Relevance of Contract Law Solutions Under a Pandemic

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Who would have thought that a submicroscopic infectious agent would revive one of the most debated topics in contract law literature[1]? How to deal with a contract of which the obligations have become impossible or more difficult due to the occurrence of some unforeseeable contingencies?

Even if the main issue of Covid-19 remains public health and the protection of lives, there is now no doubt that the current crisis may have some serious consequences on other aspects of society. Among other sectors hit by the repercussions of the Covid-19 pandemic, the economy is the one that seems to be quite vulnerable. Massive layoffs, forced closures of nonessential businesses, and disruption of cross-border transport are the most visible consequences of this latest coronavirus outbreak; the one that makes headlines in the news outlets. There are, however, some less striking impacts which escape the attention of journalists. One may think of the indirect effects of economic difficulties on contractual relations.

The Quebec Government, like many other States, has decided[2] to put the economy "on pause"[3]. The extraordinary measures adopted by the Government to fight the Covid-19 pandemic, including the forced temporary closure of nonessential businesses, creates a very unprecedented uncertainty about the fate of the contracts already concluded by the concerned agents. These measures seriously undermine the ability of contracting parties to perform their contractual obligations. The prohibition of all indoor and outdoor assemblies simply makes the performance of some ongoing contracts impossible. Some other contracts may need small to substantial modifications to be adapted to the new socioeconomic realities. Last, but not least, some contracting parties may be in breach of contract because of financial difficulties.

Notwithstanding the specific cause of non-performance in each of the above-mentioned situations, we may agree on one point: several contracts can no longer be performed as expected. While a contract is the most effective tool to proceed to risk allocation[4], it is

[1] Several authors in academia or in legal practice have already published texts on the impact of the Covid-19 outbreak on ongoing contracts. In this regard, see, for example, Julia Heinich, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision' [2020] Dalloz 611; Céline Legendre, Frédéric Plamondon and Julien Hynes-Gagné, 'COVID-19 pandemic: A force majeure under Québec civil law?' (*Osler*, 19 March 2020) <https://www.osler.com/en/resources/regulations/2020/covid-19-pandemic-a-force-majeure-under-quebec-civil-law> accessed 25 May 2020; Horia Bundaru and Vincent Rochette,'Pandemic: Superior force ('force majeure') and its impact on business obligations in Quebec' (*Norton Rose Fulbright*, 20 March 2020) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/00261309/pandemic-superior-force-force-majeure-and-its-impact-on-business-obligations-in-quebec> accessed 25 May 2020.

[2] On March 13, the Government of Quebec adopted an Order in Council to declare a public health emergency according to article 118 of the Public Health Act (chapter S-2.2). (Décret no 177-2020, March 13, 2020 concernant une déclaration d'urgence sanitaire conformément à l'article 118 de la Loi sur la santé publique [2020] 12A G.O. 1101A.

[3] Government of Quebec, 'Québec sur pause pour trois semaine' <https://www.quebec.ca/premier-ministre/actualites/detail/le-quebec-sur-pause-pour-trois-semaines/> accessed 26 May 2020.

[4] Alan Schwartz, 'The Law and Economics Approach to Contract Theory' in Donald A Wittman (ed), *Economic Analysis of the Law* (Blackwell Publishing Ltd 2004).

reasonable to ask whether or not this allocation depends on the stability of the surrounding circumstances. This reminds us of the old opposition between two maxims: *pacta sunt servanda* and *rebus sic stantibus*. The question is whether or not the contracting parties should respect the initial risk allocation despite all challenges brought about by the drastic changes in the surrounding circumstances?

For Quebec contract law scholars, the most intuitive way to answer this question is to seek a solution from within contact law. Two traditional contractual doctrines exist which aim to put forward a solution to the risk allocation problem. The question may be analyzed as a case of force majeure[5] or within the doctrine of *imprévision*[6]. More recently, a solution based on the duty of good faith has been suggested by some scholars. Notwithstanding differences between these doctrines, they have one thing in common. They all follow the intrinsic logic of contract law by providing general rules applicable to address a problem encountered in one defined contract.

Different measures adopted by Federal and Provincial Governments to help contracting parties suggest that there should be another way to find a remedy for contracts affected by drastic changes in circumstances. *Ad hoc* solutions emerging from outside of contract law may be more efficient than contractual remedies in tempering the negative effects of the Covid-19 outbreak on contracts.

The objective of this paper is to shed light on some plausible responses to the crisis caused by the Covid-19 outbreak as it affects contractual relations. Even though our analysis is limited to Quebec contract law, we will discuss some measures adopted by the Canadian Federal Government which may nonetheless have some impacts.

In the first section of this paper, we will discuss the doctrine of force majeure, its conditions, its effects and its application in the current crisis. The second section will be dedicated to the theory of *imprévision*. After a historical overview, we will demonstrate the reasons this doctrine is not applicable under Quebec contract law. The first two sections will be dedicated to more traditional responses to this problem. In the third section, we will discuss the new role assigned to the duty of good faith by virtue of a new understanding of this concept which emphasizes cooperation in contractual relationships. It will be shown that even though this understanding seems to be promising, Quebec contract law is not yet ready to use it in order to judicially redistribute risks and benefits of a contract. Finally, the last section will study the out-of-the-box solutions brought by the public au-

[5] The impossibility of performance is sometimes studied as the frustration doctrine. In this paper, we have decided to use only force majeure. This appellation is more faithful to Quebec contract law where this concept is largely known as force majeure.

[6] The doctrine of hardship represents some similarities with the theory of *imprévision*. In legal literature, these two concepts may be used indiscriminately. We use the expression "theory of *imprévision*" in order to remain faithful to the particularity of this concept in civil law.

thorities to fight the effects of the current crisis. It will be shown that slight links may be made between public responses and cooperation in contractual relationships.

1. Force Majeure: A Plausible Solution

In contract law in Quebec, force majeure is a doctrine that enables a contracting party to seek relief should the performance of an obligation become impossible due to an unforeseeable and irresistible event. Force majeure is an old concept in Quebec contract law[7], dating back to Quebec's first Civil Code, known as the Civil Code of Lower Canada (CCLC). The CCLC used to refer to two concepts for dealing with the impossibility of performance: "force majeure" and "fortuitous event"[8]. The Code did not give a formal definition of force majeure. Instead, the fortuitous event was defined by reference to the notion of force majeure. Article 17 (24) CCLC provided that "[a] 'fortuitous event' is one which is unforeseen, and caused by superior force which it was impossible to resist." Some authors suggest that there was a theoretical distinction between fortuitous event and force majeure. The former is an event caused by humans, while the latter is caused by nature[9].

In spite of this so-called theoretical distinction between "fortuitous event" and "force majeure," neither the case law[10] in Quebec nor the legal doctrine[11] have created a practical distinction between these terms and they are often used interchangeably. In accordance with this tendency, the term "fortuitous event" is no longer used in the current Civil Code of Quebec (CCQ). Article 1470 CCQ is the main provision dealing with force majeure. This article applies equally to the contractual and delictual responsibilities and remains the essential means by which debtors may excuse their non-performance. Note that the force majeure in Quebec contract law considers the performance of each obligation and not the contract[12].

[7] The concept comes from Roman law. To read more on the subject, see Robert Taschereau, 'Théorie du cas fortuit et de la force majeure dans les obligations' (Thèse, Université Laval 1901).

[8] The English version of the Civil Code of Lower Canada used two terms to designate "force majeure": "irresistible force" or "superior force". The French version used "force majeure".

[9] Léon Faribault, *Traité de Droit Civil Du Québec* (Wilson & Lafleur 1957) vol 7-*bis* 387.

[10] *Rivet v. La Corporation du Village de St-Joseph*, [1932] S.C.R. 1, 4.

[11] Faribault (n 9) 387.

[12] Marel Katsivela, 'Canadian Contract and Tort Law: The Concept Of Force Majeure In Quebec And Its Common Law Equivalent' (2012) 90 The Canadian Bar Review <https://cbr.cba.org/index.php/cbr/article/view/4263> accessed 23 April 2020."plainCitation":"Marel Katsivela, 'Canadian Contract and Tort Law: The Concept Of Force Majeure In Quebec And Its Common Law Equivalent' (2012

The second paragraph of article 1470 CCQ provides a formal definition of force majeure[13]. While the new definition lists the characteristics of force majeure, the effects of force majeure are stated at article 1693 CCQ.

1.1. Characteristics of Force Majeure

According to the second paragraph of article 1470 CCQ, force majeure is an unforeseeable and irresistible event. Two cumulative conditions must be satisfied in order to characterize an event as a case of force majeure. The case law indicates the manner in which these conditions may be interpreted.

The first condition concerns the ability of parties to foresee the probability of a contingency when contracting. The parties must absolutely not be able to foresee the contingency and, consequently, not be able to include a provision applicable in the event of its happening. In other words, the parties must not be able to bargain the risk and benefit allocation concerning that specific event. The simple fact that a contract does not contain a provision applicable to a specific event does not mean that this event was unforeseeable. In fact, the CCQ does not refer to an unforeseen event; the term used is unforeseeable. According to the case law, an analysis *in abstracto* is needed to state if an event is unforeseeable or not. The personal impossibility of the parties to estimate the probability of the contingency is not relevant. The focus should be on what a reasonable person – longtime known as *bon père de famille* in civil law – would have done when placed in the same situation. Was the reasonable person able to foresee the event? If so, a specific risk and benefit allocation would have been placed in the contract. The risk would have been shared by both parties or assumed by one of them. In this case, the event cannot be characterized as force majeure.

The case law gives some interesting examples of events that were or were not recognized as a case of force majeure[14]. It is not easy to draw a clear line between what is foreseeable

[13] The English version of the Civil Code of Quebec uses the term "superior force." We prefer the term "force majeure" which corresponds to the term used in the French version. It corresponds better to the expression largely used in the doctrine of frustration in English literature.

[14] In some cases, the unpredictability of the event is not admitted. In *Syndicat des travailleuses et travailleurs de Hilton Québec (CSN) v UMRCQ* [1992] CanLII 3067 (Court of Appeal of Quebec) the Court stated that the freezing of rain falling upon trees at certain seasons in Canada and consequent destruction of their branches by force of wind operating upon them when so laden was too frequent an occurrence to escape the attention of any intelligent person; In ibid, in the midst of collective bargaining, a hotel should have anticipated the risk of a legal strike by its employees. Therefore, the impossibility of the hotel to host a conference cannot be excused by invoking force majeure; In *Laidley v Kovalik* [1994] CanLII 5878 (Court of Appeal of Quebec), an economic crisis was not considered as a fortuitous event, because the investment professionals had to exercise caution and reserve and had to consider this probability; In *Banque Laurentienne Canada v Pinkerton du Québec ltée* [1994] JE 94-1360 (Superior Court of Quebec), a security firm could not plead the unpredictability of the theft committed by one of its employees.
On the other hand, in *Douville v 134188 Canada inc* [1995] JE 95-1769 (Superior Court of Quebec), the Superior Court of Quebec admitted the unpredictability of freezing rains; in *Factory Mutual insurance Company v Richelieu Métal Québec inc* [2011] QCCA 1690, the snow was considered as a case of force majeure; Finally in *Banque de Montréal v Krespine* [1999] 99BE-1164 (Superior Court of Quebec), theft is considered as force majeure.

and what is not. It depends largely on the facts of each case. The bottom line is that it seems to be rather hard to convince the Quebec Courts that a given event is an unforeseeable one. For instance, a court has refused to recognize a once-every-hundred-year rain as an unforeseeable event[15].

The second condition concerns the fact that the harmful event must be irresistible. This means that no matter how important the debtor's efforts, the contractual obligations can absolutely not be performed as expected. In other words, the performance of the obligation must become completely impossible. Some remarks must be made concerning the irresistible character of force majeure. First, the performance of the obligation should become impossible[16]. It is not just about the personal ability of the contracting party to perform. Again, the Court should proceed to an analysis *in abstracto*. The question is whether a reasonable person could have resisted the harmful event and been able to perform the obligation. It must be added that the performance must not become simply more onerous; in such a case, the problem must be analyzed as a case of *imprévision*[17]. Second, chronologically, the impossibility must occur after the conclusion of the contract and solely because of the harmful event. In other words, when signing the contract, contractual obligations must be possible. Should the performance of the obligation be impossible at the time of contract formation, the contract may be nullified by a court[18]. Third, the impossibility must be a direct consequence of the harmful event. It is not about the cash-flow problem caused indirectly by the harmful event. Finally, the irresistible character of force majeure implies that no reasonable person can avoid it happening. As some authors have said, "[the event] must, in fact, be irresistible as to its occurrence – inevitable – and regarding its effects – insurmountable"[19].

Some legal scholars persist that there is a third condition for an event to be qualified as force majeure. They believe that the event must be external to the debtor. Defined in the CCQ, the concept of force majeure is not necessarily an external event. This is a clear choice made by the legislature not to add this condition[20]. The case law also does not

[15] *Guardian du Canada (Nordique (La), compagnie d'assurances du Canada) v Rimouski (Ville de)* [2008] QCCS 2153 [408].

[16] In *Deux-Montagnes (Ville) v St-Joseph-du-Lac (Municipalité)* [2015] QCCA 749 [24], the Court of Appeal of Quebec considers that "*(…) un événement, ou une série d'événements regroupés, peut être qualifié d'irrésistible s'il rend l'exécution de la prestation absolument impossible*".

[17] The Court of Appeal of Quebec reaffirms in *Transport Rosemont Inc v Ville de Montréal* [2008] QCCS 5507 that if an event makes the performance simply more difficult, more hazardous, or more onerous for the debtor, the event shall not be characterized as force majeure or fortuitous event. "*Quant à l'irrésistibilité, il suffit de mentionner que l'événement qui rend l'exécution simplement plus difficile ou plus périlleuse ou plus onéreuse pour le débiteur ne tombe pas dans cette catégorie des cas fortuits.*"

[18] Paragraph 2 of article 1373 CCQ provides that the debtor is bound to render a prestation that is possible. An impossible prestation makes obligation null.

[19] Didier Lluelles and Benoît Moore, *Droit des obligations* (2nd ed, Éditions Thémis 2012) 2734.

[20] It should be noted that in some statutes, the legislature has implicitly included the external character as one of the constitutive elements of force majeure. In the context of responsibility for property damage caused by an automobile,

require such condition[21]. Some authors[22] propose to consider the external character as a part of a global analysis to verify if an event is unforeseeable and irresistible. This is only the case if the event is outside of the debtor's sphere of control. For example, an illegal strike by employees is not within the debtor's sphere of control – thus unforeseeable and irresistible – so that it may be considered as force majeure, while a legal strike is under the debtor's sphere of control, in which case a reasonable person may avoid the strike or at least anticipate its happening[23].

There is little doubt of the unforeseeable character of the Covid-19 outbreak for most contracting parties[24]. But is it really irresistible? To find the answer, a specific analysis needs to be done for each contract affected by the crisis. There is no universal answer to this question.

1.2. Effects of Force Majeure

To know the main consequence of characterizing an event as a case of force majeure, one should read article 1693 CCQ. According to this article:

Where an obligation can no longer be performed by the debtor, by reason of superior force and before he is in default, the debtor is released from the obligation; he is also released from it, even though he was in default, where the creditor could not, in any case, have benefited from the performance of the obligation by reason of that superior force, unless, in either case, the debtor has expressly assumed the risk of superior force.

The burden of proof of superior force is on the debtor.

Two remarks must be made in this regard. First, force majeure does not produce any consequences on the validity of the contract. The harmful event happens after the conclusion of the contract; the impossibility of performance does not then make the obligation invalid. It should be noted, secondly, that a contract may contain several obligations which are not equally affected by force majeure. In other words, not all obligations in a contract will become impossible by the happening of the harmful event. Therefore, the contracting

article 108 of the Automobile Insurance Act (Ch. A-25) provides that damages resulting from the condition or the running order of the automobile, or from the fault or the state of health of the driver or a passenger were not caused by force majeure.

[21] In *Guy St-Pierre Automobile Inc v Lavallée* [1964] CS 353 (Superior Court), the breaking of the axle of a car was considered as force majeure; In *Gougeon v Bousquet* [1994] RDI 523 (Courte of Quebec), the sickness of the debtor was recognized as force majeure.

[22] Lluelles and Moore (n 19) 2736.

[23] *Syndicat des travailleuses et travailleurs de Hilton Québec (C.S.N.) v U.M.R.C.Q.* (n 14).

[24] The 2009 swine flu pandemic was recognized as a case of force majeure in two decisions made by the Court of Quebec: *Lebrun v Voyages à rabais* [2010] QCCQ 1877 (Court of Quebec); *Béland v Voyage Charterama* [2010] QCCQ 2842 (Court of Quebec).

parties remain bound by the contract unless the concerned obligation is an essential one and the harmful event is permanent[25].

In a bilateral contract, the question arises about the correlative obligation of the creditor. May a debtor require the performance of the correlative obligation of the creditor, while being released from her own obligation? It should be recalled that the provisions concerning resolution or resiliation of contracts may not be applied. Articles 1604 to 1606 CCQ apply only where there is faulty non-performance; that is clearly not the case where non-performance is caused by force majeure. The answer may be found within the risk theory. According to article 1694 CCQ, "[a] debtor released by impossibility of performance may not exact performance of the correlative obligation of the creditor; if the performance has already been rendered, restitution is owed." This solution fits well non-translative contracts in which each party assumes only obligations that consist of doing or not doing something[26].

Unlike article 1351 of the French Civil Code[27], article 1693 CCQ does not specify if the extinction of an obligation applies only when the impossibility is permanent, or if it applies even when the harmful event is temporary. To find the answer, the focus should be on the importance of performance at a certain time. Should the performance be done at a fixed time, the obligation will be extinguished, and the debtor will be discharged. On the other hand, if the moment of performance is not of capital importance, a temporary impossibility of performance will only suspend the obligation, and the debtor is not relieved. In this case, should the harmful event be lifted, the creditor may exact the performance. Therefore, depending on the obligation, the sanction may be extinction or suspension of the obligation. This conclusion is not provided by CCQ. There is also little precision in the case law. The solution seems to be a doctrinal one[28] inspired by the French law. It fits well with the philosophy of Quebec contract law which promotes the specific performance of obligations[29].

[25] Unlike the Civil Code of France in article 1351, which states the definitive character of impossibility, article 1693 CCQ does not include any specification regarding the definitive character of impossibility.

[26] When the contract implies a transfer of real rights, according to article 1456 CCQ, "[t]he debtor of the obligation to deliver the property continues, however, to bear the risks attached to the property until it is delivered," although the debtor is no longer the owner of the good. Article 1456 CCQ creates an exception to the general rule which makes the owner the bearer of risk.

[27] "L'impossibilité d'exécuter la prestation libère le débiteur à due concurrence lorsqu'elle procède d'un cas de force majeure et qu'elle est définitive, à moins qu'il n'ait convenu de s'en charger ou qu'il ait été préalablement mis en demeure."

[28] Lluelles and Moore (n 19) 2747.; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations* (7th ed, Ed Yvon Blais 2013) para 846; Vincent Karim, *Les Obligations*, (4th ed, Wilson & Lafleur 2015) vol II, para 3454.

[29] "*Le mouvement constaté durant la dernière partie du 20e siècle en faveur d'une plus grande ouverture à l'exécution en nature était donc très opportun et se traduit d'ailleurs dans la lettre du Code civil du Québec. Ainsi, il est intéressant de noter que le législateur, à l'article 1590 C.c.Q., place l'exécution forcée en nature en tête de la liste des recours du créancier, de façon bien distincte, immédiatement après la mention de la sanction universelle que constitue l'exécution par équivalent. De plus, il lui consacre maintenant une disposition propre qui en énonce le principe (art. 1601 C.c.Q.), tout en y ajoutant deux dispositions consacrées à des applications particulières (art. 1602 et 1603 C.c.Q.). Ce sont là autant*

As a conclusion to this section, we may summarize the solutions proposed by Quebec contract law. In the case of force majeure, if the harmful event is temporary and the moment of performance of the obligation affected by the event may be variable, the performance is simply suspended until the end of the event. Otherwise, the debtor may seek relief and the obligation will be extinguished. The court may not rewrite the contract or reduce the obligation of the debtor except where the impossibility is partial.
But an unforeseeable event may not always lead to the impossibility of the performance. Sometimes, the performance becomes extremely onerous but still feasible. The theory of *imprévision* addresses this issue.

2. Revision of Contract for *Imprévision*: An Impossible Solution

The theory of *imprévision* is one of the most controversial theories in civil law. Under what conditions may a court intervene to balance a contract whose equilibrium is upset due to an unforeseeable contingency? The basic idea behind the theory of *imprévision* is to permit courts to rewrite or to terminate the contract despite the initial arrangement made by the contracting parties. This *ex-post* rearrangement aims to make the debtor's obligation less onerous so that it may be performed.
There is no homogenous approach to this theory among any of the civil law legal systems. Some tend to admit revision or termination of the contract when the surrounding circumstances have substantially altered[30]. Others, including Quebec, take a different approach by sticking to an orthodox reading of contract law based on the autonomy of the will[31] which precludes any judicial intervention regarding a validly concluded contract. Even though the general tendency is to recognize the theory of *imprévision*, Quebec maintains its opposition. A brief historical review of *imprévision* may help us better understand Quebec's choice to deal with this issue.

d'indices que le législateur la considère véritablement sur le même pied que les autres sanctions, et non plus comme un recours exceptionnel" (Baudouin, Jobin and Vézina (n 28) para 731).

[30] By proceeding to a thorough reform of contract law (Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, ratified by the Loi n° 2018-287 du 20 avril 2018), France becomes the latest legal system which admits the revision of contracts in case of *imprévision*.

[31] To know more about the doctrine of the autonomy of the will, see Véronique Ranouil, *L'autonomie de la volonté : naissance et évolution d'un concept* (Presses universitaires de France 1980).

2.1. *Imprévision* under the Civil Code of Lower Canada

An author rightfully states that the CCLC was "impregnated in liberalism."[32] Consequently, the principle of the binding force of contracts had the utmost importance under that Code. But surprisingly, the 1866 legislature omitted[33] to explicitly affirm this principle. The CCLC contained no provision equivalent to former article 1134 of the French Civil Code[34]. The only article dealing with the binding force of a contract was article 1022 CCLC that simply described the effects of contracts. The third paragraph of this article provided that "[contracts] can be set aside only by the mutual consent of the parties, or for causes established by law." This provision made any judicial revision of contracts subject to prior legal permission. By omitting to refer explicitly to the theory of *imprévision*, the judicial revision of contracts was neither permitted nor prohibited.

Despite the absence of a clear rule, authors were mostly opposed to any judicial intervention after the conclusion of the contract[35]. Courts unhesitatingly followed the mainstream doctrine. In 1975, the Superior Court of Quebec, in *Grant Mills Ltd. v Universal Pipeline Welding Ltd*[36] concluded that the theory of *imprévision* had not yet managed to overturn traditional principles of civil law[37]. This conclusion was confirmed by two other subsequent decisions of the Court of Appeal of Quebec made under the CCLC[38]. There was, therefore, no doubt that under the CCLC, Quebec Contract Law did not recognize the theory of *imprévision*.

[32] Sylvio Normand, 'Le Code et la protection du consommateur' (1988) 29 Les Cahiers de droit 1063.the Civil Code — virtually by itself — governed questions relating to private contractual relationships. Yet it happened that where the legal framework instituted in the mid-19th century satisfied the needs of that liberal society, it could no longer suit the requisites of a consumers' society without leading to serious injustices. The arrival of the consumers' society had a significant effect on private law. On the one hand, the liberal ideology which had been the keystone underlying the Code, was shaken and, on the other, the technique of codification which had often been presented as a culmination, was discredited. This study investigates in turn these two unsettling factors. Consumer law serves to illustrate problems that are all too often neglected, especially the relationship between private law and the Code, the Code's capacity to be adapted to socio-economic changes and the phenomenon of hybridization which private law cannot escape.","container-title":"Les Cahiers de droit","DOI":"https://doi.org/10.7202/042925ar","ISSN":"0007-974X, 1918-8218","issue":"4","journalAbbreviation":"cd1","language":"fr","note":"publisher: Faculté de droit de l'Université Laval","page":"1063-1082","source":"www.erudit.org","title":"Le Code et la protection du consommateur","volume":"29","author":[{"family":"Normand","given":"Sylvio"}],"issued":{"date-parts":[["1988"]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

[33] According to Pierre-Basile Mignault, a prominent legal scholar and former Justice of the Supreme Court of Canada, there was no need to repeat a well-known maxim (Pierre-Basile Mignault, *Droit Civil Canadien* (Théoret 1901) vol 5, 260).

[34] "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*"

[35] Gérard Trudel, *Traité de Droit Civil Du Québec* (Wilson & Lafleur 1946), vol 7, first part, 323.

[36] *Grant Mills Ltd v Universal Pipeline Welding Ltd* [1975] CS 1203 (Superior Court).

[37] ibid 41.

[38] *H Cardinal construction Inc v Dollard-des-Ormeaux (Ville de)* [1987] JE 87-970 (Court of Appeal); *Montréal (Communauté urbaine de) v Ciment indépendant Inc* [1988] JE 88-1127 (Court of Appeal).

2.2. Evolution of Quebec Contract Law: More Place for Equity

During the 20th century, the evolution of contract law was remarkable to the point that we may call it a slow metamorphosis. The weakening of the "autonomy of the will" was at the heart of this evolution which may be demonstrated by pointing out three significant episodes: the legislative response to the great crash, the introduction of a new section to the CCLC, and the adoption of the consumer protection act.

As reported by an author[39], the great crash of 1929 was one of the pivotal moments in the history of Quebec contract law. The financial disaster created by the great crash had a significant effect on the hypothecary debtors. Several debtors were facing proceedings brought by hypothecary creditors in the exercise of their rights. That would have resulted in several homeowners being dispossessed of their properties. In order to help homeowners who could no longer pay their debts, the National Assembly of Quebec adopted an Act[40] (*Loi suspendant l'exigibilité des créances hypothécaires et autres*) aiming to impose a moratorium on the mortgages. Article 1 of this Act provided a thirty-day moratorium on any action for debt recovery relating to the capital of a mortgage. According to article 2 of the Act, during this period, the hypothecary debtor could present a motion to a court in order to obtain a delay for payment. Finally, article 8 of the Act provided that any judgment granting a delay could be rescinded if it could be established that the circumstances justifying the delay had changed.

Three remarks are pertinent concerning this legislative intervention. First, this act recognized, for the first time, the judicial revision of a contract. Although the courts were not allowed to reduce the debtor's obligation, they did find the power to change the date on which the debt was due. Second, this measure was a temporary response. The period granted to debtors could not extend beyond May 1, 1934. Finally, the legislature didn't have the intention to modify contact law; not a single modification was made to CCLC.

[39] Normand (n 32).the Civil Code – virtually by itself – governed questions relating to private contractual relationships. Yet it happened that where the legal framework instituted in the mid-19th century satisfied the needs of that liberal society, it could no longer suit the requisites of a consumers' society without leading to serious injustices. The arrival of the consumers' society had a significant effect on private law. On the one hand, the liberal ideology which had been the keystone underlying the Code, was shaken and, on the other, the technique of codification which had often been presented as a culmination, was discredited. This study investigates in turn these two unsettling factors. Consumer law serves to illustrate problems that are all too often neglected, especially the relationship between private law and the Code, the Code's capacity to be adapted to socio-economic changes and the phenomenon of hybridization which private law cannot escape.","container-title":"Les Cahiers de droit","DOI":"https://doi.org/10.7202/042925ar","ISSN":"0007-974X, 1918-8218","issue":"4","journalAbbreviation":"cd1","language":"fr","note":"publisher: Faculté de droit de l'Université Laval","page":"1063-1082","source":"www.erudit.org","title":"Le Code et la protection du consommateur","volume":"29","author":[{"family":"Normand","given":"Sylvio"}],"issued":{"date-parts":[["1988"]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

[40] Loi suspendant l'exigibilité des créances hypothécaires et autres SQ 1933, c 99.

The introduction of a new section "Of equity in some contracts"[41] constituted the second significant episode in the evolution of Quebec contract law. Among the five articles contained in this section, article 1040c is the one which is the basis for the grounds for further judicial interventions in contracts. The first paragraph of the then-new article 1040c CCLC provided that:

1040a. 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.

It was clearly not a case of *imprévision*. The excessive character of the loan had to exist at the time of contracting. In fact, this provision created a new exception to the preclusion of a lesionary remedy for persons of full age. The importance of this provision may be summarized in four points. First, the legislature admitted for the first time that a contract made between two persons of full age may be harsh and unconscionable. This led to the first ever recognition of a lesionary remedy in Quebec for a contract concluded between two persons of full age. This provision went far beyond the mindset of the CCLC editors, which could be represented by the following maxim, "*qui dit contractuel, dit juste*"[42]. This provision is an implicit admission of the fact that a contract between two persons of full age might be unjust. Second, the mere insertion of a new section to the CCLC was highly symbolic; the choice of its title made it even more significant. It revealed the intention of the legislature to introduce a dose of equity in some contracts. In the third place, this modification of the CCLC did not affect the general theory of contracts. The mainstream reading of contracts remained based on a rigid conception of contract. Finally, courts did obtain the power to rewrite contracts by reducing the obligations of the debtor.

The adoption of the first consumer protection act constituted the third episode of the evolution of contract law in Quebec. For the purpose of this paper, we only mention provisions dealing with lesion. The first *Consumer Protection Act*, adopted in 1971[43], granted to a consumer whose inexperience had been exploited by a merchant the possibility of demanding the nullity of the contract or a reduction in obligations if they were greatly disproportionate to those of the merchant[44]. The second Act, which is the current *Consumer Protection Act*[45], adopted in 1978, slightly modified this provision. Article 8 states that "[t]he consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is

[41] This modification of CCLC is made by the adoption of an *Act to protect borrowers against certain abuses and lenders against certain privileges* SQ 1964 (12-13 ElizII), c 67.

[42] Alfred Fouillet, *La Science Sociale Contemporaine* (2nd ed, Hachette 1885) 410.

[43] Consumer Protection Act SQ 1971, c 74.

[44] ibid. s 118.

[45] Consumer Protection Act 1978 c P-40.1.

excessive, harsh or unconscionable". Albeit this provision applies only to the consumer contracts as defined in the Act, it affects a great number of persons of full age who may be qualified as a consumer. This fact makes this provision more than a simple exception of the preclusion of a lesionary remedy for persons of full age.

The above-mentioned examples were part of a wider movement aiming to enhance fairness in Quebec contract law. Other manifestations of this movement could be found in the decisions of the Supreme Court of Canada. In three major decisions, the Supreme Court recognized the existence of the duty of good faith by stating that all "agreements [had to] be performed in good faith"[46]. According to one of the most prominent authors in Quebec, these steps contributed to what we may call "the new contractual morality"[47]. This new era is fundamentally based on the duty of good faith and equity.

2.3. Civil Law Reform Project

In 1955, in the midst of the renewal of legal doctrine in Quebec, the legislature initiated a wide reflection on a global reform of civil law. The idea was to proceed to a systematic revision of the Code in order to make it more compatible with the social, political, and economic realities of modern Quebec. In 1955, the task was entrusted to a "jurist"[48] and subsequently, in 1960, to four other "codifiers to study the reports, observations and recommendations"[49] of the said jurist. The "Civil Code Revision Office" was then created to accomplish the task. In 1977, the office published its final report containing the Draft Civil Code[50] and the accompanying commentaries.

The Office was quite sensitive to issues relating to fairness in contracts. Several provisions were proposed to grant a contracting party the possibility to seek judicial intervention when contractual equilibrium was upset. These provisions were mostly based on the concepts of good faith and equity[51]. Most importantly for the purpose of this article, the Office proposed the revision of contracts in case of *imprévision*:

75. If unforeseeable circumstances render execution of the contract more onerous, the debtor is not freed from his obligation.

In exceptional circumstances, and notwithstanding any agreement to the contrary, the court may resolve, resiliate or revise a contract the execution of which would entail exces-

[46] *National Bank v Soucisse et al* (1981) 2 SCR 339 (Supreme Court of Canada) 356. See also *Bank of Montreal v Kuet Leong Ng* (n 46) 442; *Houle v. Canadian National Bank* (n 46) 146; *Bank of Montreal v Bail Ltée* (1992) 2 SCR 554 (Supreme Court of Canada).

[47] Jean-Louis Baudouin, 'Justice et équilibre : la nouvelle moralité contractuelle du droit civil québécois', in *Etudes offertes à Jacques Ghestin: le contrat au début du XXIe siècle* (LGDJ 2001).

[48] An Act respecting the revision of the Civil Code SQ 1954-55 (3-4 ElizII), c 47.

[49] An Act to amend the Act respecting the revision of the Civil Code SQ 1959-60 (8-9 ElizII), c 97.

[50] Québec (Province) – Civil Code Revision Office, *Report on the Quebec Civil Code*, vol I (Éditeur officiel du Québec 1977).

[51] For instance, we may cite the admission of lesionary remedy for all contracting parties (art. 37 of the Book five on obligations, ibid 337) or the nullity of an abusive clause in any contract (art. 76 of the Book five on obligations, ibid 343).

sive damage to one of the parties as a result of unforeseeable circumstances not imputable to him.[52]

This proposition broke with the longtime position based on the maxim *pacta sunt servanda*. The Office explained this turnaround in the commentaries of the Draft. We find it useful to reproduce integrally the commentaries on article 75:

The first paragraph of this article reaffirms the principle of the binding effect of contracts and maintains the present rule of Quebec law *[reference omitted]*, according to which the debtor is not freed merely because execution of the contract has been rendered more difficult or more onerous; if the debtor is to be freed because execution is impossible, such impossibility must truly be the result of a fortuitous event.

The second paragraph is new law. It consecrates in the Draft the possibility of judicial review where there has been imprevision, namely, in circumstances which do not constitute a truly fortuitous event because they do not make it absolutely impossible but merely more difficult to execute the commitment. A few comments must be made on this subject. In the first place, the words "exceptional circumstances" are at the beginning of the text to stress that the rule must only be used in truly extraordinary situations. The use of the expressions "excessive prejudice" and "unforeseeable circumstances" reinforce this idea and limit judicial discretion.

In the second place, this rule is seen as representing, in effect, the complement of a general legislative policy, which is intended to establish better justice and equity in contractual relations. The provisions relating to lesion protect at the time the contract is formed; those of imprevision protect at the time the obligation is executed.

Finally, as a result of legislative evolution in recent years, for example in consumer protection and in the lease of things *[reference omitted]*, where the courts may review an agreement because of lesion, adoption of such a rule of principle seems more acceptable to Quebec law[53].

This ambitious proposal did not convince the legislature. In 1987, the Quebec Government presented the "*Avant-projet de loi : Loi portant réforme au Code civil du Québec du droit des obligations*"[54]. The text of *Avant-projet* did not contain any provision similar to the one proposed by the Office in its final report. It was clear that the legislature did not intend to follow the Office on this issue. Finally, in 1990, the Bill 125 on Civil Code was presented to the National assembly of Quebec. The final draft did not contain any provision regarding the case of *imprévision*.

[52] Ibid. 343.

[53] Québec (Province) – Civil Code Revision Office, *Report on the Quebec Civil Code*, vol III (Éditeur officiel du Québec 1977) 614.

[54] Québec (Province) – Bibliothèque de l'Assemblée nationale, *Avant-projet de loi: Loi portant réforme au Code civil du Québec du droit des obligations* (Éditeur officiel, 1987).

2.4. *Imprévision* Under the Civil Code of Quebec

In 1991, the CCQ entered into force. The principle of the binding force of contracts is stated in two articles. According to article 1434 CCQ, "[a] contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law." This provision differs slightly from its equivalent in CCLC. Unlike article 1024 CCLC, the new provision does explicitly mention the binding effect of a validly formed contract for the parties.

The sanctity of contracts is stated in article 1439 CCQ. "A contract may not be resolved, resiliated, modified or revoked except on grounds recognized by law or by agreement of the parties". Other than some slight semantic differences between article 1439 CCQ and article 1022 CCLC, the two provisions do not meaningfully differ. Both of them unequivocally state the sanctity of contracts. But unlike the former Code, the new one multiplies the cases where courts may intervene to adjust the contract. These cases mostly concern contracts[55] or obligations[56] whose validity might be contested, but the fact that courts may reduce the obligation of the debtor is an important achievement in comparison to the former Civil Code. These new powers entrusted to courts do not, however, help us to decide between two contradictory maxims: *pacta sunt servanda* and *rebus sic stantibus*.

No explicit provision of the CCQ states a rule to admit or to refuse judicial review of a contract whose equilibrium is disrupted by an unforeseeable event. What is the best interpretation of this mutism? Before focusing on the case law, we examine some indirect arguments brought by two authors[57].

The first and most important argument is the fact that this provision was effectively proposed by the Office in the Draft Civil Code but never included in the *Avant-projet* or in the Bill 125. This was obviously not an oversight nor an omission. The choice was deliberately made not to go in that direction. Second, some other provisions of the CCQ suggest that the theory of *imprévision* should be rejected. According to two authors[58], the expansion of monetary nominalism to all contracts, on the one hand, and the authorization of judicial revision of contract in some specific cases[59], on the other hand, reveal the hidden intention of the legislature not to allow the judicial revision of contracts in general.

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[55] For instance, article 1407 CCQ provides that, in the case of error occasioned by fraud, of fear, or of lesion, a person whose consent is vitiated may apply for a reduction of his obligation.

[56] For instance, according to article 1437 CCQ, the obligation arising from an abusive clause in a consumer contract or contract of adhesion it may be reduced.

[57] Lluelles and Moore (n 19) para 2233.

[58] ibid.

[59] According to article 1834 CCQ, in a donation "[a] charge which, owing to circumstances unforeseeable at the time of the acceptance of the gift, becomes impossible or too burdensome for the donee may be varied or revoked by the court, taking account of the value of the gift, the intention of the donor and the circumstances." In another context – the lease of a dwelling in low-rental housing lower – article 1994 CCQ provides that "The lessor, at the request of a lessee who has suffered a reduction of income or a change in the composition of his household, is bound to reduce his rent during

The case law confirms this interpretation. In several judgments rendered after the adoption of the CCQ, different Quebec courts refused to apply the theory of *imprévision*[60]. Recently, in a major judgment[61], the Supreme Court of Canada forcefully rejected the application of this theory in Quebec contract law. In *Churchill Falls (Labrador) Corp. v Hydro-Quebec*, the Supreme Court found the opportunity to state clearly the rejection of *imprévision* in Quebec contract law. A brief summary of the facts contributes to a better understanding of the judgment. It is all about a contract (Power contract) signed in 1969 between two electric power companies: Hydro-Quebec and Churchill Falls (Labrador) Crop. (hereinafter, CFLCo). The contract drew the legal and financial framework for the construction and operation of a hydroelectric plant for a long period of time (65 years). According to the contract, Hydro-Quebec had to purchase nearly all of the electricity produced by the plant at a fixed price for the entire term of the contract. A few years after the conclusion of the contract, some substantial changes occurred in the energy market so that the price of electricity increased significantly. As a result, the contract price became derisory. The contract then became more profitable for the buyer, Hydro-Quebec, than for the seller because the former could resell the electricity at a much higher price in the market. CFLCo asked the court to order the renegotiation of the contract in order to replace the fixed price by a new one reflecting the new realities of the energy market. The application was ruled out before the Superior Court and the Court of Appeal of Quebec.

Even though the plaintiff claimed that she was not relying on the theory of *imprévision*, Justice Gascon, who wrote the majority judgment of the Supreme Court, dedicated a whole section to this doctrine to assess whether there is a legal basis for CFLCo's arguments re-

the term of the lease in accordance with the by-laws of the Société d'habitation du Québec; if he refuses or neglects to do so, the lessee may apply to the court for the reduction." According to the second paragraph of the article, "If the income of the lessee returns to or becomes greater than what it was, the former rent is re-established; the lessee may contest the re-establishment of the rent within one month after it is re-established." These two provisions make it clear that in some extremely exceptional cases, the legislature may allow courts to rewrite a valid contract.

[60] In *Coderre v Coderre* [2008] QCCA 888 (Court of Appeal), an arbitration agreement contained no provision expressly allowing the arbitrator-amiable compositeur to depart from the contractual stipulations. The Court reminded that Quebec law does not recognize the theory of *imprévision* or the right to the unilateral revision of the terms of a contract; in *Construction DJL inc v Montréal (Ville de)* [2013] QCCS 2681 (Superior Court), the applicant requested the court to declare that the tariff for the elimination of waste for certain years must be higher than the rate appearing in the contract concluded following a call for tenders. Rejecting the demand, the Court stated that it did not believe that it must rewrite a condition of contract binding the parties; in *Transport Rosemont Inc. v Ville de Montréal* (n 17), the applicants requested an adjustment to the price of their snow removal contract arguing that the substantial increase in fuel was entirely unpredictable. The Court considered that the parties were bound by the contract they had freely formed. The Court added also that it had no power when the alteration of contract equilibrium was due to economic factors; in *GPL Excavation Inc v Trois-Rivières (Ville de)* [2010] QCCS 1839 (Superior Court), the applicant asked for an upward adjustment of its snow removal contract on the grounds that at the concerned season, much more snow had fallen than the average for the past 36 years. According to the court, a fixed price contract meets the needs of the client who wants to be certain about the costs of the work and those of the contractor who wishes, with a certain risk, to increase his profit margin. The applicant could have benefited from this contract had it not been for the random and extrinsic event that happened. The contract is therefore not abusive in itself, nor has it become so in the process of execution.

[61] *Churchill Falls (Labrador) Corp v Hydro-Québec* [2018] SCC 46 (Supreme Court of Canada).

garding the renegotiation of the Power contract. The appeal was dismissed on this ground for two reasons: "First, and fundamentally, the doctrine of unforeseeability [*imprévision*] is not recognized in Quebec civil law at this time. Second, even in jurisdictions where the doctrine is recognized, it applies only in narrow circumstances that quite simply do not correspond to those of CFLCo"[62].

Regarding the first argument, Justice Gascon referred to Quebec legal doctrine that almost unanimously rejects the admission of *imprévision* in Quebec law[63]. Furthermore, he noted that the Civil Code revision Office's suggestion was not retained because it was "no doubt incompatible with the concern to preserve contractual stability"[64]. It must be noted that contractual stability as well as promoting greater fairness constitute two cardinal objectives underpinning the Book Five of the CCQ[65].

As for the second argument, given the absence of a formal definition of *imprévision* in Quebec law, the Supreme Court as well as the Court of Appeal[66] retained the common acceptance of *imprevision*. Referring to the new French provision[67] and the Unidroit Principles of International Commercial Contracts (2016)[68], Justice Gascon identified the two main constitutive elements of *imprévision* as follows*:*

[T] his rule is subject to two core conditions in particular. First, unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur. Second, it applies only where the new situation makes the contract less beneficial for one of the parties, and not simply more beneficial for the other. It does not apply where the parties receive the prestations and benefits that are provided for or are allocated to them in the contract."

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[62] ibid [92].

[63] ibid [93] (Justice Gascon).

[64] ibid [95] (Justice Gascon).

[65] Québec (Province) – Assemblée nationale, *La réforme du Code civil: Quelques éléments du projet de loi 125 présenté à l'Assemblée nationale le 18 décembre 1990* (Québec 1991) 16.

[66] *Churchill Falls (Labrador) Corporation Ltd.v. Hydro-Québec* [2016] QCCA 1229.

[67] French Civil Code:
"**1195.** *Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*
En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe."

[68] "**6.2.2.** There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party."

Applied to the case, the relief could not be granted simply because the Power contract became more profitable for Hydro-Quebec. CFLCo had no problem performing its obligations under the contract. The performance became neither more onerous nor more difficult. Additionally, according to the trial judge, CFLCo had fully accepted the risk of not including an escalator clause in the Power contract[69].
But the fact is that in its application, CFLCo did not seek relief on the ground of *imprévision*. Basing its argument on the duty of good faith, it pretended that Hydro-Quebec had failed to respect the obligation of cooperation. This constitutes an unorthodox way to seek relief in a case of changing circumstances.

3. Duty of Good Faith: A Marginal Solution

Absent under CCLC[70], the duty of good faith was recognized in civil law by the Supreme Court of Canada71. Four major judgments that were rendered in the last two decades of the 20th century made it clear that the parties to a contract should act in accordance with the requirements of good faith[72]. Unlike the CCLC, the CCQ provides an explicit provision on good faith in contracts. According to article 1375 CCQ, "[t] he parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished." Even though it is difficult, if not impossible, to precisely define the contours of this concept[73], two authors[74] undertook an important case-law analysis to identify the content of this obligation. They believe that good faith in Quebec law is

[69] *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec* [2014] QCCS 3590 (Superior Court) [498]–[501].

[70] Even though the CCLC did not contain any provision on the duty of good faith, some scholars like Mignault considered it as evident (*vérité de La Palice*). Mignault (n 33) 261.

[71] For a historical summary of the introduction of this concept in Quebec contract law, see Brigitte Lefebvre, 'La justice contractuelle : mythe ou réalité?' [1996] 37 Les Cahiers de droit 17.

[72] In *National Bank v Soucisse et al.* (n 46) 356–357, citing Domat, the Supreme Court states that "There is no species of agreement in which it is not implied that one party owed good faith to the other party, with all the consequences which equity may demand, in the manner of stating the agreement as well as in the performance of what is agreed upon and all that follows therefrom." This is in keeping with art. 1024 of the Civil Code; In *Bank of Montreal v Kuet Leong Ng* (n 46) 442, the Court states that "[t]he fact that there is no express provision in the Civil Code to the effect that an employee who profits from the breach of his obligation of good faith to his employer must turn over those profits to the employer does not necessarily indicate that such a rule is no part of the law of Quebec"; in *Houle v. Canadian National Bank* (n 46) 146, the Court states that "[t]o summarize, then, it appears indisputable that the doctrine of abuse of contractual rights is now part of Quebec law. The standard with which to measure such abuse has expanded from the stringent test of malice or bad faith, and now includes reasonableness, as expressed by reference to the conduct of a prudent and diligent individual."; Finally, in *Bank of Montreal v. Bail Ltée* (n 46) 582, the Court stated that "[i]n a contractual context, the general duty imposed by art. 1053 C.C.L.C. is expressed as a duty to act reasonably toward third parties. A general duty of good faith in contractual relationships, which derives from art. 1024 C.C.L.C., has been recognized by the courts [references omitted] and by legal authors."

[73] Elise M Charpentier, 'Le Role de La Bonne Foi Dans l'elaboration de La Theorie Du Contrat' (1996) 26 Revue de Droit Universite de Sherbrooke 299.

[74] Lluelles and Moore (n 19) para 1120 ff.

divided into two duties[75]: the duty of loyalty and the duty of cooperation. The duty of loyalty is the negative side of the duty of good faith[76], while the duty of cooperation is the positive side. The one which may eventually be the basis of the grounds for an obligation to renegotiate a validly formed contract is the duty of cooperation. This idea is already defended by some Quebec legal scholars who base the judicial revision of contact on the ground of the duty of good faith[77].

In *Churchill Falls (Labrador) Corp. v. Hydro-Québec,* the plaintiff took a similar position. It argued that, given the relational nature of the Power contract, the duty of good faith imposed on the parties was more intense. This argument is essentially justified by the relational contract theory[78]. According to this theory, in a relational contract, parties are bound to the highest duty of good faith. This duty gives rise to an implied obligation of cooperation which may, in some cases, impose an obligation to renegotiate the contact.

Before assessing this argument, we proceed to a brief survey of the relational theory of contracts as understood by the Supreme Court.

3.1. The relational Contract Theory in Quebec Law

There is no formal definition of relational contract in CCQ. Originally conceptualized by Ian R. Macneil, the relational contract theory was soon adopted as part of the Quebec legal doctrine[79]. In relational contract theory, a fundamental distinction is often made between relational contracts and discrete or transactional contracts. In his works, Macneil insists, however, that the opposition between these two types of contract is fictitious[80]. Nevertheless, the image of opposition between these two types of contract has already forged the mindset of some authors who consider this opposition a new classification of contracts81. Before *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, the case law was rather mute on this theory. Some implied references to relational theory may be found in two decisions

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[75] This classification is soon adopted by other authors (Baudouin, Jobin and Vézina (n 28) para 160).

[76] According to professors Lluelles and Moore, the duty of loyalty implies three prohibitions. The contracting party must not make the obligation of the other party more difficult. She should not compromise the relationship. Finally, she must not adopt an excessive or unreasonable behavior. (Lluelles and Moore (n 19) para 1979).

[77] Pierre-Gabriel Jobin, 'L'imprévision Dans La Réforme Du Code Civil et Aujourd'hui' in Benoît Moore (ed), *Mélanges Jean-Louis Baudouin* (Yvon Blais 2012); Baudouin, Jobin and Vézina (n 28) para 446; Stefan Martin, 'Pour une réception de la théorie de l'imprévision en droit positif québécois' [1993] 34 Les Cahiers de droit 599.

[78] To know more about this theory, see: Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980).

[79] JG Belley, *Le contrat entre droit, économie et société : étude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean* (Éditions Yvon Blais 1998); Jean-Guy Belley, 'Théories et Pratiques Du Contrat Relationnel : Les Obligations de Collaboration et d'harmonisation Normative', in *Conférence Meredith Lectures 1998-1999, La pertinence renouvelée du droit des obligations : Back to Basics/The Continued Relevance of the Law of Obligations: retour aux sources* (Yvon Blais 2000).; Vincent Gautrais, 'Une approche théorique des contrats: application à l'échange de documents informatisé' (1996) 37 Les Cahiers de Droit 121.

[80] Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977) 72 Northwestern University Law Review 854, 857.

[81] Baudouin, Jobin and Vézina (n 28) para 78.

made by the Court of Appeal of Quebec[82]. In these decisions, the Court of Appeal relied on the relational nature of a contract (*Franchise agreement*) to impose an obligation of cooperation on the parties. The Court of Appeal did not, however, define the relational contract.

The first approximative definition of this concept was given by Justice Gascon in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*. According to this definition, suggested originally by a prominent legal scholar[83], "a relational contract can roughly be defined as a contract that sets out the rules for a close cooperation that the parties wish to maintain over the long term"[84]. A relational contract is therefore seen as a vehicle to make economic coordination possible. The contract does not necessarily contain precise obligations of the parties. In contrast, there is a discrete contract which sets out a series of predefined obligations. Justice Rowe, who wrote the dissenting opinion, suggested another way to characterize relational contracts. Without putting forward a formal definition, Justice Rowe considered that the relational contract is a contract which "establishes a long-term cooperative relationship whereby both parties expected to gain. This relationship assumes a high degree of trust and collaboration between the parties"[85].

Notwithstanding the differences between the two understandings of relational contract, it should be noted that in both cases, the Supreme Court Justices believe that the relational contract may be characterized as a new type of contract. The main objective of characterizing a contract is sometimes "to define the specific legal scheme of the contract"[86]. Regarding relational contracts, the most important consequence is to impose a higher degree of good faith.

3.2. Scope of Obligation of Cooperation in Relational Contracts

According to article 1375 CCQ, the duty of good faith exists in all types of contracts, but its intensity may vary depending on the nature of the contract. It is often argued that this duty is highly intensified in relational contracts. The Supreme Court in *Churchill Falls (Labrador) Corp. v Hydro-Quebec* was not unanimous on the scope of this duty.

Even though Justice Gascon, writing on behalf of the majority, did not characterize the Power contract as a relational contract, he admitted that the behavioral standard required for the duty of good faith under article 1375 CCQ depends on the clauses and the nature

[82] *Provigo Distribution inc v Supermarché ARG inc* [1998] RJQ 47 (Court of Appeal); *Dunkin' Brands Canada Ltd v Bertico inc* [2015] QCCA 624 (Court of Appeal).

[83] Belley, 'Théories et Pratiques Du Contrat Relationnel: Les Obligations de Collaboration et d'harmonisation Normative' (n 78) 139.

[84] *Churchill Falls (Labrador) Corp. v. Hydro-Québec* (n 61) [67] (Justice Gascon).

[85] ibid. [154] (Justice Rowe).

[86] *Uniprix inc v Gestion Gosselin et Bérubé inc* [2017] SCC 43 (Supereme Court of Canada) [43]. On the characterization exercise, see also Pascal Fréchette, "La qualification des contrats : aspects théoriques" (2010) 51 Les Cahiers de droit 117.

of the contract at issue[87]. He added that "because good faith is a standard associated with the parties' conduct, it cannot be used to impose obligations that are completely unrelated to their conduct"[88]. In other words, the cause of the alteration of contractual equilibrium must be determined. Should it be caused by an unforeseeable contingency, the mere fact that a contracting party refuses to renegotiate does not mean that it fails to respect the obligation of cooperation. Putting it differently, to assess whether a party has failed to fulfill the obligation of cooperation, the court must proceed to an analysis *in concreto* in order to identify an unreasonable conduct. Moreover, even if a failure is noted, Courts may not be able to force "a party to renegotiate the prestations on which the commutative nature of the contract was based"[89].

The dissenting Justice held a diametrically opposed position. He stated that "[t] he practical requirements of good faith vary in intensity according to the nature of the contractual relationship at issue. In circumstances where the parties must work together to achieve the object of their agreement over a long period of time, the relational nature of the contract imposes a heightened duty of good faith on the parties"[90]. He reminded that the positive duty of good faith "entails a heightened duty of loyalty and cooperation to fulfill the obligations of the contract, whether they be explicit or implied"[91]. Applying this rule to the case, Justice Rowe concluded that:

The binding force of contracts and the considerations of good faith and equity that inform the application of the Power Contract by virtue of its relational nature confirm that the respondent must be held to this obligation. Good faith and equity in these circumstances require that the parties cooperate in reaffirming the intended balance of their relationship. The recognition of this obligation does not amount to a revision, a modification, the imposition of an unintended equilibrium on the parties, or a forced renegotiation of the Power Contract. It simply recognizes the existence of an implied obligation to cooperate that arises from the relational nature of the Power Contract itself[92].

These two antagonist understandings of relational contracts lead to two different approaches regarding the scope and the application of good faith. The first understanding, which is shared by the majority of the Supreme Court, is more compatible with the general reading of good faith in Quebec contract law. The function of good faith under this interpretation is to control the behavior of a contracting party[93]. According to Justice Gascon, this is the reason "the concepts – good faith and equity – favoured by the Quebec

[87] *Churchill Falls (Labrador) Corp. v. Hydro-Québec* (n 61) [112] (Justice Gascon).

[88] ibid [113] (Justice Gascon).

[89] ibid [121] (Justice Gascon).

[90] ibid [176] (Justice Rowe).

[91] ibid [177] (Justice Rowe).

[92] ibid [183] (Justice Rowe).

[93] ibid [75].

legislature to ensure contractual fairness are incompatible with a rule that would depend on external circumstances rather than on the conduct and the situation of the parties." Applied to a case of *imprévision*, this interpretation leads to two conclusions. First, in a case of *imprévision*, the difficulty of performance does not result from any misbehavior of the creditor. The creditor cannot be forced to renegotiate the contract if the debtor's cost of performance is increased for an external reason. Second, in the latter case, the mere refusal of creditors to renegotiate the contract must not be considered as an unreasonable behavior. A reasonable party is not expected to share the windfall profits with her contracting partner.

The second understanding of the duty of good faith goes beyond what is commonly accepted as the scope of this duty in Quebec contract law. This reading views the obligation of cooperation as an implied obligation (article 1434 CCQ) which exists in all relational contracts. "The duty to cooperate […] imposes a positive obligation that requires proactive steps to accommodate the interests and fair expectations of the other contracting party"[94]. This obligation goes way too far. Contracting parties should cooperate in order to establish a mechanism for the allocation of extraordinary profits under the contract. According to Justice Rowe, "[t] his obligation flows not from the fact that any profit imbalance between the parties was unforeseen. Rather, it is premised on the fact that an imbalance of this nature and magnitude is beyond what the parties intended when they concluded their agreement"[95]. This conclusion depends strictly on the characterization of the contract as a relational contract. Interestingly, Justice Rowe goes beyond the requirements of the theory of *imprévision*. He states that in such cases, the imbalance between the parties does not need to be "unforeseen"[96]. This understanding of good faith emphasizes an existing but implied obligation which requires the parties to cooperate in order to reestablish the balance of profits. That's why it must not be considered as a derogation to the principle of binding force of the contracts. On the contrary, it insists on the respect of all contractual obligations no matter if the obligation is an explicit obligation or an implicit one. Even though the latter interpretation of good faith is attractive, the first understanding of the good faith theory seems to prevail in Quebec contract law. It is, therefore, unlikely for a contracting party to obtain relief based on this ground in a case of *imprévision*.

[94] ibid [177] (Justice Rowe).

[95] ibid [180] (Justice Rowe).

[96] ibid.

4. Extraordinary Governmental Programs: An Out-of-the-Box Solution

Since the moment that the World Health Organization characterized Covid-19 as a pandemic[97], many States declared a public health emergency in their jurisdictions. The Quebec Government, alongside other Canadian provincial Governments, did the same[98]. This decision seems to have all the characteristics of an unforeseeable contingency; no one could have anticipated such a drastic public response to a pandemic.

So many sectors of the economy had to suspend or reorganize their activities as a result of the authorities' decision to impose confinement. The reorganization or suspension of the activities had a tangible impact on the contracts and the obligations that had been undertaken by concerned economic agents. If the objective is to find a solution within contract law, the contract or obligation must be subject to an individual contextual analysis in order to define the applicable rule. There is no universal remedy which its application is independent of the concrete state of each contract. Moreover, the closure of Courts does not make it easy to seek a solution based on contract law. This partially explains why almost all of the public responses have come from outside contract law.

As a matter of fact, the interruption of the economic activities did do harm to the agents' capacity to pay their debts. The immediate problem was cash-flow. It affected particularly agents' recurring payments: rent and mortgage payments. This is the reason that we may note that among the first measures adopted by federal and provincial authorities were ones aimed at helping lessees.

The CCQ recognizes two types of lease. The first type, defined at article 1851 CCQ, is commonly known as a commercial lease. According to article 1851 CCQ, a "[l] ease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of movable or immovable property for a certain time." This general definition applies also to the second type of lease which is known as the lease of a dwelling. Special rules are provided at the Division IV of the Chapter IV of the Title two of the Book five of the CCQ. Notwithstanding the differences between the rules applicable to all leases and the ones applicable to the lease of a dwelling, it is clear that the most affected obligation by the current situation is the obligation of the lessee to pay the rent. The current crisis reduces or cuts the revenue of several individuals and businesses. Needless to say, the contract law mechanisms described above may not help a lessee to seek relief. However, the Covid-19 outbreak does not make impossible neither more on-

[97] World Health Organization, 'WHO Announces COVID-19 Outbreak a Pandemic' (12 March 2020) <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> accessed 26 May 2020.

[98] Government of Quebec, Order in Council 177-2020 concernant une déclaration d'urgence sanitaire conformément à l'article 118 de la Loi sur la santé publique.

erous the obligation of the lessee to pay the rent. This obligation may still be performed by different means. Should it become more difficult for debtors to perform, the difficulty does not even arise from any alteration in contractual equilibrium. The contract remains a balanced one, but the lessee can no longer pay the rent because of the deterioration of his/her own financial situation. Neither force majeure nor the theory of *imprévision* may be a valid ground for the debtor to seek relief. The solution must then be sought outside of law. Two different responses have come from the two levels of government in Canada. The provincial Government has taken a measure in regard to leases of dwellings, while the Federal Government has suggested a solution for commercial leases.

The Government of Quebec's response was to suspend any judgments authorizing the eviction of lessees. Actually, the Government chose not to intervene directly in leases of dwellings. Instead of modifying or suspending some obligations in these contracts, the Government of Quebec preferred to address indirectly the lessees' difficulty to pay the rent under a lease of a dwelling. By a Ministerial Order[99] adopted on March 17, 2020, any judgment authorizing the repossession of a dwelling or the eviction of the lessee of a dwelling was suspended. Being a rather shy measure, this response aims only to delay the eviction of lessees. Lessees are not discharged; their obligations are not reduced; and those who fail to pay rent will be evicted once the crisis is over.

The Federal Government's response was completely different. The program announced by the Prime Minister of Canada aims at encouraging lessors to reduce the obligations of lessees. The program, known as the Canada Emergency Commercial Rent Assistance (CECRA) for small businesses, is financed by the Federal Government and administered by the Canada Mortgage and Housing Corporation (CMHC). The program offers a forgivable loan to lessors who agree to reduce the rent by at least 75% for the months of April, May, and June 2020. To be eligible for this program, lessor and lessee must meet certain conditions. The property owned by the lessor should be a real commercial property located in Canada that generates rental revenue for the owner. Moreover, the lessor should have a mortgage secured by the commercial real property leased by at least one small business eligible for this program. Regarding the lessees, only small businesses, including non-profit and charitable organizations, may be concerned. According to CMHC, three cumulative conditions define a small business. The amount of monthly rent paid under the contract should not exceed $50,000 per location; the gross annual revenue of the entity should be less than

[99] "The effects of any judgment by a tribunal or any decision by the Régie du logement authorizing the repossession of a dwelling or the eviction of the lessee of a dwelling are suspended, as are the effects of any judgment or any decision ordering the eviction of the lessee or occupant of a dwelling, unless the lessor rented the dwelling again before the coming into effect of this Ministerial Order and the suspension would prevent the new lessee from taking possession of the premises. Despite the foregoing, the tribunal or the Régie du logement may, when exceptional circumstances justify doing so, order the enforcement of one of its judgments or one of its decisions, as the case may be" (Quebec - Minister of Health and Social Services, *Ministerial Order* 2020-005 concerning the ordering of measures to protect the health of the population during the COVID-19 pandemic situation).

$20 million per year; and last but not least, the business should have temporarily ceased operations and experienced at least a 70% decline in pre-Covid-19 revenues[100]. To be eligible for the program, the parties should modify their contract and agree to a rent reduction for the period of April, May, and June 2020. The agreement has to include a moratorium on eviction for the same period. By this agreement, the lessee has to pay 25% of the initial rent, the lessor has to assume 25% of it, and CMHC pays, through the forgivable loan, the remaining 50%.

Some remarks should be made in regard to this measure. First, the federal program respects the principle of binding force of contracts because it does not include any legal or judicial intervention[101]. Second, this program promotes cooperation in contractual relationships by persuading the parties to redistribute risks and benefits. By offering a forgivable loan in return for rent reduction, the Federal Government creates a win-win option in a situation that resembles the most the "prisoner dilemma game"[102]. For the lessor, who has nothing to do with the inability of the lessee to pay rent, accepting the program means the assumption of 25% of the loss. But on the other hand, not entering into the program will lead to the collapse of the relationship. It would be fatal for both parties because the lessee will lose its location and the lessor will have to find another lessee at a time when the demand for such contracts has fallen because of the crisis. Consequently, the best option for each party is to enter into the program even if it implies that the lessor should assume some part of the losses. This solution is in sync with the relational contract theory which implies that cooperation constitutes the essence of relationships. By providing some financial incentives, the Government facilitates the cooperation between the parties so that they can reach an agreement to temporarily deviate from the initial contract. This deviation seems to be essential to the preservation of the relationship which is a contractual norm that strongly characterizes relational contracts[103].

In the same way, but without a clear financial incentive offered by the public authorities, some major Canadian banks[104] have proposed mortgage deferral to their clients. Eligible homeowners may be allowed to suspend their mortgage payments up to 6 months. This is again a private agreement between the concerned parties[105]. There is no direct public

[100] Canada Mortgage and Housing Corporation, 'CECRA | Coronavirus Funding | CMHC' <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business> accessed 26 May 2020.

[101] It should be noted that according to article 92 (13) of the Constitution Act of 1867 (30 & 31 Victoria, c 3 (U.K.)), the Legislature in each Province may exclusively make Laws in relation to Property and Civil Rights in the Province. Consequently, the Federal Government did not have the power to intervene directly in contractual relations.

[102] AW Tucker, 'The Mathematics of Tucker: A Sampler' (1983) 14 The Two-Year College Mathematics Journal 228.

[103] "[T]he ongoing character of relations is such that preservation of the relation becomes a norm." (Macneil (n 77) 66).

[104] Erica Alini, 'Coronavirus: Canada's Big Banks to Allow Mortgage Payment Deferrals' (*Global News*) <https://globalnews.ca/news/6694459/coronavirus-canada-big-banks-mortgage-payment-deferrals/> accessed 26 May 2020.

[105] Canada Mortgage and Housing Corporation, 'Are You Financially Impacted by the #COVID19 Crisis?' <https://www.cmhc-schl.gc.ca/en/finance-and-investing/mortgage-loan-insurance/the-resource/covid19-understanding-mortgage-payment-deferral> accessed 26 May 2020.

intervention in the contract. This is yet another measure adopted in accordance with the relationship preservation norm. This solution implies some losses for the creditor but ultimately permits the relationship to undergo the crisis. The two described initiatives highlight the importance of cooperation in ongoing and often long-term contractual relationships. We note that the cooperation in question does not necessarily arise from a well-established and explicit contractual obligation. It emerges from the internal dynamic of the contract and notably from the shared desire to have the relationship continue.

5. Conclusion

Contract law reaches its limits when it comes to proposing a solution applicable to a crisis which undermines simultaneously the performance of several hundred thousand, if not millions, of contracts. The efficiency of contact law is uncertain because all the remedies within contract law require an analysis *in concreto*. Without reviewing the facts of each contract and its obligations, it is impossible to determine the rule applicable to a contract for which the performance is somehow compromised. It is only after knowing the facts and the contextual reality of a defined contract that a court may decide to discharge the debtor, suspend the obligation, reduce it, or simply enforce the contract. This requires that the dispute be brought before a Court, which is quite difficult in a situation where the activities of judicial Courts are limited. Even after the reopening of Courts, the judicial option is far from being the most optimal one. The judicial proceeding is costly and time consuming. Moreover, there is no guarantee that the Court will order the relief. Traditional remedies, especially force majeure, require the meeting of several strict conditions. Finally, traditional solutions almost never lead to the revision of a contract. The final result is binary: either the debtor will succeed – and the obligation will be suspended or extinguished – or the debtor will fail and the contract will be enforced. In both cases, the relationship will no longer be a win-win situation for the parties.

The solution suggested by the Federal Government to save commercial leases seems to be a more suitable solution in this context. By providing a financial incentive, the Government encourages contracting parties to proceed to a temporary modification of their contract. This out-of-the-box solution best serves the preservation of relationships and does not harm the freedom of contracting.