The Seller's Revendication Remedy as a Fossil

Martin Boodman*

The author argues that the seller's revendication remedy is a fossil of pre-codification Quebec law. The author states the reasons for this as being firstly, that there is an inherent contradiction in the remedy being limited to sales not made on credit or with a term, and secondly, that the pre-codification basis for the remedy, namely the unpaid seller's continued ownership of the goods sold and delivered to the buyer cannot exist in a post-codification era which is characterised by the consensual transfer of ownership of moveables. These two factors culminate in an unresolvable conflict between principles protecting the unpaid seller as creditor and those protecting the debtor from precipitous demands for payment.

The first part of the paper explains the anomalous and inferior status of the seller's revendication remedy within the Quebec model of security on moveable property. The second part is a development of the historical and modern analysis of the rules in article 1999(1) and (4) of the *Civil Code of Lower Canada* concerning sales with a term. The author argues that a detailed analysis of these rules, as well as of the notions of term and *mise en demeure* is critical to understanding why this remedy can no longer have any meaningful existence in the present law of Quebec.

The author uses this debate as a forum for understanding the nature and the characteristics of Quebec codification, and in this regard, considers the degree to which codal interpretation should include historical analysis, and more specifically, issues of codal interpretation and conflict of policies underlying codal provisions.

L'auteur soumet que le droit de revendication du vendeur est, en droit québécois, un fossile d'avant la codification. Il propose deux explications pour ceci. Tout d'abord, il est contradictoire que ce droit se limite aux ventes sans crédit et sans terme. Deuxièmement, sous le *Code civil du Bas-Canada*, la propriété des meubles est transféré par la rencontre des volontés. Le maintien d'un droit de propriété du vendeur impayé, sur des biens meubles vendus et livrés, à la base du droit de revendication, ne peut donc plus être justifiée. Il s'ensuit que les règles protégeant le vendeur impayé en tant que créancier se heurtent à celles visant la protection du débiteur contre des demandes abusives de paiement.

En première partie, l'auteur explique le statut anormal et inférieur du droit de revendication du vendeur dans le cadre du modèle québécois des suretés sur les meubles. La seconde partie de l'article étudie l'analyse historique et moderne des règles ayant trait aux ventes à terme, édictées à l'article 1999(1) et (4) du *Code civil du Bas-Canada*. L'auteur soutient qu'une analyse en détail de ces règles, ainsi que des notions de terme et de mise en demeure, est indispensable pour comprendre pourquoi l'action en revendication n'a plus de place dans le contexte du droit québécois actuel.

L'auteur se sert du droit de revendication comme base pour discuter de la nature et des conséquences de la codification au Québec. Dans cette veine, il évalue la nécessité de recourir à une analyse de l'historique et des politiques qui sous-tendent le *Code*.

*Associate Dean (Academic) of the Faculty of Law, McGill University. I would like to thank my colleagues Professors R.A. Macdonald, Frank Buckley, Daniel Jutras, Ralph Simmonds and Stephen Scott, as well as those who attended a Faculty Workshop at the Faculty of Law, McGill University, April 5, 1989 for their helpful comments on earlier drafts of this article. I am also grateful to Mr. Justice Amédée Monet, J.A. Any errors or omissions are the sole responsibility of the author. The use of the masculine pronoun throughout the text is adopted for the convenience of the author and is not intended to preclude the feminine.

Synopsis

* * *

Introduction

There are two methods of enquiry into the natural and social sciences. One method, the search for unity and simplification, focuses upon characteristics which comply with a unified conceptual view. The second approach derives principles through the analysis of complex and diverse particulars or anomalies.

This paper is an application of the second mode of enquiry to the revendication remedy of the seller of moveables in the law of Quebec. It is intended to establish that the rarely used seller's revendication remedy under articles 1998(1) and 1999 *C.C.L.C.* is a fossil or relic from pre-codification Quebec law resulting from an oversight of codification and inertia in law reform. Two related arguments are offered in support of this conclusion. First, in its historical and modern incarnation, the revendication remedy suffers from the inherent contradiction of being limited to sales not made on credit or with a term. Second, the pre-codification basis for the remedy — an unpaid seller's continued ownership of goods sold and delivered to a buyer — cannot exist in a post-codification era characterized by the consensual transfer of ownership of moveables. In a modern perspective, these anomalies culminate in an unresolvable

conflict between principles protecting an unpaid seller as a creditor and those protecting debtors from precipitous demands for payment.

Given the thesis of this paper, its arguments are developed and presented as completely as possible. Hence, the seller's revendication remedy and its preconditions shall be considered in their historical and modern contexts. The first part of this paper is an explanation of the anomalous and inferior status of the seller's revendication remedy within the Quebec model of security on moveable property. It is followed by historical and modern analyses of the rules in articles 1999(1) and (4) *C.C.L.C.* regarding sale with a term. A detailed examination of these rules, as well as the notions of a term and *mise en demeure* are critical to understanding why the remedy can have no meaningful existence in the present law of Quebec.

The analysis of the seller's revendication remedy is also a paradigm for understanding the nature and characteristics of Quebec codification. This theme is considered explicitly in two parts of the paper. First, in a prelude to the study of article 1999(1) *C.C.L.C.* in its modern context, the issue of the degree to which codal interpretation should include an historical analysis is addressed. Second, in response to a potential critique of the thesis that the revendication remedy of the seller of moveables is defunct, issues of codal interpretation and the conflict of policies underlying codal provisions are considered.

I. Revendication as an Inferior Remedy

The right of revendication under articles 1998(1) and 1999 *C.C.L.C.* permits a seller of moveables under certain circumstances to reacquire custody of goods sold and delivered for non-payment of the purchase price. Like the seller's right of retention,[1] the right of revendication is a conservatory, custodial remedy.[2] It does not dissolve the contract of sale, terminate the buyer's owner-

---

[1]See arts 1496, 1497 *C.C.L.C.*; M. Pourcelet, *La vente*, 5th ed. (Montreal: Thémis, 1987) at 172; T. Rousseau-Houle, *Précis du droit de la vente et du louage*, 2nd ed. (Quebec: Presses de l'Université Laval, 1986) at 200; M. Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec" (1987) 47 R. du B. 871 at 919; M. Boodman, "The Right of Retention of the Seller of Moveables in Quebec" (1988) 67 Can. Bar Rev. 658 at 683; Y. Goldstein, "A Bird's Eye View of Conflicting Claims" [1981] *Meredith Memorial Lectures* (Toronto: R. DeBoo, 1982) 88 at 92; R.A. Macdonald, "Privileges and other Preferences upon Moveable Property in Quebec: Their Impact upon the Rights and Recourses of Execution Creditors" in M.A. Springman & E. Gertner, eds, *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1984) 255 at 339; P.-B. Mignault, *Le droit civil canadien*, vol. 7 (Montreal, Wilson & Lafleur, 1906) at 72; T. Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec" (1985) 15 R.D.U.S. 307 at 376; *Drouin* v. *Gilbert* (1937), 63 B.R. 174.

[2]See Pourcelet, *ibid.* at 173-74; Rousseau-Houle, *Précis de droit de la vente et du louage*, *ibid.* at 201-02; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *ibid.*; P. Ciotola, *Droit de sûretés* 2d ed. (Montreal: Thémis, 1987) at 250; L. Faribault, *Traité de droit civil du Québec*, vol. 11 (Montréal: Wilson & Lafleur, 1961) at 353; Goldstein, *ibid.* at 92-93; Macdonald

ship, nor remedy the buyer's refusal or inability to pay the purchase price. In fact, the right of revendication is often described as an extension of the seller's right of retention beyond delivery.[3] In this regard, an unpaid seller who revendicates goods sold and delivered is in the same legal position as one who has withheld delivery through a right of retention.

Despite its ostensible affinity to the seller's right of retention, the right of revendication is an anomaly in the context of the unpaid seller's remedies and in the broader context of security on moveables in Quebec. Essentially, the revendication remedy is rarely used in practice and has been overshadowed by the unpaid seller's other post-delivery recourses, particularly the right of dissolution under article 1543 *C.C.L.C.*

In a post-delivery scenario, dissolution of the contract of sale is a better remedy for an unpaid seller than revendication. Both of these remedies are exercised by the intervention of suit[4] with the possibility of a seizure before judgment.[5] Yet, the scope of enforceability of dissolution under article 1543 *C.C.L.C.* is greater and more effective than that of revendication.

---

in Springman & Gertner, eds, *ibid.* at 341; R.A. Macdonald & R.L. Simmonds, "The Financing of Moveables: Law Reform in Quebec and Ontario" [1981] *Meredith Memorial Lectures* (Toronto: R. DeBoo, 1982) 246 at 261, 263; Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec", *ibid.* at 377; Mignault, *ibid.* at 146-48; R.A. Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and its Surrogates Part Two" (1986) 32 McGill L.J. 1 at 11; *Jocami Inc.* v. *Joly*, [1982] C.S. 637.

[3]See Pourcelet, *ibid.* at 173; Rousseau-Houle, *Précis de droit de la vente et du louage*, *ibid.* at 200-01; Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates Part Two", *ibid.*; R.A. Macdonald, "Security under Section 178 of the Bank Act: A Civil Law Analysis" (1983) 43 R. du B. 1007 at 1055-56; Macdonald & Simmonds, *ibid.* at 262; Boodman, *ibid.* at 918; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 673; *Jocami Inc.* v. *Joly*, *ibid.*; *Juris-classeur civil*, art. 2044-2123, "Privilèges, Privilèges spéciaux sur les meubles, Privilège du vendeur des meubles", by R. Fridman-Clause, fasc. H-2, No. 1; *Encyclopédie juridique Dalloz: Répertoire de droit civil*, 2d ed., vol. 6 "Privilèges mobiliers", by H. Thuillier, No. 129; H. & L. Mazeaud, J. Mazeaud & F. Chabas, *Leçons de droit civil*, t. 3, vol. 1, 6th ed. by V. Ranouil & F. Chabas (Paris: Montchrestien, 1988), Nos 187, 193.

[4]See arts 1538, 1544 *C.C.L.C. a contrario*; *Pépin* v. *Feeney* (1936), 44 R.L. 74 (C.S.); *Fiducie du Québec* v. *Fabrication Précision Inc.*, [1978] C.A. 255; R.A. Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates Part One" (1986) 31 McGill L.J. 573 at 600-01, 614, 629-30; Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates Part Two", *ibid.*

[5]See art 734(1) *C.C.P.*; *Thibault* v. *Dame Perron-Lanthier* (1968), [1969] B.R. 138; *F. & W. Sichelschmidt* v. *H. Nickel Industries of Canada Ltd.* (1975), [1976] C.S. 142; *Jocami Inc.* v. *Joly*, *supra*, note 2; *Aménagements Arto Inc.* v. *Canadienne de gestion I. Bouvier Inc.* (1987), 11 Q.A.C. 269, [1987] R.J.Q. 753, [1987] R.D.J. 113 (C.A.); *Alcools de Commerce Inc.* v. *Corp. de Produits Chimiques de Valleyfield Inc.*, [1985] C,A, 686, 56 C.B.R. (n.s.) 255; *Keymar Equipment Ltd.* v. *Thomcor Holding Ltd.*, [1983] C.S. 326; Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec", *supra*, note 1 at 384-86; Ciotola, *supra*, note 2 at 249.

As a remedy which retroactively re-establishes a seller's ownership, dissolution, if available, is completely enforceable against a buyer's unsecured creditors and creditors with security on after-acquired or future property. The priority vis-à-vis the former results from the retroactive removal of goods from the buyer's patrimony and, hence, from the common pledge of his unsecured creditors.[6] The priority vis-à-vis the latter is also related to ownership. The future property secured creditors of a buyer who might compete with a seller are banks with security under section 178 of the *Bank Act*,[7] transferees of property in stock under Division III of *An Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*[8] and trustees for bondholders under the *Special Corporate Powers Act*.[9] A condition for the validity of each of these security mechanisms is that the debtor be or become owner of the collateral security at some time during the lifetime of the creditor's security interest.[10] Dissolution of the contract of sale under article 1543 *C.C.L.C.* prevents fulfillment of this condition. Further, special priority rules regarding an unpaid seller vis-à-vis a bank with section 178 security[11] and a transferee of property in stock[12] have been inter-

---

[6]See arts 1980, 1981 *C.C.L.C.*

[7]R.S.C. 1985, c.B-1.

[8]*An Act Respecting Bills of Lading Receipts and Transfers of Property in Stock*, R.S.Q. c. C-53 [hereinafter *Bills of Lading Act*].

[9]R.S.Q. 1977, c. P-16, ss. 27-30.

[10]See as regards *Bank Act* security, *Bank Act, supra*, note 7, s. 178(2); Macdonald, "Security under section 178 of the Bank Act: A Civil Law Analysis", *supra*, note 3 at 1019-20, 1051-52; J. Auger, "Les sûretés mobilières sans dépossession sur des biens en stock en vertu de la loi sur les banques et du droit québécois" (1983) 14 R.D.U.S. 221 at 235-37; G.E. LeDain, "Security Upon Moveable Property in the Province of Quebec" (1956) 2 McGill L.J. 77 at 104; Macdonald and Simmonds, *supra*, note 2 at 266; Y. Caron, "La vente et le nantissement de la chose mobilière d'autrui: Deuxième partie" (1977) 23 McGill L.J. 380 at 413; L. Payette, "Nantissement commercial — Chose d'autrui" (1980) 40 R. du B. 677 at 680; *Union Sulphur Co. of New York* v. *Riordan Co.* (1922), 30 R.L. n.s. 144 (C.S.) at 150-51; *La Chaîne Coopérative du Saguenay Inc.* v. *Laberge*, [1959] C.S. 320 at 326-30; *Ackroyd Brothers (Canada) Ltd.* v. *Brackon Products Inc.*, [1948] C.S. 407 at 408-09; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 901; Boodman, "The Rights of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 691-92.

As regards the transfer of property in stock, see *Bills of Lading Act, supra*, note 8, s.13; Auger, at 235, 237; R.A. Macdonald, "Inventory Financing in Quebec after Bill 97" (1984) 9 Can. Bus. L.J. 153 at 159; Y. Renaud, "La cession de biens en stock: deux régimes, deux sûretés de même nature" (1984) 86 R. du N. 253 at 285.

As regards trust deed security under the *Special Corporate Powers Act*, see *Special Corporate Powers Act, ibid.* at 236-37; Macdonald, Security under Section 178 of the *Bank Act*: A Civil law Analysis", *supra*, note 3 at 1066.

[11]See *Bank Act, ibid.*, s. 179(2) which provides *inter alia* that the bank's priority over the claim of any unpaid vendor under s.179(1) "...does not extend over the claim of any unpaid vendor who had a lien on the property at the time of the acquisition by the bank of the ... security, unless the same was acquired without knowledge on the part of the bank of such lien ...".

[12]See *Bills of Lading Act, supra*, note 8, s.27(1) which states: "The transferor must indicate to the transferee in the writing evidencing the transfer any claim of an unpaid vendor affecting the

preted not to displace the enforceability and priority of the seller's dissolution remedy under article 1543 *C.C.L.C.*[13]

The priority of the dissolution remedy over a buyer's unsecured creditors and future property secured creditors is reflected in the procedural domain so that a seller, as eventual and retroactive owner under article 1543 *C.C.L.C.*, could likely withdraw goods from a seizure before or after judgment by a competing unsecured creditor or future property secured creditor of the buyer.[14] The requirement in article 1543 *C.C.L.C.* that a buyer be in possession of goods purchased at the time of exercise of the dissolution remedy by a seller is not breached by seizure by a third party. In this context, seizure before or after judgment does not deprive a debtor of possession of goods seized, but merely puts them in the hands of justice.[15] The only case in which a seizure might cause a seller to lose the remedy due to breach of the possessory requirement in article 1543 *C.C.L.C.* would be seizure after judgment in favour of a future property secured creditor exercising a secured, possessory remedy as opposed to a preference on judicial sale proceeds.[16] In this case, however, an informed seller could oppose any seizure before judgment and seize before judgment in his own right to preserve his buyer's possession and the dissolution remedy. Nonetheless, the voluntary, extra-judicial transfer of possession by a buyer to a secured creditor with a possessory remedy including those with security on after-acquired property would, of course, render the seller's dissolution remedy unavailable.

The priority of the dissolution remedy is not affected by a buyer's bankruptcy. Given its basis in ownership, a seller's dissolution remedy is enforceable against a buyer's trustee in bankruptcy whose administration is limited to assets in a bankrupt debtor's patrimony.[17]

---

transferred property, and any claim so indicated takes precedence over the rights of the transferee."

[13]See Macdonald, "Security under Section 178 of the Bank Act: A Civil Law Analysis", *supra*, note 3 at 1058; Goldstein, *supra*, note 1 at 96; Auger, *supra*, note 10 at 299; Macdonald, "Inventory Financing in Quebec after Bill 97", *supra*, note 10 at 173; LeDain, *supra*, note 10 at 108-09; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 693; *Knitrama Fabrics Inc.* v. *K. & A. Textiles Inc.*, [1984] C.S. 1202; *Ménard* v. *Latulipe, Renaud, Bourque Ltée*, [1986] R.J.Q. 657 (C.S.); *Keymar Equipment Ltd.* v. *Thomcor Holding Ltd.*, *supra*, note 5; *Re Wm. A. Marsh Co. & Buzzell* (1930), 11 C.B.R. 63 (C.S.).

[14]For a discussion of oppositions to withdraw goods from seizure before and after judgment, see Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *ibid.* at 697-700.

[15]See art. 737 C.C.P.; art. 2001, para. 1 *C.C.L.C.*; *Enterprises Jean-Claude Lalonde Ltée* v. *Blanchette*, [1980] C.S. 509. Nevertheless, there is some confusion in the case law as to the notions of possession and custody in the context of seizures before and after judgment. See *Heltzel Co.* v. *Mont-Royal Steel Product Inc.*, [1980] C.A. 221; *Cie de construction Belcourt* v. *Bronzage 3 Soleils Inc.* (1985), [1986] R.D.J. 26 (C.A.).

[16]See arts 565-67 C.C.P. as regards compulsory execution in moveable real actions.

[17]See *Bankruptcy Act*, R.S.C. 1985, c. B-3, ss 16(3), 67, 81; J.M. Deschamps, "Le Syndic: Un Successeur du Débiteur? Un Cessionnaire? Un Représentant des Créanciers?" [1985] *Meredith*

By contrast, a seller's revendication remedy under articles 1998 and 1999 *C.C.L.C.* affords little or no protection against competing unsecured creditors and future property secured creditors of a buyer. As a privileged remedy, revendication is ostensibly enforceable against all unsecured creditors and lower ranking secured creditors of a buyer.[18] Such lower ranking secured creditors include a trustee for bondholders under the *Special Corporate Powers Act*,[19] but, due to statutory provisions regarding seller's priorities, do not include a bank with section 178 security or a transferee of property in stock.[20] Even this limited ostensible enforceability, however, is eliminated where any competing creditor of a buyer seizes the goods. According to article 2000, paragraph 1 *C.C.L.C.*,[21] a judicial sale at the initiative of a third party pending proceedings in revendication or a seizure before the revendication remedy is exercised automatically transforms the seller's remedy into a preference on judicial sale proceeds. Hence, a seller could not on the basis of a revendication remedy withdraw goods from a seizure in execution after judgment by any competing creditor of the buyer. This rule should apply as well to a third party seizure before judgment, a conservatory measure which from the point of view of oppositions to withdraw is assimilated to seizure after judgment.[22] It would be inconsistent to prohibit enforcement of the seller's revendication remedy at the stage of seizure after judgment yet permit preservation of the remedy vis-à-vis seizure before judgment by a competing creditor. The rule in article 2000, paragraph 1 *C.C.L.C.* also implies that any third party contestation of a seizure before judgment taken by a seller pending revendication will extinguish the revendication remedy and activate the preference on judicial sale proceeds. Finally, the rule in article 2000, paragraph 1 *C.C.L.C.* implies that a seller's revendication rem-

---

Memorial Lectures (Toronto: R. DeBoo, 1986) 245 at 249-51; *Re Beatrice Pines Ltd.: Vendome Knitting Mills Ltd.* v. *Lawrence* (1967), [1968] C.S. 351; *Re Iberville Furniture and Appliances Co.: Grobstein* v. *Facto* (1956), 4 C.B.R. (n.s.) 36 (C.S.); *Re Rosenzweig: Hart* v. *Goldfine Ltd.* (1921), 2 C.B.R. 255, 31 B.R. 558, 70 D.L.R. 174 aff'g 1 C.B.R. 385, 431, 56 D.L.R. 101 (C.A.).

[18]See as regards ranking of claims as a basis for determining priority among competing, secured possessory remedies Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 687; Macdonald, in Springman & Gertner, eds, *supra*, note 1 at 337-44; Macdonald, "Security Under Section 178 of the Bank Act: A Civil Law Analysis", *supra*, note 3 at 1061ff.; *Sous-Ministre du Revenu du Québec* v. *Total Rental Equipment Inc.*, [1979] C.S. 840; *Elliott Krever & Assoc. Ltd.* v. *Montreal Casting Repairs Ltd.*, [1969] C.S. 6; *Gagnon* v. *Banque Nationale* (1920), 29 B.R. 166.

[19]*Supra*, note 9, s.29, para. 2.

[20]See authorities cited in note 13 which tend to give a bank and transferee of property in stock absolute priority over a seller's revendication remedy under arts 1998 and 1999 *C.C.L.C.*

[21]Article 2000, para. 1 *C.C.L.C.* reads as follows:

> If the thing be sold pending the proceedings in revendication, or if, when the thing is seized at the suit of a third party, the vendor be within the delay and the thing in the conditions prescribed for revendication, the vendor has a privilege upon the proceeds in preference to all other privileged creditors hereinafter mentioned.

[22]See Macdonald in Springman & Gertner, eds, *supra*, note 1 at 341-42. See also text accompanying note 14.

edy is not enforceable against a buyer's trustee in bankruptcy despite the thirty-day rule in article 1998, paragraph 2 *C.C.L.C.*[23] A trustee in bankruptcy who represents both the debtor and the debtor's creditors possesses a debtor's property as a court-appointed receiver exercising a combined conservatory and liquidation function analogous to that of a custodian under a seizure before or after judgment.[24]

Article 2000, paragraph 1 *C.C.L.C.* indicates that in cases of seizure before and after judgment the preservation of goods is assumed and revendication becomes superfluous. In both cases, the seller can exercise at his option the dissolution remedy under article 1543 *C.C.L.C.* accompanied by seizure before judgment or an opposition to withdraw the goods from a competing seizure, or the preference on judicial sale proceeds through the mechanism of seizure before judgment[25] or opposition for payment after judicial sale.[26] Further, a seller can exercise these remedies within the context of a buyer's bankruptcy. The result is that revendication as a conservatory remedy is effective only between seller and buyer. Where third parties are competing with a seller, the unenforceability of revendication in the face of third party seizures and the availability to the seller of other conservatory and final remedies makes revendication superfluous.

In summary, the seller's revendication remedy is not enforceable against two of the three potential future property secured creditors of a buyer. These creditors of a buyer are most likely to compete with an unpaid seller of moveables.[27] Further, the revendication remedy is not enforceable against any competing secured or unsecured creditor of a buyer if that creditor has seized the goods. While revendication may have an ostensible enforceability greater than or equal to that of dissolution under article 1543 *C.C.L.C.* as regards other potentially competing secured creditors of a buyer such as pledgees, commercial pledgees and lessors,[28] it is less effective than dissolution in the face of

---

[23]See text accompanying note 31.

[24]See *Bankruptcy Act*, *supra*, note 17, s.16(4); Deschamps, *supra*, note 17.

[25]See art. 734(4) *C.C.P.*

[26]See art. 604 *C.C.P.*

[27]See Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 660; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 925-26.

[28]Revendication and dissolution are equally unenforceable vis-à-vis a buyer's pledgee (see arts. 1966, 1968-1979 *C.C.L.C.*) insofar as the latter's possession constitutes a breach of the possessory requirements of the seller's remedies. See text *supra* preceding note 15 and *infra* following note 32. Otherwise, dissolution despite its retroactive effect does not invalidate pledge or commercial pledge (see arts 1979e-k *C.C.L.C.*) by a buyer to a third party or the privilege of the buyer's lessor (see arts 1637-40, 1994(8), 2005 *C.C.L.C.*). According to art. 1966a *C.C.L.C.* the *nemo dat* exceptions applicable to sale also apply to pledge and commercial pledge. See Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 901; A. Mayrand, "Nantissement de la chose d'autrui" (1943) 3 R. du B. 313 at 313; C. Demers, *Traité de Droit Civil*

future property secured creditors and any seizing creditor whether secured or unsecured. As regards competing future property secured creditors and seizing creditors, until the revendication remedy is brought to fruition by a judgment ordering the return of the goods to the seller, it will be replaced by a preference on judicial sale proceeds. If the remedy is completed, it has the effect of conserving the goods in the seller's hands, pending his option for a final remedy. However, this preservation of goods can equally be achieved by seizure before judgment in the context of the dissolution remedy which is more widely enforceable than the revendication remedy with all its modalities.

The practical advantages of the dissolution remedy over the revendication remedy are clear. As illustrated above, in situations of competition between an unpaid seller and his buyer's creditors, revendication will likely result in a preference on judicial sale proceeds as opposed to return of the goods to the seller. It is well known that a judicial sale generates far less than the market value of goods.[29] Further, the original seller of goods is best qualified, by virtue of his professional link to the goods, to realize upon them through resale. Consequently, where his buyer is insolvent or bankrupt a seller can minimize his loss by regaining custody of the goods and reselling them. In a post-delivery scenario, this can best be achieved through the dissolution remedy under article 1543 *C.C.L.C.*[30]

Even the preconditions for the exercise of the dissolution and revendication remedies appear to favour dissolution. Both remedies are subject to a peremp-

---

du Québec, vol. 14 (Montreal: Wilson & Lafleur, 1950) at 15-17; Ciotola, *supra*, note 2 at 63-64, 104; Caron, *supra*, note 10 at 407-09; R.A. Macdonald, "Exploiting the Pledge as a Security Device" (1985) 15 R.D.U.S. 551 at 558; Goldstein, *supra*, note 1 at 102-03; *Gotfredson Corp.* v. *Filion* (1928), 46 B.R. 52; *Productions Michel Desrochers Inc.* v. *Bourbeau*, [1983] C.S. 522; *Pétroles Irving Inc.* v. *Machinerie B.D.M. Inc.*, [1984] C.S. 511; *Bo-Less Inc.* v. *Boily* (27 December 1979), Quebec 200-03-000192-770 (C.A.).

According to art. 1639 *C.C.L.C.*, the lessor's privilege applies *inter alia* to moveable effects belonging to a third person if found on the leased premises. Assuming no seizure of the goods has been initiated, the seller's revendication remedy would be enforceable against a pledgee and commercial pledgee on the basis of the ranking in art. 1994 *C.C.L.C.* which ranks sellers third and pledgees fourth. The lessor's privilege presupposes some form of seizure. Hence, it would never compete directly with the seller's revendication remedy.

As regards competition between a seller and a third party who purchases goods from the buyer see text accompanying notes 33 & 34 regarding the possessory requirements of revendication and disssolution.

[29]See Macdonald in Springman & Gertner, eds, *supra*, note 1 at 351; J.T. Robertson, "The Problem of Price Adequacy in Foreclosure Sales" (1987) 66 Can. Bar Rev. 671 as regards judicial sale of immoveables.

[30]In a pre-delivery scenario, resale by a seller can be achieved without court intervention by means of the combination of the right of retention under arts 1946 and 1497 *C.C.L.C.*, dissolution under art. 1544 or 1065 *C.C.L.C.*, and art. 1027, para. 2 *C.C.L.C.* For an analysis of this situation see Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 702-04.

tory thirty-day delay in the case of a buyer's insolvency or bankruptcy[31] and require that the goods be physically identifiable and unchanged.[32] These remedies' pre-conditions differ, however, in three respects. The first concerns a requirement that no third party have possession of the goods. In the context of article 1543 *C.C.L.C.*, dissolution can only be exercised "while the thing sold remains in the possession of the buyer". Any loss of possession by him extinguishes the right. Article 1999(3) *C.C.L.C.* states that the right of revendication is subject to the condition that the thing "not have passed into the hands of a third party who has paid for it". Accordingly, both third party payment and possession are required in order to extinguish the right.[33] Consequently, the revendication remedy is less likely to be extinguished than dissolution on the basis of third party possession.[34]

This potential slight edge in favour of revendication, however, is greatly reduced by the effect of article 1999(1) and (4) *C.C.L.C.* These provisions subject revendication to the conditions that the sale not have been made on credit or with a term, and that the remedy be exercised within eight days of delivery in non-insolvency situations. If either of these conditions is unfulfilled the revendication remedy is forfeited and transformed into a privilege ranked lower than that otherwise accorded an unpaid seller.[35] Dissolution under article 1543 *C.C.L.C.*, on the other hand, is not subject to any such restrictions.[36]

---

[31]See arts 1543, para. 2, 1998, para. 2 *C.C.L.C.*; *Mercure* v. *Philippe Beaubien & Cie* (1965), [1966] B.R. 413; *Re Beatrice Pines Ltd.: Vendome Knitting Mills Ltd.* v. *Lawrence*, *supra*, note 17; *Re Dame Talbot: Antaya* v. *de Cotret* (1957), [1958] C.S. 239; *Re Iberville Furniture and Appliances Co.: Grobstein* v. *Facto*, *supra*, note 17.

[32]This is expressly required under art. 1999(2) *C.C.L.C.* as regards the seller's revendication remedy and implied in the dissolution remedy which subsumes a revendication remedy by the seller as owner. See Macdonald in Springman & Gertner, eds, *supra*, note 1 at 306, 341, 333; Pourcelet, *supra*, note 1 at 173; Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 201, 206; Ciotola, *supra*, note 3 at 170-71; Macdonald & Simmonds, *supra*, note 2 at 262; Macdonald, *supra*, note 4 at 629-31; *Mechanic Supply Co.* v. *Hudon* (1933), 71 C.S. 400; *Mercure* v. *Philippe Beaubien et Cie*, *ibid.*; *Roy* v. *Bois Ste-Lucie Inc.*, [1977] C.S. 845.

[33]See Macdonald & Simmonds, *ibid.* at 262-63, LeDain, *supra*, note 10 at 81; C. Demers, *Traité de droit civil du Québec*, vol. 14 (Montreal: Wilson & Lafleur, 1950) at 131; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 896-97; Macdonald in Springman & Gertner, eds, *ibid.* at 306; *Mechanic Supply Co.* v. *Hudon*, *ibid.*

[34]The possessory requirements for dissolution under art. 1543 *C.C.L.C.* and for revendication are intended to protect third parties who purchase goods from a buyer by limiting or eliminating a seller's right to follow. There is no apparent reason for the distinction between these requirements. See *Patterson* v. *Baldwin* (1894), 8 C.S. 513. The distinction is all the more anomalous given the historical basis for the seller's revendication remedy analysed later in this paper.

[35]See art. 2000(2) *C.C.L.C.*

[36]A term for payment in favour of a buyer prevents the exercise of revendication and dissolution remedies alike insofar as it delays performance and possible breach of the buyer's obligation to pay the purchase price. Assuming such breach to have occurred, thereby giving rise to a seller's remedies for non-payment, art. 1999(1) *C.C.L.C.* constitutes a superadded restriction against revendication, one which is not applicable to dissolution under art. 1543 *C.C.L.C.*

Within an economic analysis, revendication and dissolution are equally efficient or inefficient, as the case may be. As a custodial or repossessory remedy, revendication, like dissolution which entails repossession based on ownership, appears to undermine the collective debt collection process of bankruptcy and the goal of keeping firm or buyer specific assets together where necessary to maximize their value.[37] However, valuation considerations combined with the technical rules regarding a seller's non-consensual remedies indicate that the collective process will remain intact where this is an efficient result despite either revendication or dissolution by a seller.

Whether before or after a buyer's bankruptcy, a seller will exercise a remedy other than a preference on judicial sale proceeds only if the value of the goods in his hands is greater than their judicial sale or liquidation value, i.e. their value in the hands of the buyer-debtor or his trustee in bankruptcy, which in turn is less than the seller's claim. Similarly, a debtor or debtor's trustee in bankruptcy will want to restrict the seller's remedy to a preference on judicial sale proceeds only if the value of the goods in the debtor's hands is greater than the seller's preferred claim.[38] Both of these scenarios have the effect of maximizing the value of a debtor-buyer's assets vis-à-vis the reduction of claims upon bankruptcy. Further, these two scenarios are mutually exclusive in that goods will likely not be buyer specific and non-buyer specific at the same time.[39]

Technically, the revendication remedy appears to be more sensitive than dissolution to efficiency considerations. Revendication is not enforceable against third party seizures or a buyer's trustee in bankruptcy.[40] Exercise of the remedy by a seller on the eve of a buyer's bankruptcy will not itself prevent recovery of the goods by the buyer's trustee in bankruptcy if it is desirable to do so. By contrast, the dissolution remedy creates an absolute bar to recovery.[41] However, from an efficiency point of view, a trustee in bankruptcy's ability to recover goods will be the same whether revendication or dissolution is a seller's basis for repossession. This results from the mutual exclusivity of scenarios favouring repossession by a seller or the collective process of liquidation. Even if a seller has dissolved the sale of buyer specific goods and has thereby created an absolute bar to recovery by a trustee in bankruptcy, their buyer specific nature is incentive for a seller to return the goods or resell them to the buyer to

---

[37]See T.H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986) at 5, 10-19, 103-04, 139-42.

[38]See Jackson, *ibid.* at 140.

[39]The only instance in which both a seller and a buyer's trustee in bankruptcy will want to recover goods will be where they are goods that appreciate rapidly in value, such as gems or original works of art. In this case, the appreciating value of the goods sold ensures that a seller's preference on judicial sale or liquidation proceeds will satisfy his claim.

[40]See text accompanying notes 21-24.

[41]See text accompanying note 17.

maximize their realizable value and the seller's own preferred claim. The technically absolute enforceability of dissolution does not reflect completely, but neither does it remove, the economic realities of a seller's claim in bankruptcy. In fact, the existence and preeminence of the seller's dissolution remedy over that of revendication reflects the greater probability that goods are worth more in the hands of a seller than in the hands of a buyer's trustee in bankruptcy[42] and supports a bias, perhaps erroneously, in favour of the non-consensual, secured status of a seller of moveables.[43]

The result is that revendication and dissolution are identical remedies from the perspective of economic efficiency.[44] This indicates that there is no clear efficiency justification to sustain the revendication remedy which, as shown above, is otherwise superfluous under the technical rules for security on moveables in Quebec.

Having established the inferior status of the seller's right of revendication as regards its availability and enforceability, the question to be resolved is why and how does the remedy exist in the law of Quebec. The answer resides in the requirement under article 1999(1) *C.C.L.C.* that sale not be made on credit and, to a lesser degree, in the requirement under article 1999(4) *C.C.L.C.* that the remedy be exercised within eight days of delivery. These provisions indicate that the seller's revendication remedy is an error of codification and has no meaningful existence in the present law of Quebec with the practical result that after delivery a seller has only a dissolution remedy or lower ranked preference on judicial sale proceeds.

II. Historical Analysis of Article 1999(1) and (4) *C.C.L.C.*

As a preliminary observation, it must be stated that this historical analysis is intended to indicate the pre-codification legal bases for the rules in article 1999(1) and (4) *C.C.L.C.* An examination of the origins of these rules provides a critical understanding of their transposition into the post-codification law of Quebec. The analysis is not intended to be a full socio-legal, historical examination. Hence, no attempt will be made to situate the precursors to article 1999(1) and (4) *C.C.L.C.* in their greater historical context.

The examination of the origins of article 1999(1) and (4) *C.C.L.C.* shall take place in the context of the Codifiers' sources and Roman law.

---

[42]See text accompanying note 29.

[43]See text accompanying notes 231-34.

[44]The identity of revendication and dissolution in economic terms accurately reflects the historical origins of revendication. See text accompanying notes 45ff.

1. Codifiers' Sourccs

In the Codifiers' Reports,[45] the present article 1999 *C.C.L.C.* is article 23b of Title Seventh: Of Privileges and Hypothecs, Chapter Second: Of Privileges, Section I: Of Privileges upon Moveable Property.[46] The Codifiers' Sixth Report contains no specific commentary upon article 23b. Their observations regarding article 17 to 34a of Section I: Of Privileges upon Moveable Property are as follows:

> Such are the rules according to which the order of privileges has been established in article 17, of which the subsequent articles are a mere development requiring no remark.[47]

Hence, the primary clues as to the bases for the rules in article 23b(1) and (4) are the sources mentioned by annotation to the French version of article 23b.[48] This annotation reads as follows:

> Ferrière, *sur art.* 176, *no* 19. — 2 Bourjon, 689. — 4 Anc. Den. 377-8 — Tropl. *Priv. nos* 194, 195, 196, 197. — 2 Tropl. *Vente*, p. 531. — Code, *Louage art.* 21.

For several reasons, extracts from some of these sources are reproduced at length insofar as they relate to the rules that limit revendication to sale without a term and to the period of eight days following delivery. First, these sources are rare 18th and 19th Century treatises which are not generally available for consultation.[49] Second, as will be seen, the words used by the authors cited by the Codifiers leave no doubt as to the pre-codification bases for the rules under scrutiny here. Finally, the actual sources for the codification of article 23b provide insight and raise serious questions as to the methodology and framework used by the Codifiers.

It is evident from the sources of article 23b and the annotation to the French version of article 23, the precursor to article 1998 *C.C.L.C.* which establishes the unpaid seller's right of revendication and privilege on judicial sale proceeds,[50] that the revendication remedy derives in part from articles 176 and 177 of the *Coutume de Paris*. Article 176 reads:

---

[45]*Civil Code of Lower Canada* (Quebec: George E. Desbarats, 1865).

[46]*Ibid.*, Sixth and Seventh Reports and Supplementary Report, Sixth Report at 163 as amended by the Supplementary Report at 383. The title, chapter and section are identical to those in the present *Civil Code of Lower Canada*.

[47]*Ibid.* at 54. There is a separate commentary on art. 29 regarding the expenses of the last illness which is irrelevant for present purposes. See *ibid.*

[48]*Ibid.* at 162.

[49]I would like to thank the Law Library of the Faculty of Law, McGill University for access to its Wainwright Collection.

[50]See *Civil Code of Lower Canada, supra*, note 45, Sixth Report at 162.

> Qui vend aucune chose mobiliaire sans jour et sans terme, espérant être payé promptement, il peut sa chose poursuivre, en quelque lieu qu'elle soit transportée, pour être payé du prix qu'il l'a vendue.

Article 177 reads:

> Et néanmoins encore qu'il eût donné terme, si la chose se trouve saisie sur le débiteur par autre créancier peut empêcher la vente; & est préféré sur la chose aux autre créanciers.

Ferrière, commenting upon the phrase "sans terme, espérant être payé promptement" in article 176 as a condition to revendication notwithstanding seizure by a third party, states:

> ... la raison est qu'en ce cas la chose vendue quoique livrée, n'est pas parvenue dans le domaine de l'acheteur et par conséquent les créanciers n'y peuvent prétendre aucun droit au préjudice du vendeur autrement ils s'enrichiraient de ces biens contre l'équité naturelle.[51]

His comment on the phrase "sans jour et sans terme" is as follows:

> Au contraire, si le premier vendeur sans jour et sans terme avoit laissé passer quelque temps, comme de sept à huit jours au plus, ce qui dépend des circonstances et de la prudence du juge sans avoir poursuivi l'acheteur, ou pour le prix convenu, ou pour reprendre sa chose faute de paiement, et que cet acheteur l'eût revendue; sans doute que le premier vendeur n'auroit pas droit de suit à l'encontre du second acheteur, parce qu'il seroit présumé avoir tacitement suivi la foi de l'acheteur et ainsi la propriété de la chose auroit passée en la personne de cet acheteur, laquelle auroit pu transférer à une autre....[52]

Further, Ferrière states:

> Le vendeur ayant donné tems à l'acheteur pour le paiement, il a suivi la foi et il a par ce moyen transféré la propriété de la chose en sa personne, en sorte que dès à ce même tems, il peut la vendre, l'échanger ou l'engager avec entier sûreté pour les acquéreurs d'icelle...[53]

Bourjon[54] makes the following commentaries regarding the requirement in article 176 that the sale be made "sans jour et sans terme, espérant être payé promptement":

> LXXXV — Le droit de revendiquer la chose cesse, si le vendeur a donné terme, et il ne peut empêcher la vente de la chose; parce que l'acheteur en est devenu propriétaire puisqu'en ce cas la vente et l'achat ont été parfaits; mais il a un privilège sur le prix provenant d'icelle; c'est à ce privilege en ce cas auquel se réduit son droit; privilège fondé sur ce que c'est le crédit qu'il a fait qui a mis l'effet parmi

---

[51]See C. de Ferrière, *Commentaire sur la Coutume de la Privoté et Vicomté de Paris* vol. 1 (Paris: Librairies associées, 1788) at 407.

[52]*Ibid.* at 410.

[53]*Ibid.* at 411.

[54]F. Bourjon, *Le droit commun de la France et la coutume de Paris réduits en principes*, vol. 2 (Paris: Grange, Cellot, 1770) at 688.

> les biens du débiteur: il a donc été juste de lui accorder un privilège sur le prix d'icelui; c'est raison écrite, c'est droit commun.
> LXXVI — Lorsqu'il a vendu sans jour et sans terme, espérant être payé promptement, il peut empêcher la vente et revendiquer la chose; dans ce cas-ci, son privilège est plus étendu que dans l'autre; l'imperfection de la vente, imperfection qui est constante en ce cas, fonde ce second privilège.
> LXXVII — Cette distinction a cependant juste base: elle est fondé sur ce que l'acheteur ne devenoit propriétaire d'icelle que sous une condition, qui étoit de payer le prix; condition qu'il n'a pas rempli, et qui a par conséquent laissé la convention imparfaite et incapable de transférer la propriété de la chose.
> LXXVIII — Mais ce droit est sujet à une forme: pour exercer ce droit de revendication, il faut que le vendeur agisse incontinent et au plus tard dans la huitième de la livraison, si le vendeur et acheteur sont demeurais en même ville; après lequel tems, il auroit fin de non-recevoir, parce que la juste présomption est en ce cas, que la vente n'a pas été faite sans jour et sans terme, qu'un plus long délai auroit été préjudiciable au commerce; et après ce délai, il n'y a plus que le privilège sur le prix, et non le droit de revendiquer, qui subsiste en faveur du vendeur, qui n'est plus regardé en ce cas comme vendeur sans jour et sans terme.

Troplong[55] makes the following comments upon the conditions that the sale be made "sans terme" and that revendication be exercised within eight days of delivery:

> Si la vente est faite avec terme, alors le vendeur ayant suivi la foi de l'acquéreur, ne peut exercer la revendication. Il faut que la vente soit fait *fidé graeca*, c'est-à-dire à deniers comptans. Car les Grecs ne faisaient point de crédit, et on n'avait rien chez eux que l'argent à la main.[56]

> On suppose que s'il s'écoulait plus de huit jours sans réclamation, le vendeur aurait suivi la foi de l'acquéreur, et que, dès lors, ce dernier serait devenu propriétaire.[57]

> Dans l'ancienne jurisprudence le délai pour l'exercice de la revendication n'était pas fixé, en sorte que l'on disputait beaucoup pour savoir quel laps de temps devait s'écouler afin de juger si le vendeur avait voulu accorder tacitement un délai de grâce, et suivre la foi de l'acheteur.[58]

It is clear from the doctrinal sources cited by the Codifiers that in pre-codification French law the unpaid seller's revendication remedy was based on the concept of ownership, the remedy being available only so long as ownership did not pass to the buyer. The transfer of ownership to a buyer upon delivery required payment of the purchase price unless the seller expressly or impliedly waived the condition or extended credit. Express waiver would occur where a seller gave his buyer a term for payment. Waiver would arise by implication if the seller's behaviour upon delivery indicated that he did not expect to be paid promptly, for example by not pursuing his buyer either for the price or for return

---

[55]M. Troplong, *Le droit civil expliqué*, vol. 1 (Paris: Charles Hingray, 1833).
[56]*Ibid.* at 286.
[57]*Ibid.* at 288.
[58]*Ibid.* at 288-89.

of the goods with enough celerity. The lapse of time necessary for implied waiver of payment appears to have depended upon the circumstances, with eight days as the outside limit. It is not clear from the Codifier's sources that pre-codification French law in all cases permitted a seller to wait eight days before exercising a remedy. In fact, as suggested by Ferrière and Troplong, the caselaw was uncertain in this regard[59] and according to Troplong the uncertainty was remedied by codification of an eight-day rule in France.[60] Further, Troplong, in a passage not cited by the Quebec Codifiers,[61] indicates that prior to codification, delivery by a seller without an immediate and express demand for payment constituted waiver or the extension of credit. This is in contradistinction to Pothier[62] who states that the extension of credit is not presumed and arises tacitly only with the lapse of a considerable time after delivery without a demand for payment by a seller.

The rules for revendication as enunciated by the Codifier's doctrinal sources are unclear and paradoxical as regards the extension of credit by implication. First, there is a discrepancy as to the exact formality required of a seller to preserve ownership of goods delivered and, hence the revendication remedy. Ferrière[63] and Bourjon[64] seem to indicate that a seller must institute legal proceedings. By contrast, Troplong[65] suggests that a mere demand for payment will suffice.

The ultimate difficulty is that neither of these proposed solutions is truly satisfactory. The institution of legal proceedings in revendication is unsatisfactory because of the logical framework of the remedy. It is tautological to require that the remedy be exercised within a certain delay in order to negate a transfer of ownership based on an implied extension of credit and thereby preserve the remedy. It is submitted that this is logically and substantively different from peremptory delays for the exercise of remedies such as those regarding the unpaid seller's dissolution and privileged remedies in a modern context.[66] The institution of proceedings to recover the purchase price as suggested by Ferrière contradicts the revendication remedy and cannot be a means of preserving it. On the other hand, an informal demand for payment would be meaningless as a legal mechanism to preserve the revendication remedy. It would lead to either complete preservation of the remedy through simulated demands for payment or complete elimination of the remedy every time delivery is made without an

---

[59]See text accompanying notes 52 and 58.

[60]See art. 2102(4) *C.N.*; Troplong, *supra*, note 55 at 289.

[61]See Troplong, *ibid.*, paras. 189, 190.

[62]See M. Bugnet, *Oeuvres de Pothier*, 3d ed., vol. 3 (Paris: Marchal & Billard — E. Plon, Nourrit et cie., 1890) para. 324.

[63]See text accompanying note 52.

[64]See text accompanying note 54, para. LXXVIII.

[65]See text accompanying notes 56, 57.

[66]See arts 1543, 1998 *C.C.L.C.*

immediate demand. The latter results from the informal nature of the requirement which implies that a short lapse of time would suffice to create a presumption that a seller has extended credit.[67]

These difficulties with the rules enunciated by the doctrinal sources cited by the Quebec Codifiers can be explained and perhaps resolved by consideration of the Roman law rules regarding the transfer of ownership of moveables.

2. *Roman Law*

An examination of the rules for the transfer of ownership of moveables by delivery in Roman law illustrates vis-à-vis the pre-codification French law some of the risks associated with the adoption of ancient laws outside their original context.

The post-classical Roman law regarding the transfer of ownership as regulated by the *Institutes* of Justinian is the culmination of entrenched Roman formalism and a gradual process of liberalization. According to the *Institutes*, the transfer of ownership of moveables occurs upon delivery (*traditio*) if one of three conditions is fulfilled:

(i) payment of the purchase price upon delivery;
(ii) the provision of adequate security by the buyer in lieu of payment; or
(iii) the granting of credit by the seller.[68]

In keeping with the historicism and classicism of Justinian's *Corpus Iuris Civilis*, these rules for transferring ownership upon delivery represent separate stages in the development of Roman law.[69]

---

[67]Pothier also suggests an informal demand for payment as the requirement for preservation of the remedy. He suggests, however, that the requirement that this demand be made immediately upon delivery would engender too great a presumption of credit. See text accompanying note 62.

[68]See P. Cumin, *A Manual of Civil Law*, 2d ed. (London: Stevens & Sons, 1865) at 91 regarding Book II, Title I, no. 41 of the *Institutes* of Justinian. The first two conditions regarding price and security are based upon the phrase "*...venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit...*". The condition regarding credit is based upon the phrase "*Sed si is qui vendidit fidem emptoris secutas fuerit, dicendum est statim rem emptoris fieri.*" See also P.F. Girard, *Manuel élémentaire de droit romain*, 8th ed. by F. Senn (Paris: Librairie Rousseau, 1929) at 312-13; B. Nicholas, *An Introduction to Roman Law* (London: Oxford University Press, 1965) at 179; W.W. Buckland, *A Text-Book of Roman Law*, 2d ed. (Cambridge: Cambridge University Press, 1932) at 230, 240, 493; M. Alter, *L'obligation de délivrance dans la vente des meubles corporels* (Paris: L.G.D.J., 1972) at 11; P. Ourliac & J. De Malafosse, *Histoire du droit privé*, 2d ed., vol. 1 (Paris: Presses Universitaires de France, 1969) at 34-36, 273-74; D. Pugsley, *The Roman Law of Property and Obligations* (Cape Town: Juta, 1972) at 87-90; M. Kaser, *Roman Private Law*, 3d ed., trans. R. Dannenbring (Pretoria: University of S. Africa, 1980) at 127-29.

[69]See Buckland, *ibid.* at 230 n. 8; Girard, *ibid.*; Ourliac & Malafosse, *ibid.*; Kaser, *ibid.*

The first rule, that ownership transfers by delivery if the price is paid, reflects the classical rule according to which simultaneous reciprocal execution was necessary for synallagmatic contracts to have their full legal effect.[70] It also reflects the formalism of the ancient process of *mancipatio*, a pre-currency precursor to the contract of sale.[71] *Mancipatio* was a complex ceremony for the transfer of ownership held before five witnesses in which the parties to the contract spoke solemn words and a *libripens* weighed bronze ingots to be paid to the transferor as the price.[72]

It is not certain whether the provision of security in lieu of payment included both personal suretyship and real security. Nonetheless, this precondition to the transfer of ownership was intended to be an equivalent to payment of the price. In fact, it is described in the *Institutes* in terms of "satisfying" the seller as to the price.[73] It has been suggested that the provision of security in this context was accomplished through the formal mechanism of *stipulatio*.[74] This condition, too, relates to the formalism of *mancipatio*.

The third condition, the granting of credit to the buyer, is the furthest removed from the concept of payment and the latest chronologically.[75] It is often described in terms of the seller "putting his faith" in the buyer[76] and indicates that the seller renounces his right to payment upon delivery, the condition for the transfer of ownership. By granting credit, a seller accepts in exchange for the transfer of ownership the constitution of a personal debt owed by the buyer as security for payment of the price. While this would appear to bring the Roman law close to a consensual transfer of ownership, it seems that the giving of credit in this context was not merely the granting of a term, but consisted of a formal stipulation by which the seller accepted the debt in lieu of payment.[77]

---

[70]See Kaser, *ibid.* at 200-02; Faribault, *supra*, note 2 at 20; Rousseau-Houle, *Précis de droit de la vente et de louage*, *supra*, note 1 at 11; H. Brun, "Les origines du consensualism en matière de transfert de propriété et des mitigations apportées au principe par le droit civil québécois" (1967-68) 9 C. de D. 273 at 274-75; D. Jacoby, "Le transfert contractuel de propriété dans une perspective de réforme" (1970) 5 R.J.T. 65 at 69-70; J.J. Gow, "Conveyance of Title in the Sale of Corporeal Moveables" (1967) 13 McGill L.J. 244 at 246-47.

[71]See Buckland, *supra*, note 68 at 231, 240 n. 2; Kaser, *ibid.* at 126, 210.

[72]See P. Ourliac & J. de Malafosse, *Histoire du droit privé*, vol. 2, 2d ed. (Paris: Presses Universitaires de France, 1971) at 277-81; Girard, *supra*, note 68 at 308-09, Buckland, *ibid.* at 235-38; Kaser, *ibid.* at 45-47; Pugsley, *supra*, note 68 at 4-7.

[73]See text cited *supra*, note 68 regarding "*vel alio modo ei satisfecerit.*" See also Girard, *ibid.* at 313 n. 3; Bugnet, *supra*, note 62, para. 322.

[74]See Kaser, *supra*, note 68 at 49-51, 128, 206-09.

[75]Girard, *supra*, note 68; Kaser, *ibid.* at 129; Pugsley, *supra*, note 68 at 89.

[76]The exact wording of the *Institutes* is *fidem emptoris secutus fuerit.* See text cited *supra*, note 68. See also Girard, *ibid.*; Ourliac & Malafosse, *supra*, note 68 at 274; Bugnet, *supra*, note 62, para. 324.

[77]See Troplong, *supra*, note 55 at 278; Bugnet, *ibid.* at 135 n. 1. The reliance on the "faith" of the buyer seems to indicate the use of *fides* in this context. *Fides* was the creation of a debt and

Despite the many uncertainties associated with the analysis of laws of antiquity, it seems clear that the transfer of ownership by delivery in Roman law did not arise by the implied giving of credit or a term for payment. Roman formalism combined with the importance of price in the transfer of ownership during and after the reign of Justinian[78] indicate that if the price was not paid upon delivery a formal agreement for security or credit in lieu of payment was necessary to transfer ownership. This rule, however, was not transposed faithfully into the pre-codification French law regarding revendication outlined above. The possibility for a seller "to follow the faith" of a buyer by implication, as opposed to formal stipulation, greatly reduced the extent of Roman law formalities for the transfer of ownership upon delivery. The result is a two-fold paradox. From a remedial perspective, the transfer of ownership by means of implied credit eliminates the seller's revendication remedy without providing adequate security for payment of the purchase price.[79] In the context of translatory contracts, the transfer of ownership by means of implied credit undermines the formalism otherwise inherent in the Roman concept of sale.

This limited historical analysis indicates that the pre-codification French law sources of article 1999(1) and (4) *C.C.L.C.* reflect a position somewhere between Roman formalism and post-codification consensualism. As regards the transfer of ownership and seller's revendication remedy, the mix of components from both extremes appears not to work. In fact, the development of the rule that credit is presumed only if the seller has taken no action eight days after delivery seems to be an attempt to mitigate the paradox described above. Given this historical background and the internal inconsistencies of the Codifiers' sources, it is now appropriate to consider the transposition of the rules in article 1999(1) and (4) *C.C.L.C.* to a modern context — a context exemplified, for present purposes, by the consensual nature of the transfer of ownership of moveables in sale.

III. Modern Analysis of Article 1999(1) *C.C.L.C.*

As can be seen from the first part of this paper and by implication from the historical analysis, the intelligibility of the unpaid seller's revendication remedy in a modern context is intimately linked with the civil law notion of a "term" or "credit". In this part, the notions of express and implied terms as well as the role of *mise en demeure* shall be considered in the context of article 1999(1)

---

was originally based on faith and social pressures rather than legal sanctions. It later became legally enforceable as *constitutum*. See Ourliac & Malafosse, *ibid.* at 17, 35, 44; Bugnet, *ibid.*; Buckland, *supra*, note 68 at 422, 529-31; Kaser, *supra*, note 68 at 210, 235.

[78]See Alter, *supra*, note 68, para. 4; Buckland, *ibid.* at 230 n. 8; Ourliac & Malafosse, *ibid.*, para. 247.

[79]This paradox is recognized by Nicholas and Pugsley as regards the formal notion of credit in Roman law and by Pothier as regards credit by implication in pre-codification French law. See Nicholas, *supra*, note 68 at 179; Pugsley, *supra*, note 68 at 90; Bugnet, *supra*, note 62, para. 324.

C.C.L.C. in order to determine their effect upon the seller's remedy and ultimately to show that the remedy cannot exist in its present state. It must be emphasized that this analysis of article 1999(1) *C.C.L.C.* in a modern context is distinct from the preceding examination of the historical sources of the seller's revendication remedy. Despite the historicism inherent in codified rules of law, in this part of the paper it is intended to show that the revendication remedy is meaningless on its own terms in post-codification law. Before doing so, however, the reasons for a strictly modern interpretive framework are explained.

1. Interpretive Framework for Modern Analysis

For the purposes of this paper, that is to show that the seller's revendication remedy has no meaningful existence, an analysis of article 1999(1) *C.C.L.C.* must be restricted to a modern context owing to methodological and substantive reasons. The methodological reasons relate to the uncertainty in Quebec as to the use of historical sources in codal interpretation. The substantive reasons indicate that an historical analysis of article 1999(1) *C.C.L.C.* is neither useful nor warranted to explain the modern codified rule. These reasons for a modern interpretive framework, particularly the methodological reasons, are described in detail because they elucidate how the perception of codified rules of law can permit a defunct mechanism such as the seller's revendication remedy to endure.

From a methodological point of view, there are two opposing opinions, one permissive, the other restrictive, as to whether recourse to the *Codifiers' Reports* and pre-codification law is a proper interpretive technique. The controversy results from conflicting codal and statutory provisions regarding the scope and application of the *Civil Code of Lower Canada.*

The mandate of the Codifiers was, *inter alia,* (i) to reduce into codal form the laws of Lower Canada then in force relating to civil matters and of a general and permanent character; (ii) to provide the authorities upon which the Codifiers relied as to what the law in force in Lower Canada was; and (iii) to suggest amendments to the existing laws of Lower Canada separately and distinctly supported by reasons.[80] Thus, the *Civil Code of Lower Canada* combines both pre-codification rules of law and amendments to those rules, each of which can be identified by reference to the *Codifiers' Reports.*[81] The *Codifiers'*

[80]See *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedures,* 20 Vict., S.C. 1857, c.43 ss. 4, 6. See also J.E.C. Brierley, "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill L.J. 521 at 542-54, 565-73; F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworths, 1980) at 85; M. Tancelin, "Introduction" in F.P. Walton, at 7; P.-B. Mignault, *Le droit civil canadien,* vol. 1 (Montreal: Whiteford & Théoret, 1895) at 48-49.

[81]The amendments to the pre-codification law are designated by square brackets in the *Civil Code of Lower Canada.*

Reports also indicate the legal sources of the pre-codification rules which were reduced into codal form.

The permissive theory of interpretation recognizes the importance and relevance of the *Codifiers' Reports* and pre-codification law as interpretive aids for the *Civil Code of Lower Canada*. This theory is given support by article 2712 *C.C.L.C.*, formerly article 2613 *C.C.L.C.*[82] Article 2712 *C.C.L.C.* states:

> The laws in force at the time of the coming into force of this code are abrogated in all cases:
> In which there is a provision herein having expressly or impliedly that effect;
> In which such laws are contrary or inconsistent with any provision herein contained;
> In which express provision is herein made upon the particular matter to which such laws relate;
> Except always that as regards to transactions, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such transactions, matters and things remain in force and apply to them, and this code applies to them only so far as it coincides with such provisions.

The implication of article 2712 *C.C.L.C.* is that the pre-codification laws of Lower Canada are still in force in Quebec to the extent that they have not been repealed expressly or impliedly by the *Civil Code of Lower Canada*, are not inconsistent with its provisions and do not relate to a subject matter expressly regulated by the *Code*. While the precise extent to which the former law is still in force may be impossible to determine other than on a case-by-case basis,[83] article 2712 *C.C.L.C.* indicates a three-fold necessity for reference to pre-codification laws via the *Codifiers' Reports*.

First, unless a provision of the *Civil Code of Lower Canada* is new law as expressly indicated by brackets in the official edition, it is impossible to determine if a particular pre-codification law is still in force according to article 2712 *C.C.L.C.* unless that law is examined and compared to its modern codal counterpart.[84] Second, if particular pre-codification rules are held not to have been repealed by codification, these rules must be interpreted and applied. Finally, even if the pre-codification laws of a particular subject matter have been repealed according to article 2712 *C.C.L.C.*, the interpretation of the present codal provision can be enhanced by comparison with the former law. This is particularly true because repeal under article 2712 *C.C.L.C.* occurs not only

---

[82]Art. 2613 *C.C.L.C.* became art. 2712 *C.C.L.C.* in virtue of *An Act respecting Insurance*, S.Q. 1974, c.70, s.466 which came into force on October 20, 1976, G.O.Q. 1976 II.5941.

[83]*E.g. Lapierre* v. *A.G. Quebec*, [1985] 1 S.C.R. 241 at 257-59, 16 D.L.R. (4th) 554, 32 C.C.L.T. 233, Chouinard J.; *Dame B.* v. *D.* (1941) 71 B.R. 469 at 474; *Masson* v. *Solomon* (1935) 73 C.S. 196; L. Baudouin, "Méthode d'interprétation judiciaire du Code civil du Québec" (1950) 10 R. du B. 397 at 403.

[84]See *Masson* v. *Solomon*, *ibid.* at 197-98.

when a present provision is inconsistent with a past rule, but also when the present and past rules coincide as to subject matter. Therefore, the terms of article 2712 *C.C.L.C.* and the mandate of the Codifiers justify some reference to the *Codifiers' Reports* and pre-codification law when interpreting the *Civil Code of Lower Canada*, particularly if a provision is ambiguous. In fact, this appears to be a growing tendency.[85]

The second and opposing view that the *Codifiers' Reports* should not be consulted when interpreting the *Civil Code of Lower Canada* is based on specific and general rules of statutory interpretation. The most persuasive specific rule is that found in section 1 of *An Act respecting the Civil Code of Lower Canada*,[86] the statute which gave the newly codified rules the force of law. This provision states, *inter alia*:

> ...the marginal notes and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only...

The argument is that except for the texts of the codal provisions themselves, neither the *Codifiers' Reports* nor the sources cited by the Codifiers have the force of law and should not be part of the interpretive process.[87] The argument is cogent in that it imposes a textual limit to interpretation of the *Code* without which an infinite regression of interpretation of sources would occur. This is consistent with the general rules of statutory interpretation according to which except for a preamble,[88] marginal notes and other *travaux préparatoires* are not part of the interpretive process.[89]

The point of this second view is that only the actual texts of law should be interpreted and applied. While this is true if a text is clear and unambiguous, it

---

[85]See Tancelin, *supra*, note 80 at 19; P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville: Yvon Blais, 1984) at 10, 332-33; *Lapierre* v. *A.G. Quebec*, *supra*, note 83; L. Baudouin, "Originalité du droit du Québec" (1950) 10 R. du B. 121 at 132; S. Normand, "Les travaux préparatoires et l'interprétation du Code civil du Québec" (1986) 27 C. de D. 347; J.-L. Baudouin, "L'Interprétation du Code civil québécois par la Cour suprême du Canada" (1975) 53 Can. Bar Rev. 715 at 730-31; A. Popovici, "Dans quelle mesure la jurisprudence et la doctrine sont-elles source de droit au Québec" (1973) 8 R.J.T. 189 at 197-98; *Elite Kosher Caterers Inc.* v. *Karmazyn*, [1973] R.L.n.s. 118 (C.P.); *Royal Victorial Hospital* v. *Morrow* (1973), [1974] S.C.R. 501 at 505, 42 D.L.R. (3d) 233; *Cie Immobilière Viger* v. *L. Giguère Inc.* (1976), [1977] 2 S.C.R. 67, 10 N.R. 277.

[86]S.L.C. 1865, c.41.

[87]See Brierley, *supra*, note 80 at 525; Tancelin, *supra*, note 80 at 18-20; L.-P. Pigeon, *Rédaction et interprétation des lois*, 2d ed. (Quebec: Éditeur officiel, 1978) at 58; *A.G. Canada* v. *Reader's Digest Assn. (Canada)*, [1961] S.C.R. 775, 30 D.L.R. (2d) 296, [1961] C.T.C. 530; *Despatie* v. *Tremblay*, [1921] 1 A.C. 702, 124 L.T. 674, 37 T.L.R. 395 (P.C.).

[88]See *Interpretation Act*, R.S.Q., c. I-16, s.40; art. 12, para. 2 *C.C.L.C.*; *Interpretation Act*, R.S.C. 1985, c. I-21, s.13.

[89]See *Interpretation Act*, R.S.C. 1985, c. I-21, s.14; Tancelin, *supra*, note 80 at 18-20; Pigeon, *supra*, note 87; Côté, *supra*, note 85 at 339-50.

creates a paradox vis-à-vis the very notion of interpretation. Once it is necessary to look outside a text of law in order to interpret it, all reasonable and reliable sources of meaning should be consulted. In fact, as regards the *Civil Code of Lower Canada*, the rule excluding recourse to *travaux préparatoires* in a wide sense is unintelligible in the face of article 2712 *C.C.L.C.* which as indicated above requires reference to pre-codification laws, at least, to determine the extent to which they are still in force in Quebec.[90] It is conceded that in a judicial context, consultation of the *Codifiers' Reports* and pre-codification sources of law is usually a luxury reserved for the interpretation of ambiguous codal provisions and, in rare cases, determination of the extent to which pre-codification law is still in force in Quebec. Thus, while reference to the *Codifiers' Reports* and pre-codification rules cannot be excluded altogether in a judicial context, it is not a primary technique of interpretation. In fact, the restrictive role of the *Codifiers' Reports* and pre-codification law in the interpretation of the *Civil Code of Lower Canada* counterbalances the generally static form of the *Code*. Due to its format, the adaptation of the *Code* to societal changes would be difficult, if not impossible, if the primary technique of interpretation were consultation of the *Codifiers' Reports* and pre-codification law. As time goes on, an historical analysis of the *Code* might become less desirable and less reliable.[91]

There are cogent reasons for supporting both the permissive and restrictive approaches to codal interpretation. A reasonable and efficient approach, situated somewhere between the two theories, entails referring to historical sources only where the interpretive problem and ambiguity cannot be resolved otherwise. However, applying this approach or the two theories discussed above to article 1999(1) *C.C.L.C.* leads to the substantive conclusion that the analysis be limited to modern or post-codification sources. The first substantive reason is that the historical basis for the rule in article 1999(1) *C.C.L.C.* does not exist in a modern context. As stated above, prior to codification the sale and delivery of moveable property transferred ownership to a buyer only if upon delivery the buyer paid the price, gave adequate security in lieu of payment or was given the benefit of a term for payment by his seller.[92] Since the revendication remedy was available to a seller only *qua* owner, he would forfeit the remedy if he transferred ownership to his buyer by according a term for payment. In a modern context, however, the transfer of ownership in sale is consensual;[93] the consent

---

[90]See text accompanying notes 83-85.

[91]See Brierley, *supra*, note 80 at 525.

[92]See text following note 58 and accompanying note 68.

[93]See arts 1025, 1472 *C.C.L.C.*; T. McCord, "Synopsis" in T. McCord & A.D. Nicholls, eds, *The Civil Code of Lower Canada*, 3d ed. (Montreal: Dawson Bros, 1880) at iv-v; Pourcelet, *supra*, note 1 at 68; Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 20-21; Jacoby, *supra*, note 70 at 74-76; Gow, *supra*, note 70 at 248-51; D. Lefebvre, "La vente en droit québécois est-elle un contrat consensuel?" (1962) 22 R. du B. 181; Brun, *supra*, note 70 at 273ff.; *Lafleur*

of the parties alone transfers ownership without consideration as to the timing of payment of the price or delivery. As a result, the transfer of ownership cannot be the modern basis for article 1999(1) *C.C.L.C.* because ownership is no longer the basis for the seller's revendication remedy. Applying a purely historical analysis under these circumstances would only give rise to a paradox.

A second substantive reason for analysing article 1999(1) *C.C.L.C* solely within its modern context is that on its face the provision is not really ambiguous. While its function as an element of the revendication remedy is unclear, the meaning of article 1999(1) *C.C.L.C.* is plain.[94] According to both the interpretation methodologies discussed above, there is no immediate justification on the face of article 1999(1) *C.C.L.C.* for reference to pre-codification law. The historical bases of the provision can help to explain it as a modern anomaly only if its anomalous nature is established independently.

2. *The Notion of a Term*

In civil law, a term is a future and certain event which qualifies or modifies the performance of an obligation.[95] A suspensive term delays the exigibility or due date of an obligation so that a creditor cannot demand performance of it before the term's expiration.[96] An extinctive term ends an obligation and limits the duration of a creditor's right to demand performance to the period of the term.[97] For the purposes of the present analysis, only suspensive terms or terms which delay the exigibility of a debt thereby effectively extending credit to a debtor are relevant.

---

v. *Viens & St-Laurent Ltée* (1983), [1984] C.S. 311; *Sous-ministre du revenu du Québec* v. *Coopérative fédérée du Québec*, [1984] C.A. 564 at 569, Rothman J.A.; *Soucy* v. *Filion*, [1976] C.A. 870; *Zusman* v. *Tremblay*, [1951] S.C.R. 659 at 671-73, Taschereau J.

[94]See text accompanying notes 175-89 as regards difficulties interpreting art. 1999(1) *C.C.L.C.* vis-à-vis art. 1092 *C.C.L.C.*

[95]See arts 1089-1092 *C.C.L.C.*; J.-L. Baudouin, *Les obligations*, 3d ed. (Cowausville: Yvon Blais, 1989) at 456-57; J. Pineau & D. Burman, *Théorie des obligations*, 2d ed. (Montreal: Thémis, 1988) at 356; M. Tancelin, *Des obligations*, 4th ed. (Montreal: Wilson & Lafleur, 1988) at 187; L. Faribault, *Traité de droit civil du Québec*, vol. 8-bis (Montreal: Wilson & Lafleur, 1959) at 95; M. Planiol & G. Ripert, *Traité pratique de droit civil français*, 2d ed. by P. Esmein, J. Radouant & G. Grabolde, vol. 7 (Paris: L.G.D.J., 1954) at 336; B. Starck, *Droit civil — obligations* (Paris: Librairies Techniques, 1972) para. 1841; *Encyclopédie juridique Dalloz: Répertoire de droit civil*, 2d ed., "Terme", by F. Derrida, No. 1; *Juris-classeur civil*, art. 1136-1270, "Contrats et Obligations, Obligation à terme", by D. Veaux, fasc. 50 à 52, No. 1; *Boilard* v. *Gaudreau*, [1980] C.P. 142.

[96]See art. 1089 *C.C.L.C.*; Baudouin, *ibid.* at 456; Pineau & Burman, *ibid.* at 357; Tancelin, *ibid.* at 187; Faribault, *ibid.* at 96; Planiol & Ripert, *ibid.*; Starck, *ibid.*; Derrida, *ibid.*, Nos, 1, 21-27; Veaux, *ibid.*, Nos 2, 33ff.

[97]See Baudouin, *ibid.*; Pineau & Burman, *ibid.*; Tancelin, *ibid.*; Faribault, *ibid.*; Planiol & Ripert, *ibid.*; Starck, *ibid.*; Derrida, *ibid.*, Nos 1, 28, 33; Veaux, *ibid.*, Nos 2, 122ff.

As a future event, a term must end after the creation of the obligation it modifies. The certainty requirement refers to the occurrence of the event which limits the duration of a term and not to the duration itself.[98] Hence, a suspensive term such as "until death" is a valid term because of the certainty of death despite the uncertain duration of life.[99] This notion of certainty is a means of distinguishing terms and conditions in civil law and reflects their respective roles as modalities of obligations. As stated before, a term modifies the performance of an obligation without affecting its initial inception. An extinctive term ends the legal existence of an obligation and, hence, its exigibility only prospectively or from the end of the term. Prior to that time, the obligation has its full legal effect.

In civil law, a condition is a future and *uncertain* event which retroactively qualifies the initial creation or existence of an obligation.[100] A suspensive condition until fulfilled suspends the legal existence and effect of an obligation.[101] Once the condition has been fulfilled, the obligation is deemed to have existed from the date of the juridical act which created it and imposed the condition.[102] Inversely, an extinctive or resolutory condition until fulfillment does not affect the legal existence of the obligation it modifies.[103] Once fulfilled, however, the

---

[98]See Baudouin, *ibid.* at 457; Pineau & Burman, *ibid.* at 356; Tancelin, *ibid.* at 187-88; Faribault, *ibid.* at 98; Planiol & Ripert, *ibid.* at 337; Starck, *ibid.*; Derrida, *ibid.*, Nos 11-14; Veaux, *ibid.*, Nos 5, 6.

[99]See Baudouin, *ibid.*; Pineau & Burman, *ibid.*; Faribault, *ibid.*; Planiol & Ripert, *ibid.*; Starck, *ibid.*; Derrida, *ibid.*, No. 13; Veaux, *ibid.*, No. 6; *Fiduciaires de la cité et du district de Montréal Ltée* v. *Mallette*, [1981] C.S. 633, aff'd *sub nom. Mallette* v. *Mallette* (22 April 1985), Montreal 500-09-000710-814, J.E. 85-462 (C.A.); *Labadie* v. *Labrecque*, [1981] C.A. 401; *Machines automatiques Laniel Co. (Sainte-Adèle)* v. *Beausoleil*, [1985] C.P. 189.

[100]See arts 1079, para. 1, 1085 *C.C.L.C.*; Baudouin, *ibid.* at 457, 462, 467; Pineau & Burman, *ibid.* at 362, 363, 372; Tancelin, *supra*, note 95 at 187, 195, 197; Faribault, *ibid.* at 15, 49-59; Planiol et Ripert, *ibid.* at 370; Starck, *ibid.* at 544; *Juris-classeur civil*, art. 1136-1270, "Contrats et Obligations, Obligations conditionnelles, Caractères de la condition", by J.-J. Taisne, fasc. 40 à 43, No. 1.

[101]See art. 1079, para. 1 *C.C.L.C.*; Baudouin, *ibid.* at 462-63, 465; Pineau & Burman, *ibid.* at 362-63, 369-70; Tancelin, *ibid.* at 197; Faribault, *ibid.* at 17, 62; Planiol & Ripert, *ibid.* at 372, 379-83; Starck, *ibid.* at 547-48; *Juris-classeur civil*, art. 1136-1270, "Contrats et obligations, Obligations conditionnelles, Effets de la condition suspensive", by J.-J. Taisne, fasc. 47, Nos 4-33.

[102]See art. 1085 *C.C.L.C.*; Baudouin, *ibid.*, at 466-67; Pineau & Burman, *ibid.* at 371; Tancelin, *ibid.* at 197-98; Faribault, *ibid.* at 62; Planiol & Ripert, *ibid.* at 384ff.; Starck, *ibid.* at 548; Taisne, *ibid.*, Nos 47-88.

[103]See Baudouin, *ibid.* at 468-69; Pineau & Burman, *ibid.* at 371-72; Tancelin, *ibid.* at 198-99; Faribault, *ibid.* at 72-77; Planiol & Ripert, *ibid.* 372-73; Starck, *ibid.* at 547; *Juris-classeur civil*, art. 1136-1270, "Contrats et Obligations, Obligations conditionnelles, Effets de la condition résolutoire", by J.-J. Taisne, fasc. 48, Nos 4-21.

obligation is deemed never to have existed.[104] Hence, a condition is a means of retroactively creating and extinguishing obligations.

The uncertainty element of a condition — uncertainty as to whether the future event will occur — enables conditions to complement terms as mechanisms which ensure the autonomy and intelligibility of the intention of parties as to the creation and enforcement of obligations. A condition as an uncertain event permits parties to agree that their rights and obligations may be affected by events external to their immediate legal relationship. The parties agree to bind themselves and at the same time recognize the dependence of their legal situation upon external factors. If the future, external event is certain to occur, the parties can decide whether to contract or not and, if the former, whether the event affects the performance or duration of the ensuing obligations and therefore gives rise to a term. Without the possibility of conditional obligations, parties who otherwise agreed would have to postpone the creation of a legal relationship until the future event occurred or until it became clear that the event would not occur.

Terms and conditions reflect the factual and intentional reality behind legal relations and in this context are complementary means of classifying and giving effect to the intention of parties. The distinction between terms and conditions based on the element of uncertainty is a necessary consequence of the combinations of external factors which can affect legal relations. As is true of the classification of nominate contracts in civil law,[105] the taxonomy of modalities of obligations such as terms and conditions is legal shorthand for the identification and interpretation of the intention of parties to juridical acts. The importance of the intentional aspect of modalities of obligations is particularly pronounced as regards indefinite terms or terms the duration of which is uncertain. In some instances, the authorities pertaining to indefinite terms appear to sacrifice the strict taxonomy of terms and conditions in order to sustain the perceived intention of the parties.

As stated previously, "until death" is an indefinite term because it is certain as to outcome and uncertain as to duration.[106] An analysis of the notion of certainty in this context is beyond the scope of this essay. Nevertheless, this notion seems to be wide enough to include ostensibly uncertain events such as a co-contractant's ability and willingness to perform his obligations. For example, the contractual stipulation that a debtor pays "when he is able" or "when it is

---

[104]See art. 1085 *C.C.L.C.*; Baudouin, *ibid.* at 463, 468; Pineau & Burman, *ibid.* at 372; Tancelin, *ibid.* at 199; Faribault, *ibid.* at 77-94; Planiol & Ripert, *ibid.* at 386ff.; Starck, *ibid.* at 548; Taisne, *ibid.*, Nos 26-57.

[105]See P. Malaurie & L. Aynès, *Cours de droit civil: Les contrats spéciaux* (Paris: Cujas, 1986) at 7-19; Baudouin, *ibid.* at 52-53; Pineau & Burman, *ibid.* at 47; Pourcelet, *supra*, note 1 at 1.

[106]See text accompanying note 99.

convenient" is widely accepted as an indefinite term.[107] Despite the uncertain occurrence of these future events and their dependence to some degree upon the will of the debtor, most authorities distinguish them from conditions and, more particularly, from purely potestative conditions.[108] In Quebec, the basis for the distinction is article 1783 *C.C.L.C.* interpreted by reference to its source and counterpart in French law, article 1901 *C.N.*[109] Article 1783 *C.C.L.C.* states that if, in a contract of loan for consumption, there is no agreement as to the time for return of the thing borrowed, the time is fixed by the court according to the circumstances. In a more precise fashion, article 1901 *C.N.* states:

> S'il a été seulement convenu que l'emprunteur paierait quand il le pourrait, ou quand il en aurait les moyens, le juge lui fixera un terme de paiement suivant les circonstances.

The requirement that a court consider the circumstances when fixing a term indicates that the rationale for these codal provisions and for their application beyond the realm of loans for consumption is the presumed intention of the parties.[110] Where the occurence of an event or act, other than performance of an obligation but dependent on the will of a debtor, modifies the performance of the obligation, the courts assume, unless there is evidence to the contrary, that the parties intend merely to delay performance but not to make the existence of the obligation conditional upon occurrence of the act. In particular, in cases where the event or act is the debtor's ability to perform, the presumption in favour of an indefinite term circumvents the application of the rule that an obli-

---

[107]See *Poli* v. *Salaska* (1932), 39 R.J. 310 (C.S.); *Dame St-Gelais* v. *Gagnon*, [1953] C.S. 247; *Binette* v. *Globensky* (1931), 71 C.S. 111; *Orban* v. *Levy* (1918), 27 B.R. 370; *Laberge* v. *Lepage* (1916), 56 C.S. 207 at 211-12, 213; *Mercier* v. *Mercier* (31 October 1986) Montreal 500-005-004814-867, J.E. 86-1119 (C.S.); *Lambert* v. *Club des Chevaliers de Colomb de Matane*, [1954] C.S. 233; *Cardiec* v. *Vaillant* (1968), [1969] C.S. 284; *Prévoyants du Canada* v. *Poulin* (1969), [1970] C.S. 34 at 36-37; *Hudon* v. *Landry*, [1982] R.P. 163 (C.S.); Baudouin, *supra*, note 95 at 457; Pineau & Burman, *supra*, note 95 at 356; Planiol & Ripert, *supra*, note 95 at 337-38; Starck, *supra*, note 95 at 549; Derrida, *supra*, note 95, No. 14; Veaux, *supra*, note 95, No. 16; Faribault, *supra*, note 95 at 102-03.

[108]*Ibid.* See art. 1081 *C.C.L.C.* which provides: "An obligation conditional on the will purely of the party promising, is void; but if the condition consists in the doing or not doing of a certain act, although such act be dependent on his will, the obligation is valid." These events are properly classified as not being *purely* potestative conditions because they are external to the debtor's willingness to perform and, hence, objectively determinable.

[109]See *Poli* v. *Salaska*, *supra*, note 107; *Binette* v. *Globensky*, *supra*, note 107; *Cardiec* v. *Vaillant*, *supra*, note 107; *Prévoyants du Canada* v. *Poulin*, *supra*, note 107; *Mercier* v. *Mercier*, *supra*, note 107; Baudouin, *supra*, note 95 at 457; Starck, *supra*, note 95 at 549-50.

[110]See *Lareau* v. *Poirier* (1915), 51 S.C.R. 637; *Chouillon* v. *Johnson Co.* (1920), 60 C.S. 256; *Picard* v. *Proteau* (1916), 51 C.S. 115; *Lachance & Morel (Ltée)* v. *Cantin* (1934), 75 C.S. 235; *Chartier* v. *Chouinard* (1944), [1945] C.S. 232; *Mahaffy* v. *Baril* (1896), 11 C.S. 475; *Pelletier* v. *Richard* (1940), 79 C.S. 239; *Dame Grenier* v. *Thibaudeau*, [1942] C.S. 272; *Bigaouette Ltée* v. *Gagnon* (1928), 34 R.L.n.s. 72 (C.S.); Derrida, *supra*, note 95, Nos 14-15; Veaux, *supra*, note 95, Nos 10-15.

gation conditional purely on the will of the debtor, an obligation subject to a purely potestative condition, is void.[111] This presumed intent is also consistent with the rule that contractual clauses are to be interpreted so as to have some effect rather than in a way which produces none.[112] While future events such as a debtor's ability and willingness to perform are uncertain in fact, they are by necessity certain of occurrence in the minds of the parties in order to render their contract intelligible and enforceable. Consequently, based on the parties' presumed intention, future, uncertain events closely associated with a debtor's willingness or ability to perform are consistently held to be indefinite terms, as opposed to conditions.[113]

Intention plays an analogous role in cases where parties specify an indefinite term which is truly a future, certain event or do not specify any time at all for the performance of an obligation. In the former case, the circumstances will indicate the parties' intention as to a reasonable duration for the term.[114] In the latter case, a finding of presumed intention has a dual function. It supports an assumption that parties intend obligations to be performed within a reasonable delay and indicates the duration of the delay.[115]

In all of the above cases, where no exact time is specified for the performance of an obligation, the parties' presumed intention is a basis for the existence or duration of an implied term or both. From a practical point of view, recourse to presumed intention arises only in the context of a court-appointed remedy initiated by one of the parties to the contract. It is only where the parties cannot voluntarily and bilaterally fix the time of performance and one of them seeks redress for late or non-performance by the other that a precise term for perform-

---

[111]See art. 1081 *C.C.L.C.* See also text accompanying note 108.

[112]See art. 1014 *C.C.L.C.* The interpretation is not inconsistent with art. 1019 *C.C.L.C.* which states that in cases of doubt a contract is interpreted against the person who has stipulated and in favour of the one who has contracted the obligation. In the present case, the stipulation to pay "when you can" is deemed to have been stipulated in favour of the debtor. Hence, it is consistent with both arts 1014 and 1019 *C.C.L.C.* to interpret the phrase against the interest of the debtor by characterizing it as a future, certain event or term, as opposed to a future, uncertain event or condition which might be potestative.

[113]This tendency of Quebec and French authorities is not absolute. According to the circumstances, the presumed intention of the parties may indicate the presence of a future, uncertain event or condition. See *Déchènes* v. *Doody* (1924), 38 B.R. 273; Pineau & Burman, *supra*, note 95 at 363-64; Derrida, *supra*, note 95, Nos 14, 17; Veaux, *supra*, note 95, No. 9; Taisne, *supra*, note 100, Nos 17-24.

[114]See *Guy* v. *Paré* (1892), 1 C.S. 443 (Court of Rev.); *La compagnie d'Aqueduc de la Jeune Lorette* v. *Dame Turner* (1921), 33 B.R. 1.

[115]See *Lareau* v. *Poirier*, *supra*, note 110; *Chouillon* v. *Johnson Co.*, *supra*, note 110; *Picard* v. *Proteau*, *supra*, note 110; *Lachance & Morel (Ltée)* v. *Cantin*, *supra*, note 110; *Pelletier* v. *Richard*, *supra*, note 110; *Chartier* v. *Chouinard*, *supra*, note 110; *Dame Grenier* v. *Thibaudeau*, *supra*, note 110; *Mahaffy* v. *Baril*, *supra*, note 110; *Bigaouette Ltée* v. *Gagnon*, *supra*, note 110; *Timossi* v. *Moos* (1907), 16 B.R. 382. The situation in which the parties do not specify any term for performance is property the domain of art. 1783 *C.C.L.C.* See text accompanying note 97.

ance is imposed by an external authority such as a court. The remedial context necessary for the external fixing of an indefinite term in effect dictates the procedure for doing so. It also establishes the important link between indefinite and implied terms and the process of putting in default.

3. *The Role of Putting in Default*

In the context of contractual relations, putting in default or *mise en demeure* is, subject to certain exceptions, a pre-requisite for all court-appointed remedies and a *de facto* screening mechanism for serious breaches of contract.[116] A creditor puts a debtor in default vis-à-vis a contractual obligation by formally notifying him that he is late or otherwise in breach as regards performance and by insisting upon performance of the obligations past due.[117] The process ensures that prior to litigation, a debtor is aware that according to his creditor he has breached an obligation and that the breach is in his creditor's view serious enough to warrant a judicial remedy. As a notice mechanism, putting in default permits a debtor to avoid litigation by rectifying the default or negotiating with his creditor. The process of *mise en demeure* prompts a creditor to state his intention vis-à-vis his debtor's non-performance thereby opening lines of communication between the parties before litigation ensues.

The formal role of *mise en demeure* is to establish the legal date of a debtor's default to perform his obligations. This crystallization of default has three primary legal effects. First, it determines the precise date at which damages suffered by a creditor are deemed to arise and, hence, permits their evaluation. Second, it establishes the date after which a creditor can exercise his contractual remedies, most notably dissolution of the contract, without further notice to his debtor. Third, if a debtor is obliged to deliver a certain and determinate object to a creditor, default as regards this obligation imposes upon the debtor the risk of fortuitous loss of the thing.

There are numerous codal and jurisprudential exceptions to the general rule that a creditor must formally put his debtor in default before commencing litigation to enforce a contractual remedy. The most common of these arises where the parties expressly and unequivocally stipulate in a contract that late perform-

---

[116]See R.P. Kouri, "The Putting in Default" (1971) 2 R.D.U.S. 1 at 4-5; Baudouin, *supra*, note 95 at 398-99; Pineau & Burman, *supra*, note 95 at 418; Tancelin, *supra*, note 95 at 399; F. David, "De la mise en demeure" (1939) 59 Rev. crit. leg. jur. 95 at 95, 97, 100-04; Planiol & Ripert, *supra*, note 95 at 81-82; Starck, *supra*, note 95 at 602-03; *Encyclopédie juridique Dalloz: Répetoire de droit civil*, 2d ed., vol. 5 "mise en demeure", by R. Perrot & C. Giverdon, No. 1; *Shorter* v. *Beauport Realties (1964) Inc.* (1968), [1969] C.S. 363; *Gareau* v. *Les Habitations Beaupré Inc.*, [1981] R.L. 410 (C.S.); *Mindlin* v. *Cohen*, [1960] C.S. 114.

[117]See Kouri, *ibid.* at 46-50, 51-54; Baudouin, *ibid.* at 398; Pineau & Burman, *ibid.* at 418-19; David, *ibid.* at 103-05; Planiol & Ripert, *ibid.* at 82-84; Starck, *ibid.* at 603-04; Perrot & Giverdon, *ibid.*, Nos, 25-31; *Shorter* v. *Beauport Realties (1964) Inc.*, *ibid.*

ance entails an automatic default.[118] In the case of conventional or contractual default, the parties' intention *ex ante* is clearly to enforce rigorously all obligations under the contract and to waive the formal *mise en demeure* process. A second common exception is the rule that in commercial contracts with a fixed term for performance, a debtor is put in default for late performance by the mere lapse of time.[119] This exception is essentially an application of the presumption that parties intend time to be of the essence in commercial matters.[120] A third exception arises where the debtor has not performed an obligation to do or to give which could only have been performed within a limited period of time.[121] In other words, where the debtor has rendered performance impossible, he is automatically in default. Under this rubric also falls the automatic default for breach of a negative obligation or duty not to do.[122] A fourth exception arises where a provision of law dispenses with putting in default for breach of specific obligations.[123] Fifth, prior to the institution of an action in dissolution of contract, a creditor does not have to put in default a debtor who has unequivocally repudiated the contract or formally declared that he will not perform his contractual obligations.[124] Similarly, it is not necessary to put in default a debtor who admits or recognizes his default under a contract.[125] Finally, in a contract with continuous or successive obligations, it is not necessary for a creditor to put the debtor in default vis-à-vis each successive breach.[126] One *mise en demeure* is sufficient. In all of these exceptional cases, a debtor is put in default by the event which constitutes the contractual breach.

---

[118]See art. 1067 *C.C.L.C.*; Kouri, *ibid.* at 27-34; Baudouin, *ibid.* at 399; Pineau & Burman, *ibid.* at 420; Tancelin, *supra*, note 95 at 400; David, *ibid.* at 107-09; Planiol & Ripert, *ibid.* at 84-85; Starck, *ibid.* at 604; Perrot & Giverdon, *ibid.*, Nos 5-8.

[119]See Art. 1069 *C.C.L.C.*; Kouri, *ibid.* at 10-17; Baudouin, *ibid.* at 400; Pineau & Burman, *ibid.* at 420; Tancelin, *ibid.* at 400; David, *ibid.* at 110; Perrot & Giverdon, *ibid.*, No. 10.

[120]See Baudouin, *ibid.*; *Bigaouette Ltée* v. *Gagnon*, *supra*, note 110; Kouri, *ibid.* at 10-11; David, *ibid.*

[121]See art. 1068 *C.C.L.C.*; Kouri, *ibid.* at 17-25; Baudouin, *ibid.*; Tancelin, *supra*, note 95 at 401; David, *ibid.* at 109; Starck, *supra*, note 95 at 604; Planiol & Ripert, *supra*, note 95 at 85; Perrot & Giverdon, *supra*, note 116, Nos 16, 17.

[122]See arts 1070 & 1134 *C.C.L.C.*: Kouri, *ibid.* at 25-27; Baudouin, *ibid.*; Pineau & Burman, *supra*, note 95 at 420; Tancelin, *ibid.*; Starck, *supra*, note 95 at 604; Perrot & Giverdon, *ibid.*, Nos 13-15.

[123]*E.g.* arts 296, 313, 722, 871, 1049, 1088, 1200, 1544, 1713, and 1840 *C.C.L.C.*

[124]See Kouri, *supra*, note 116 at 36; Baudouin, *supra*, note 95 at 400; Tancelin, *supra*, note 95 at 401; Starck, *supra*, note 95 at 604; Planiol & Ripert, *supra*, note 95 at 85; Perrot & Giverdon, *supra*, note 116, Nos 19-21; *Shorter* v. *Beauport Realties (1964) Inc.*, *supra*, note 116; *Raoul Beaubieu Inc.* v. *Dion* (1982), [1984] R.L. 91 (C.P.); *DiPaola General Building Contractors Ltd.* v. *Boulanger*, [1962] B.R. 783.

[125]See Kouri, *ibid.* at 36-38; Planiol & Ripert, *ibid.*; *Gareau* v. *Les Habitations Beaupré Inc.*, *supra*, note 116; *Shorter* v. *Beauport Realties (1964) Inc.*, *ibid.*

[126]See Baudouin, *supra*, note 95 at 400; Tancelin, *supra*, note 95 at 401; Perrot & Giverdon, *supra*, note 116, Nos 22-24.

Assuming that none of the above exceptions applies, there are three techniques for formal *mise en demeure* in Quebec. These are a verbal or written demand for performance and the commencement of a suit before the courts.[127] A verbal demand for performance is permissible only if the contract itself is verbal.[128] In all cases, the *mise en demeure* must contain a clear and unequivocal demand for performance.[129] Further, there is some indication in the Quebec authorities that the formal notice of putting in default takes effect only after a delay which is reasonable under the circumstances.[130] This inherent delay is known as a *délai de grâce* and may be either expressly stipulated by a creditor in a formal putting in default notice or imposed by a court. Finally, it is a formal requirement for putting in default that a creditor abide by the terms of the contract as regards the enforcement of his debtor's obligations and performance of his own obligations. Hence, if the debt is *quérable* or payable at a place other than the creditor's domicile, the creditor must actually seek payment at the appropriate location in order to substantiate factually a debtor's default prior to putting him in default.[131] In synallagmatic contracts, a creditor must be ready, willing and able to perform his contractual obligations in order to validly put his debtor in default.[132] In other words, a purported *mise en demeure* of a debtor who has validly withheld performance according to the *exceptio non adimpleti contractus* will be without effect.

Given these rules for putting in default, there are multiple connections between terms for performance in civil law and the process of putting in default. First, the institution of formal *mise en demeure* is based on the rule in favour of debtors that a creditor is deemed to extend tacitly the delay for performance unless and until he puts his debtor in default.[133] In other words, in cases in which a formal putting in default is necessary, until this is done the creditor is deemed to have accorded to his debtor an indefinite term for performance even if the

---

[127]See art. 1067 *C.C.L.C.*; Kouri, *supra*, note 116 at 44-51; Baudouin, *ibid.* at 401; Tancelin, *ibid.* at 400-01; Pineau & Burman, *supra*, note 95 at 419. Tancelin and Kouri point out the anomaly of classifying commencement of a suit as a *mise en demeure* prior to a court-appointed remedy. See Tancelin at 402; Kouri at 53-54. Nonetheless, the date of commencement of a suit is important as a putting in default vis-à-vis the calculation of damages.

[128]See art. 1067 *C.C.L.C.* There is a controversy as to whether the existence of a verbal contract creates an exception as to the use of testimony to prove the *mise en demeure*. See Kouri, *ibid.* at 47-50; Baudouin, *ibid.* at 401; Pineau & Burman, *supra*, note 95 at 419.

[129]In the context of commencement of a suit, there is sometimes difficulty fulfilling this requirement because a declaration issued in pursuance of a particular contractual remedy does not always include conclusions for specific performance. See *supra*, note 127.

[130]See Kouri, *supra*, note 116 at 57-58.

[131]See Kouri, *ibid.* at 33-34, 56; *Trester* v. *Desève* (1917), 27 B.R. 237.

[132]See Baudouin, *supra*, note 95 at 402; Kouri, *ibid.* at 54.

[133]See Kouri, *ibid.* at 4-5; Baudouin, *ibid.* at 398-99; Pineau & Burman, *supra*, note 95 at 418-19; David, *supra*, note 116 at 101-02; Planiol & Ripert, *supra*, note 95 at 82; Perrot & Giverdon, *supra*, note 116; *Reinhardt* v. *Turcotte*, [1956] B.R. 241; *Cardinal* v. *Lalonde* (1907), 31 C.S. 322 (C. of Rev.); *Place Versailles Inc.* v. *Ville de Montréal*, [1977] C.A. 176.

contract originally stipulated a fixed term. This rule is extraordinary in that notwithstanding the factual non-performance or late performance by a debtor under the terms of a contract, the onus is placed upon a creditor to establish the legally effective date of default. However, the practical impact of the general rule has been reduced greatly due to the proliferation of codal and jurisprudential exceptions.[134]

Not only does the absence of a *mise en demeure* when required impose by implication an indefinite term for performance, but *mise en demeure* is the procedure by which all indefinite terms whether implied or express are fixed.[135] As a pre-condition to a judicial remedy, *mise en demeure* determines legally both the due date of performance and the corresponding date of default. In almost all cases where it is required, a formal *mise en demeure* necessarily indicates the existence of an express or implied, indefinite term for performance.[136] Hence, indefinite terms are rendered definite by a *mise en demeure* in the form of a verbal or written demand or commencement of suit before the courts. As stated previously,[137] in the absence of agreement by the parties as to a precise delay for performance, a remedial and judicial context is unavoidable. In this context, a court will determine the proper delay according to the presumed intention of the parties either *ex post* by determining if a formal *mise en demeure* was reasonable under the circumstances[138] or *ex ante* by actually fixing the delay for performance in default of which a court-appointed remedy will be enforceable.[139]

---

[134]See text accompanying notes 118-26.

[135]See Planiol & Ripert, *supra*, note 95 at 349; Kouri, *supra*, note 116 at 12-16; Veaux, *supra*, note 95, Nos 10-16; Tancelin, *supra*, note 95 at 400-01; *Danmar Construction Co. Ltd.* v. *P.G. Québec*, [1972] C.S. 771; *Marley Canadian Ltd.* v. *Canada Ballotini Inc.*, [1971] C.S. 477; *Chouillon* v. *Johnson Co.*, *supra*, note 110; *Labonté* v. *Laliberté* (1942), [1943] C.S. 394; *Lebrun* v. *Gruninger* (1917), 27 B.R. 210; *La Compagnie d'Aqueduc de la Jeune Lorette* v. *Dame Turner*, *supra*, note 114; *Laberge* v. *Lepage*, *supra*, note 107.

[136]Apparently, the only situation in which a formal *mise en demeure* is required but does not imply an indefinite term is where the contract specifies a fixed term and prior to term the creditor formally notifies the debtor that the latter will be in default if performance is late. See *Reinhardt* v. *Turcotte*, *supra*, note 133; Kouri, *ibid.* at 55. These authorities indicate that a pre-term *mise en demeure* will only be valid if it is given close enough to the term to sustain a continuing intention by the creditor to enforce the due date for performance. In effect, this pre-term *mise en demeure* permits a creditor to unilaterally insert into the contract a stipulation of automatic default.

[137]See text following note 115.

[138]See *Picard* v. *Proteau*, *supra*, note 110; *Lachance & Morel (Ltée)* v. *Cantin*, *supra*, note 110; *Dame Grenier* v. *Thibaudeau*, *supra*, note 110.

[139]See *Picard* v. *Proteau*, *ibid.*; *Lambert* v. *Club des Chevaliers de Colomb de Matane*, *supra*, note 107; *Chartier* v. *Chouinard*, *supra*, note 110; *Guy* v. *Paré*, *supra*, note 114; *Caplan* v. *Montreal City and District Realty Co.* (1917), 52 C.S. 435 (C. of Rev.). The difficulty here is that if a *mise en demeure* prior to suit is not adjudged to be reasonable, the declaration issued in commencement of the suit must formally seek to enforce the debtor's contractual obligations so as to constitute a formal putting in default. In this regard, see *supra*, notes 115 and 117. Depending on the remedy sought the default will arise from the date of the suit or from the date of non-performance within the delay imposed by the court.

In essence, the above described rule in article 1783 *C.C.L.C.* concerning loans for consumption[140] is merely an example of the courts' role as ultimate arbiter of the reasonableness of either judicial or non-judicial *mise en demeure* necessary for express or implied, indefinite terms.

Finally, after an implied or express indefinite term has been fixed by a formal *mise en demeure* and even in cases in which a formal *mise en demeure* is dispensed with, a supervening, indefinite term can arise if the creditor expressly or impliedly renounces to his post-default rights to enforce performance of his debtor's obligations.[141] Express renunciation would likely arise as a result of a post-default bargain between the parties particularly in cases in which a formal *mise en demeure* opens lines of communication. Implied renunciation by a creditor to the rights resulting from a formal or automatic *mise en demeure* arises where his behaviour indicates unequivocally an intention not to enforce performance and not to hold a debtor responsible for damages ensuing after the *mise en demeure*.[142] Renunciation to a right is never presumed.[143] Hence, the fact of a creditor not exercising a judicial remedy after formal or automatic default would likely not amount to renunciation to the putting in default.[144] On the other hand, granting a new delay for performance without a reservation of rights would indicate an intention to waive the effects of a previous *mise en demeure*.[145] Similarly, any juridical act between the parties such as novation or release of debt that has the effect of extinguishing the obligation which is the object of default also extinguishes the effects of default.[146]

In summary, the timing of the enforceability of contractual obligations in civil law — the notion of a term — is a question of intention. This intention may be expressed by the parties to a contract. It may be implied by circumstances surrounding the formation of a contract or by a creditor's behaviour *vis-à-vis* putting in default. Intention as to the timing of performance may also be implied by law as indicated by the exceptions to the rule requiring a formal *mise en*

---

[140]See text following note 109.

[141]See Kouri, *supra*, note 116 at 64; Faribault, *supra*, note 95 at 378; P. Raynaud, "La renonciation à un droit" (1936) 35 Rev. trim. dr. civ. 763 at 773-74; *Caplan* v. *Montreal City & District Realty Co.*, *supra*, note 139; *Thibault* v. *Dame Lafaille*, [1951] C.S. 188.

[142]See *Verret* v. *Pollock* (1932), 38 R.L.n.s. 314 (C.S.); *Turcotte* v. *Caisse Populaire St-Arsène de Montréal* (18 April 1985), Montreal 500-09-001685-817, J.E. 85-489 (C.A.); *Gingras* v. *Gagnon*, [1977] 1 S.C.R 217 at 222, Beetz J.

[143]See Raynaud, *supra*, note 141 at 774; *Gingras* v. *Gagnon*, *ibid.*; *Mile End Milling Co.* v. *Peterborough Cereal Co.*, [1924] S.C.R. 120; *Ville de Laval* v. *Marquis*, [1982] C.S. 755; *Encyclopédie juridique Dalloz: Répetoire de droit civil*, 2d ed., vol. 6 "Renonciation", No. 8.

[144]See Konri, *supra*, note 116 at 66.

[145]See Kouri, *ibid.* at 64; Faribault, *supra*, note 95 at 378; *Caplan* v. *Montreal City and District Realty Co.*, *supra*, note 141; *Vallée* v. *Tease* (1908), 33 C.S. 299 (C. of Rev.).

[146]See Kouri, *ibid.* at 65. In order to extinguish the effects of default vis-à-vis the remedy of damages, the juridical act would have to demonstrate an intention to extinguish the principal debt as well as the debt of damages.

demeure. The notion of a term in civil law, in particular that of an implied term, is inextricably linked, if not synonymous, with the process of putting in default in that both are necessary in some legal form to determine the timing of the enforceability of obligations. Finally, in cases in which a term arises by implication, it will be of indefinite duration and will become fixed in duration only through subsequent agreement by the parties or court intervention.

4. Sale on Credit or With a Term

In order to determine when a sale on credit or with a term as analysed above arises under article 1999(1) *C.C.L.C.*, it is necessary to consider the obligational structure of the contract and the notion of payment in sale.

In civil law, the contract of sale is the archetypal synallagmatic or bilateral contract in that *inter alia* it imposes upon a buyer and seller respectively the reciprocal and simultaneous obligations of payment and delivery.[147] While the transfer of ownership to a buyer is an important effect of sale,[148] as is the seller's obligation of warranty against eviction and latent defects,[149] delivery and payment of the price are inextricably linked in the obligational framework of the contract. Article 1533 *C.C.L.C.*, which states that in the absence of a stipulation to the contrary, a buyer must pay the purchase price at the time and place of delivery, does not indicate fully the roles of payment and delivery. In fact, delivery and payment are interdependent obligations, each being the contractual cause of the other.[150] Accordingly, breach of one of these obligations by one party entitles the other to withhold performance of the corresponding reciprocal obligation under the *exceptio non adimpleti contractus*. It also permits the non-defaulting party to sue to dissolve the contract.

---

[147]See arts 1472, 1491, 1496, 1487, 1532, 1533 *C.C.L.C.*; Rousseau-Houle, *Précis de droit de la vente et du louage*, *supra*, note 1 at 12, 17, 62, 92, 196-97; Pourcelet, *supra*, note 1 at 82, 105, 125, 168; Faribault, *supra*, note 2 at 22; Baudouin, *supra*, note 95 at 53-54; Pineau & Burman, *supra*, note 95 at 42; Tancelin, *supra*, note 95 at 35; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 674-75; *Lebel* v. *Commissaire d'École pour la municipalité de la Ville de Montmorency*, [1955] S.C.R. 298; *Superior Leather Goods* v. *Advanced Fur Mfg. Co.*, [1948] C.S. 198; *Cusson* v. *Philion*, [1959] C.S. 248.

[148]See art. 1022, para. 2 *C.C.L.C.*; Rousseau-Houle, *ibid.* at 83; Pourcelet, *ibid.* at 83, 84; Baudouin, *ibid.* at 187-88; Pineau & Burman, *ibid.* at 217-18; G. Trudel, *Traité de droit civil du Québec*, vol. 7 (Montreal: Wilson & Lafleur, 1946) at 315-20, 347-54; Faribault, *supra*, note 141 at 221-25; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 877, 908; Faribault, *ibid.* at 48.

[149]See art. 1491 *C.C.L.C.*

[150]See arts 1496, 1497 *C.C.L.C.*; Rousseau-Houle, *Précis de droit de la vente et du louage*, *supra*, note 1 at 17, 196; Pourcelet, *supra*, note 1 at 125, 167, 168; Faribault, *supra*, note 2 at 309, 315; Baudouin, *supra*, note 95 at 53-54; Pineau & Burman, *supra*, note 95 at 42; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 674-75, 683.

Given their obligational interdependence, payment and delivery in sale can be analogized to mutual, indefinite terms for performance such as terms consisting of a debtor's willingness to perform.[151] Unless there is a stipulation to the contrary, delivery and payment are mutual catalysts for performance. Payment is due only when delivery takes place. Delivery may be due under the contract at a fixed or indefinite time. Nonetheless, it is not due if payment is not forthcoming.[152] In either case, the catalyst is not a definite or indefinite time period but an event consisting of performance by the other party which is never truly certain of occurrence. The analogy to terms such as "when you are able" or "when it is convenient" is apt because parties to a contract of sale intend to create the mutual obligations of delivery and payment and intend them to be binding. The intentional certainty of occurrence overrides any factual uncertainty. Further, in sale, the obligations of delivery and payment are said to arise by consent to the contract.[153] Only the respective due dates of these obligations are affected by their obligational interdependence. Hence, delivery and payment do not function as mutually conditional obligations;[154] instead, they are analogous to mutual, indefinite terms for performance implied by law in the absence of a contrary, contractual stipulation.

The status of payment and delivery as mutual terms is supported by the legal effects of the *exceptio non adimpleti contractus*. The remedy is essentially a legal excuse or defense for non-performance by the non-defaulting party.[155] It does not terminate the parties' contractual relationship, nor does it remedy the non-performance of the defaulting party. It merely suspends the exigibility of the non-defaulting party's obligation until performance of the corresponding obligation by the other party. In other words, it acts as an indefinite term in favour of the non-defaulting party.[156]

In summary, mutual indefinite terms for performance are an intrinsic element of all synallagmatic contracts, at least as regards reciprocal, simultaneous

---

[151]See text accompanying notes 107-13.

[152]See arts 1496, 1497 *C.C.L.C.*; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 674-76, 677; Pourcelet, *supra*, note 1 at 125-26; Rousseau-Houle, *supra*, note 150 at 200; Faribault, *supra*, note 2 at 196; Baudouin, *supra*, note 95 at 279; Tancelin, *supra*, note 95 at 360-63; *Interprovincial Lumber Co.*, v. *Matapedia Co.*, [1973] C.A. 140.

[153]See Rousseau-Houle, *ibid.* at 12; Pourcelet, *ibid.* at 85-86; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 876-77; Faribault, *ibid.* at 31, 49-50.

[154]See as regards the notion of a condition text accompanying notes 110-14.

[155]See Baudouin, *supra*, note 95 at 277-78; Pineau & Burman, *supra*, note 95 at 416; Tancelin, *supra*, note 95 at 405; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 683; *Dumas* v. *Ostiguy*, [1950] C.S. 60; *Eugène Falardeau Ltée* v. *O.M.H.Q.*, [1976] C.A. 244.

[156]See Baudouin, *ibid.* at 280; Pineau & Burman, *ibid.* at 414; P.-B. Mignault, *Droit civil canadien*, vol. 5 (Montreal: C. Théoret, 1901) at 450; *Robert* v. *Sarrault* (1913), 53 C.S. 484; *Fortier* v. *Perrault* (1923), 29 R.L. 354 (C.S.); *Drouin* v. *Gilbert*, *supra*, note 1; *Eugène Falardeau Ltée* v. *O.M.H.Q.*, *ibid.*; *Pelland* v. *Feldman* (1945), [1946] R.L. 153 (C.S.).

obligations. The existence of these terms is implied by law based upon the presumed intention of the parties. The rule in sale is that unless parties express a contrary intention, payment and delivery are reciprocal, simultaneous obligations. Revendication is a post-delivery remedy available to a seller for non-payment of the purchase price by a buyer. Hence, a sale on credit or with a term under article 1999(1) *C.C.L.C.* requires that the parties set aside the legal presumptions as to intention and indicate that the price is payable after the due date for delivery. For example, the stipulation of a term for payment unaccompanied by a term for delivery demonstrates an intention to sell on credit. In this case, an indefinite, reasonable term for delivery is implied.[157] In the absence of an express starting date, the term for payment, presumed to benefit the buyer as debtor,[158] is interpreted to commence at delivery, the presumptive date at which the price would otherwise be payable. By contrast, a term for delivery unaccompanied by a term for payment does not indicate an intention to sell on credit in the context of article 1999(1) *C.C.L.C.* because it merely delays both obligations without affecting their reciprocal and simultaneous nature.[159]

Contractual stipulations of credit as described above, however, are not sufficient to activate the restriction in article 1999(1) *C.C.L.C.* These stipulations merely demonstrate an intention or agreement to give credit. Actual credit in the context of article 1999(1) *C.C.L.C.* arises only if the seller has performed his delivery obligation prior to performance by the buyer of his corresponding obligation to pay the price. A seller's prior performance is essential to the existence of credit due to the synallagmatic nature of sale and the nature of the seller's revendication remedy. As stated above, until delivery, the price is not exigible because of the obligational structure of sale and not because of any term accorded the buyer. Until delivery, credit is inchoate.[160] It may be argued that the transfer of ownership to a buyer before the price is payable is an extension of credit to him. The argument is attractive because ownership and possession are closely associated in fact and in law.[161] Nonetheless, in a modern context, the transfer of ownership *per se* is a legal effect of sale, foreign to the obligational structure of the contract except to the extent that a buyer's ownership is enhanced by performance of a seller's obligations.[162] In other words, in the con-

[157]See text accompanying note 115. See also Pourcelet, *supra*, note 1 at 112, 168; Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 87-88.

[158]See art. 1091 *C.C.L.C.*

[159]See art. 1533 *C.C.L.C.*; Pourcelet, *supra*, note 1 at 168; Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 197; Faribault, *supra*, note 2 at 311, 313; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 677.

[160]Conversely, if it were stipulated that the price was due before delivery, until actual payment the credit or term accorded the seller vis-à-vis his delivery obligation would be inchoate.

[161]See arts 2193, 2268(1) *C.C.L.C.*; Macdonald, *supra*, note 4 at 590-92; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 666-67.

[162]For example, a seller's warranty against eviction, obligation to deliver accessories such as title documents and keys and obligation to render goods certain and determinate enhance and make

text of synallagmatic contracts, true credit or a term vis-à-vis otherwise reciprocal simultaneous obligations exists only if the parties intend that one party's obligation is to be executed while the other's remains executory and that state of affairs actually exists.[163]

It is obvious that revendication as a post-delivery remedy presupposes performance of the seller's delivery obligation. The result is that breach of the requirement in article 1999(1) *C.C.L.C.* entails two events, namely: i) the existence of a term which makes the price payable after delivery and ii) delivery itself.

The notion of express and implied, definite and indefinite terms discussed above, and the connection in the context of article 1999(1) *C.C.L.C.* between terms or credit and performance of the seller's delivery obligation indicate that any voluntary delivery by a seller without immediate receipt of the purchase price entails the granting of a term for payment. The result is that the requirement in article 1999(1) *C.C.L.C.* makes the existence of the seller's revendication remedy legally impossible.[164] The omni-presence of a term associated with the seller's revendication remedy is best demonstrated by considering a range of scenarios concerning payment of the purchase price. In this regard, non-insolvency and non-bankruptcy situations will be considered first.

The least complicated situation is that in which a seller by express stipulation in the contract accords his buyer a term for payment, such as a specified time delay, so that the price is payable after delivery. Assuming that according to the terms of the contract the seller delivers and does not require payment, he will have forfeited the revendication remedy. The intention of the parties is clearly to dissociate the obligations of payment and delivery in a way which breaches the requirement of article 1999(1) *C.C.L.C.* A common example of this scenario is the sale on terms "net 30 days".[165]

Where there is no specific stipulation as to payment of the price, it is payable upon delivery and a seller need not deliver unless the buyer is ostensibly ready, willing and able to pay. At the point of delivery, the seller or his representative always has a choice. He can choose to withhold delivery until payment

---

meaningful a buyer's ownership. See Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 908-09.

[163]When obligations are not simultaneous, a term for performance or credit is inherent in the contract. For example, a repairman's right of retention under art. 441 *C.C.L.C.* presupposes performance of the repair obligation prior to payment.

[164]The only exception to this statement arises where a buyer pays a seller upon delivery using counterfeit currency. See text following note 202.

[165]See *Fiducie du Québec* v. *Fabrication Précision Inc.*, *supra*, note 4; *Re Roulottes Eureka Ltée: Dionne* v. *Desroches* (1974), 19 C.B.R.(n.s.) 268 (C.S.); *Alcools de Commerce Inc.* v. *Corporation de Produits Chimiques de Valleyfield*, *supra*, note 5, McCarthy J.; *Pépin* v. *Feeney*, *supra*, note 4; Goldstein, *supra*, note 1 at 97.

is actually offered to him;[166] or, he can deliver goods notwithstanding the absence of payment by the buyer. The choice to deliver without receipt of payment unequivocally indicates an intention by the seller to waive the reciprocity and simultaneity of payment and delivery in sale. Delivery is the manifestation of an intention to give the buyer a term for payment. The term is implied and indefinite, analogous to that which arises by implication where a creditor neglects to put his debtor formally in default though legally required to do so.[167]

The implied, indefinite term for payment arises whether delivery is preceded by a seller's demand for payment which is refused by a buyer, a buyer's express refusal to pay without a previous demand or silence by both parties. In the first two situations, a buyer might initially be in default to pay by the seller's verbal or written demand[168] or by his own repudiation of the contract.[169] Yet, the effects of any such default would surely be waived by the seller's subsequent delivery of the goods.[170] The ineluctable result of delivery without payment is the extension of credit to a buyer by means of an implied, indefinite term. Moreover, the creation of this term may be viewed not just as the unilateral act of the seller, but as a bilateral act of buyer and seller.

In sale, delivery is a bipartite concept composed of buyer's and seller's obligations. The seller's delivery obligation, defined by article 1493 *C.C.L.C.*, is *inter alia* to put the buyer in actual possession of the thing sold or to consent to possession being taken by him. The buyer's obligation to which allusion is made in articles 1495 and 1544 *C.C.L.C.* is to receive or remove the thing delivered by the seller. Delivery which extinguishes a seller's right of retention under articles 1496 and 1497 *C.C.L.C.* and after which the revendication remedy is appropriate arises only after the buyer has performed his delivery obligation.[171] In other words, revendication is appropriate only after the buyer has participated in the process of delivery by taking possession of the goods. In situations of delivery without payment, the active roles of buyer and seller vis-à-vis delivery combined with non-payment by the buyer indicate a joint or bilateral intention to modify the initial contract by adopting an indefinite term for payment in favour of the buyer.[172]

---

[166]This would be an exercise of the right of retention under art. 1496 *C.C.L.C.* which is an exercise of the contractual *exceptio non adimpleti contractus*. See text accompanying notes 155-56.

[167]See text accompanying note 133.

[168]See text accompanying note 127.

[169]See text accompanying note 124.

[170]Even delivery with a reservation of rights would affect renunciation to default as regards payment of the price upon delivery. However, it might protect the seller's remedy in damages. As regards renunciation to the benefits of default see text accompanying notes 142-45.

[171]See Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 660-72.

[172]It is difficult to conceive of a situation in which a buyer accepts delivery, does not pay and, yet, would not agree to a term for payment in his favour. If the custody of the goods were detri-

It has been suggested[173] that a credit sale and loss of the revendication remedy can be avoided by replacing payment terms such as "net 30 days" with the following contractual stipulation:

> Accounts are payable in full upon delivery. Interest shall be charged on accounts more than 30 days in arrears at the rate of 1% per month (19.56% per annum).

The intent of this clause is to sustain a cash sale by requiring payment upon delivery, but to delay the imposition of interest for late payment until thirty days after delivery. Given the above analysis concerning express and implied terms for payment in sale, this clause will not achieve its desired effect. The stipulation for payment upon delivery merely replicates the rule in article 1533 *C.C.L.C.*[174] Upon factual delivery without payment an implied, indefinite term for payment will arise as described above, thereby eliminating the seller's revendication remedy and demoting the rank of his privilege on judicial sale proceeds. The stipulated delay for interest charges would not preclude the existence of an implied term based upon delivery without payment because credit in this context includes any delay for payment with or without interest charges. Further, the clause stipulates that interest will commence to run on accounts "more than 30 days in arrears". Given the implied, indefinite term resulting from delivery without payment, no arrears would exist until the due date for payment is fixed through the mechanism of putting in default. Ironically, the seller's position would be worsened rather than enhanced because the clause would delay interest charges thirty days past the date of the buyer's default in payment of the purchase price.

The wording of the suggested clause is intentionally ambiguous in its attempt to give a buyer the benefit of a term without running afoul of the rule in article 1999(1) *C.C.L.C.* On this basis alone and notwithstanding a potential, implied term for payment, a court would likely interpret the clause to have the same legal effect as "net 30 days". Hence, in cases of delivery without payment with or without contract stipulations as to payment, actions speak louder than words and give rise to an implied, indefinite term for payment.

Paradoxically then, non-payment of the purchase price upon delivery is at the same time a legal cause for the revendication remedy and, by virtue of article 1999(1) *C.C.L.C.* and the necessary implied term, a legal cause of its extinction.

The paradoxical effect of the rule in article 1999(1) *C.C.L.C.* is particularly acute in the case of a buyer's insolvency or bankruptcy. According to article

---

mental to the buyer due to storage costs, for example, he would merely refuse delivery. This would avoid the problem of revendication.

[173]See K.S. Atlas, "The Vendor of Moveables in Quebec: His Protection and Privileges" (1982) 42 R. du B. 597 at 613.

[174]See text following note 149.

1092 *C.C.L.C.*, the general rule is that a debtor loses the benefit of the term *inter alia* if he becomes insolvent or bankrupt.[175] In the former case, the intervention of a suit is necessary to substantiate the debtor's insolvency and the term is forfeited only from the date of judgment.[176] In the case of bankruptcy, once this juridical state is established by the appropriate proceedings, no further judicial intervention is required and forfeiture takes effect from the date of bankruptcy.[177] In both cases, article 1092 *C.C.L.C.* accelerates the term enabling a creditor to demand performance and to put the debtor in default according to the rules described above.[178] In this regard, the putting in default would likely occur through the commencement of suit which results in a judicial declaration of a debtor's insolvency effective from the date of judgment[179] or by the filing of a claim in the case of a debtor's bankruptcy.[180]

In the context of a seller's non-consensual remedies, forfeiture of the term under article 1092 *C.C.L.C.* combined with the applicable rules for putting in default establish a seller's entitlement to a remedy for a buyer's non-payment.[181]

In the context of a seller's revendication remedy, the paradoxical effect of article 1999(1) *C.C.L.C.* makes it impossible to determine whether article 1092 *C.C.L.C.* will have an effect. The phrase "the sale must not have been made on credit" is itself ambiguous in this regard. In the case of *Fiducie du Québec* v. *Fabrication Précision Inc.*,[182] article 1999(1) *C.C.L.C.* was interpreted without discussion to refer to the original terms of the sale and not to any subsequent forfeiture of a term.[183] However, the pluperfect past tense in the phrase is con-

---

[175]Art. 1092 *C.C.L.C.* provides:"The debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract."

[176]See Faribault, *supra*, note 95 at 112; Baudouin, *supra*, note 95 at 459; Pineau & Burman, *supra*, note 95 at 360; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 680; *Dalrymple* v. *Simms* (1918), 58 C.S. 194; *Arpin, Gendron & Beauregard Ltée* v. *Tremblay*, [1960] C.S. 577; *Cie Légaré Ltée* v. *St-Amant*, [1962] C.S. 29.

[177]See Faribault, *ibid.* at 110; Baudouin, *ibid.*; Pineau & Burman, *ibid.*; Boodman, *ibid.*; *Bankruptcy Act*, *supra*, note 17, s.121(3); *Re Hamel: Trottier* v. *Mathieu*, [1964] B.R. 831.

[178]See text accompanying notes 116-32.

[179]The commencement of suit in the case of insolvency would amount to a putting in default prior to the due date which would be established by the judgment substantiating insolvency. See *supra*, note 136.

[180]See *Bankruptcy Act*, *supra*, note 17, s.121. Unless there is a specific clause in the contract which states that bankruptcy is an automatic default, bankruptcy would not entail imposing a fixed term under art. 1092 *C.C.L.C.* because the bankruptcy is neither a future nor certain event.

[181]The seller's right of retention under arts 1496 and 1497 *C.C.L.C.* appears to be exempt from both judicial intervention under art. 1092 *C.C.L.C.* and formal putting in default. This is due to the nature of the retention remedy as an *exceptio non adimpleti contractus*. See Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 680.

[182]*Supra*, note 4.

[183]*Ibid.* at 257, Turgeon J.A. states:

sistent with reference to both the time of sale and the period immediately preceding the exercise of the revendication remedy. In fact, the latter is obviously the time of reference in article 1999(3) *C.C.L.C.* which requires that "the thing must not have passed into the hands of a third party who has paid for it." The restriction of conditions in article 1999 *C.C.L.C.* to a time immediately preceding the exercise of the revendication remedy is further supported by article 1999(4) *C.C.L.C.* This provision requires that revendication be exercised within eight days of the sale. It is based on the assumption that a seller who does not do so is deemed to have tacitly given a term for payment.[184]

If the relevant reference point is the time immediately preceding the exercise of the remedy, in principle article 1092 *C.C.L.C.* can apply to expunge the term and re-activate the remedy. Yet, in this case as well the remedy is likely doomed to failure. In order to invoke article 1092 *C.C.L.C.* when a buyer is insolvent, a seller must initiate proceedings for a court to substantiate the insolvency and declare forfeiture of the term. In the present context, these proceedings will also constitute a putting in default and the exercise of the seller's revendication remedy. The judicial, remedial context causes the seller's pleadings to be contradictory in that he is simultaneously exercising the revendication remedy and demanding the prospective forfeiture of a term. A paradox arises in that until the remedy is exercised, article 1999(1) *C.C.L.C.* precludes its exercise.

The same scenario would arise if the seller's revendication remedy were enforceable against a buyer's trustee in bankruptcy.[185] After the declaration of bankruptcy has caused forfeiture of the term, subject to contractual stipulations, a *mise en demeure* will be necessary. Again, in order to expedite matters, it is likely that the proceedings in revendication will also constitute the putting in default. However, it is contradictory to exercise a remedy and establish its procedural preconditions in the same pleading. It may be suggested that in cases of insolvency and bankruptcy, a seller should separate procedurally and temporally the *mise en demeure* and exercise of the revendication remedy. Not only would delays in time jeopardize the seller's remedy, but the possibility of manipulating the procedure in this manner renders ineffectual any rule requiring that no term exist at a time immediately preceding the exercise of the remedy.

> Le premier juge a décidé que la question de savoir s'il y avait terme ou non ne semblait pas importante, parce que la défenderesse principale ... avait reconnu son insolvabilité ... ce qui, d'après lui, entraînait la perte du bénéfice du terme. Avec déférence, je ne puis accepter l'opinion du premier juge sur ce point, car elle va à l'encontre de l'une des conditions formelles de l'article 1999 *C.C.* qui exige que la vente ait été faite sans terme et non pas que le débiteur ait perdu le bénéfice du terme.

[184]See text accompanying notes 60 and 206.

[185]As indicated above, a seller's right of revendication is not enforceable against a buyer's trustee in bankruptcy. See text accompanying notes 23-24.

The only logical, consistent and meaningful interpretation of article 1999(1) *C.C.L.C.* in this regard is that a term must not have been granted at any time preceding the remedy. Yet, this expansive interpretation indicates that for the purposes of revendication, a seller who has expressly or impliedly given a term thereby has waived the benefit of the rule in article 1092 *C.C.L.C.* This is unreasonable in that the mere giving of a term to a buyer does not indicate any such waiver because the premise of article 1092 *C.C.L.C.* is precisely the existence of a term for payment. The same paradox results from the decision in *Fiducie du Québec* v. *Fabrication Précision Inc.*[186] Hence, there is no truly satisfactory solution to the problem of how article 1092 *C.C.L.C.* applies in the context of a seller's revendication remedy. The technical contradictions discussed above result in part from the uncertainty of article 1999(1) *C.C.L.C.* as to the timing of a term. They also result from the coincidence of two contradictory rules. Article 1999(1) *C.C.L.C.* states that the revendication remedy is extinguished by the existence of a term for payment. Article 1092 *C.C.L.C.* indicates that a term for performance does not extinguish remedies, but merely delays their enforcement. It is impossible to reconcile these rules. Yet, at present, in light of the decision in *Fiducie du Québec* v. *Fabrication Précision Inc.*,[187] the rule in article 1999(1) *C.C.L.C.* prevails. The result is that article 1999(1) *C.C.L.C.* creates an absolute bar to the revendication remedy in all cases including a buyer's insolvency and would create an absolute bar if revendication were enforceable in the case of a buyer's bankruptcy.[188] As previously mentioned,[189] this result as regards article 1092 *C.C.L.C.* is inconsistent with the seller's other non-consensual remedies.

The above analysis indicates that a sale on credit or with a term arises by implication whenever a seller voluntarily delivers goods to a buyer without receiving payment. It is important to note that payment in the context of sale means payment in cash.[190] Hence, any voluntary delivery by a seller without

---

[186]*Supra*, note 4.

[187]*Ibid.*

[188]In France, as regards goods sold to a *commerçant*, this problem has been finessed by amendment to the *Code de commerce*. According to art. 62 of *Loi no 67-563 du 13 juillet 1967*, J.O. 14 juillet 1967, Gaz. Pal. 1967, 2e sem. Lég. 75, a seller's revendication remedy is available until the goods sold are placed in a publicly prominent situs of the buyer. Until this event has occurred, delivery is deemed not to be complete and any custodial remedy exercised by a seller falls outside the ambit of art. 2102(4), para. 2 *C.C.*, the Frencb equivalent of art. 1999 *C.C.L.C.* In this way, art. 1188 *C.C.*, the French equivalent of art. 1092 *C.C.L.C.*, can apply to sales on credit so as to reactivate a seller's custodial remedy. See Fridman-Clausse, *supra*, note 3, paras 27, 45-55. These amendments implicitly recognize the contradictions inherent in the codal revendication remedy discussed above.

[189]See text accompanying notes 31 and 36.

[190]See art. 1472 *C.C.L.C.*; Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 13, 80-82, 194; Pourcelet, *supra*, note 1 at 79-81; Faribault, *supra*, note 2 at 19-20, 25ff. It should be noted that where as a result of multiple transactions a buyer and seller are mutually

receipt of payment in cash is a sale with a term which extinguishes the right of revendication. In this context, the use of negotiable instruments as a payment mechanism is of particular interest.

As a rule, the issuance of a negotiable instrument by a debtor and its delivery to a creditor do not constitute payment, nor, more specifically, payment of the purchase price under a contract of sale. For example, a cheque, whether certified by its drawer or holder, or noncertified, is merely an order by its drawer addressed to a bank authorizing it to pay on demand the sum indicated to the payee.[191] While certification might entail debiting the amount of the cheque from its drawer's account at the drawee bank and imposing liability on the cheque upon the drawee bank, payment in favour of a payee or holder of a certified or noncertified cheque occurs only with the actual transfer of legal tender or possibly the crediting of the account of the payee or holder.[192] Hence, a creditor traditionally has not been obliged to accept a cheque in lieu of actual payment.[193] The acceptance of a cheque in lieu of payment is deemed to be condi-

---

debtor and creditor of liquidated, exigible debts for sums of money, payment of the purchase price by the buyer occurs by compensation. This mecbanism for payment in cash is effected automatically as soon as the mutual debts exist simultaneously and entails the mutual extinction of these debts as far as permitted by their respective amounts. See arts 1187-1188 *C.C.L.C.* Hence, the only forms of cash sales are those in which a seller receives cash or legal tender upon delivery, or compensation occurs at that time. As regards payment by exchange goods see *infra*, note 198.

[191]See *Bills of Exchange Act*, R.S.C. 1985, c. B-4, s.165(1); *Crawford and Falconbridge Banking and Bills of Exchange*, 8th ed. by B. Crawford, vol. 2 (Toronto: Canada Law Book, 1986) at 1736-41; *Byles on Bills of Exchange*, 26th ed. by F. Ryder & A. Bueno (London: Sweet & Maxwell, 1988) at 281; *Chalmers on Bills of Exchange*, 13th ed. by D.A.L. Smout (London: Stevens & Sons, 1964) at 247-48; B. Geva, "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 Can. Bar Rev. 107 at 126; *Cleveland Stove Co.* v. *Walters & Sons* (1918), 54 C.S. 154 (C. of Rev.); *Duval* v *Janvier* (1934), 57 B.R. 481; *Noad* v. *Lampson* (1860), 9 R.J.R.Q. 379 (B.R.); *Re J. Garmaise Ltd. & Lamarre* (1939), 78 C.S. 275; *Mount Royal Paving & Supplies Ltd.* v. *Dompierre*, [1954] B.R. 592; *Millet* v. *The Queen*, [1954] Ex. C.R. 562; *Ouellette* v. *Lepine* (1952), [1953] C.S. 244.

[192]See as to the notion of payment of negotiable instruments and the effects of certification *Crawford and Falconbridge Banks and Bills of Exchange*, *ibid.* at 1669-72, 1791-96; *Byles on Bills of Exchange*, *ibid.* at 135-36, 310-11; *Chalmers on Bills of Exchange*, *ibid.* at 199, 249-50; Geva, *ibid.* at 123-30; J.M. Deschamps, "Les comptes en banque au Québec" (1986) 65 Can. Bar Rev. 75 at 91-94; *Canadian Imperial Bank of Commerce* v. *Perrault Ltée*, [1969] B.R. 958.

[193]See *Lavimodière* v. *Gariépy* (1917), 51 C.S. 471 (C. of Rev.); *Mount Royal Paving & Supplier Ltd.* v. *Dompierre*, *supra*, note 191; *Dame Matte* v. *Dame Roger* (1923), 35 B.R. 198; Baudouin, *supra*, note 95 at 371; Pineau & Burman, *supra*, note 95 at 322-23; Tancelin, *supra*, note 95 at 489-90.

A recent amendment to art. 1163(4) *C.C.L.C.* regarding tender and deposit does not likely have the effect of elevating the delivery of a certified cheque to the status of payment in cash under the law of Quebec. The former art. 1163(4) *C.C.L.C.* provided:

> It is necessary to the validity of a tender: ... 4. That, if it be of money, it be made in coin declared by law to be current and a legal tender...

According to s.2 of S.Q. 1987, c. 98 in force from December 18, 1987 (see G.O.Q. 1988.II.605), art. 1163(4) *C.C.L.C.* now reads:

tional upon the existence of sufficient funds in the appropriate account and payment of the cheque by the drawee bank upon presentment by the payee or holder.[194] Hence a creditor's acceptance is acknowledgement that delivery of a cheque is conditional performance of the debtor's payment obligation. In the event of non-payment of a cheque, payment is deemed never to have occurred.

In the context of sale, acceptance by a seller of a cheque or bill of exchange in lieu of payment upon delivery indicates waiver of the right to demand payment in cash upon delivery and consequently an implied intention to accord a term for payment. The same result arises if the seller accepts a demand promissory note upon delivery because this form of negotiable instrument is a promise to pay, which between immediate parties is merely evidence of the underlying debt.[195] Similarly, acceptance by a seller of an irrevocable bank draft, money order or letter of credit indicates an intention to accord a term for payment because delivery of these documents does not entail payment.[196] An implied term for payment would also arise to the degree that an electronic fund transfer delays actual payment to a seller beyond delivery to a buyer.[197]

Further, it appears that an implied term for payment extinguishes a seller's revendication remedy in most situations where delivery is obtained through fraudulent non-payment by a buyer.[198] The most common examples of fraudu-

---

It is necessary to the validity of a tender: ... 4. That, if it be of money, it be made in cash or by certified cheque...

Tender and desposit (see arts 1162-68 *C.C.L.C.*; arts 187-91 C.C.P.) is a mechanism by which *inter alia* a debtor can pay a sum of money to a creditor despite the latter's refusal to receive payment. According to art. 1162 *C.C.L.C.*, deposit of a sum of money is equivalent to payment as of the date of offering or tendering payment if the debtor continues to be ready and willing to pay the sum of money. Tender and deposit discharges a debtor as of the date of tender and reduces his liability for late payment and for the costs of suit, if any. Nonetheless, strictly speaking, this mechanism makes payment available to a creditor but does not entail actual payment until the creditor receives the money in cash. Seen in this light, tender and deposit of a certified cheque according to the amended art. 1163(4) *C.C.L.C.* is not actual payment and does not conflict with the regulation of cheques under the *Bills of Exchange Act* (*supra*, note 191.).

[194]See *Mailloux* v. *Beaudry* (1915), 48 C.S. 9 (C. of Rev.); *Noad* v. *Lampson*, *supra*, note 191; Tancelin, *ibid.* See as to the acceptance of cheques being conditional upon payment in the common law of sale of goods, M.G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 31, 404, 683.

[195]See *Bills of Exchange Act*, *supra*, note 191, s. 176(1); *Marzitelli* v. *Lahaie* [1943] B.R. 527; *Bank of Toronto* v. *Hingston* (1868), 12 L.C.J. 216 (C.S.).

[196]See Geva, *supra*, note 191 at 108, 111, 122, 131-32, 143-44; *Crawford and Falconbridge Banking and Bills of Exchange*, vol. 1, *supra*, note 191 at 834-47, 878-80, 1005-07; P.R. Trudeau, "Les garanties contractuelles érigées des exportateurs québécois de biens et de services" (1985) 45 R. du B. 163.

[197]At present, there is some controversy as to when electronic fund transfers actually effect payment to a payee. See N. L'Heureux, "Le transfert électronique de fonds en regard du contrat bancaire" (1986) 65 Can. Bar Rev. 147 at 152-54.

[198]Excluded from this analysis is the fraudulent non-payment which might arise in the context of a contract of exchange under arts 1596 to 1599 *C.C.L.C.* Fraudulent non-payment would arise in this context where one party transfers goods knowing that his title in them is defective or non-

lent non-payment as an inducement for delivery are the issuance of an N.S.F. cheque by a buyer with knowledge of the insufficiency of funds[199] and the issuance of an order to "stop payment" of a cheque.[200] In both of these cases, the initial acceptance by a seller of a cheque in lieu of payment and in exchange for delivery implies the granting of a term for payment for reasons explained above. The buyer's fraudulent non-payment increases the scope of his liability in damages for non-performance[201] and activates the other non-consensual remedies available to a seller for non-payment after delivery. The buyer's fraud does not, however, displace the seller's initially implied intention to waive the buyer's obligation to pay in cash upon delivery.[202]

The only situation imaginable in which an implied term for payment does not exist in a case of non-payment upon delivery is where a buyer pays with counterfeit currency. In this extreme case, whether or not there is fraud by a buyer, the seller's intention is to deliver only in exchange for actual payment.[203] Hence, according to the present analysis of article 1999(1) *C.C.L.C.*, the scope of the seller's revendication remedy is limited to the case of delivery in exchange for payment by counterfeit currency. Consequently, for all intents and purposes, the rule in article 1999(I) *C.C.L.C.* renders the seller's revendication remedy non-existent.

---

existent. In this case, the person receiving the goods or "buyer" would be able to invoke the relative nullity under art. 1487 *C.C.L.C.* or the remedy for breach of his "seller's" warranty against eviction under arts 1598 and 1508-21 *C.C.L.C.* Further, it is not likely that a seller's revendication remedy applies to an exchange party under a contract of exchange for two reasons. First, art. 1599 *C.C.L.C.* states that the rules contained "in the title *Of Sale*" apply to exchange. The right of revendication is not found within that title of the *Civil Code of Lower Canada.* Second, the rules of privileges, which include the seller's revendication remedy, are to be interpreted restrictively. Hence, it is doubtful that one can extend the revendication remedy to the contract of exchange.

[199]*E.g. Inns* v. *Gabriel Lucas Ltée,* [1963] B.R. 500; *Kuhne and Nagel (Canada) Ltd.* v. *Polygraph-Export G.M.B.H.,* [1963] C.S. 679; *Wilson* v. *Doyon,* [1964] C.S. 93.

[200]*E.g. Gstrein* v. *Dukel Auto Inc.,* [1978] C.P. 188; *Bonin* v. *Banque Internationale de Commerce S.A.* (22 October 1986), Montreal 500-09-000772-830, J.E. 86-115 (C.A.).

[201]See arts 1074, 1075 *C.C.L.C.*; *Pfeuti* v. *Bahler et Schaub* (1987), 11 Q.A.C. 101; Baudouin, *supra,* note 95 at 429; Pineau & Burman, *supra,* note 95 at 439; Tancelin, *supra,* note 95 at 446.

[202]This result is analogous to the rule that art. 1092 *C.C.L.C.* does not apply to re-activate a revendication remedy extinguished by the initial existence of a term. See text accompanying notes 182 and 183.

[203]According to s. 420(1) of the *Criminal Code,* counterfeit money belongs to the Federal Crown. Accordingly, this money could be seized by the Crown in the hands of a seller, presumably without compensation. Further, payment by a buyer using counterfeit currency would be non-payment because such currency does not belong to the buyer. Hence, with or without a buyer's fraudulent intent, the use of counterfeit currency constitutes non-payment.

5. *Critique and Response*

The thesis of this paper, that article 1999(1) *C.C.L.C.* renders the seller's revendication remedy non-existent, can be criticized on two related bases. The first argument is that an omni-present term implied in cases of delivery without payment is mere technical legal wizardry and counter-intuitive as regards the process of the sale of moveables. The second and related argument is that this thesis is contradicted by case law which enunciates a presumption against credit or terms for payment in sale.

The argument based upon the process of sale is not merely a negation of the implied intention of a seller to accord a term for payment, it is recognition of the fictional and unrealistic nature of simultaneous and reciprocal obligations in synallagmatic contracts. In practical terms, payment of the price and delivery of goods are rarely truly simultaneous. At the very least, there is always some divergence in the performance of these reciprocal obligations. The fiction of simultaneity of performance likely reflects the formalism of sale in Roman law. Further, in a modern context, it symbolizes the causal link between payment and delivery which permits *exceptio non adimpleti contractus* and the dissolution remedy in favour of a non-defaulting party.[204] Assuming simultaneous performance to be merely symbolic in this sense, it can be argued that there must be some margin for non-simultaneous performance which does not entail an implied term and extinction of the remedy. A strict rule of simultaneity of performance leads to a stand-off in which neither party performs, anticipating non-performance by the other. An analogous but inverse margin exists in favour of a seller who can withhold delivery on the basis of reasonably imminent or hypothetical non-payment of the purchase price by a buyer.[205]

In the context of a seller's revendication remedy, the margin as regards simultaneity is found in article 1999(4) *C.C.L.C.* which states that the remedy must be exercised within eight days of delivery. Even in a purely modern context, this rule indicates that a seller can deliver goods without receiving payment and wait a maximum of eight days to demand return of the goods for non-payment.[206] In other words, despite delivery without payment, a seller is deemed to have given a term for payment and forfeited the remedy only if he does not pursue his buyer for eight days. This period of time is sufficient to permit a seller to accept and clear payment in the form of a cheque, for example. In this way, a seller's acceptance of the cheque does not cause forfeiture of the revendication remedy which acts as a disincentive to payment with N.S.F. cheques or

---

[204]See text accompanying notes 147-50.

[205]See Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 674-75.

[206]See *Henderson* v. *Tremblay* (1876), 21 L.C.J. 24 (B.R.); Pourcelet, *supra*, note 1 at 174.

generally to non-payment upon delivery. The eight-day rule preserves the seller's post-delivery remedy for a short but sufficient duration and relieves him of the pre-delivery costs of screening prospective buyers as regards their solvency.[207]

As a specific codal exception to the civil law notion of an implied term, however, the eight-day rule is incompatible with article 1999(1) *C.C.L.C.* and underscores its paradoxical nature. Essentially, article 1999(4) *C.C.L.C.* implies a maximum eight-day term for payment as regards the seller's revendication remedy. This is contrary to the rule in article 1999(1) *C.C.L.C.* and makes it impossible to determine the scope and the purpose of this provision. In the face of article 1999(4) *C.C.L.C.*, article 1999(1) *C.C.L.C.* is superfluous and meaningless. Consequently, the possible critique of this paper based on the process of the sale of moveables is well-founded and supported by the eight-day rule in article 1999(4) *C.C.L.C.* However, at the same time, this critique supports the view that article 1999(1) *C.C.L.C.* is anathema to the seller's revendication remedy.

The second potential argument against the thesis of this paper is that it is contrary to the few Quebec cases which have considered the availability of the seller's revendication remedy in light of article 1999(1) *C.C.L.C.* and implied, as opposed to express, terms for payment. In fact, there are post-codification authorities concerning revendication actions in Quebec which state that sale is presumed to be a cash transaction and that delivery of goods accompanied by a *de facto* delay for payment does not create a sale on credit.[208] Perhaps the clearest statement of the rule emanating from these cases is found in the decision of *Re Wm. A. Marsh Co.* v. *Buzzell.*[209] In this case, several unpaid sellers claimed repossession of goods sold and delivered less than thirty days before the bankruptcy of the buyer. The seller's claims were contested by a bank with security under section 88 of the *Bank Act.*[210] In accordance with prior court authorization, the trustee in bankruptcy used the goods claimed to complete work in progress of the bankrupt debtor. Hence, the bank and unpaid sellers were competing *de facto* for the monetary value of the goods. As regards the cash or credit nature of a contract of sale, Gibsone J. states:

---

[207]See as regards screening costs in secured transactions F.H. Buckley, "The Bankruptcy Priority Puzzle" (1986) 72 Vir. L.R. 1393 at 1451-60.

[208]See *Re Wm. A. Marsh Co.* v. *Buzzell, supra,* note 13; *Re Rosenzweig: Hart* v. *Goldfine Ltd., supra,* note 17 at 562-63, Tellier J.; *Dame Hyatt* v. *Herlihy* (1916), 50 C.S. 163 (C. of Rev.) at 183-84, Bruneau J., dissenting; *Allan* v. *Francoeur* (1895), 8 C.S. 466 at 468; *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114 (B.R.) at 118-20, Badgley J., dissenting; *Blagdon* v. *Lebel* (1878), [1879] 5 Q.L.R. 87 (B.R.); *Mercure* v. *Philippe Beaubien & Cie, supra,* note 31 at 417, Tremblay J.; *Martineau* v. *Plante* (1916), 50 C.S. 102 at 103.

[209]*Ibid.*

[210]R.S.C. 1927, c. 12.

> Sales may be made for immediate payment or on credit; a sale is on credit when the express (or sufficiently established tacit) agreement between the parties is that the buyer becomes owner of the thing at once but that the seller may not call for payment of the price until after a definite delay; a sale is not presumed to be on credit, on the contrary there is a general presumption of law that sales of moveable property, including merchandise, are made for cash and for immediate payment; the fact that a seller does not insist upon immediate payment and that (presumably as a matter for convenience) he allows payment to be delayed for some short period does not of itself make the sale to become a sale on credit, nor deprive the seller of the right to ask for payment at any time;
> A consequence of the seller's right to payment on delivery is that, if the price is not paid, within eight days in ordinary cases, within thirty days in cases of bankruptcy, the seller is entitled to recover back the thing sold, but he can do this only provided it is entire and in the same condition and provided it has not been bought and paid for by a third party; this right of the vendor to recover back the thing sold constitutes a lien upon it.[211]

Despite the ostensibly clear import of these *dicta*, their reliability is questionable for several reasons. First, Gibsone J. provides no reasoning or authority for his statement that a short delay for payment upon delivery does not constitute a term by implication. The legal presumption that sale is a cash transaction is merely a restatement of the rule in article 1533 *C.C.L.C.* which can be displaced by the express or implied intention of the parties to the contract. Further, the statement that a delay for payment does not deprive the seller of the right to demand payment at any time is tautological. As indicated above,[212] an indefinite, implied term created by delivery without payment can be fixed by a *mise en demeure* which can take the form of an express demand for payment.

Of greater consequence is the fact that the decision in *Re Wm. A. Marsh Co.* seems to give priority to the unpaid sellers based on their ownership of the goods. This is indicated by the following statement:

> The fact that the customer might have, either erroneously or falsely, represented to the bank that he was owner, when he was not, would not deprive the real owner of his rights.[213]

The ownership basis of this decision is also indicated by its conclusion which permits "the unpaid vendors to be collocated in preference to the bank for the value of *their* merchandise."[214] Even the headnote to the decision supports the ownership basis for the sellers' priority. It reproduces article 1543 *C.C.L.C.* which enunciates a seller's right to dissolve a contract of sale for non-payment of the price.[215] The headnote to *Re Wm. A. Marsh Co.* also refers to the case of

---

[211]*Supra*, note 13 at 466-67.
[212]See text accompanying notes 133-46.
[213]*Supra*, note 13 at 466.
[214]*Ibid.* at 468 (emphasis added).
[215]*Ibid.* at 463-64.

Re Rosenzweig: Hart v. *Goldfine Ltd.*[216] in which a majority of the appeal court decided that the remedy under article 1543 *C.C.L.C.* is enforceable against a buyer's trustee in bankruptcy. Further, in the recent case of *Knitrama Fabrics Inc.* v. *K. & A. Textiles Inc.*[217] the decision in *Re Wm. A. Marsh Co.* was judicially considered to be based upon article 1543 *C.C.L.C.* This interpretation is consistent with the contemporary view that the seller's dissolution remedy under article 1543 *C.C.L.C.*, but not the revendication remedy, is enforceable against a bank with security under the *Bank Act.*[218]

A seller's ownership of goods is the common basis of all of the revendication cases which enunciate a presumption against sale on credit and deny an implied term for payment based on delivery without payment.[219] In fact, unlike the case of *Re Wm. A. Marsh Co.* which is fairly subtle in this regard, the other authorities specifically state that the presumption against credit sale preserves a seller's ownership of goods delivered and right to revendicate them. In other words, the post-codification authorities, contrary to the thesis of this paper, adopt the pre-codification regime of sale in which ownership of moveables does not transfer upon delivery unless a seller receives payment or adequate security, or gives a term for payment.[220] Under this regime, a seller's ownership of goods delivered is the basis for a right of revendication. In a post-codification context, however, the existence of a term for payment has no effect upon the consensual transfer of ownership in sale. Hence, post-codification decisions such as *Re Wm. A Marsh Co.*[221] cannot be justified as a means of restricting implied dispositions of property. It is obvious that these cases misconstrue the basis for the nature of the seller's revendication remedy or confuse it with the distinct remedy of dissolution of a contract.[222] Otherwise, the only rationale for these cases is the avoidance of the paradox created by article 1999(1) *C.C.L.C.* In fact, by their refusal to consider implied terms in the context of article 1999(1) *C.C.L.C.*,

---

[216]*Ibid.* at 464.

[217]*Supra*, note 13 at 1206-07.

[218]See authorities cited in note 13.

[219]See authorities cited in note 208.

[220]See as to pre-codification, Quebec cases regarding a seller's revendication remedy *Sinclair* v. *Ferguson* (1858), 2 J. 101, 6 R.J.R.Q. 227 (C.S.); *Sénécal* v. *Mills* (1860), 4 J. 307, 8 R.J.R.Q. 262 (C.S.); *Moor* v. *Dyke* (1833), S.R.C. 538, 1 R.J.R.Q. 399 (B.R.); *Aylwin* v. *McNally* (1812), 1 R. de L. 506, 1 R.J.R.Q. 401 (B.R.).

[221]*Supra*, note 13.

[222]As to the distinct nature of the seller's post-delivery dissolution remedy under article 1543 *C.C.L.C.* compared to that of revendication see art. 1543, para. 1, *in fine C.C.L.C.*; Macdonald, *supra*, note 1 at 341; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 918; Rousseau-Houle, *Précis de droit de la vente et du louage*, *supra*, note 1 at 206; Pourcelet, *supra*, note 1 at 173; Mignault, *supra*, note 1 at 143-48; Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec", *supra*, note 1 at 377-78; Faribault, *supra*, note 2 at 353; *Re Beatrice Pines Ltd: Vendome Knitting Mills Ltd.* v. *Lawrence*, *supra*, note 17; *Re Rosenzweig: Hart* v. *Goldfine Ltd*, *supra*, note 17; *Re Iberville Furniture & Appliances Co. Ltd.: Grosbtein* v. *Facto*, *supra*, note 17.

these authorities implicitly recognize or, at least serve to illustrate, that article 1999(1) *C.C.L.C.* effectively eliminates the seller's right of revendication.

By contrast to these authorities, the decision of *Brown* v. *Hawksworth*[223] supports the present analysis. In this decision Caron J.A. in the majority of the Court of Appeal states:

> ...ce n'est qu'au créancier qui vend sans termes et sans crédit que le droit de revendiquer est accordé. Or, la question se résoudrait à savoir si dans l'espèce la vente a été faite à crédit ou pour argent comptant. Suivant la preuve, il me paraît que c'est à crédit, puisque les effets sont par les vendeurs expédiés de Sheffield à Liverpool, à l'agent reconnu et admis des acheteurs, sans qu'on exige d'eux ni de personne autre le prix desdites marchandises, lesquelles sont expédiées de nouveau par ledit agent, aux acheteurs à Montréal, pour être livrées aux acheteurs eux-mêmes, sans qu'il y ait aucune preuve que les vendeurs eussent, sur les lieux à Montréal, qui que ce soit pour retenir les effets jusqu'au paiement; au contraire, c'est à eux qu'ils sont adressés et c'est par eux et en leur nom qu'ils sont déposés à l'entrepôt, non pour la sûreté du prix desdites marchandises, mais bien et uniquement pour la sûreté des droits de douane. Si tous les faits et cette manière d'agir ne constituent pas une vente à crédit je ne sais pas vraiment ce qu'il faut pour en faire une. Si je suis fondé dans cette appréciation des faits et de la loi sur le sujet, la conséquence est que dès l'instant que les vendeurs se sont dessaisis de leurs marchandises en les expédiant à Liverpool sans exiger le paiement ils ont pour toujours perdu le droit de revendication;...[224]

This case is interesting not only because it addresses the issue of implied credit and raises the problem under pre-codification law, but also because its dissenting opinion invokes the almost irrebuttable presumption against implied credit in sale.[225] It is in fact the only case in which both sides of the issue are considered, albeit superficially.

This historical link between revendication and a seller's ownership has prompted some doctrinal authorities to suggest that the remedy is an oversight of codification incompatible with the consensual transfer of ownership in sale.[226] Given the historical importance of a term for payment or credit vis-à-vis the transfer of ownership in sale, this modern incompatibility is essentially the paradox created by article 1999(1) *C.C.L.C.*

---

[223]*Supra*, note 208.

[224]*Ibid.* at 115. This *dictum* assumes that delivery occurred when the goods were transferred to the buyer's custom house broker. The alternate basis for the majority decision is that the revendication remedy was taken more than fifteen days after delivery contrary to the *Insolvent Act of 1864*, Statutes of the Province of Canada, 27-28 Vict., c. 17, s.12, para. 1.

[225]*Ibid.* at 118, Badgley J.A., dissenting.

[226]See Fridman-Clausse, *supra*, note 3, No. 2; Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de chose au Québec", *supra*, note 1 at 377; Mignault, *supra*, note 1 at 143-48; Mazeaud, Mazeaud & Chabas, *supra*, note 3, no. 187; M. Planiol & G. Ripert, *Traité pratique de droit civil français*, 2d ed. by E. Becqué, vol. 12 (Paris: L.G.D.J., 1953), no. 188 at 215.

It can also be argued that the revendication remedy embodied in articles 1998 and 1999 *C.C.L.C.* exists and is recognized to exist by virtually all authorities regarding the unpaid seller's non-consensual remedies.[227] To accommodate the consensual transfer of ownership in sale, the modern authorities dissociate revendication from ownership and append it to the seller's quasi-custodial right of retention.[228] Contemporary authorities do not challenge the viability of the seller's right of revendication. Nor do they contemplate the paradox inherent in article 1999(1) *C.C.L.C.*

The unqualified acceptance of the seller's revendication remedy results from basic civil law principles regarding codal interpretation and the non-consensual secured status of the unpaid seller of moveables. As stated previously,[229] article 1999(1) *C.C.L.C.* is not ambiguous on its face and consequently appears not to require in-depth interpretive analysis in an historical or modern context. Hence, it is far from obvious that the historical basis for the seller's revendication remedy is incompatible with post-codification rules of sale. Nor is it obvious that the paradox surrounding credit or terms for payment in sale exists in both an historical and a modern context.[230] Further, the concept of an error or oversight of codification is anathema to codal interpretation. There is, with some justification, an almost irrebuttable presumption that the provisions of a civil code contain a coherent and intelligible set of rules. Codal interpretation as a means of filling in lacunae, resolving ambiguities and modernizing codified rules based upon internally expressed and implicit principles cannot accommodate unavoidable paradoxes such as that in article 1999(1) *C.C.L.C.* It is not surprising, then, that there has been no perceived need to examine critically article 1999(1) *C.C.L.C.*

Interpretations of article 1999(1) *C.C.L.C.* which justify the existence of the revendication remedy are also supported by a traditional civil law bias in favour of the unpaid seller of moveables. The classic justification for the non-consensual privileged status of the unpaid seller of moveables is that goods sold enhance the patrimony of the buyer-debtor to the benefit of his creditors and

---

[227]See for example Rousseau-Houle, *Précis du droit de la vente et du louage*, *supra*, note 1 at 200-02; Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec", *supra*, note 1 at 377-81; Ciotola, *supra*, note 2 at 169-73; Pourcelet, *supra*, note 1 at 173-74; Boodman, "The Prepaying Buyer of Corporeal Moveables in Quebec", *supra*, note 1 at 896-97, 918-21; Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 659, 694-95; Atlas, *supra*, note 173 at 607-09; Faribault, *supra*, note 2 at 353; Mignault, *supra*, note 1 at 146-47; Goldstein, *supra*, note 1 at 91, 97; Macdonald & Simmonds, *supra*, note 2 at 261, 262-63; Macdonald in Springman & Gertner, eds, *supra*, note 1 at 341-42; Macdonald, *supra*, note 3 at 1055-56, 1058, 1060; Macdonald, *supra*, note 2 at 11-12.

[228]See authorities cited in note 3.

[229]See text accompanying note 94.

[230]See as regards allusions to the problem of credit in an historical context authorities cited in note 79.

detriment of the unpaid seller.[231] It is to offset this economic inequity that the seller is accorded the privileged rights of revendication and preference on the proceeds of judicial sale of the goods sold. This justification for the seller's non-consensual secured status is based on the concept of ownership of moveables. However, like the unpaid seller, lenders enhance the patrimony of a borrower-debtor to their own detriment and to the benefit of the borrower's other creditors. These creditors benefit from their debtor's added liquidity or from assets purchased with the funds advanced. The only possible rationale for a non-consensual secured status in favour of the unpaid seller of moveables as opposed to the lender of funds is that the ownership of moveable property, quite apart from the value of the moveable owned, is inherently more valuable than other patrimonial assets, for example currency. In other words, the non-consensual secured status of the seller of moveables seems to be based upon the reification of the seller's debt and the buyer's right of ownership in particular, identifiable, corporeal assets.[232] It is doubtful that the enhanced stature of the right of ownership as opposed to a right of debt is a valid justification for the non-consensual nature of a seller's secured status.[233] While this non-consensual secured status might not be justified, it is, however, consistent with the priority of the seller's purely contractual remedies of retention and dissolution, the enforcement of which is greatly enhanced specifically because of the ownership component in the contract of sale.[234]

Rightly or wrongly, the codal provisions regarding the unpaid seller's non-consensual privileged rights reflect a principle of protection toward the seller of moveables which underlies the unqualified acceptance of the revendication remedy. The paradox of article 1999(1) *C.C.L.C.* results from the unresolvable conflict between the principle in favour of an unpaid seller as creditor and that in favour of debtors generally which gives rise to the rules regarding implied terms

---

[231]See Fridman-Clausse, supra, note 2, No. 13; *Bushnell Co.* v. *Baldwin* (1894), 8 C.S. 395; *Mechanic Supply Co.* v. *Hudon*, *supra*, note 32 at 403; *Re Rosenzweig: Hart* v. *Goldfine Ltd.*, *supra*, note 17; J. Blumenthal, *Droits du vendeur non payé* (Paris: A Giard, 1880) at 1-2; Planiol & Ripert, *supra*, note 226 at 215-16; Mazeaud, Mazeaud & Chabas, *supra*, note 3 at no. 187.

[232]This reification of rights into assets can also explain the non-consensual special privileges accorded creditors with a right of retention (see art. 441 *C.C.L.C.*) and the owner of goods lent, leased, pledged or stolen (see art. 1994(8a) *C.C.L.C.*).

[233]The argument here is that any secured status accorded an unpaid seller of moveables should be consensual and result from the intention of the parties to the contract of sale. While it is argued that the justification for the non-consensual secured status of the unpaid seller is invalid, this does not address the question of the superior priority of a seller's secured status vis-à-vis competing creditors of a buyer who have security on future or after-acquired property. In this regard, see for example T.H. Jackson & A.T. Kronman, "Secured Financing and Priorities Among Creditors" (1979) 88 Yale L.J. 1143; Buckely, *supra*, note 207 at 1461-66.

[234]See as to the common contractual basis for a seller's dissolution and retention remedies Boodman, "The Right of Retention of the Seller of Moveables in Quebec", *supra*, note 1 at 695.

and putting in default as discussed above.[235] In a modern context, the conflict between these two principles renders article 1999(1) *C.C.L.C.* meaningless and the entire revendication remedy of the seller non-existent. Assuming that one can justify a remedy enforceable against competing third parties which permits an unpaid seller of moveables to retake them after delivery for non-payment of the purchase price, this need is amply fulfilled by the seller's dissolution remedy under article 1543 *C.C.L.C.*[236] The inevitable conclusion is that within the present model of security on moveables in Quebec the demise of the seller's revendication remedy due to the pardox inherent in article 1999(1) *C.C.L.C.* is not a grievous loss.[237]

Conclusion

An historical and modern analysis of the seller's right of revendication under articles 1998 and 1999 *C.C.L.C.* indicates that within the Quebec moveable security model, the remedy is a fossil or relic of a bygone era. In a legal context, fossilization, as opposed to evolution, occurs by a process of compression over time of competing principles underlying conflicting rules of law. In the case of the seller's revendication remedy, this process results from the protection of debtors through the rules regarding terms and putting in default and the protection of unpaid sellers through privileged remedies, reinforced by the consensual nature and obligational structure of the contract of sale. The endurance of the rule in article 1999(1) *C.C.L.C.* in a modern context is extraordinary because allusions to its paradoxical nature exist in the Codifiers' sources for the rule and in cases decided immediately prior to and after codification. The antipathy between a seller's privileged remedies and credit sales is so tenacious that recent proposals for reform of the contract of sale inexplicably append the rule in article 1999(1) *C.C.L.C.* to the seller's revendication remedy based upon post-delivery dissolution, giving rise to the same paradoxes as those described above.[238]

---

[235]See text accompanying notes 116ff.

[236]See as regards the inferior status of the revendication remedy vis-à-vis the dissolution remedy text accompanying notes 4-33.

[237]Ironically, the seller's right of revendication as a non-consensual remedy enforceable only against a buyer is consistent with the view that any priority accorded a seller of moveables should be consensual and subject to third party publicity. See *supra*, note 233.

[238]See Draft Bill, *An Act to add the reformed law of obligations to the Civil Code of Quebec*, 2d Sess., 33d Leg. Que., 1988, s.1 at art. 1791, para. 1. This provision reads as follows:"Except in the case of a sale with a term, the seller of moveable property may within thirty days of delivery, consider the sale dissolved and revendicate the property if the buyer has failed to pay the price and property is still entire and in the same condition in the hands of the buyer." Under the Draft Bill, the salient features of the rules regarding terms (see Draft Bill, *supra*, at arts 1566-75), putting in default (see Draft Bill, *supra*, at arts 1647-54, 1488, para. 2.) and payment (see Draft Bill, *supra*, at arts 1611-25), as well as the obligational structure of the contract of sale (See Draft Bill, *supra*, at arts 1756ff., particularly arts 1756 and 1780.) are not substantially different from the present

In a broader perspective, an analysis of the seller's right of revendication suggests that fossilization is an inevitable, but often obscure, by-product of the process of evolution of law. It is obscure because of the uncertain and fluctuating interdependencies of legal rules over time. Obscurity also results from a perception and method of interpretation of law, which assume it to be, at any given time, a perfect, complete and inherently consistent system divorced from its historical precursors. The evolutionary process of law, however, is characterized by both historicism and modernism. Fossilization is inevitable because it occurs vis-à-vis a particular rule of law when these traits conflict as they must do from time to time.

---

rules discussed above. The only possible innovation relevant to the present analysis of the seller's revendication remedy is the proposed expansion of the notion of payment as performance of the obligation to pay a sum of money so as to include delivery of legal tender, money order, certified cheque, credit card or "other similar instrument of payment, or ... any other mode of payment which relies on an electronic system for the transfer of funds, if the creditor is able to accept it." (See Draft Bill, *supra*, at art. 1622.). While this expansion of the notion of payment may substantially reduce instances of sales on credit, as indicated above, the effect of this type of rule is as yet uncertain. See *supra*, note 193.