Recent Cases

OBLIGATIONS — LOAN OF MONEY — OPERATION HARSH AND UNCONSCIONABLE — POWER AND DISCRETION OF COURT — ARTICLE 1040c C.C. *Boutin* v. *Corporation de Finance Belvedere,* [1970] C.A. 389; *Fribourg Investment Inc.* v. *Savage and Dame Clavette,* [1970] C.A. 612.

In two recent decisions of the Quebec Court of Appeal, the terms "harsh and unconscionable" of Article 1040c C.C. are given a numerical definition. The Court has used the powers granted to it in 1964 by the *Act to protect borrowers against certain abuses and lenders against certain privileges*[1] and has reduced the interest on a loan from 36% to 12%.

The *Fribourg Investment*[2] case dealt with a hypothec and this fact must have been relied upon since the risk and the circumstances involved must be considered in deciding whether the terms are harsh and unconscionable. Owen, J., did not, unfortunately, expand on his decision, and therefore, it is not known what criteria were used to lower the interest rate to 12%.

More interesting for our purposes is *Boutin* v. *Corporation de Finance Belvedere.*[3] This action involved a loan of $25,000 taken to finance the purchase of equipment. The cost of the loan to the borrower is best stated in the words of Crète, J., the trial judge, reproduced in Casey, J.'s decision:

> La preuve a établi clairement que, pour un prêt de $25,000 consenti par la défenderesse au demandeur, le 5 janvier 1966, le demandeur a dû payer à la défenderesse, sur une période d'un peu plus de quatre mois, une première commission de $5,000, une seconde de $4,000 et des frais de perception de $1,560, soit un total de $10,560.[4]

Casey, J., in his calculations, withdrew the $1,560 charged for collection as this sum may be considered as not being a disguised financing charge. Even without this sum, the return to the lender was roughly 36%.

The issue was centered around the question of whether the Court could review a transaction once the loan has been repaid. The trial judge decided that once the obligation is extinguished by repayment,

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[1] 12-13 Eliz. II, ch. 67.
[2] [1970] C.A. 612.
[3] [1970] C.A. 389.
[4] *Ibid.*, at p. 389.

the Court is without power to order a return of harsh and unconscionable interest.

On appeal, the Court agreed with the trial judge that, all circumstances considered, the cost of the loan was excessive. However, Casey, J., disagreed with the trial judge in stating that the power of the Court is not extinguished when the obligation under the loan is extinguished. Furthermore, 1040*c* C.C. is stated to be of public order and therefore the debtor cannot waive or renounce his rights under this article.[5]

In deciding that the Court could still review the loan, Casey, J., stated that 1040*c* C.C. created an entirely new action. It is worth quoting at length:

> Article 1040*c* C.C. creates an entirely new action that becomes viable if the circumstances of the loan make the operation, *i.e.* the whole matter, harsh and unconscionable and its cost excessive. The moment this is shown, the Court may intervene and since the rule is one of public order, this intervention may occur at any stage and at any time. The Article empowers the Court to look at all the circumstances, to reopen any loan and if in its discretion it finds that the costs of the loan has been excessive, it may order the creditor to return the excess over what it regards as fair.[6]

In deciding on 12% as a fair rate of return, Casey, J., considered the *Small Loans Act*[7] and two rates that the parties had used in computing interest. However, it seems that 12% is mainly a figure that Casey, J., in his discretion, thought to be fair.

This case is a very welcome addition to jurisprudence. Not only does it give a numerical interpretation to 1040*c* C.C., but it also establishes that the borrower has a recourse even after he has discharged his obligations. It is hoped that the Courts will now clearly enunciate the circumstances which will be considered in deciding what is a fair rate in similar actions.

One final comment to be made deals with an aspect not considered by the Court. The final paragraph of 1040*c* C.C. permits testimony to prove the actual sum advanced. This is clearly an exception to the rule in 1234 C.C. which does not allow testimony to contradict a valid written instrument. However, it is a necessary corollary to the first two paragraphs of 1040*c* C.C. since it would be all too easy for a lender to circumvent these provisions by advancing a lesser sum than that marked on the instrument.

A. T. M.

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[5] *Ibid.*, at p. 391.
[6] *Ibid.*
[7] R.S.C. 1952, ch. 251.

DIVORCE — MENTAL CRUELTY — HIPPY HUSBAND — USE OF DRUGS — ULTIMATUM TO WIFE — DIVORCE ACT, S. 3(d) — *F.* v. *F.* (1970), 11 D.L.R. (3d) 621.

Use of narcotics, sale of drugs, living a "hippy life" from the proceeds do not automatically amount to mental cruelty entitling the spouse to obtain a divorce. This has been decided in *F.* v. *F.*,[1] where Washington, Co. Ct. J. outlined the activities of the husband and the reactions of the wife to determine whether the particular facts in that case would warrant a conclusion that there was, in effect, mental cruelty.

The respondent, despite the "continuing, persistent and entreating protests" of petitioner, continued to use and sell drugs. The husband furthermore had drug parties literally every night.

However, Washington, J., in order to determine whether such activity rendered continued cohabitation intolerable, considered petitioner's background. He found that the wife was "raised in a home where love and happiness and good common sense prevailed."[2] Petitioner had on several occasions asked her husband to give up the hippy life but all this was to no avail. In fact, her husband had gone to the extent of giving her an ultimatum, whereby she would either join him in his style of life or get out.

The test used by the judge was the one adopted in *Zalesky* v. *Zalesky* to the effect that:

> The whole history of the marriage must be examined and a conclusion reached after taking into account all relevant facts — the question is whether *this* conduct by *this* man to *this* woman, or vice versa is cruelty.[3]

What was the nature of the cruelty? The judge qualifies it as a "short but nevertheless vivid period of exquisite mental torture."[4] Petitioner found her husband's behaviour "repellent" and "abhorrent" and her counsel submitted that her feeling went deeper than a mere moral or legal disapproval.

The more interesting aspect of this decision is that the court seemed to rely on the testimony of petitioner and her mother to establish mental cruelty. The only evidence of effect on mental health seems to be the mother's observations that petitioner's health was affected.

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[1] (1970), 11 D.L.R. (3d) 621.
[2] *Ibid.*, at p. 624.
[3] (1968), 1 D.L.R. (3d) 471 at p. 472.
[4] *F.* v. *F.*, at p. 626.

It is submitted that the judge did not sufficiently consider whether there was in effect mental cruelty. On the mere testimony of petitioner and her mother, the judge was not sufficiently informed to meet the standard of *Knoll* v. *Knoll*, which requires proof of injury to "health as will give reasonable apprehension that the continuance of such conduct will cause permanent injury of mind or body."[5] In such cases as *F.* v. *F.*, the judge should require petitioner to produce expert medical witnesses who can testify on the effect of a certain behaviour on petitioner's mental state. The mental torture referred to by the judge does not have any medical basis. The *Divorce Act* requires the cruelty to be such as to render cohabitation intolerable; such cruelty should be proved by more than the testimony of interested parties.

A. T. M.

MUNICIPAL LAW — NECESSITY OF NOTICE UNDER 622 CITIES AND TOWNS ACT, PRELIMINARY EXCEPTION, FAILURE TO INVOKE, *Ville de Mont-Royal* (défenderesse) appelante v. *Dame Leibovitch et Vir* (demanderesse) intimée [1970] C.A. 522 and *Corporation Municipale de la Cité de Magog* (défenderesse) appelante v. *Dame Giguère* (demanderesse) intimée [1970] C.A. 983.

Two recently reported decisions of the Quebec Court of Appeal considered three different aspects of the notice requirement of Article 622 of the *Cities and Towns Act*,[1] namely the necessity for same, the exceptions to giving same and the effect of Article 167 C.C.P.

In resolving these three issues the two Plaintiffs must be wondering exactly what happened, for on the one hand a Plaintiff who gave no notice at all was able to have her case heard on the merits while on the other hand a Plaintiff who gave a notice, although it was late, was not.

In the *City of Magog* case [2] a decision rendered March 31, 1967 but not reported until 1970, the facts were as follows:

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[5] (1969), 6 D.L.R. (3d) 201 at p. 205.
[1] S.R.Q. 1964, c. 193.
[2] [1970] C.A. 983.

The Respondent, Dame Giguère, initiated an action in damages against the municipal corporation of Magog claiming $35,000 in damages, alleged to be the result of flooding from the city's sewer. As undisputed fact, Dame Giguère gave no notice to the city but simply instituted an action on September 27, 1966 and the city only moved by way of preliminary exception on October 31, 1966, *i.e.* at a time beyond the five day delay of Article 162 C.C.P.

As Mr. Justice Hyde pointed out:

> The whole question for us is whether the waiver provisions of the *Cities and Towns Act* above quoted are nullified by the terms of article 167 of the new C.P. reading as follows:
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> The dismissal of a suit for one of the grounds set forth in article 165 may be urged notwithstanding the failure to do so within the delays; but if an exception made beyond the delays results in the dismissal of the suit, the costs shall be the same as if the exception had been made within the delays, unless the court otherwise orders.
>
> This is new law because under the old code the failure to take the exception within the required delay was fatal.[3]

Mr. Justice Hyde with whom Casey, J. concurred, after commenting that the notice is an exceptional protection to the Defendant municipalities and constituted a real hazard prospective claimants, concluded:

> It is therefore right and proper that the municipality for its part be required to invoke such failure within a specific delay and that failure to do so should, as provided by sub-section 4 above quoted, constitute "a waiver of such irregularity".
>
> It was unnecessary for the Legislature to spell this out under the old rules applicable to exceptions to the form.
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> Article 167 C.P. to all intents and purposes removes the effectiveness of the stipulated delays for making of these exceptions except insofar as costs are concerned.
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> The delay for making them, however, is still specified in the new code, namely five days, and in the face of the specific provision that the failure to invoke the exception within the delay constitutes a waiver of such irregularity, I would in the interest of preserving a right of action, continue to apply that provision.[4]

Mr. Justice Rinfret in his dissent adopted a rather mechanical approach to the whole question. He stated, that since the concluding words of Article 622 of the *Cities and Towns Act* read:

> Le défaut d'invoquer ce moyen par exception à la forme dans les délais et suivant les règles établies par le Code de procédure civile couvre cette irrégularité.

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[3] *Ibid.*, at p. 984.
[4] *Ibid.*

and that as the rules of the Code of Procedure had been changed from the old Article 164 C.C.P. to a combination of Articles 162 and 167 of the new C.C.P., therefore:

> Le jugement de première instance sur ce point doit donc être infirmé.[5]

In the *Town of Mount Royal* case[6], a decision rendered March 25, 1970, the facts may be briefly stated as follows:

1. The Respondent Dame Leibovitch was injured from a fall on Bates Road in the Town of Mount Royal on November 12, 1968.

2. November 22, 1968, Dame Leibovitch's attorney addressed a letter to the City of Montreal outlining the damages which she was holding the city entirely responsible for. On December 12 the City advised Dame Leibovitch's attorney that Bates Road was within the jurisdiction of the Town of Mount Royal and was therefore not within the jurisdiction of the City of Montreal. This same day, namely December 12, a new letter was addressed to the Town of Mount Royal holding them responsible. As undisputed fact this letter addressed to the Town of Mount Royal was outside the 15 day delay of Article 622 C.T.A. and the Town of Mount Royal urged the preliminary exception of 162 within the 5 days immediately following receipt, namely within the delay of Article 162 C.C.P.

The sole question which had to be decided by the court was whether or not a late notice was fatal. Taschereau, J., relying on the decision of the *City of Quebec* v. *Baribeau*[7] as an authority that notice was not only necessary, but in fact gave right to the action and the decision of *Dame Rheaume* v. *The City of Quebec*[8] which stated that the exceptions of 622(4) C.T.A. could only be invoked in circumstances tantamount to *force majeure*, allowed the exception to the form and dismissed Dame Leibovitch's action. The decision of Mr. Justice Rinfret was centered upon the circumstances under which the exception of Article 622(4) could be invoked and it was his conclusion that ignorance of the fact that Bates Road was in the Town of Mount Royal was "un fait facilement contrôlable" as opposed to uncontrolable circumstances and therefore allowed the exception to the form and dismissed the action. Mr. Justice Owen in his dissent simply agreed with the trial judge that the conclusion asked for in the Motion for Exception to the Form simply did not flow from allegations contained therein: namely it was

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[5] *Ibid.*, at p. 987.
[6] [1970] C.A. 522.
[7] [1934] S.C.R. 622.
[8] [1959] S.C.R. 609.

alleged in the Motion that the town did not receive any notice; this fact was false, a notice was sent, it was late. It was further alleged that the Defendant, namely the Town had suffered prejudice from this irregularity and as Mr. Justice Owen pointed out, absolutely no proof of prejudice was presented and prejudice in law, namely having to defend an action, is a thing of the past.

The rule of Article 622 of the *Cities and Towns Act*, as Mr. Justice Hyde quite correctly pointed out, is an exception and constitutes a real hazard for prospective plaintiffs. The results which flow from these two seemingly contradictory cases are important to note. The failure to give notice will be fatal to the action, unless the plaintiff can show that he comes within one of the allowable exceptions of Article 622(4) of the *Cities and Towns Act* or if the city does not invoke the error within a delay of five days (Article 162 C.C.P.).

The principal concern to prospective plaintiffs would be the allowable exceptions to giving notice and it is to be noted in this respect that the courts have been much harsher than in the opinion of the author they need have been.

One wonders whether or not the courts ought not to be relying more on the words "for any reason deemed sufficient by the court or judge" and make their decision based on the policy consideration of the notice requirement as enunciated in *Jobin* v. *City of Thetford Mines*[9], namely whether or not the city, in the analysis of the relative merits of the claim, was prejudiced.

S. J. LOVECCHIO.

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[9] [1925] S.C.R. 686 which states at p. 687: "The purpose of the notice was to give the municipal corporation such knowledge of the claim in respect of which it was given as would enable it to make the necessary inquiries to ascertain, within a reasonable time after the claim arose, the basis of it and the material facts and circumstances affecting the corporation's liability."