of the abuse of rights decisions, judges use other doctrines of civil law to justify the departure from the absolutist view of contracts. Quite often the reference is to art. 1040c *C.C.L.C.*,<sup>68</sup> the primary unconscionability provision in the *Civil Code*, which, it is argued, provides legislative condonation for a departure from classical contract theory.<sup>69</sup> Article 1040c *C.C.L.C.* was created in 1964 in the hope of inserting a limited concept of lesion for majors. It sought to give the judiciary the power to annul or reduce harsh and unconscionable provisions in a contract of loan of money. The inappropriateness of using art. 1040c *C.C.L.C.* as an analogy in abuse of rights cases is that the Quebec judiciary has never been particularly receptive to this provision, and has proceeded to read it very restrictively. Rather than abandoning the absolutist view of contracts, the judiciary's reaction to art. 1040c *C.C.L.C.* demonstrates its continuing commitment to consensualism and the autonomy of the parties' will. Quebec courts have told us in art. 1040c *C.C.L.C.* cases that *pacta sunt servanda* required them to be bound by the parties' voluntarily assumed obligations, and that this important corollary to the autonomy of the will theory could only be undermined in very specific and limited circumstances which fall squarely within the wording of the article of the *Civil Code*. Obligations which did not fall strictly within the contract of loan of money, such as prepayment

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<sup>67</sup>*Supra*, note 50 at 1976 (emphasis added).

<sup>68</sup>The first paragraph of art. 1040c *C.C.L.C.* reads:

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.

<sup>69</sup>Some examples of reference to art. 1040c *C.C.L.C.* in abuse of rights cases are: *Fiorito, supra*, note 3 at 7; and *Aselford, supra*, note 50 at 1976.

clauses or obligations under a hypothec, did not fall within the rubric of review by the courts.<sup>70</sup>

This reluctance to intervene in contractual matters is also seen in the area of *imprévision*. Quebec, like many other civil law jurisdictions, has refused to grant relief for unforeseeable future events which fall short of causing impossibility of performance but nonetheless change significantly the equilibrium of the contract. Quebec civil law restricts the concept of discharge from one's obligations to cases of fortuitous events, where the irresistible event causes the performance of the contract to be impossible. The stability of contractual obligations created in a properly formed agreement dictates that the parties perform their contract. In a recent Quebec case on *imprévision*,<sup>71</sup> the court held that short of impossibility, contractual obligations cannot be extinguished and that the theory of *imprévision* should not be allowed to overturn or undermine traditional civil law principles. This approach is in sharp contrast to the common law, where the excuse of frustration is a much broader form of relief for non-performance, because it encompasses impracticability of performance, and frustration of the underlying purpose of a contract, in addition to impossibility.<sup>72</sup> It is also in contrast to the position in several other civilian jurisdictions where a concept analogous to frustration has been recognized. It is worth mentioning that in German law, this notion has evolved from the interpretation of the section on good faith in the German *Civil Code*.<sup>73</sup> In Quebec law, despite great advances being made with respect to the doctrines of good faith and abuse of rights, the notion of *imprévision* still remains an unacceptable deviation from civilian contract principles.

The result in Quebec civil law today is a somewhat schizophrenic approach to the law of contractual obligations. On the one hand, the courts are ready and willing to ignore, add to, vary and rewrite parties' contracts in the name of

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<sup>70</sup>See in this vein, *Roynat Ltée v. Les Restaurants La Nouvelle-Orléans Inc.*, [1976] C.A. 557, aff'd [1978] 1 S.C.R. 969 [hereinafter *Roynat*]; *Eiffel Construction (Quebec) Ltd v. Morguard Trust Co.*, [1986] R.J.Q. 879 (C.S.), aff'd in most respects (25 October 1990), Montreal 500-09-000327-866, J.E. 90-1594 (C.A.); *Imperial Oil Ltd v. Le Domaine Gatineau Inc.*, [1977] C.S. 212; *Construction St-Hilaire Ltée v. Les Immeubles Fournier Inc.*, [1972] C.A. 35, rev'd on other grounds [1975] 2 S.C.R. 2; *Simard v. Royer*, [1978] C.A. 219; *Tremblay v. Trans-Canada Crédit Inc.* (28 May 1982), Hauterive (Baie-Comeau) 655-05-000045-823, J.E. 82-698 (C.S.). See also the discussion in R. Jukier, "Flexibility and Certainty As Competing Contract Values: A Civil Lawyer's Reaction to the O.L.R.C.'s Recommendations on Amendments to the Law of Contract" (1988) 14 Can. Bus. L.J. 13 at 22-26.

<sup>71</sup>*Canada Starch v. Gill & Duffus* (6 December 1983), Montreal 500-05-001746-823, J.E. 84-88 (C.S.), aff'd on appeal (17 October 1990), Montreal 500-09-000036-848, J.E. 90-1617 (C.A.).

<sup>72</sup>See Waddams, *supra*, note 44 at 265-84.

<sup>73</sup>S. 242 of the German *Civil Code*. See E.J. Cohn, *Manual of German Law*, vol. 1 (London: British Institute of International and Comparative Law, 1968) at 100; P. Hay, "Frustration and its Solution in German Law" (1961) 10 Am. J. Comp. L. 345.

equity and good faith. The judiciary has seized upon one word — “equity” — in art. 1024 *C.C.L.C.* to perform that feat.

On the other hand, the courts in Quebec are loathe to intervene in contractual matters when substantive injustice and inequity are taking place, other than in the consumer context.<sup>74</sup> In cases of lesion in particular, the courts hide behind the doctrine of autonomy and the supremacy of the parties’ contract as self-made law, and refuse to apply provisions relating to lesion in anything but a very restrictive and toothless manner. Bernier J. in *Roynat* stated that:

La liberté des conventions est la règle; la convention est la loi des parties. Les Tribunaux ne peuvent y déroger ... 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.<sup>75</sup>

In the Supreme Court judgment in *Houle*, L’Heureux-Dubé J. argues that the doctrine of abuse of rights that she proposes “inserts itself into today’s trend towards a just and fair approach to rights and obligations”<sup>76</sup> and cites as support for this “just and fair approach” the notion of lesion between persons of full age in the proposed reforms to the Quebec *Civil Code*. This again is inappropriate support for a doctrine of abuse of rights. It is true that such a general provision on lesion was suggested as part of the general reform of the *Civil Code* currently contemplated in Quebec. It made its way into proposed legislation at the draft bill stage,<sup>77</sup> but, ironically enough, it was eliminated from the proposed *Code* when it finally took the form of a bill before the legislature.<sup>78</sup>

Bill 125, which seeks to recodify civil law, likewise contains no reference to a doctrine of *imprévision*. Thus, Quebec civil law will remain in the current uneven state of having a very developed notion of abuse of rights in contractual matters and a very undeveloped notion of judicial intervention in areas of lesion

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<sup>74</sup>The attempts to introduce lesion at the consumer protection level have, by contrast, been more successful. Decisions rendered pursuant to the Quebec *Consumer Protection Act*, L.R.Q. c. P-40.1, for example, have advocated a more liberal and flexible approach and consumers have been awarded reductions in obligations when the court has found that the consumer paid an excessive purchase price or when the contract proved to be too onerous for the particular consumer. See, for example, *Leclair v. Chevalier* (21 November 1983), Abitibi 615-32-000265-833, J.E. 84-38 (C.P.); *CIBC v. Carbonneau*, [1985] C.P. 65; *Banque de Nouvelle-Écosse v. Savard*, [1990] R.J.Q. 1707 (C.Q.); *Banque de Montréal v. Nadon*, [1990] R.J.Q. 880 (C.Q.). It is perhaps felt that such flexibility is more justifiable in the consumer setting where inequality in bargaining power is often presumed and exploitation an accepted fact whenever an unfair contract has been entered into.

<sup>75</sup>*Supra*, note 70 at 559-60. See also statement by the Superior Court in *Eiffel Construction (Quebec) Ltd v. Morguard Trust Co.*, *supra*, note 70 at 882, affirmed by the Court of Appeal: “an exception to the fundamental principle of freedom of contract ... must be interpreted restrictively.”

<sup>76</sup>*Supra*, note 7 at 145.

<sup>77</sup>Draft Bill, *An Act to Add the Reformed Law of Obligations to the Civil Code of Québec*, 2d Sess., 33d Leg. Qué., 1988, Art. 1449.

<sup>78</sup>Bill 125, *Civil Code of Québec*, 1st Sess., 34th Leg. Qué., 1990.

and *imprévision*. It is interesting to note that this is the reverse of the current situation in Anglo-Canadian law. In the common law provinces, courts have clearly adopted a doctrine of unconscionability<sup>79</sup> and have recognized the ability of a contracting party to escape the consequences of non-performance due to a frustrating event.<sup>80</sup> On the other hand, they have not, as has the civil law, explicitly adopted a general duty of good faith or recognized the concept of abuse of rights in any general way.

### Conclusion

The doctrine of abuse of rights has justifiably been surrounded by controversy both as to its existence and as to the parameters of its applicability. At first glance, it seems inconsistent to even assert that it is possible for a person to abuse a "right:"

The abuse of rights doctrine states essentially that a person may incur civil liability through a certain act, even though such act is within the bounds of a legal right.<sup>81</sup>

Once it is admitted that by imposing a general good faith obligation under art. 1024 *C.C.L.C.*, liability may arise for unreasonable and harmful exercises of a contractual right, a conflict then arises between the desire to intervene and protect against such abuse, and the desire to uphold the philosophical underpinnings of civilian contract law. No matter how well-founded the obligation of good faith and the doctrine of abuse of rights may be, it is incontestable that such principles seriously interfere with the autonomy of the will theory. But given the dynamics of modern day contract law, as it functions in a complex society, it is entirely justifiable to undermine the concept of autonomy of the will in such manner. Although many Quebec judges still operate from the vantage point of freedom of contract and the sacrosanct nature of freely-created contractual obligations, most contemporary doctrinal writers admit that there has been a serious decline in the relevance of the doctrine of the autonomy of the will such that it is no longer recognized as the operating theory underlying contractual obligations:

Le consensualisme a perdu l'importance qu'il avait autrefois et l'autonomie de la volonté occupe une moins grande place dans notre système juridique.<sup>82</sup>

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<sup>79</sup>See, for example, *Harry v. Kreutzinger* (1979), 95 D.L.R. (3d) 231, 9 B.C.L.R. 166 (C.A.); and most recently, *Hunter Engineering v. Syncrude*, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321.

<sup>80</sup>*Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A.). See also the Ontario *Frustrated Contracts Act*, R.S.O. 1980, c. 179, and the British Columbia *Frustrated Contract Act*, R.S.B.C. 1979, c. 144.

<sup>81</sup>Angus, *supra*, note 5 at 151.

<sup>82</sup>M. Deschamps, "L'autonomie de la volonté dans la détermination de la loi contractuelle et du tribunal compétent" (1990) 24 R.J.T. 471 at 473.

The autonomy of the will theory owes its origin primarily to the individualistic philosophy of the natural rights of man, and, in particular, to the Rousseauian premise that "men are free and equal" implying that contracting parties would not, in exercising their freedom to contract, agree to something that is unjust. The "decline of the autonomy of the will theory" reflects the growing acceptance that its underlying premise no longer reflects societal reality of the late twentieth century.<sup>83</sup> Critics of the theory propound that men are not free and equal because inequality in bargaining power exists in almost every type of contract.<sup>84</sup> Furthermore, freedom of contract is no longer absolute: legislative restraints on the content of contracts are legion,<sup>85</sup> and adhesion contracts, in which contractual terms are not negotiated but are imposed by one of the contracting parties, are proliferating. Finally, monopolistic market conditions make the freedom of choosing a contracting party largely unrealistic. The reality of contracts in today's society has led one author to state in a recent article on autonomy of the will that

[I]a théorie de l'autonomie de la volonté n'a donc pas réussi à être un *principe directeur* de la politique législative et de la pratique jurisprudentielle.

C'est pourquoi il ne faut pas parler de son déclin mais de son *abandon*.<sup>86</sup>

The purpose of this comment is not to lament the decline of the autonomy of the will theory or to criticize the detrimental effect the expanded judicial role in the area of abuse of contractual rights may have on that theory. In fact, the contrary is true. The fact that contracting parties are rarely of equal bargaining power and virtually never possess equal amounts of relevant information are, in this author's opinion, sufficiently serious grounds for rethinking the wisdom of remaining wedded to such a theory as the underlying foundation of contractual obligations in the civil law.

What is lamentable, however, is the inconsistent approach of the civil law in Quebec with respect to the possibility of judicial intervention to correct contractual injustice and inequities. It is regrettable that the same judges who have advanced the cause of equity in the field of abuse of rights have not seized upon opportunities to inject equity into other areas of civil law in deserving cases.

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<sup>83</sup>R. West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner" (1985) 99 Harv. L. Rev. 384.

<sup>84</sup>One of the most notable dissents to the theory is Jacques Ghestin who expounds an alternative theory to the effect that the State should not lend its hand at enforcing contracts unless they are both useful and contractually just. See "L'utile et le juste dans les contrats" in *Archives de Philosophie de Droit*, t.26 (Paris: Sirey, 1981) 35.

<sup>85</sup>See in this vein the decision of *Lapointe v. Hôpital Le Gardeur*, [1989] R.J.Q. 2619 (C.A.).

<sup>86</sup>M. Coipel, "La liberté contractuelle et la conciliation optimale du juste et de l'utile" (1990) 24 R.J.T. 485 at 488 (emphasis added).