DO MANDATORY INJUNCTIONS EXIST IN QUEBEC LAW?

Claude-Armand Sheppard*

I — Introduction

Mandatory injunctions exist in many jurisdictions to enforce the performance of positive acts. They are to be contrasted with the more common negative injunctions which, instead of ordering performance, prohibit the commission of particular acts. Mandatory injunctions command; negative injunctions forbid. Mandatory injunctions can be framed affirmatively, as orders to do, or even negatively, as orders to refrain from not doing a certain thing. A surprising amount of confusion still exists in Quebec as to whether or not our law admits of mandatory injunctions. The better opinion is that it does not; but, as we shall see, the jurisprudence has always been divided. Many judges do not hesitate to grant mandatory injunctions despite the absence of any legal foundation for such orders. However, a persuasive argument can be made for the addition in the future of this type of injunction to our Code of Procedure.

II — Injunctions Are Based on Anglo-American Law

Injunctions were introduced in Quebec in 1878.[1] Despite some borrowings from California, our rules are based essentially on English law.[2] It has hence been suggested[3] that "the interpretation that has been put upon (them) under English decisions is a good guide to us". The law reports abundantly evidence this reliance upon English authorities. Indeed, English precedents enunciating general principles or illustrating particular applications are often valuable aids in filling in the gaps of our own jurisprudence and in guiding our courts. But uncritical dependance on English cases is dangerous since, as will be seen anon, the English law of injunctions is considerably broader than ours.

---

*Of the Bar of Montreal.

[1]41 Vict. c. 14.

[2]See, as to the history of injunctions in our law, *Wills et al. v. The Central Railway Co.* (1915) 24 K.B. 102 (Privy Council), more particularly Lord Moulton's judgment at 107; and (1914) 23 K.B. 126 (Court of Appeal), especially Mr. Justice Gervais' judgment.

[3]Trenholme, J. (diss.) in *La Société Anonyme des Théâtres v. Lombard* (1906) 15 K.B. 267 and 7 P.R. 262. See also Anglin, J., Davies, C. J. and Idington, J. in *Canada Paper Company v. Brown* (1922) 63 S.C.R. 243.

III — Anglo-American Law Allows Mandatory Injunctions

Quebec judges who uphold the existence of mandatory injunctions in our law inevitably refer to *Kerr on Injunctions*,[4] the leading English authority on the subject. The passage of Kerr usually cited is the following:[5]

> Although the Court of Chancery would not direct the performance of a positive act tending to alter the existing state of things (such as the removal of a work already executed), nevertheless, by framing its order in an indirect form, it would compel a defendant to restore things to their former condition, and so effectuate the same result as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a *mandatory injunction*. The jurisdiction was formerly questioned, but its existence is now beyond all doubt; and accordingly the Court now frames the injunction in a positive form.

This relief is frequently given in England today.[6] However, except in very special circumstances,[7] it will not be granted to order the performance of personal services, of repairs, or of an act which requires the continuous employment of people or to compel anyone to carry on a business.

Mandatory injunctions also exist in American law, although American courts of equiry appear to be more reluctant to grant them than their English counterparts.[8]

IV — No Mandatory Injunctions in Our Code of Procedure

Article 964 of the Code of Procedure defines an injunction as

> . . . an order enjoining the opposite party, his servants, agents and employees, to refrain from a specified act, or to suspend all acts and operations respecting the matters in controversy, under pain of all legal penalties.

Reading this article together with art. 957 C.P., which is cited below, it would appear that in Quebec an injunction is a negative order of the court, forbidding, either for a limited period of time or perpetually, the commission or continuance of specified acts or operations. In effect, the respondent is ordered not to do a certain thing. An injunction in Quebec is a restraining order. It forbids. If the respondent disobeys, he is in contempt of court and becomes liable, under art. 971. C.P., to fines of up to two thousand dollars, with or without imprisonment for maximum periods of sixty days. These penalties can be inflicted repeatedly.

The definition of art. 964 C.P. evidently does not encompass affirmative or mandatory orders. An injunction, it states, is ". . . an order . . . to refrain". In fact, none of the articles dealing with injunctions in the Code of Procedure contemplate the possibility of mandatory injunctions. Article 957 C.P.

[4]William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions* (1914), 5th ed.

[5]*Ibid.*, (1927) 6th ed., at page 40.

[6]Halsbury, *The Laws of England*, (1957), 3rd ed., by Viscount Simonds, vol. 21, p. 362.

[7]*Ibid.*, at 363.

[8]*Corpus Juris Secundum* (1945), vol. XLIII, p. 409.

enumerates the categories of situations in which injunctions can be granted and the remedy in each case is obviously negative:

> Any judge of the Superior Court may grant an interlocutory order of injunction in any of the following cases:
>
> 1. At the time of issuing the writ of summons:
>
> (a) Whenever it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief consists, in whole or in part, in restraining the commission or continuance of any act or operation, either for a limited petiod or perpetually;
>
> (b) Whenever the commission or continuance of any act or operation would produce waste, or would produce great or irreparable injury.
>
> 2. During the pendency of a suit:
>
> (a) Whenever the commission or continuance of any act or operation during the suit would produce waste, or would produce great or irreparable injury;
>
> (b) Whenever the opposite party is doing or is about to do some act in violation of the plaintiff's rights or in contravention of law, respecting the subject of the action, which is of a nature to render the final judgment ineffectual.
>
> 3. Without the issue of a writ of summons in the case of sub-paragraphs (a) and (b) of paragraph 1, if at the time the plaintiff has no other recourse to exercise than an injunction. The application for injunction shall then itself constitute a suit.
>
> The issue of an interlocutory order of injunction in such circumstances shall not deprive the petitioner of the right to obtain later the issue of a writ of summons, to exercise any other recourse on the same subject, but based on a ground of action subsequent to his petition for an interlocutory injunction.

Admittedly, art. 970 C.P. stipulates that:

> The judge may order the destruction, demolition, or removal of anything done in contravention of the injunction, if it is practicable.

Clearly this article does not provide for the issue of mandatory injunctions but rather it deals with violations of an already existing negative injunction. The court is authorized to order the elimination of works erected in contravention of a previous prohibition. In the event of such contravention, art. 970 C.P. makes it possible to obtain, through a procedure subsequent to the injunction itself, an order for the destruction, demolition or removal of the illegal works. This would presumably become part of the contempt proceedings to enforce the penalties of art. 971 C.P. But it must be noted that the wording of art. 970 C.P. does not allow the judge to order such destruction, demolition or removal in the original order of injunction itself.

Moreover, the consequences of disobedience to such a subsequent order of demolition are not clear. Would respondent be held in contempt a second time, or repeatedly, until compliance? Or would disobedience merely entail, by analogy to art. 1066 C.C.,[9] execution of the order by officers of the court at respondent's expense? The writer has been unable to find a single reported decision on this point.

There is thus nothing in the Code of Procedure to support the granting of mandatory orders of injunction. On the contrary, the wording of the relevant

[9]Art. 1066: The creditor, without prejudice to his claim for damages, may require also, that any thing which has been done in breach of the obligation shall be undone, if the nature of the case will permit: and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other.

articles clearly indicates that the legislator only contemplated negative or restraining orders.

V — Mandatory Injunctions Are Contrary to Our Civil Law

But it is not only the language of the Code of Procedure which militates against mandatory injunctions. There is also the fundamental principle of our civil law that the Court will not enforce specific performance of an obligation to do, but will resolve it into a condemnation in damages.[10] Positive obligations are held not "to admit of" specific performance under art. 1065 C.C.[11] Both in France and in Quebec, the jurisprudence and the doctrine consider it repugnant to human dignity to enforce civil obligations physically or by imprisoument. Specific performance will not be granted where it would entail compelling the defendant to perform personally a given act, since such judgment either would not "be susceptible of execution" (and would hence contravene art. 541 C.P.) or would require physical constraint. This well-known principle is often summed up with the Latin maxim *nemo praecise cogi potest ad factum.* Obviously, mandatory injunctions would violate this important rule. Moreover, it has been held repeatedly[12] that despite its English origin, the procedural remedy of injunction remains subject to substantive civil law rules and that in case of conflict between the civil law and the common law in this realm of procedure, the former has precedence. Indeed, short of an express legislative enactment to that effect, it would be difficult to admit that a rule of procedure imported from the common law could be used to defeat the substantive civil law principle of art. 1065 C.C.!

VI — Mandatory Injunctions and Public Law

The problem of mandatory orders does not arise as acutely outside the civil law since in public or administrative law resort can be had to *mandamus* to obtain performance of a positive action or duty. On the other hand, our labour law now provides for certain limited mandatory orders akin to, but not iden-

[10]*Lajoie v. Canup* [1954] C.S. 341; *In re Diamond Truck Co. Ltd. and Bell Telephone Co. of Canada v. Duclos* [1942] K.B. 83, (1941) 79 S.C. 87; *Quebec County Railway Company v. Montcalm Land Company* (1929) 46 K.B. 262, *obiter* of Rivard, J. at 270; *Lombard et al. v. Varennes et Théâtre National* (1922) 32 K.B. 164; *Pitre v. Association Athlétique* (1911) 20 K.B. 41; *Société Anonyme des Théâtres v. Lombard et Gauvreau* (1906) 15 K.B. 267; *Wills et al. v. The Central Railway Co. of Canada* (1914) 23 K.B. 126 maintained by the Privy Council whose judgment is reported at (1915) 24 K.B. 102.

[11]Art. 1065: Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.

[12]*Pitre v. L'Association Athlétique d'Amateurs Nationale* (1911) 20 K.B. 41; *Robinson v. Robinson* (1922) 33 K.B. 180; *Claude v. Weir* [1888] M.L.R. (K.B.) 197; *Lombard et al. v. Varennes et Théâtre National* (1922) 32 K.B. 164, at 176; and *Richstone Bakeries v. Margolis* [1953] R.P. 56.

tical with, mandatory injunctions. Indeed, the *Quebec Labour Relations Act*[13] was amended in 1959[14] to give the Labour Relations Board the power to order the reinstatement of employees dismissed illegally. Section 21a of the Act states:

> When an employee is dismissed, suspended or transferred by the employer or his agent, because of the exercise by such employee of a right granted to him by this act, or because of trade union activities, permitted by it, the Board may order the employer to reinstate, within eight days of the service of the Board's ordinance to that effect, such employee in his employ, with all his rights and privileges, and pay him, as an indemnity, the equivalent of the salary and other advantages of which he was deprived by such dismissal, suspension or transfer, and the employer shall be bound to comply with the Board's ordinance to that effect.

These provisions have been held to be constitutional by Mr. Justice Ignace-J. Deslauriers.[15] Disobedience to a reinstatement ordinance renders the employer liable to the relatively heavy fines provided for in the Act. It can be argued that the very fact that such special legislation was necessary proves the lack of mandatory injunctions in our procedure.

VII — Leading Appeal Decisions Refuse Mandatory Injunctions

While, as will be seen, the Court of Appeal has occasionally contradicted itself, its leading jurisprudence is that mandatory injunctions are contrary to both the letter of our Code of Procedure and to the spirit of our civil law.

Its first authoritative pronouncement was in *The Central Railway Company of Canada v. Wills*;[16] here the Court reversed a judgment of the Superior Court enjoining a railway company from granting a contract to a contractor other than the petitioner and held that such order would constitute a disguised mandatory injunction since in effect respondent would be compelled to deal with the petitioner only if it wanted to continue construction. Mr. Justice Gervais, after reviewing the English and Californian antecedents of our law of injunction, concluded[17] that, contrary to English law,

> . . . there is no mandatory injunction in our law whereby "specific performance" of a contract may be assured, for the very good reason that any such redress would be futile under articles 1063 c.c. and 610 c.p., which provide very effectively for specific performance of an obligation to give, and for which art. 1058 and 1063 legislate. Secondly, it is necessary to come to the conclusion that in the case of an obligation to do or not to do, there can never be even a suggestion of "specific performance", spoken of in the common law of England, and this because, under the law, there is no provision similar to our articles 1063 and 1065 c.c., whereby, failure to execute such obligations only resolves itself into the payment of damages, the recovery whereof is secured under those articles as well as under article 612 c.p., by means of the seizure of moveable or immoveable property, or again, by attachments before or after judgment, or,

[13]R.S.Q. 1941, c. 162a.

[14]by 8-9 Eliz. II, S.Q. 1959-60, c. 8, sanctioned on December 18th, 1959 and in force since January 5th 1960.

[15]*La Grenade Shoe Manufacturing Limited v. Commission de Relations Ouvrières de la province de Québec et al.* [1961] S.C. 305, discussed by Marie-Louis Beaulieu in (1961) 21 *R. du B.* 485.

[16](1914) 23 K.B. 126; maintained by the Privy Council whose judgment is reported at (1915) 24 K.B. 102; *cf.* for a similar situation, decided on different grounds, *Maurice Moiriat Inc. v. Desourdy Constructions Limitée et la Corporation de la Ville de St-Hubert* [1962] R.P. 34 (Superior Court).

[17](1914) 23 K.B. 126, at 150.

finally, by abandonment of property, or by imprisonment. The indirect means, under our law, whereby judgments, that is to say, contracts, may be enforced, are numerous. Proceedings by way of injunction therefore, are, in our law, never otherwise than restrictive, to prevent, by the defendant, or even by the plaintiff during suit, the doing of an act — not the omission of one — which would render illusory the direct or indirect modes of executing judgments.

The learned judge added:[18]

The respondents, by the injunction, would succeed in obtaining "specific performance" of the appellant's obligation that its railway should be built by them, when the sanction for the breach of such an obligation, without referring to article 1691 c.c., would only authorize condemnation in damages, recoverable, according to circumstances, by the seizure of moveable or immoveable property. To sustain the injunction, therefore, in the present proceedings, would constitute a positive act of coercion towards the appellant to force it to make, in the hands of the trustee in London, the deposits required by the contracts; it would mean the introduction into our law, where it is no where recognized, of a mandatory injunction.

Cross, J. dissented on the ground that the injunction was not mandatory, thus implicitly agreeing that mandatory injunctions do not exist in our law.

A few years later, in the leading case of *Lombard et al. v. Varennes et Théâtre National*,[19] the Court of King's Bench reiterated its stand forcefully. Lamothe, C. J. wrote:[20]

Une Cour de justice ne peut, par injonction forcer un défendeur à faire un acte quelconque. Sous le droit actuel, encore plus que sous l'ancien droit, le *cogere ad factum* répugne. L'exécution d'une ordonnance de ce genre ne peut se faire qu'au moyen de violence physique sur la personne.

He added:[21]

Un tribunal peut ordonner à un défendeur de donner tous ses services à un demandeur et de ne pas les donner à d'autres; mais si cet ordre n'est pas exécuté, il ne peut y avoir contrainte pour mépris de Cour, car ce serait un emprisonnement en matière civile. La seule punition est le paiement de dommages. Prétendre le contraire, serait reconnaître aux tribunaux le droit d'emprisonnement de presque toutes les personnes condamnées en matière civile soit à faire un acte quelconque, soit à n'en pas faire, que cette obligation soit rédigée en termes affirmatifs ou en termes négatifs, et ces cas sont nombreux.

Mr. Justice Dorion analyzed at length[22] the remedy of injunction and concluded that[23] it could not be used to order performance:

Ce n'est pas, et cela ne peut pas être un ordre d'exécuter personnellement une obligation quelle qu'elle soit . . . un tribunal ne pourrait par jugement final ordonner efficacement à un défendeur de livrer un objet revendiqué; et un juge ne pourrait pas non plus par injonction ordonner au défendeur de le livrer . . .

Il n'y a pas de doute que le droit anglais fournit à la procédure d'injonction un champ d'action beaucoup plus étendu. Ainsi, le recours en équité, pour *specific performance* peut être exercé par voie d'injonction, mais l'introduction de cette procédure dans notre Code n'a pas changé les principes du droit civil; elle a seulement introduit un nouveau mode de sanctionner provisoirement les modes existants d'exécution.

The same opinion was expressed in an *obiter dictum* of Rivard, J. in *Quebec County Railway Company v. Montcalm Land Company*.[24] In *re Diamond Truck Co.*

[18] *Ibid.*, at 152.

[19] (1922) 32 K.B. 164.

[20] *Ibid.*, at 166.

[21] *Ibid.*, at 169.

[22] *Ibid.*, at 174 *et seq.*

[23] *Ibid.*, at 177.

[24] (1929) 46 K.B. 263, at 270.

Ltd. and Bell Telephone Co. of Canada v. Duclos,[25] the Court of Queen's Bench reversed a judgment of the Superior Court ordering the Bell Telephone Company to continue furnishing telephone services to a bankrupt estate. The *Wills* case was cited. Mr. Justice Surveyer described[26] the remedy of mandatory injunctions as "inconnu chez-nous jusqu'ici".

The Court has very recently reaffirmed its position in *Cité de Trois-Rivières v. Syndicat National Catholique des Employés Municipaux de Trois-Rivières*[27] where it unanimously reversed the unreported judgment of Laroche, J. enjoining the municipality from dismissing superfluous employees. Mr. Justice Choquette, sitting *ad hoc*, ruled that the lower court's order was mandatory and hence contrary to our law. Citing the Supreme Court decision of *Dupré Quarries Ltd. v. Dupré*,[28] he wrote:[29]

> La règle est que l'on peut recourir à l'injonction pour empêcher une partie de faire une chose qu'elle s'était engagée à ne pas faire; mais on ne peut (sauf dispositions spéciales) recourir à cette mesure pour obliger une partie à faire une chose qu'elle s'était engagée à faire. Dans ce dernier cas, le remède est celui de l'article 1065 c.c.

Tremblay, C. J. and Badeaux, J. agreed that the injunction had been improperly granted but based their opinion on the somewhat novel argument that the employee's right, if any, consisted in the payment of a sum of money: to enforce it by injunction would resurrect imprisonment for debts which is repugnant to our law.

VIII — Three Contrary Decisions of the Court of Appeal

But the Court of Appeal has not been altogether consistent. On at least three occasions it seems to have reversed itself or at least it seems to have ignored its own jurisprudence. In *Vincent v. Ayotte*,[30] it overruled a judgment of the Superior Court which had dismissed a petition to enjoin the owner of an aqueduct from ceasing to furnish water to the petitioner. In effect, the Court issued a mandatory injunction ordering the owner to continue supplying water. No authorities were cited and the principle of mandatory injunction was not discussed in the four-paragraph judgment of the Court of Appeal. On the other hand, in order to continue to supply water in this case, the respondent did not really have to perform a positive act, since both aqueduct and pipes already existed. At best this case is hardly authoritative.

---

[25][1942] K.B. 83 and (1941) 79 S.C. 87.

[26][1942] K.B. at 98.

[27][1962] Q.B. 510.

[28][1934] S.C.R. 528.

[29][1962] Q.B. 510, at 513.

[30](1923) 35 K.B. 17. For a similar ruling of the Superior Court on similar facts, see: *Garand v. Lacroix* (1916) 50 S.C. 456.

Equally puzzling however, is the short *obiter* of Mr. Justice Bond in *City of Verdun v. Legault*:[31]

> There is such a thing known to the law as a mandatory injunction, designed to restore things to their former condition, and so effectuate the same result as would be obtained by ordering a positive act to be done.

The petition in this case prayed that the City of Verdun be ordered to revoke a permit it had granted for boxing exhibitions.

The third and most recent of these doubtful decisions of the Court of Appeal was rendered in the case of *Rochford v. Philie*.[32] Philie, the owner of the dominant land, by excavating near a spring, had caused an overflow of water on Rochford's servient land. Rochford sued in damages and prayed for an injunction to restrain respondent from allowing the waters to flow. In effect petitioner demanded a mandatory injunction ordering Philie to stop the flow. It was properly refused in the Superior Court. This decision was reversed in appeal where Mr. Justice Bissonnette, speaking both for himself and Rinfret, J., ordered the issue of the injunction on the surprising ground that it was the only "recours efficace". Owen, J. rightly dissented, stating,[33] *inter alia*:

> It would be twisting and distorting the meaning of words to say that defendant's failure to do something on his higher land which would divert the water in question and prevent it from coming to the surface constituted an act or operation the commission or continuance of which could be restrained by an order of injunction. Defendant cannot be enjoined from not doing anything to prevent the water from flowing under his land and emerging at the surface of plaintiff's land. In effect plaintiff is asking the Court to order defendant to do a positive act such as to dig a hole to collect the subterranean water on defendant's higher land and pump it into the sewers or in any event to do something to stop the flow of water at the surface of plaintiff's property.

IX — Superior Court Usually Grants Mandatory Injunctions

Curiously enough, many Superior Court judges have refused to follow the leading jurisprudence of the Court of Appeal and maintain against all juridical logic that mandatory injunctions exist in our law. In fact, they do not even seem to be aware of such jurisprudence.

In 1903, Mr. Justice Lavergne granted our first reported mandatory injunction,[34] ordering respondent to return to the head office of a company certain objects he had removed therefrom. In *Montreal Light, Heat and Power Co. v. Vipond*,[35] Davidson, J. ordered the removal of poles and wires interfering with the electrical works of the petitioner. We took note earlier of the decision of the Superior Court in *The Central Railway Company of Canada v. Wills* which granted a disguised mandatory injunction reversed in appeal. There is an *obiter* of Mr. Justice Drouin of the Court of Revision in *Garand v. Lacroix*[36]

[31](1936) 60 K.B. 559, at 566; (1935) 41 *R. de J.* 514.

[32][1959] Q.B. 567.

[33]*Ibid.*, at 575.

[34]In *Bourdon v. Dinelle* (1902-03) 5 P.R. 240.

[35](1911) 40 S.C. 196.

[36](1916) 50 S.C. 456, at 460.

holding that an injunction would be the proper remedy to force the owner of an aqueduct to continue supplying water. In *Genest v. Fillion*,[37] although no injunction was demanded, the Court granted the conclusions of the principal action and ordered defendant to remove a fox farm which constituted a nuisance. While there was obviously no question of mandatory injunction, the Court indicated its willingness to disregard the principle that *nemo praecise cogi potest ad factum*. We saw that in *re Diamond Truck Co. Ltd. and Bell Telephone Co. of Canada v. Duclos*[38] the Court of Appeal reversed an injunction ordering a public utility to continue furnishing certain services.

In *Hardy v. Coulombe*,[39] petitioner prayed for an order enjoining respondent from interfering with his right of passage and ordering him to remove the obstacles to the exercise of such right. The petition was rejected on the merits, but the Court would have granted it in other circumstances. In *Mailloux v. Corporation Municipale de St-Edmond*,[40] Mr. Justice Gérard Lacroix expressed[41] the unsubstantiated opinion that:

> . . . il peut y avoir lieu, dans certains cas, d'accorder une injonction mandatoire, ce remède extraordinaire ne doit être appliqué par la Cour que lorsqu'aucun autre remède ne peut être donné par un recours en dommages.

The petition prayed for an order enjoining the town from closing off a municipal road. The Court cited Kerr on the existence of mandatory injunctions, but ruled that such injunctions could only be granted in exceptional circumstances which did not obtain in the case. But had the balance of convenience not favoured the respondent, there is no doubt that the mandatory injunction would have been issued.

Then, we have the recent decision of Miquelon, J. in *Le Syndicat des Travailleurs des Chantiers Maritimes de Lauzon Inc. v. Davie Shipbuilding Limited*[42] holding that the remedy of mandatory injunction "est bien reconnue et dans notre droit et dans la jurisprudence" and enjoining a company from ceasing to deduct union dues and from ceasing to remit them to the union. At approximately the same time, three similar judgments were rendered in identical cases by Judges Laroche[43] and Morin[44] of the Superior Court. The writer has been informed, but has not verified, that these last three judgments were appealed

[37](1936) 74 S.C. 66.

[38][1942] K.B. 83 reversing (1941) 79 S.C. 87.

[39][1945] S.C. 380.

[40][1952] R.L. 495.

[41]*Ibid.*, at 498.

[42][1961] P.R. 105.

[43]*Le Syndicat National des Employés de l'Aluminium de Shawinigan Falls Inc. v. Aluminum Company of Canada Ltd.*, C.S. Trois-Rivières, no. 22,939 where the Court relied on the above-mentioned decision of the Court of Appeal in *Rochford v. Philie* [1959] Q.B. 567. The judgment of Mr. Justice Laroche orders the company to continue to deduct union dues and to continue to remit them to the union.

[44]*Le Syndicat National des Employés de l'Aluminium d'Arvida Inc. v. Aluminum Company of Canada Limited*, C.S. Chicoutimi, no. 29,154; *Le Syndicat National des Employés de l'Aluminium de St-Joseph d'Alma Inc. v. Aluminum Company of Canada Ltd.*, C.S. Roberval, no. 24,927.

but that the successful petitioners desisted from the injunctions before the hearing of the appeals.

It is noticeable that none of the judicial pronoucements in favour of mandatory injunctions are strongly motivated. They do not analyse the relevant articles of the Code of Procedure and fail to cite or distinguish the leading precedents of the Court of Appeal. At most, they refer to the above-mentioned passage from Kerr. Usually, they consist of a mere assertion that mandatory injunctions are part of our law. But these decisions illustrate the ever-present pressure to admit a mandatory recourse in our law.

X — Some Contrary Opinions of the Superior Court

On the other hand, one can find recurrent statements or *obiter dicta* in which judges of the Superior Court take it as self-evident that mandatory injunctions do not exist in Quebec law.

Thus, Pelletier, J. in the case of *United Shoe Machinery Company of Canada v. Brunet et al.*[45] remarked:

> La requérante ne pouvait certainement pas les forcer à faire ce qu'ils ne voulaient pas faire . . . L'injonction demandée n'est pas pour forcer les défendeurs à faire ce qu'ils ne veulent pas faire, mais uniquement pour les empêcher de faire ce qu'ils se sont engagés à ne pas faire.

We noted above the refusal of the Superior Court in the case of *Vincent v. Ayotte* to order by injunction the continuation of water services, a decision reversed in appeal.

In *Montreal Dairy Co. Ltd. v. Gagnon*,[46] Mr. Justice Fabre-Surveyer stated that a court could not order by injunction the execution of a contract obliging respondent to purchase all his dairy equipment from the petitioner. It could only prohibit purchase elsewhere. Edge, J. expressed the same view thirty years later in *Champlain Oil Products Ltd. v. C. E. Imbeault*,[47] a case dealing with a contract for the exclusive supply of oil products. In *Houle v. Diamond Taxicab Association Limited*,[48] Deslauriers, J. refused to enjoin respondent association from expelling Houle, a recalcitrant member who balked at signing a pledge not to join a rival organization. The learned judge wrote:[49]

> La Cour d'appel a refusé une injonction dans des circonstances semblables au cas qui nous occupe pour forcer un intimé à continuer ses services. En effet, on ne peut contraindre à faire quelque chose suivant le principe bien connu; *Nemo potest praecise cogi ad factum.*

In an as yet unreported judgment,[50] Mr. Justice Paul E. Côté dismissed, albeit without giving reasons, a petition in which it was sought to enjoin the

[45](1905) 27 S.C. 200, at 212; Appeal Court decision in this case reported at (1908) 17 K.B. 435; and Privy Council's at [1909] A.C. 330 or (1909) 18 K.B. 511.

[46](1932) 38 R.L. n.s. 272, at 280.

[47][1960] P.R. 399.

[48][1957] S.C. 56.

[49]*Ibid.*, at 59.

[50]*Seventy-Seven Sunset Strip Inc. v. Cité de Montréal*, C.S.M. 551,456.

City of Montreal from "continuing to refuse to issue" a restaurant permit. In effect, petitioner prayed for a mandatory injunction ordering the City to issue the permit. Here, of course, *mandamus* would have been the proper remedy.

More recently, an interesting *obiter* was handed down by Brossard, J. in the case of *Lafleur v. Guay and Minister of National Revenue*.[51] The Court enjoined the Minister from conducting an inquiry into petitioner's affairs *in absentia* of petitioner and without permitting his lawyers to attend the hearings. Respondent apparently invoked the argument that such an injunction would be mandatory and hence could not be issued. Mr. Justice Brossard,[52] while holding that the order prayed for did not partake of an imperative character, nevertheless agreed with the proposition that mandatory injunctions are illegal:

> The defendant claims that the purpose of the injunction is to require the defendant as inquisitor to allow the plaintiff and his counsel to be present at the inquiry and, therefore, to compel him to do something. That is not what the plaintiff claims. He only claims that the inquiry should be stayed for a certain period. He does not claim that the defendant be enjoined to allow him to attend with his counsel. But what he does claim is that the defendant cease proceeding with the inquiry illegally and irregularly in contempt of his rights and in a manner which does him an irreparable injury by refusing him the right to attend the sittings of the inquiry. The relief sought in the motion is therefore not to obtain an order directed to the defendant to do something, but to prevent him continuing by his refusal, to place an obstacle in the way of the plaintiff which is capable of doing the plaintiff an irreparable injury. That is the very object of an injunction under the terms of art. 957 C.C.P.

XI — Conclusion

It is this writer's belief that in strict law most of the jurisprudence of the Superior Court and the decisions of the Court of Appeal in *Vincent v. Ayotte*, *City of Verdun v. Legault* and *Rochford v. Philie* are erroneous. Neither the articles of the Code of Procedure nor the fundamental principles of our civil law presently admit of mandatory injunctions. No argument other than the fact of their existence in English law has been advanced in favour of mandatory injunctions.

Technically, at the present time, mandatory injunctions do not exist in Quebec.

But a persuasive argument can be made for their introduction. The Commissioners revising the Code of Procedure will no doubt consider it carefully. For there are cases where mandatory injunctions are the only satisfactory recourse. No amount of damages will compensate the stockbroker whose telephone service is unjustly suspended or the manufacturer whose goods the only public carrier in the area refuses to transport. Only a mandatory injunction will protect these rights.

Nor should we accept unquestioningly the principle that *nemo praecise cogi potest ad factum*. While our law shies away from physical constraint, it does not hesitate to enforce, even by imprisonment, the performance of positive obligations. The above-mentioned sections of the *Labour Relations Act* are an example.

[51](1962) 31 D.L.R. (2d) 575, also reported at [1962] S.C. 254, presently in appeal.

[52](1962) 31 D.L.R. (2d) 575, at 581.

Mandamus is another. The Criminal Code makes it an offence among others not to support dependents,[53] to refuse aid to a public officer,[54] not to obtain assistance in childbirth,[55] not to stop after an accident and offer assistance to the victims.[56] A *laissez-faire* approach to law is no longer acceptable. In an increasingly socialized society, active duties are at least as important as prohibitions. Respect for the individual's integrity must not lead to contempt of the rights of others. The ethical argument against mandatory orders has become obsolete.

Mandatory injunctions should be introduced in our law. Our injunctions should be redefined so as to include both restraining and mandatory orders. However, unlike other injunctions, the issue of mandatory orders ought to be subject to certain special conditions. First of all, they ought to be confined to situations where no other effective remedy exists (*e.g.* to prevent the termination of the services of a public utility). In such cases, moreover, the balance of convenience rule would frequently operate in favour of the petitioner. Secondly, purely personal acts, such as an artistic performance or an individual contribution, should not be required. Such an order would be fraught with untold dangers and its enforcement might be well-nigh impossible.

On the other hand, the new Code should provide for the issue not only of permanent orders but also of interim and interlocutory mandatory injunctions. Inevitably considerable latitude will have to be left to the courts, but a recourse such as injunctions is predicated upon a wide exercise of judicial discretion and cannot fit within too rigid rules. Each petition raises special questions of fact and equity which the courts must weigh. Almost every injunction is *une cause d'espèce*. Codification can only provide a framework, and the jurisprudence, while frequently guiding, is often merely illustrative. There is no less judicial discretion in negative injunctions than in mandatory orders.

But there is no fundamental reason to reject a recourse which such other civilized and liberty-loving countries as the United States and the United Kingdom have long adopted and to which the French *astreinte* bears considerable resemblauce. Even in strict civil law, we must not allow the principle of *nemo praecise cogi potest ad factum* to obscure the equally authoritative rule that *pacta servanda sunt*.

[53]Ss. 186 *et seq.*

[54]S. 110.

[55]S. 214.

[56]S. 221.