ABUSE OF RIGHTS IN CONTRACTUAL MATTERS IN THE PROVINCE OF QUEBEC

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"Omnium rerum quarum usus est, potest esse abusus, virtute solo excepta."

INTRODUCTION

Throughout the evolution of the civil law of Quebec the concept of contractual freedom has stood out consistently as one of the most basic civil rights in the Province.[1] Except where restricted by public order and good morals and by certain recent social legislation, *la volonté* reigns supreme. Individuals are at complete liberty to bind themselves, and when they have done so, the ensuing contractual rights as a rule have been deemed absolute.

This individualistic conception of private rights was adapted by Quebec's codifiers in 1866 when they looked to the French Code Napoléon for guidance. The French code, reflecting the Napoleonic idea of absolutism of the rights of man and the individual as the basis of human relations, marked a move away from the moral notion in Roman and old French law that one must act with good intentions. Thus, in keeping with the absolutist texts of the French and Quebec codes, our courts have refused to impinge on contractual rights. As a result, certain individuals in Quebec, although exercising their contractual rights in a malicious manner, have been held to be acting within the scope of the law.[2]

The French courts have taken a different attitude, however. Reacting against the absolutism of the Code Napoléon and interpreting it in a liberal manner French doctrine and jurisprudence have developed the idea that a right, even though absolute, is susceptible of abuse. On the basis of this principle there has been a trend towards greater equity in French civil law through the doctrine of abuse of rights. At the same time, the civil right of contractual freedom has not disappeared from French law. In the words of Louis Josserand, the foremost proponent of the abuse of rights theory:

> . . . la liberté contractuelle est indispensable à l'existence même de toute société; elle est la condition de l'activité comme elle est fonction de la dignité humaine . . .
>
> Mais il ne semble pas que cette liberté même soit infinie; elle ne doit pas être utilisée à l'encontre d'autres libertés également sacrées ou d'institutions centrales du pays; elle ne saurait être exercée que socialement et à bon escient.[3]

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[1] I refer here to civil rights as per Section 92(13) of the B.N.A. Act. However the right of contractual freedom is also closely allied with certain fundamental civil liberties.

[2] See esp. *Christie v. York Corporation*, [1940] S.C.R. 139 and 65 K.B. 104.

[3] Josserand, L. *De L'Esprit Des Droits Et De Leur Relativité*, Paris, Dalloz, 1927, p. 130.

There has been considerable discussion of the doctrine of abuse of rights in the writings of French jurists and various refinements of the theory have been evolved.[4] Discussion of these is beyond the scope of this article. I wish only to outline the central principles of the doctrine and to discuss its application to the theory of contract in the Province of Quebec.

The abuse of rights doctrine states essentially that a person may incur civil liability through a certain act, even though such act is within the bounds of a legal right. This situation occurs when a legal or contractual right is abused through its exercise in a manner which prejudices another and brings no appreciable benefit to its author. Henri Capitant defines an abuse of right as:

> . . . un acte dommageable qui serait considéré comme licite si l'on s'en tenait à un examen objectif formel de l'acte, mais qui est illicite parce que le titulaire du droit l'exerce dans l'intention de nuire à autrui.[5]

One might say, in fact, that such an abusive act is one which is objectively irreproachable, but subjectively reprehensible. Louis Josserand accentuates this with the words:

> Intérêt légitime, cause légitime, motif légitime, exercise légitime d'un droit, ces formules reparaissent partout, à toute occasion, comme le *leitmotiv* qui caractérise et souligne toute cette théorie de l'abus des droits dont elles marquent à coup sur les manifestations multiples.[6]

Josserand also points up the key distinction between an excess of a power or right and an abuse of right.[7] In the latter, the author of the action exercises his legal right in a manner that was not intended when the right was conferred, whereas in the former the author is acting beyond the scope of authority conferred by the right. Excellent examples of a right being exceeded were afforded by the recent Quebec cases of *Roncarelli v. Duplessis*[8] and *Garneau v. Hopital St. Jeanne D'Arc.*[9] One cannot help but wonder, however, how these cases, particularly the latter, would have been decided if an excess of power had not been ruled to exist. Would our courts have admitted the abuse of rights theory, or would the decisions have gone the opposite way? Perhaps an answer to this question will flow naturally from the following discussion.

EVOLUTION OF ABUSE OF RIGHTS IN QUEBEC

"Sic utere tuo ut alienum non laedas"

Although limitation of private rights, both contractual and extra-contractual, through the abuse of rights theory was an established doctrine in France by 1857, the theory was never invoked expressly by Quebec courts

[4]See Marcovitch, M. *La Théorie de L'Abus des Droits En Droit Comparé*, Paris (1936); Ripert, *La Règle Morale*, Paris, L.G.D.J., 4th ed., 1949; Josserand, *De L'Abus des Droits*, Paris, Rousseau, 1905.

[5]Capitant, H., *Vocabulaire Juridique*, Vol. 1, p. 17.

[6]Josserand, L., *L'Abus des Droits*, 58.

[7]*Ibid*, 55-57.

[8][1959] S.C.R. 121.

[9][1961] S.C.R. 426.

until 1944. In contractual matters, absolutism was firmly upheld and a similar rigid application of the absolutist wording of the code (especially Art. 406 c.c.) was exercised in proprietary matters. These words of McDougall, J. reflect the judicial attitude which existed:

> The court must be vigilant to safeguard rights of property and reluctant to relax the principles of law which ensure to a proprietor the right to deal with his property as he pleases.[10]

From time to time after 1895, various French jurists came to Quebec and spoke ardently in favor of the abuse of rights theory. As a result, Quebec writers began to discuss the theory,[11] and indications that the absolutist tradition might break down appeared in several judgements.[12] Moreover, a growing awareness of socio-economic needs led to some restriction of private rights through Acts of the Quebec Legislature.[13] This trend towards greater equity in the law led finally, in 1944, to express acceptance by our courts of abuse of rights in extra-contractual matters.

The jurisprudential ice was broken by Duranleau, J. in *Brodeur v. Choinière*.[14] In this case defendant was held to have abused his right of ownership by erecting on his property a crude wood fence which caused considerable displeasure to his neighbour. The abuse was deemed a delict and defendant was condemned to damages under 1053 c.c. This decision has since been upheld consistently by the Quebec courts.[15] It also has drawn favorable comment from Quebec authors and has provoked some discussion of extending the theory to contractual matters.[16] For the most part, however, there has been a lack of positive Canadian comment on abuse of rights and to date the theory has not been applied to contract.

The leading Quebec case on abuse of contractual rights is *Quaker Oats v. Coté*, in which the Court of Appeal rejected the theory.[17] This decision underlined the confusion which exists in Quebec concerning abuse of contractual rights; *viz*: one judge failed to comment on the theory, a second said it had no

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[10]*Gendron v. Bourbonnais*, (1936) 74 S.C. 261 at 263.

[11]Mignault, P. B., [1927] *C.B.R.* 10 and 1939-40 Toronto Law Journal 360. Goldenberg, C., *The Law of Delicts Under the Civil Code of Quebec* (1935), pp. 56-63. Nicholls, G. H., *Responsibility For Offenses and Quasi-Offenses*, 23 *et seq. Travaux de Congrès Henri Capitant*, 1939. Lussier, C., *La Théorie de l'Abus des Droits dans le Droit Civil de la Province de Québec*, McGill University Thesis (1945).

[12]*Drysdale v. Dugas*, [1896] S.C.R. 20 at 23; *Genest v. Felton*, 74 S.C. 67; *Robins v. Dominion Coal Co.*, 16 S.C. 195 at 200; *Decarie v. Lyall*, 17 R. de J. 299; *Bouchard v Tremblay*, 51 S.C. 68; *Connelly v. Bernier*, 36 K.B. 57; *Jean v. Paradis*, 49 K.B. 74.

[13]*Minimum Wage Act*, 1941 R.S.Q. c. 164; *Workmen's Compensation Act*, R.S.Q. c. 160; *Collective Agreements Act*, R.S.Q. c. 163; *Rental Controls Act*, 1950-51 c. 20; *Industrial and Commercial Establishments Act*, R.S. Q. c. 175.

[14][1945] S.C. 334.

[15]See *Laperiere v. Lemieux*, [1958] R.L. 228; *Blais v. Giroux*, [1958] S.C. 569; *Air Rimouski v. Gagnon*, [1952] S.C. 149.

[16]Nadeau, A., [1947] Can. B. Rev. 512; Barcelo, J., 13 Thémis 28, Brossard, A., 18 Thémis 24; Baudouin, L., *Le Droit Civil de la Province de Québec*, 1278 *et seq.*

[17][1949] K.B. 389.

application in the case, two others said abuse of rights is limited to extra-contractual matters and the fifth judge, Letourneau, C.J., favored abuse of contractual rights. The learned Chief Justice wrote:

> Cette théorie existe sans aucun doute dans notre droit et je crois même qu'on puisse y recourir en matière d'inexecution d'obligation.[18]

In a comprehensive comment on the case, Antonio Perrault concluded that there is no room for the theory in the Quebec law of contract.[19] The Appeal Court has since refused, on several occasions, to recognize the abuse of contractual rights.[20]

Such steadfast refusal by our courts expressly to apply the abuse of rights doctrine to contract is perhaps misleading. Closer analysis of the jurisprudence reveals that there has been what one might call a tacit acceptance of the theory in certain areas of contract. The most striking example of this is afforded by *Drozdzinski v. Zemel.*[21] This was an action by a lessor to cancel a lease on the basis of the lessee's violation of a clause which said the lessee could not sub-let without the written permission of the lessor. The lessee had proceeded to sub-let after his request for written permission was denied. Batshaw, J. held in favor of the lessee on the grounds that a lessor cannot unreasonably withhold his consent and refuse to accept a sub-tenant because of his desire to obtain an increase in rent.

In *Drozdzinski v. Zemel*, then, it seems fair to conclude that the court found it acceptable to look into the mind of the lessor in much the same way the French courts look into the minds of contracting parties to see if they have abused their contractual rights. It would be but a short step further to admit expressly the abuse of rights doctrine in such matters.

The same may be said for the case of *Furman v. Muster*, which dealt with the unilateral resiliation by the employer of a contract of lease and hire of work.[22] The court held:

> The provision in a contract of lease and hire of services to the effect that the employee's engagement was subject to his duties being performed to the entire satisfaction of the employer does not entitle the employer to dispense with the employee's services on a mere whim or caprice and the employer must establish some reasonable ground for his dissatisfaction.

ARGUMENTS AGAINST ABUSE OF CONTRACTUAL RIGHTS

"Actus legitimi non recipiunt modum"

There have been many adverse criticisms levelled at the abuse of rights theory and no analysis of the doctrine would be complete without at least a

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[18] *Ibid* at p. 401.

[19] [1949] Rev. du B. 361.

[20] See esp. *St. Laurent v. Lapointe*, [1950] K.B. 229; *Trottier v. McColl Frontenac*, [1953] K.B. 497.

[21] [1954] S.C. 163. See also: Snow, *Landlord and Tenant*, 3rd. ed. 339; *Veitch v. Eliasoph, Shaw and Armstrong*, 30 R.L. 38; *Charbonneau v. Houle*, 1 S.C. 41; *Dufeutrelle v. Audet*, 34 R.L. 130.

[22] [1950] R.L. 464. See also: *Lang v. Modern Garment Co.* [1950] R.L. 296; *Vezina v. Megantic*, (1936) 39 R.P. 223.

cursory examination of these. The most basic general criticism of the theory comes from the Common Law under which it is a settled rule that when an act is done during the exercise of a right the motive is immaterial.[23] In short, the subjective and psychological notion of abuse of rights is foreign to the common law.

It must be remembered, however, that abuse of rights is a civil law concept and accordingly that only the criticisms of civil law jurists are truly relevant. Nevertheless, this common law tradition must be considered in explaining the refusal of Quebec courts to admit the doctrine in contract. Professor Louis Baudouin[24] and Ariste Brossard[25] have both stated that the development of Quebec civil law through social policy is restricted by the proximity and influence of the common law. Brossard wrote recently:

> I shall venture to prophesy that in the matter of abuse of rights . . . our courts will stop short of what has been attained in France. No doubt, we are influenced by what I would call the spirit of conservatism prevailing throughout the common law decisions . . . the law of Quebec is following a development of its own, distinct from the evolution taking place in France, in general, more cautious and conservative and is probably influenced by the common law doctrine of sister provinces.[26]

Among the French critics of the theory, Saleilles,[27] Cornil,[28] and Planiol[29] have been the most outspoken. They believe that a right ceases to exist once an abuse begins and that the theory is much too subjective to have a place in the theory of contract. These jurists argue that the theory leaves an overabundance of discretion in the hands of the judiciary. Summarizing this criticism, Josserand has written:

> À cette conception subjective de l'abus des droits ses détracteurs opposent une objection pressante: elle autorise et elle oblige le juge à des recherches d'intention extrêmement délicates. Or ces recherches seront à la fois inutiles et dangereuses: inutiles, en ce sens que rien ne sera plus aisé à l'agent que d'échapper à toute responsabilité en alléguant un intérêt individuel,—dangereuses aussi, puisque les tribunaux pourront violenter le fort intérieur de chacun et assigner arbitrairement à nos actes tel ou tel mobile constitutif de l'abus d'un droit.[30]

Certain Quebec authors have echoed the French criticisms and have contributed one or two reasons of their own as to why there can be no abuse of contractual rights in our civil law. Perrault has stated that the provisions of the Quebec Civil Code are sufficient to cover any abuses of contractual rights, and he uses the example of Article 1895 which seems to provide for abuse of the right to dissolve a partnership.

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[23]See *Mayor of Bradford et al. v. Pickles*, [1895] A.C. 587, which held that "a man cannot sue in tort unless he prove that a tort has been committed . . ." and see *Allan v. Flood*, [1898] A.C. 1; for a recent Canadian illustration see: *King v. Barclay and Barclay's Motel*, (1960) 24 D.L.R. 418.

[24]*op. cit.*

[25]*op. cit.*

[26]*Ibid* at 88-91.

[27]Saleilles, *Théorie Générale de l'Obligation*, 370 *et seq.*

[28]Cornil, *Le Droit Privée*, pp. 98-99.

[29]Planiol, *Traité Elémentaire*, 1939 ed. Vol. 2, no. 870 *et seq.*

[30]*L'Abus des Droits*, p. 47.

> . . . il n'y a pas lieu d'introduire la théorie de l'abus des droits dans le domaine contractuel. Le code civil Québécois, reconnaissant la liberté des conventions, permet des recours suffisants en matière de contrats.[31]

Mignault argued that when and if there is need to restrict freedom of contract in Quebec, this can be done efficiently and sufficiently by the Legislature.[32] Other critics have stated that abuse of rights is restricted to the realm of delict and that there is no juridical basis for recognizing the abuse of contractual rights.[33]

A JURIDICAL BASIS FOR ABUSE OF RIGHTS IN CONTRACTUAL MATTERS

"In omnibus quidem, maxime tamen in jure, aequitas spectanda sit."

Despite the foregoing criticisms, there have been no systematic crusades against admitting abuse of rights to the Quebec law of contract. Comment by Quebec authors has been sparse and the overall outlook on the subject to date seems to have been one of confusion, rather than downright denial of the doctrine. In view of this, it is submitted that conditions warrant a judicial re-examination of the applicability of abuse of rights to contractual matters. Furthermore, the author believes that the arguments against admitting the theory are unfounded and that there are in Quebec law, as in French law, all the elements necessary to develop a rational doctrine of abuse of contractual rights.

Article 1024 c.c. recently referred to by Professor Paul A. Crépeau as "la charte fondamentale d'interprétation des contrats,"[34] serves as a natural basis for the theory.

> Art. 1024—The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

According to this article, contracts in Quebec contain certain implied clauses above and beyond those expressly stipulated. Would it be going too far to understand from 1024 c.c. that contracts in Quebec contain an implied clause that they will be executed equitably and in good faith?

The general rule existing in Quebec since 1866 has been to overlook the concept of equity because of the principle of autonomy of the will. Our courts have thus been ultra-conservative in applying the equity rule of 1024 c.c. and as a result certain cases which would have been abuse of rights matters in France have been decided on the basis of *dura lex sed lex* in Quebec.[35] Never-

[31][1949] Rev. du B. 361 at p. 377. See also Art. 1759 c.c.

[32]1939-40 Toronto Law Journal 360. See also: *Quebec Asbestos v. Cook*, [1933] S.C.R. 86 at 91.

[33]See Nicholls, *op. cit.*; Nadeau, *Traité de Droit Civil de la Province de Québec*, Vol. 8, 194 *et seq.*

[34]Crépeau, P. A., "Réflexions sur le Fondement Juridique de la Responsabilité Civile du Transporteur de Personnes," 7 McGill L. J. 225 at 240.

[35]*eg*: *Chaput v. Bonhomme* (1925) 38 K.B. 47.

theless, there has been a very noticeable trend towards equity in the civil law of Quebec during the past 50 years.[36] It is respectfully submitted that it is now time for the courts to increase this trend by giving a more liberal interpretation to Art. 1024 c.c.

The Quebec commentators seem to favor, although reluctantly, such an interpretation of 1024 c.c. Trudel quotes Domat and agrees with his statement that:

> Il n'y a aucune espèce de convention où il ne soit sous-entendu que l'un doit à l'autre la bonne foi, avec tous les effets que l'équité peut y demander, tout en la manière de s'exprimer dans la convention, que pour l'exécution de ce qui est convenu et de toutes les suites.[37]

Langelier states that it is up to our courts to interpret contracts according to equity:

> L'équité est un mot très vague, mais précisément parce qu'il est vague, notre article (1024) laisse aux tribunaux, dans chaque cas, la décision de la question de savoir quelles sont les conséquences que l'équité fait découler du contrat qui leur est soumis.[38]

Mignault, who has indicated his opposition to admitting the abuse of rights doctrine in contract, nevertheless observes in his commentary on the civil code:

> Les conventions doivent être exécutées de bonne foi. Nous n'avons pas, comme en droit romain, des contrats de bonne foi et des contrats de droit strict.[39]

The civil law systems of such countries as Switzerland, Lebanon, Ethiopia, and Germany contain an express provision that contracts will be exercised in good faith and without malice.[40] Such a provision is lacking in France and Quebec. The French courts have introduced the concept of abuse of rights to fill the gap. Quebec courts could do the same by means of 1024 c.c. and the abuse of rights doctrine. A brief analysis of the concept of equity reveals that it is comprised of the aggregate of morality and justice plus social expediency and order. Thus, if contracts are to be interpreted according to the principles of equity, the abuse of rights theory seems ideally suited as a rational means to this end.

> The theory behind the concept of abuse of rights is perhaps the most forceful example of the manner in which good faith injects morality into the law.[41]

A major criticism of admitting abuse of rights in contract has been the large amount of discretion it would leave to the courts. However, one must remember

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[36]See Statutes *supra*, footnote 13. Also note Theory of Unjust Enrichment— *Jure Naturae Aequum est Neminem Cum Alterius Detrimento Et Injuria Fieri Locupletiorem. Banque Canadienne Nationale v. St. Germain and Delisle*, [1942] K.B. 496; *Beaudry v. Demaris*, [1944] K.B 623; *Pharand v. Herman*, [1945] K.B. 265.

[37]Domat, Vol. 1, Book 1, Titre 1, Sec. 2, No. 12 as quoted by Trudel, G., *Traité de Droit Civil de Québec*, Vol. 7, p. 345.

[38]Langelier, *Cours de Droit Civil de la Province de Québec*, Vol. 3, p. 415.

[39]Mignault, P. B. *Le Droit Civil Canadien*, Vol. 5, p. 264.

[40]For example, Art. 2 of the Swiss Civil Code—"Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi. L'Abus manifeste d un droit n'est pas protégé par la loi." See Art. 124, Civil Code of Lebanon.

[41]Rosenberg, G. A., "The Notion of Good Faith in the Law of Quebec," 7 McGill L.J. 1 at p. 20.

that our courts have recently taken a more subjective outlook in matters of contract and have shown a willingness to examine the intention of the parties in construing contracts. This has been evident especially as regards the interpretation of consent in formation of contracts.[42] Furthermore, our Criminal Courts daily are exercising a far greater discretion than the abuse of rights theory would entail and they have been doing so for years without ill-effect.

The argument that our civil code already provides for abuse of rights is also rebuttable. Although 1759 c.c. and 1895 c.c. indeed provide a remedy for abuse of the right of dissolution in mandate and partnership, there are many areas in our law of contract where such provisions do not exist. Particular cases in point are the rights unilaterally to resiliate contracts of lease or of lease and hire of services. By adapting the abuse of rights theory to contract, our courts will be able to establish a set of criteria whereby inequitable execution of certain contracts may be uniformly remedied. A ready-made model is provided by Josserand and the French decisions, who have treated abuse of contractual rights in five different categories; *viz*: abuses in the pre-contractual stage such as abuse of the right not to contract; abuses during execution; abuses of the right to resiliate; abuses of the right to dissolve; and abuses during the post-contractual stage.[43]

To further illustrate how abuse of contractual rights would function if it were applied in Quebec, it is useful to borrow from the analagous international law doctrine of *conventio omnis intelligitur rebus sic stantibus*.[44] According to this doctrine, the obligations of a treaty terminate when a change occurs in those circumstances which existed at the signing of the treaty and whose continuance formed, according to the intention of the parties, a condition of the continuing validity of the treaty. Applying this idea to civil law, a breech of contract would result if a party ceased to exercise his rights according to the pre-existing intention of good faith; there would be an abuse of contractual rights.

CONCLUSION

"Ab abusa usum non valet consequentia"

If one looks at the true spirit of our civil law, it is clear that contractual rights cannot be totally absolute. Contracting parties do not foresee all eventualities expressly and so their formal accord is limited to the essential. For the rest, the law or the judge decides on the basis of the parties' presumed intentions.[45] The courts must perform this task according to the spirit of the law, in an equitable manner and non-arbitrarily.

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[42]See *Grégoire v. Béchard* (1930) 49 K.B. 27; *Rawleigh v. Dumoulin* (1925) 39 K.B. 241; *Faubert v. Poirier* [1959] S.C.R. 459.

[43]Josserand, L., *L'Esprit des Droits*, 124 *et seq.*

[44]Briggs, H. W., *The Law of Nations*, pp. 917-18, See also: Hill, C., *The Doctrine of Rebus Sic Stantibus in International Law.*

[45]See Act. 1013 c.c.

The system of absolute rights no longer has a place in the civil law. This was evidenced by the willingness of our courts to accept abuse of rights in extra-contractual matters. If the spirit of 406 c.c. could be so changed, is it not inconsistent that a spirit of absolutism persists in contract? In France, the pressure of social evolution forced the courts to surpass the old absolutist philosophy by introducing abuse of rights. The civil law is a living institution, changing to meet new needs. Is it not true that there is a *prima facie* need for a change in Quebec so long as a possibility exists for a contractual right to be exercised with impunity in a spirit of malevolence or selfishness? By restricting the civil right of contractual freedom through the abuse of rights doctrine, the courts would be at the same time preventing infringements on certain basic human rights.