Fitness for Purpose in the Contract of Lease under the Civil Code of Québec

Alain Olivier*

In this article, the author considers a number of possible sources for the interpretation of the guarantee of "fitness for purpose" in article 1854 C.C.Q., first in foreign legal systems and then in the law of Quebec. In French law, the concept of *aptitude à l'usage* is understood as an application of the warranty for latent defects. This view inspired the *Civil Code of Lower Canada* on the issue of warranties for leased property. The common law, and more specifically the various *Sale of Goods Acts*, provides for the quality of property through the implied conditions of fitness for purpose and merchantability.

The author then examines the concept of fitness for purpose as it appears elsewhere in the *Civil Code* (particularly in the chapter on sale) and in the Quebec *Consumer Protection Act*. The majority of doctrine and case law seems to assimilate fitness for purpose with the warranty for latent defects. However, some writers and judges have argued that fitness for purpose is an autonomous concept which goes beyond the warranty for latent defects to provide the buyer or lessee with property fit for his particular use. The author favours the latter interpretation, especially in light of the common law's treatment of the implied condition of fitness for purpose. He posits that a comparative law approach to understanding article 1854 C.C.Q. would not undermine the principles of Quebec civil law, and would provide broader warranties to lessees than did the previous *Code*.

Dans le présent essai, l'auteur examine plusieurs sources d'interprétation possibles pour la garantie d'«aptitude à l'usage» à l'article 1854 C.c.Q., dans les systèmes de droit étrangers, puis dans le droit québécois. D'abord, en droit français, le concept d'aptitude à l'usage est considéré comme une application particulière de la garantie des vices cachés. Le *Code civil du Bas-Canada* s'est inspiré de ce modèle pour établir les garanties de qualité pour les biens loués. D'autre part, la *common law*, et plus spécifiquement les différents *Sale of Goods Acts*, assure la qualité des biens par les conditions implicites d'aptitude à l'usage et de qualité marchande.

L'auteur examine ensuite le concept d'aptitude à l'usage tel qu'il apparaît ailleurs dans le *Code civil* (notamment dans le chapitre sur le contrat de vente) et dans la *Loi sur la protection du consommateur* du Québec. La majorité de la doctrine et de la jurisprudence québécoises semble assimiler l'aptitude à l'usage à la garantie des vices cachés. Toutefois, certains auteurs et juges croient qu'il s'agit plutôt d'un concept autonome qui prévoit une protection additionnelle pour l'acheteur ou le locataire, au-delà de la garantie des vices cachés. L'auteur favorise la deuxième interprétation, surtout à la lumière de la discussion faite dans la *common law* au sujet de l'aptitude à l'usage. Il est d'avis que l'on peut faire appel au droit comparé pour comprendre l'article 1854 C.c.Q. sans déroger aux principes de droit civil québécois. De plus, l'interprétation proposée permettrait d'accorder une protection plus généreuse aux locataires que ce n'était le cas sous l'ancien *Code*.

* B.A., B.C.L., LL.B. (McGill); Student, Lavery de Billy (Montreal). An earlier version of this article was awarded the Wainwright Essay Prize (shared) for the best essay on a Civil Law topic. The author would like to thank Paul Golding and David Cohen of the *McGill Law Journal* for their valuable assistance in editing this text. The author would especially like to thank Professor Pierre-Gabriel Jobin of the Faculty of Law, McGill University. Without Professor Jobin's comments, advice and constant support, this project would not have been possible.

To be cited as: (1995) 40 McGill L.J. 187
Mode de référence: (1995) 40 R.D. McGill 187

Synopsis

Introduction

The fruit of a reform process begun over twenty years ago, the *Civil Code of Québec* will effect major changes in the civil law by introducing new concepts and a new vocabulary into the private law of Quebec. The drafters have sought inspiration from a variety of sources, ranging from Quebec statutes (for example, the *Consumer Protection Act*[1]) to foreign law (for example, European Directives, and Canadian sale of goods legislation). They have also attempted to clarify and modernize the concepts and language of the *Code*.[2] In so doing, the drafters have often used new terminology which has yet to be accepted and understood by the legal community of Quebec. This new vocabulary must be explained, discussed and criticized for the *Civil Code* reform to be successful. As one learned author comments: "Il faut ... montrer clairement que la recodification civiliste n'est pas une rupture sans vergogne avec le passé, mais le simple réaménagement d'un ensemble complexe de règles."[3]

A clear example of change appears in the contract of lease. The chapter on lease has undergone only minor amendments in the current *Civil Code* revision, given that the Legislator had recently made important modifications in this area.[4] Nonetheless, an important change seems to have occurred at article 1854 C.C.Q., the first article under the chapter entitled "Rights and Obligations Resulting from Lease". In that provision, the warranty for latent defects,

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[1] R.S.Q. c. P-40 [hereinafter C.P.A.].

[2] J. Pineau, "La philosophie générale du nouveau Code civil du Québec" (1992) 71 Can. Bar Rev. 423.

[3] J.-L. Baudouin, "Réflexions sur le processus de recodification du Code civil" (1989) 30 C. de D. 817 at 825.

[4] The 1973 Reform, which was implemented by Bill 2, *An Act concerning the lease of things*, 1st Sess., 30th Leg., Quebec, 1973 (assented to 22 December 1973, S.Q. 1973, c. 74) [hereinafter *Bill 2*], affected the general provisions on lease, and both immovable and residential leases. It introduced into the *Civil Code of Lower Canada* some of the social realities which characterize the modern law of lease (*e.g.* the importance of consumer protection in an urban context).

The 1979 Reform, which was implemented by the *Loi instituant la Régie du logement et modifiant le Code civil et d'autres dispositions législatives*, S.Q. 1979, c. 48, which became the *Act on the Régie du logement*, R.S.Q. c. R-8.1, focused on the protection of tenants in the context of residential leases. It also created the "Régie du logement", which replaced the "Commission des loyers" as the administrative body responsible for settling disputes between landlords and tenants. For a detailed analysis of the importance of these two reforms, see A.-M. Morel, "La nouvelle législation concernant le logement: De quelques innovations et difficultés du projet de loi 107" (1981) 15 R.J.T. 201; P.-G. Jobin, *Le louage de choses* (Cowansville, Que.: Yvon Blais, 1989) at 10-21 [hereinafter *Louage de choses*].

traditionally the cornerstone of the regime of warranties available to the lessee,[5] has been removed and replaced by a guarantee of *fitness for purpose*. Though the concept of *fitness* was included in article 1606 C.C.L.C., which required the lessor to "warrant the lessee against latent defects in the thing leased which prevent or diminish its use," there is some question as to the proper interpretation of that expression today. Does the new article merely *replace* the warranty for latent defects without modifying its substance, or is it meant to provide the lessee with a much broader "garantie de satisfaction",[6] as was suggested in similar provisions on fitness for purpose in the Quebec *Consumer Protection Act*? Furthermore, is article 1854 C.C.Q. conceptually related to the well-known guarantee of fitness for purpose in the *Sale of Goods Acts* of the common law provinces?

The present essay proposes to elucidate this concept as it appears in the chapter on lease, and to explain its content under the regime of the *Civil Code of Québec*. We will first present the legal warranty of the guarantee of fitness in the new *Code* and then compare its conditions of application and its effects with those of the warranty for latent defects in the *Civil Code of Lower Canada* (I). Second, the actual *content* of the fitness for purpose guarantee (its meaning, its conceptnal scope) will be examined in light of foreign and domestic (*i.e.* Quebec) legal sources (II). Questions of legislative intent will be considered throughout, such as were invoked in the public hearings on the *Draft Bill on Obligations*:[7]

> [N]ous avons noté l'utilisation d'un nouveau vocabulaire. ... Nous avons noté la reformulation de règles. S'agit-il d'une reformulation pour le simple plaisir de reformuler ou s'agit-il effectivement de modifier la règle de droit? Et comment cette reformulation risque-t-elle d'être interprétée par les tribunaux?[8]

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[5] Quebec courts have tended to impose the same rules regarding the *quality* of the property in both sale and lease. Article 1854 C.C.Q. could give rise to a differentiated regime between these two types of contracts by imposing broader obligations on the lessor than on the vendor with respect to the quality of the property, a change which would be fully consistent with the central importance of the lessee's *enjoyment* of the property in the contract of lease (art. 1854 C.C.Q.). The close relationship between the contracts of sale and lease will be discussed throughout the article. See especially *infra* notes 99ff and accompanying text.

[6] F. Poupart, "Les garanties relatives à la qualité d'un bien de consommation" (1983) 17 R.J.T. 233 at 262.

[7] *An Act to add the reformed law of obligations to the Civil Code of Québec*, 2d Sess., 33rd Leg., Quebec, 1988 [hereinafter *Draft Bill on Obligations* or D.B.O.].

[8] These comments were made by Jean Lambert, President of the Chambre des notaires, in his presentation before the Sous-commission des institutions, which held public hearings on the reform of the *Civil Code* (Quebec, Sous-commission des institutions, "Travaux préparatoires sur

This study intends to shed light on the concept of *fitness for purpose* in the contract of lease and to provide insight into its future interpretation by Quebec courts.

I. Legal Regime of the Warranty of Fitness for Purpose

The *Civil Code of Québec* offers guarantees to the party who leases a movable or immovable object. Article 1854 reads as follows:

> The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease.
>
> He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

Such warranties are particularly important in the contract of lease, since the lessor's fundamental obligation towards his lessee is precisely to provide the "enjoyment of a movable or immovable property for a certain time."[9] In addition, section 53 C.P.A. contains a warranty for latent defects, while sections 37 and 38 guarantee the *fitness for purpose* and *durability* of the property.[10] Since section 34 makes the *Consumer Protection Act* applicable to the sale and lease of (movable) goods and services, the above provisions are equally applicable to *both* types of contracts. More generally, the courts have tended to transpose to the contract of lease the principle of latent defects developed in the context of sale.[11]

The *Civil Code of Québec* effects a major change in the law of lease. It imposes on the lessor an obligation "to warrant the lessee that the property may be used for the purpose for which it was leased,"[12] instead of providing the

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l'*Avant-projet de loi portant réforme au Code civil du droit des obligations*" in *Journal des débats*, 1st Sess., 30th Leg. (8 November 1988) at SCI-291).

[9] Art. 1851 C.C.Q.

[10] An ongoing debate exists in Quebec doctrine and jurisprudence as to whether the two articles create guarantees independent of the warranty for latent defects. This controversy will be examined below in Part **II.C.**2.

[11] One could however make an argument for a broader interpretation of the law in the context of lease, since protection of the lessee's right of enjoyment is the lessor's *principal* obligation, while the law of sale focuses instead on the seller's transfer of real rights to the buyer.

[12] Art. 1854, para. 2 C.C.Q.

consumer with a warranty "against latent defects in the thing leased."[13] At first glance, this new language may not appear to affect the underlying conceptual framework of the warranty available to lessees. However, in the comments on article 1854 C.C.Q., Quebec's Minister of Justice maintains that:

> [Cet article] remplace la garantie contre les vices cachés que l'on connaissait auparavant et qui paraît plus appropriée au contrat de vente qu'au bail, par une garantie de bon usage, laquelle doit s'appliquer pendant toute la durée du bail.[14]

A comparison of the conditions of application of these warranties (A), and of their effects (B) will demonstrate the real and substantive differences between the two *Codes*.

A. Conditions of the Warranties

1) The *Civil Code of Lower Canada*

Under the *Civil Code of Lower Canada*, four basic conditions must be met for the warranty against latent defects to apply.[15] First, the defects must be *serious*: article 1606 C.C.L.C. requires that they "prevent or diminish [the object's] use." Summarizing the case law, Jobin points out that "pour considérer un vice comme grave, il n'est aucunement nécessaire qu'il rende la chose inutilisable, mais il suffit qu'il en diminue substantiellement la jouissance."[16] The seriousness of the defect will be evaluated according to the plaintiff's purpose in leasing the thing and in light of the factual elements of the case.[17] Safety defects, such as a faulty furnace which causes a fire in a building[18] or, in the context of residential leases, a general lack of fitness for habitation, evidenced by any number of factors ranging from water penetration

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[13] Art. 1606, para. 1 C.C.L.C.

[14] Quebec, *Commentaires du ministre de la Justice*, vol. 2 (Quebec: Publications du Québec, 1993) art. 1854 [hereinafter *Commentaires*].

[15] For a thorough discussion of the warranty for latent defects in the contract of lease under the regime of the C.C.L.C., see *Louage de choses*, *supra* note 4 at 462-507.

[16] *Ibid.* at 484.

[17] For example, a student who leases a truck for a one-week hunting trip will not suffer serious prejudice if the vehicle has suspension and engine problems, but the trucker who wants to lease the same vehicle on a long-term basis for commercial transport would find the vehicle unusable for the proposed purpose. See *Létourneau* v. *Laflèche Auto Ltée*, [1986] R.J.Q. 1956 (C.S.) [hereinafter *Laflèche*], in the context of the *sale* of a used truck.

[18] *Royale du Canada cie d'assurances* v. *Immeubles Turret inc.* (1 December 1994), Montreal 500-02-018474-911, J.E. 94-181 (C.Q.).

to inadequate heating,[19] are usually considered proof of the seriousness of the defect.

Second, article 1606 C.C.L.C. requires the defect to be *latent*. Jobin writes that "le vice occulte est celui qui échappe à un examen ordinaire et attentif de la chose par le locataire."[20] In that sense, the lessee's professional qualifications will be of some importance in a court's appreciation of the "hidden" nature of a defect (for example, an auto mechanic will be held to a greater degree of skill in his inspection of a used car than will an ordinary consumer).

The third condition for the application of the warranty, that the lessee was *unaware of the existence of the defect*, has been developed by the courts through analogy with the relevant codal provisions on the law of sale. Article 1522 C.C.L.C. explicitly requires that the purchaser of property be ignorant of the defects when he bought the property.[21] The lessee can claim the protection of articles 1604 and 1606 C.C.L.C. if he can prove that the defect predated the actual formation of the contract, eventhough it only appeared after that date.

Finally, the defect in the thing leased must *not* have been caused by the act of the lessee. This condition protects the lessor from being exposed to potentially open-ended liability for shortcomings of the property, such as those caused by normal wear and tear or by the lessee's own fault.[22]

Therefore, even if the courts have applied these requirements in a liberal manner, lessees must satisfy a set of conditions under the Civil Code of Lower Canada to avail themselves of the warranty for latent defects. The new Code, however, provides very few indications as to what these conditions will be in the future.

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[19] *Eppelé* v. *Poiré* (26 October 1992), Longueuil 505-02-004498-915, J.E. 92-1754 (C.Q.); art. 1652.8 C.C.L.C.

[20] *Louage de choses*, *supra* note 4 at 494.

[21] On the other hand, if the defect is sufficiently serious (*e.g.* if it makes a dwelling unfit for habitation), the two preceding conditions will be waived in the lessee's favour (*ibid.* at 498).

[22] In his analysis of this condition under the *Civil Code of Lower Canada*, Jobin, *ibid.* at 500, states categorically that "[l]e locateur n'est jamais responsable des vices imputables au locataire."

2) The *Civil Code of Québec*

There is no explicit mention in the second paragraph of article 1854 C.C.Q. that the defect must be serious, latent, or unknown to the lessee.[23] The drafters have thus attempted to create conceptually different regimes of warranties in the contracts of sale and lease in the new *Code*, whereas, at least since 1973, the *Civil Code of Lower Canada* had basically applied the same set of warranties in the two types of contracts.[24] The generality of the language used by the drafters at article 1854 C.C.Q., and the virtual absence of formal conditions for the application of the guarantee of fitness in the *Civil Code of Québec* seem to invite a liberal interpretation of that article by the courts.

There is some indication that the defect must still be serious (*i.e.* that it must prevent the lessee from "peaceably enjoying" the property) for the lessee to have a remedy.[25] The *Code* would otherwise impose considerable hardship on the lessor, who could be held liable for any defect even if it had no adverse effect on the lessee's enjoyment of the property.[26]

One can infer from the language of the new *Code* another condition for the application of the guarantee of fitness: the defect must not be attributable to the

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[23] This differs substantially from the situation which applies in the chapter on the law of sale. Article 1726, paragraph 1 C.C.Q. reads:

> The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

Furthermore, paragraph 2 of that article makes it explicit that the warranty does *not* apply when the defects are apparent or known to the buyer. This provision therefore restates the classic conditions for the application of the warranty for latent defects, *i.e.* the presence of a serious defect which is latent and unknown to the purchaser at the time of formation of the contract, and which is not attributable to the buyer's fault (the latter requirement can be implied from article 1726). See T. Rousseau-Houle, *Précis du droit de la vente et du louage*, 2d ed. (Sainte-Foy, Que.: Presses de l'Université Laval, 1986) at 120-38 for a discussion of these conditions in the law of sale.

[24] See *Louage de choses*, *supra* note 4 at 5-21 for an overview of the evolution of the law of lease from 1866 to the *Draft Bill on Obligations* in 1988.

[25] *Ibid.* at 506; N. Archambault, "Droits des obligations du louage" in Barreau du Québec & Chambre des notaires du Québec, eds., *La réforme du Code civil*, vol. 2 (*Obligations, contrats nommés*) (Sainte-Foy, Que.: Presses de l'Université Laval, 1993) 621 at 632.

[26] In fact, in the *Commentaires*, *supra* note 14, art. 1854, the Minister of Justice relates the guarantee of fitness for purpose to the "obligation qu'a le locateur de procurer la jouissance du bien et ... l'obligation d'entretien qu'il doit assumer pendant la durée du bail."

conduct of the lessee. Article 1855 C.C.Q. requires the lessee "to use the property with prudence and diligence during the term of the lease." The consequences of the lessee's conduct cannot be imposed on the lessor, since he does not act as an insurer for his co-contractant.[27]

These modifications greatly benefit the lessee, since they alleviate many of the difficulties involved in proving the property's lack of fitness. As will be seen below, this change may have been inspired by some of the provisions of the *Consumer Protection Act* on warranties, which apply whether the defect is patent or latent, and whether or not the lessor or lessee knew of the defects when the contract was formed.[28]

B. Remedies Available under the Warranties

When the lessor fails to fulfil the obligation to provide enjoyment of the property, a number of remedies are available to the lessee. Article 1863 C.C.Q. reads as follows:

> The nonperformance of an obligation by one of the parties entitles the other party to apply for, in addition to *damages*, *specific performance of the obligation* in cases which admit of it. He may apply for the *resiliation of the lease* where the nonperformance causes serious injury to him or, in the case of the lease of an immovable, to the other occupants.
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> The nonperformance also entitles the lessee to apply for a *reduction of rent*; where the court grants it, the lessor, upon remedying his default, is entitled to reestablish the rent for the future.[29]

Both *Civil Codes* provide approximately the same remedies to an aggrieved lessee. First, articles 1612 and following C.C.L.C. confer on the lessee the right to *withhold the rent* to force the lessor to proceed with "repairs and improvements to which he is bound." Similarly, article 1907 C.C.Q. allows lessees to ask for the court's authorization to perform these obligations themselves, and to withhold from the rent the amount of expenses associated

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[27] Archambault, *supra* note 25 at 632, writes that "tout comme maintenant, le défaut ne devra pas être imputable au locataire pour donner ouverture à la garantie: le garant n'ayant pas à répondre des vices qui sont le fait du bénéficiaire de la garantie."

[28] See especially C.P.A., *supra* note 1, ss. 37, 38, 54.

[29] [Emphasis added]. The remedies available to the lessee for the lessor's failure to perform contractual obligations are quite similar in both the old and new *Codes*. Compare article 1065 C.C.L.C. with article 1590 C.C.Q. in the general provisions on the effects of obligations. Compare also articles 1610, 1656 C.C.L.C. with article 1863 C.C.Q. in the chapter on lease.

with the repairs on the basis of the second paragraph of article 1867 C.C.Q.[30] Lessees may also avail themselves of the right to demand *specific performance of the obligation*.[31] They may seek a court order to *reduce the rent* until the necessary repairs or alterations are made on the object leased.[32] Furthermore, as in the general regime of contracts, lessees may *resiliate the contract* if they have suffered a substantial prejudice because of defects in the property leased, such as when the object is unusable, or when a dwelling is not in good habitable condition or is entirely unfit for habitation.[33]

The new *Code* has *removed* the requirement of the lessor's knowledge of the defect as a precondition for the availability of damages to the lessee.[34] Under the *Civil Code of Lower Canada*, the lessor who "knew or was presumed to know of the defects [was] ... liable for the damage suffered by the lessee."[35] Since the C.C.Q. is silent on the issue of damages for defects in the property, one must look to article 1863 C.C.Q., the general provision on the nonperformance of obligations in the contract of lease, to infer that the lessor would be held liable for damages in *all* cases where the property leased was

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[30] This is an application of the *exceptio non adimpleti contractus* principle (art. 1591 C.C.Q.). Furthermore, Jobin points out that the act of withholding rent may not have much persuasive effect on the lessor, especially in cases where there is a serious imbalance in the bargaining power of the parties (*Louage de choses*, *supra* note 4 at 644).

[31] Arts. 1652.11, 1656.2, 1656.3 C.C.L.C.; arts. 1601, 1917-18, 1973 C.C.Q.

[32] Jobin notes that the reduction of rent does not preclude the lessee from exercising other remedies such as resiliation, damages, *etc.* (*Louage de choses*, *supra* note 4 at 613-16). See articles 1611, 1636 C.C.L.C. and article 1861 C.C.Q. for the relevant codal provisions on the reduction of rent.

[33] *Louage de choses*, *ibid.* at 630. An entire subsection of the chapter on lease deals with the condition of the dwelling leased (see arts. 1910-21 C.C.Q.). Article 1910 C.C.Q. requires that the dwelling be in "good habitable condition", while article 1913, paragraph 2 C.C.Q. defines what constitutes a "dwelling unfit for habitation". However, at the public hearings on the *Draft Bill on Obligations*, D. Cusson of the Regroupement des comités de logement et associations de locataires du Québec criticized the new *Code* for failing to define the standard of a "dwelling in good habitable condition", and suggested that the *Code* specify a single point of reference for *all* residential leases (Quebec, Sous-commission des institutions, "Travaux préparatoires sur l'*Avant-projet de loi portant réforme au Code civil du droit des obligations*" in *Journal des débats*, 1st Sess., 30th Leg. (1 November 1988) at SCI-188).

For general provisions on the remedy of resiliation, see articles 1625, paragraph 3 and 1628, paragraph 2 C.C.L.C.; arts. 1604-1606 C.C.Q. In the specific context of the lease of dwellings, see articles 1656.2, 1656.6, 1661ff. C.C.L.C. and articles 1914, 1971ff. C.C.Q. Persons with residential leases may further exercise the remedy of abandonment ("le déguerpissement") in extreme cases where the dwelling is unfit for habitation (art. 1652.9 C.C.L.C.; art. 1915 C.C.Q.).

[34] Neither the French *Code civil* nor the *Civil Code of Québec* requires that the lessor have knowledge of the defect for liability in damages to follow.

[35] Art. 1606, para. 2 C.C.L.C.

defective (for example, when the property violated the guarantee of fitness at article 1854, paragraph 2 C.C.Q.).

This can be contrasted with the availability of damages in a contract of sale where, under article 1728 C.C.Q., the *seller* can invoke certain defences:

> If the seller was aware or could not have been unaware of the latent defect, he is bound not only to restore the price, but to pay all damages suffered by the buyer.

By implication, this means that the seller will not pay damages if he can rebut the presumption of knowledge at 1729 C.C.Q. The *lessor*, by contrast, is liable for damages if the object leased is not fit for its purpose, whether or not he had knowledge of the defect at the time of the contract. The drafters have removed the grounds of exoneration formerly available to the lessee under the second paragraph of article 1606 C.C.L.C.,[36] thereby improving the lessee's prospects of obtaining damages.

By adopting article 1854 C.C.Q., the Legislature has provided the lessee with a broader, more general protection against defects that prevent the property from being "used for the purpose for which it was leased." To avail themselves of the guarantee of fitness for purpose, lessees no longer have the burden of proving that the defect was latent, or that they were unaware of its existence at the date of formation of the contract. Furthermore, even if the remedies for inexecution of the lessor's obligations are quite similar under both *Codes*, the lessee no longer has to show that the lessor knew of the defect or lack of fitness to obtain damages. The drafters have thus provided the lessee with a more generous regime than was available under the previous *Code* with respect to the *conditions* and *effects* of the warranty. It is necessary to study the actual *content* of "fitness for purpose" in the contract of lease so as to more precisely identify the expression's conceptual scope.

II. Concept of Fitness for Purpose

The guarantee of fitness for purpose is not new to the civil law of Quebec. In the version of article 1614 C.C.L.C. which existed prior to the 1973 and

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[36] Note that under the *Civil Code of Lower Canada*, actual or presumed knowledge of the defect was required for both the seller (art. 1527 C.C.L.C.) *and* the lessor (art. 1606, para. 2 C.C.L.C.) to be held liable for damages towards the buyer and lessee, respectively.

1979 reforms of the law of lease,[37] the lessor had an obligation "to warrant the lessee against all defects and defaults in the thing leased, *which prevent or diminish its use*, whether known to the lessor or not."[38] However, this warranty was subsumed within the warranty for latent defects both in the provisions on lease and in those on sale.[39] Article 1606 C.C.L.C., which was integrated into the *Code* in 1973, uses language identical to former article 1613 with respect to the warranty for latent defects. Article 1854, paragraph 2 C.C.Q. innovates to the extent that the guarantee of fitness for purpose now stands alone as an independent warranty in the chapter on the contract of lease, to protect the lessee's right to have property fit for his proposed use. Since the warranty for latent defects as such has now disappeared from the chapter on lease, what will be the scope of the guarantee of fitness? Will it offer a broader protection than the warranty for latent defects,[40] or does it simply reiterate the guarantee afforded to the lessee by article 1606 C.C.L.C.?

To gain some insight into the meaning of the second paragraph of article 1854 C.C.Q., a survey of possible sources of interpretation proves most useful. Foreign legal sources will be considered first (A). An analysis of Quebec law, more specifically the law of sale in the *Civil Code of Québec* (B), and the regime of the *Consumer Protection Act* (C) will follow. Analogies drawn from these sources could provide useful arguments as to the proper interpretation of article 1854 C.C.Q.

A. Foreign Legal Sources

In the twentieth century, Quebec civil law has been greatly influenced by foreign legal sources. Before 1940, the courts frequently borrowed from the principles of Canadian and English common law to interpret the provisions of

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[37] See *supra* note 4 for additional information on these reforms.

[38] [Emphasis added].

[39] Article 1522 C.C.L.C. reads:

> The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

[40] Could the following reasoning, advanced by Poupart in his comments on sections 37 and 38 C.P.A., apply to the contract of lease?

> [U]n consommateur insatisfait du produit ... pourrait valablement et efficacement se plaindre qu'il est incapable de s'en servir comme on le lui avait affirmé ou comme il était lui-même en droit de s'attendre, indépendamment du fait que ce bien soit ou non affecté d'un défaut caché (Poupart, *supra* note 6 at 262).

the *Civil Code of Lower Canada*. Furthermore, the Supreme Court of Canada tried to foster a certain uniformity in Canadian private law by deliberately applying common law solutions to Quebec civil law problems. Note, for example, the following passage from Taschereau J.'s opinion in the *Glengoil Steamship* case:

> It strikes one as an astounding proposition, to say the least, that what is undoubtedly licit in England, under the British flag, which covers over two-thirds of the maritime carrying trade of the world, should be immoral and against public order in the Province of Québec, and that what is sanctioned by law in six of the provinces of this Dominion [Canada], should be prohibited in the seventh because of its immorality.[41]

Jobin gives the following interpretation of the 1900-1940 period in Quebec law: "[L]es tribunaux, mal éclairés ou mal inspirés, assez souvent citent des précédents de *common law* ... pour interpréter des règles appartenant à la tradition de droit civil. Le droit québécois est à la recherche de son identité."[42]

Concurrently, and in reaction to this push towards the consolidation of private law across Canada, a strong resistance movement took shape in the francophone legal community to protect the integrity of Quebec civil law. The inappropriate use of comparative law was denounced by Mignault[43] and a number of other doctrinal writers, who emphasized that the private law of Quebec is rooted in the civilian tradition of France. They encouraged borrowing from French law to deal with questions which could not be satisfactorily answered by the law of Quebec. Still today, some influential civilians adamantly oppose looking to common law cases or principles when dealing with questions of Quebec civil law.[44]

On the other hand, faced today with the growing integration of legal and political systems around the world (especially within the European Community), some authors argue for a "dialogne transfrontalier"[45] between

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[41] *Glengoil Steamship Line Co.* v. *Pilkington* (1898), 28 S.C.R. 146 at 155-56. There were only seven provinces in the Dominion at the time the case was decided.

[42] P.-G. Jobin, "L'influence de la doctrine française sur le droit civil québécois: le rapprochement et l'éloignement de deux continents" in H.P. Glenn, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville, Que.: Yvon Blais, 1993) 91 at 102 [hereinafter "L'influence de la doctrine française"].

[43] Sce *e.g.* P.-B. Mignault, "L'avenir de notre droit civil" (1923) 1 R. du D. 104.

[44] P.-A. Crépeau, "Les lendemains de la réforme du Code civil" (1981) 59 Can. Bar Rev. 625 at 636.

[45] H.P. Glenn, "Droit comparé et droit québécois" (1990) 24 R.J.T. 339 at 351 [hereinafter "Droit comparé et droit québécois"]. See also, by the same author, "Persuasive Authority" (1987)

jurisdictions. Glenn believes it is illusory to conceive of legal systems today as pure and hermetical:

> Ce n'est donc pas par la création et le conflit de systèmes juridiques que les traditions de droit se maintiennent, mais dans des conditions continues de mixité et d'interpénétration, où les conditions d'exclusion de traditions ne se réunissent pas.[46]

If this theory were carried to its logical conclusion, the diffusion of juridical models would make national boundaries irrelevant for our understanding of the law, and would render the very concept of a legal "system" obsolete.

Other authors adopt a compromise position and believe that Quebec law should generally be receptive to the influence of comparative law as long as the use of foreign sources can be integrated into a civilian framework. Baudouin writes:

> Il me semble sain qu'un système évolue avec son temps et emprunte les règles d'un autre système si celles-ci lui paraissent valables et utiles. *Par contre, l'emprunt de la règle ne doit pas signifier l'emprunt des techniques d'interprétation non plus que l'imputation sans discrimination de l'interprétation donnée aux textes par les tribunaux étrangers.*[47]

With the increase in the quantity and quality of doctrinal work by Quebec authors, comparative law can be seen today as a source of enrichment rather than as a threat to the integrity of Quebec's legal system. Also, given the province's mixed civil and common law tradition derived from its historical evolution under French and British rule, the law of Quebec should be open to a wide range of legal ideas. However, citing the vulnerability of our legal system to an improper use of foreign sources, Jobin argues for a method of legal reasoning coherent with the spirit of civil law:

> Le juriste du Québec ... doit préserver les principes fondamentaux du droit civil, la méthode d'interprétation du Code, la conception systématique du droit, en un mot l'esprit civiliste, et ce malgré la présence de règles, de concepts et d'institutions étrangères.[48]

Keeping these warnings in mind, one can now turn to the existing regime for

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32 McGill L.J. 261 at 263. Glenn takes an international perspective on the sources of law, and argues for a freer circulation of decisions and ideas between national legal systems.

[46] "Droit comparé et droit québécois", *ibid.*

[47] Baudouin, *supra* note 3 at 821 [emphasis added]. See also "L'influence de la doctrine française", *supra* note 42 at 115-16.

[48] "L'influence de la doctrine française», *ibid.* at 116.

the lease of goods under French law (1), and the Canadian common law which has developed a considerable body of jurisprudence on the guarantee of fitness (especially in the context of sale) (2), to gain insight into the possible meanings of "fitness for purpose" in article 1854 C.C.Q.

1) French Law

The French *Code civil* serves as a suppletive regime governing the conduct of the parties in the French law of lease. Article 1721 C.N.[49] contains the basic warranties with respect to the quality of leased property:

> Il est dû garantie au preneur pour tous les vices ou défauts de la chose louée qui en empêchent l'usage, quand même le bailleur ne les aurait pas connus lors du bail.
>
> S'il résulte de ces vices cachés ou défauts quelque perte pour le preneur, le bailleur est tenu de l'indemniser.

French courts have limited the scope of this article to *latent* defects in the property leased, so lessees cannot avail themselves of its protection where they knew or should have known of the defect.[50] Article 1606 C.C.L.C. thus resembles article 1721 C.N. to the extent that both articles associate the existence of latent defects in the property leased with the prevention of its normal use, and impose liability on the lessor for damages suffered by the lessee due to those defects. There is no independent guarantee of fitness for use available to the lessee in French law.

In the more specific realm of the lease of dwellings, the French *Assemblée nationale* has enacted specific legislation which remains separate from the *Code civil*. The French Legislator has been particularly active in this area since the beginning of the 1980s. The 1982 *Loi Quilliot*,[51] the 1986 *Loi Méhaignerie*[52] and the 1989 *Loi Mermaz*[53] have sought, albeit by different means, to correct the disequilibrium which had existed since World War II between lessors and lessees by providing more adequate protection to tenants.[54] Paragraphs 6a) and

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[49] Reference to the *Code Napoléon* [hereinafter C.N.].

[50] *Code civil 1991-92* (Paris: Dalloz, 1991), annotation under art. 1721. See also P. Malaurie & L. Aynès, *Contrats spéciaux (1990)*, 4th ed. (Paris: Cujas, 1990) at 351.

[51] *Loi n° 82-526 du 22 juin 1982*, J.O., 23 June 1982, Gaz.Pal.1982.Lég.397.

[52] *Loi n° 86-1290 du 23 décembre 1986*, J.O., 24 December 1986, Gaz.Pal.1987.Lég.15.

[53] *Loi n° 89-462 du 6 juillet 1989*, J.O., 8 July 1989, 8541, D.1989.Lég.227 [hereinafter *Loi Mermaz*].

[54] For a description of the evolution of the French statutory regime in the context of lease, see J.

b) of the *Loi Mermaz* are particularly relevant to the quality of the dwelling leased:

> 6. Le bailleur est obligé: ...
>
> a) De délivrer au locataire le logement en bon état d'usage et de réparation ainsi que les équipements mentionnés au contrat de location en bon état de fonctionnement; ...
>
> b) D'assurer au locataire la jouissance paisible du logement et, sans préjudice des dispositions de l'article 1721 du code civil, de le garantir des vices ou défauts de nature à y faire obstacle ...

Paragraph a) is related to the lessor's obligation to perform repairs. Paragraph b) explicitly refers to the warranty for latent defects, and ties it to the lessor's fundamental obligation to provide the lessee with the peaceful enjoyment of the dwelling for the term of the lease. In that sense, paragraph 6b) of the *Loi Mermaz* has the same effect as article 1721 C.N.[55] Though the statute focuses on the peaceable enjoyment of the property instead of its fitness for use, the *Juris-classeur* considers this a minor difference with limited practical implications.[56] The developments in the general law of lease under article 1721 C.N. could thus be carried over to the interpretation of paragraph 6b) of the *Loi Mermaz*.[57] Consequently, the statutory regime in France does not appear to add to the protection accorded to lessees by the general provisions of the *Code civil*.

This examination of French law reveals many of the concepts which underlie the approach of the *Civil Code of Lower Canada* to the obligations of the lessor. Under both legal systems, the lessor's duty to maintain and repair the property, the warranty for latent defects and the lessee's right of enjoyment are interrelated to a certain extent. One can conclude that the concept of fitness for purpose could not be interpreted as autonomous in the French law of lease.

Calais-Auloy, *Droit de la consommation*, 3d ed. (Paris: Dalloz-Sirey, 1992) at 326-27.

[55] Note that the provisions of the *Loi Mermaz* are of public order (s. 2), and cannot be set aside by the parties (Calais-Auloy, *ibid.* at 328).

[56] *Juris-classeur civil*, art. 1708 à 1762, fasc. 140, by B. Solletty, No. 21.

[57] *Ibid.* Note that Calais-Auloy, *supra* note 54 at 331, believes that the lessor's obligation to warrant the property against latent defects is similar to that of the seller.

2) The Common Law

The British *Sale of Goods Act*, enacted in 1893,[58] was the first comprehensive statutory attempt to deal with contracts of sale in the common law. Its objective was to complement existing contract law and to provide a set of specific rules governing the law of sale. Bridge writes:

> The *Sale of Goods Act* may not be a code in the sense understood by a civil law jurist, since it is confined to a special contract and permits penetration by the general law to fill its lacunae, but it can rightly be called a codification for the conscious attempt behind it to summarise rather than reform the antecedent case law.[59]

Legislation governing the sale of goods adopted in Canadian common law provinces has its origins in the British *Act*. The following discussion will be centered around the Ontario *Sale of Goods Act*,[60] which contains most of the changes to the Canadian law of sale in recent years.

Section 15 S.G.A. sets out the basic regime regarding implied warranties of quality in the contract of sale:

> Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment ... , there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description ... , there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

When the *Act* deals with "sales by description", it refers to the common

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[58] *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71.

[59] M.G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 3.

[60] R.S.O. 1990, c. S.1 [hercinafter S.G.A.].

intention of the parties with respect to the *identification* of the goods. Facts relating to the *quality* or *standard* of the goods can only be considered conditions or warranties of the merchandise.[61]

Section 15 of the *Act* maintains that one buys merchandise at one's own risk (*caveat emptor*), but this general principle is qualified in subsections (1) and (2). These subsections provide guarantees for the fitness for purpose and merchantable quality of the goods, respectively. Though it provides a narrower remedy to the buyer, as we will see below, the fitness for purpose guarantee historically applied to *all* sales, whether or not they were sales by description, whereas the merchantability warranty was only available when descriptive words were used. The differences between the two implied warranties have faded over the years, as the courts have given a broader interpretation to the expression "sale by description".[62]

Fridman outlines the three main requirements of the guarantee of fitness for purpose: first, the property must have been sold in the course of the seller's business; second, the seller must have known of the buyer's purpose in purchasing the goods; finally, the buyer must have relied on the seller's skill and judgment in deciding to purchase the goods.[63] If the buyer does not state the proposed use of the goods at the date of purchase, the seller can assume the buyer wishes to make a commonplace use of the goods. In cases where the buyer has in mind a specific use of the property, he must inform the seller of his plans. If he does so, a stricter form of liability will be imposed on the seller, since a narrower range of goods can fulfil the buyer's proposed use.[64]

As the above discussion illustrates, merchantable quality is closely related to the concept of sale by description. In a number of cases, the courts have equated merchantability with the compliance of the goods with their contractual description. For example, in *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.*,[65] Lord Reid gave the following definition of merchantable

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[61] This interpretation of "description" in Canadian sale of goods legislation has been strongly influenced by English law, more specifically by *Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.*, [1972] A.C. 441, [1971] 1 All E.R. 847 (H.L.). See G.H.L. Fridman, *Sale of Goods in Canada*, 3d ed. (Toronto: Carswell, 1986) at 175-81 for an analysis of the evolution in the case law which has given rise to the present definition.

[62] Bridge, *supra* note 59 at 454-55.

[63] See Fridman, *supra* note 61 at 186-95 for a detailed analysis of the conditions of the fitness for purpose guarantee.

[64] Bridge, *supra* note 59 at 469.

[65] [1969] 2 A.C. 31, [1968] 2 All E.R. 444 (H.L.) [hereinafter cited to A.C.].

quality: "It may be that various qualities of goods are commonly sold under that description — then it is not disputed that the lowest quality commonly so sold is what is meant by merchantable quality: it is commercially saleable under that description."[66] Lord Reid also explained the scope of merchantability in terms of fitness for purpose:

> If the description in the contract was so limited that the goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under that description if they were of no use for that purpose. But if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes.[67]

The existence of latent defects in the property will not necessarily ground a claim based on the implied condition of merchantable quality. For example, the improper dyeing of an expensive roll of fabric may prevent that material from being used in the manufacture of designer clothing, but it could easily be used in the production of lower-quality garments. Thus, property is merchantable if it can fulfil *one* of a range of possible uses. Given the breadth of the concept of merchantability, the buyer may have difficulty both in identifying the *range* of possible purposes for which the goods can be used, and in showing that they could not be used for *any* of those purposes. To remedy this problem, the courts draw inferences with respect to the defective quality of the goods if the buyer can prove that the defect was not caused by his own actions.[68] It is also noteworthy that a considerable price abatement may lead the courts to conclude that the goods are not saleable in the marketplace under their contractual description.[69]

The two implied conditions outlined in section 15 S.G.A. are closely related, but Bridge finds that fitness for purpose is more appropriate to the context of used goods as it provides a guarantee of quality of the goods *after* the date of purchase. He writes:

> Whereas the merchantable quality standard speaks to the character of the goods at the moment of sale or delivery, fitness for purpose invites an inquiry into the subsequent history of the goods as they are applied to the buyer's purpose, which may be a protracted one in the case of a consuming buyer. Fitness therefore seems to be a more appropriate vehicle for carry-

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[66] *Ibid.* at 75.
[67] *Ibid.* at 77.
[68] Fridman, *supra* note 61 at 211.
[69] *Ibid.* at 208.

> ing the issue of durability.[70]

Consumers receive a lesser degree of protection in their purchase of second-hand goods than in their purchase of new merchandise, but certain minimum standards with respect to the quality and durability of the goods exist nonetheless.[71]

There has been some confusion in drawing the line between the implied conditions of fitness for purpose and merchantability because of the interrelation of the two concepts. First, one must consider whether the consumer can launch an action for the lack of fitness of the property eventhough the goods are of merchantable quality. In the above-mentioned case of the improperly dyed fabric, the buyer would have a remedy under the fitness for purpose warranty provided the seller was aware of the purchaser's specific purpose (for example, the production of designer clothing) even if no remedy would exist under the implied condition of merchantability. Section 15.1 S.G.A. clearly affords protection to the buyer in that case.

The true conceptual difficulty in our examination of the guarantee of fitness occurs in the opposite situation, where the property is fit for its purpose, but is *not* of merchantable quality. As was seen above, merchantability is ordinarily phrased in terms of a *range of normal uses*. Could a buyer who wishes to make an *unreasonable* use of the property avail himself of the protection provided by section 15.2 S.G.A.?[72] Under such circumstances, if the purpose were disclosed and yet the merchant accepted to sell the property, he would presumably warn the buyer that the merchandise was not designed for the proposed use. Because of the seller's warning, the buyer could not argue that he had *relied* on the seller's expertise and was misled into purchasing the property. The guarantee of fitness for purpose would thus be unavailable to the buyer. He would also be precluded from opportunistically invoking the implied condition of merchantable quality, since the proposed purpose (which is *unreasonable*)

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[70] Bridge, *supra* note 59 at 473-74.

[71] *Ibid.* at 472.

[72] Note the similarities between the above discussion on the *Sale of Goods Act* and Rousseau-Houle's comments on the warranty for latent defects in the C.C.L.C.:

> Lorsque l'acheteur a fait connaître au vendeur l'usage auquel il destinait la chose, les juges doivent tenir compte de cette destination ayant joué un rôle dans la formation du contrat. Lorsque l'acheteur n'a rien dit, ou du moins que rien ne le prouve, on doit tenir compte de l'usage normal et habituel de la chose.
>
> Il est nécessaire toutefois que l'usage particulier envisagé par l'acheteur ne soit pas contraire à la nature de la chose (Rousseau-Houle, *supra* note 23 at 120-21).

would be at odds with the guarantee of fitness for a range of *normal* uses as provided by section 15.2 S.G.A. Since neither warranty could be successfully invoked by the purchaser, the general rule in section 15 S.G.A. would apply, requiring the purchaser to accept the property as it was supplied under the contract of sale.

Therefore, even at a theoretical level, one could not successfully argue that the implied condition of merchantable quality had been breached if the property purchased was fit for its purpose. We can conclude that, in sale of goods legislation, the guarantee of fitness for purpose offers a more generous protection to the buyer who acquires defective property than does the guarantee of merchantable quality.

The concept of *bailment* in the common law roughly corresponds to the lease of movables in the civil law.[73] There are a number of different types of bailment, such as hire purchase agreements, equipment lease, pledge and sale or return, and others. As the terms of the lease agreements grow longer, these transactions come to look more like sales. According to Bridge, "as a leasing agreement increasingly approximates to a sale of goods, the more likely will the *Sale of Goods Act* be extended by analogy to the warranty obligations of the bailor."[74] Consequently, since the implied condition of fitness for purpose seems to include some guarantee of durability — a crucial element of any leased property — and the distinctions between bailment and sale tend to become confused for longer-term leases, it follows that fitness for purpose could be applied to various forms of bailment in the common law.

Given the similarities between bailment and lease, the cases and commentary which have interpreted "fitness for purpose" under the *Sale of Goods Act* could be relevant to our understanding of that expression in the *civil law* contract of lease. However, there is no guarantee in the *Code*'s chapter on lease which is equivalent to an implied condition of "merchantable quality". Is it nonetheless legitimate to refer to common law authorities on the concept of fitness for purpose in interpreting article 1854, paragraph 2 C.C.Q.?[75]

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[73] Bridge defines bailment as follows:

> Bailment is a transaction by which possession of goods is transferred from bailor or bailee, whether for a fixed or indefinite term, on the understanding that the same goods will be returned to the bailor at the end of the term, or transferred to or held on behalf of someone else on his direction (Bridge, *supra* note 59 at 56).

[74] *Ibid.* at 59.

[75] Note that an analogy could only be drawn with respect to the *content* of the implied condition of fitness for purpose in the two legal systems. The civil law and the common law differ substan-

On the one hand, fitness for purpose in the civil law could be seen as including *both* implied conditions in sections 15.1 and 15.2 of the *Sale of Goods Act*. This suggested interpretation of the *Civil Code*, however, runs contrary to basic principles of statutory construction. Of course, a civil code requires a method of interpretation which differs from that which is used for ordinary legislation,[76] but this does not authorize judges to read words into the *Code*, especially in a chapter such as lease where the drafters have used precise terms to describe the parties' obligations. The text of the law is thus presumed to be complete as it stands.[77] For those reasons, an expansive reading of article 1854, paragraph 2 C.C.Q., which would extend its scope to cover *both* fitness for purpose *and* merchantable quality, would not seem appropriate.

On the other hand, one could take a *narrow* interpretation of the guarantee of fitness and find its content to be *identical* in both the civil law and the common law. Some civilians might consider such a parallel conceptually unsound. They would argue that the *Sale of Goods Act* could provide a remedy to the buyer under the heading of merchantability in a case where the guarantee of fitness for purpose was unavailable (in other words, if the property were fit for its purpose but not of merchantable quality). Since the *Civil Code of Québec* contains no such guarantee of merchantability, the purchaser would find himself without recourse under Quebec law in such a situation. However, the guarantee of fitness for purpose in the common law provides a *broader* remedy to the purchaser than does the implied condition of merchantable quality. Therefore, the "importation" of the common law notion of fitness for purpose into the interpretation of article 1854, paragraph 2 C.C.Q. would not cause any prejudice to lessees under the law of Quebec, even failing a concept equivalent to merchantable quality in the *Civil Code* or the *Consumer Protection Act*.

We believe this analogy between the civil law and the common law could be helpful in providing Quebec jurists with a point of reference, however

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tially on the *conditions* and *effects* of the guarantee. For example, while article 1854, paragraph 2 C.C.Q. extends to *all* lessors and lessees, whether they are private parties or professional sellers, the implied conditions at sections 15.1 and 15.2 S.G.A. *only* apply to business sellers (Bridge, *ibid.* at 457-58, 489-90).

[76] As Côté writes:

> [L]es Codes ne sont pas, dans leur ensemble, rédigés en style statutaire. Un texte conçu de manière à énoncer de façon claire et concise certains grands principes ne se prête pas aisément à une approche purement grammaticale (P.-A. Côté, *Interprétation des lois*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990) at 30).

[77] *Ibid.* at 257-58.

elementary, for understanding article 1854 C.C.Q.[78] Just as the *Sale of Goods Act* imposes a duty on the seller to provide property which "is reasonably fit for [its] purpose," article 1854 C.C.Q. requires the lessor to take active steps to ensure the property "may be used for the purpose for which it was leased." The *Civil Code of Québec* can thus be seen to create *positive* obligations whereas the *Civil Code of Lower Canada* imposed only *negative* obligations on the lessor.[79] Furthermore, this use of comparative law would not deprive lessees of any rights, since the fitness for purpose guarantee in the *Sale of Goods Act* offers a broader protection than does the implied condition of merchantable quality. Moreover, a parallel between the two legal systems would be limited to the *content* or *scope* of the notion of fitness for purpose, because important differences remain between the *conditions of application* and the *effects* of this guarantee under the *Civil Code* and the *Sale of Goods Act.*

B. The Civil Code of Québec

An examination of the *Civil Code of Québec* itself might yield additional insights on the possible scope of article 1854, paragraph 2 C.C.Q. First, the legislative history of the article will be briefly reviewed (1). Then, because of the influence of the law of sale on the warranty applicable in the contract of lease, the *Code*'s provisions on sale will be considered (2). The existence of a guarantee of quality in sale, which would be independent of the warranty for latent defects, could give rise to an interesting analogy between the contracts of sale and of lease in Quebec civil law.

1) Legislative History

Prior to the legislative reform of 1973,[80] which brought major changes to the codal provisions on lease, articles 1613 and 1614 C.C.L.C. were the relevant provisions regarding the lessor's obligation to provide the lessee with property fit for its use. Article 1613 read as follows:

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[78] Quebec judges and lawyers will certainly find it interesting to consider how common law cases have interpreted the *positive* obligations of the lessor to provide property which is fit for its purpose. These obligations are discussed in terms of the lessee's reliance on the lessor's expertise, the range of intended uses of the product and the standards of the marketplace — concepts which were somewhat foreign to the law of lease under the *Civil Code of Lower Canada.*

[79] The text of article 1606 C.C.L.C. required the lessor to "warrant the lessee against latent defects in the thing leased which prevent or diminish its use, whether or not they are known to the lessor."

[80] See *supra* note 4 for additional information on the 1973 and 1979 reforms to the law of lease.

> The thing must be delivered in a good state of repair, and the lessor is obliged, during the lease, to make all necessary repairs, except those which the tenant is bound to make, as hereinafter declared.

And article 1614 C.C.L.C.:

> The lessor is obliged to warrant the lessee against all defects and defaults in the thing leased, which prevent or diminish its use, whether known to the lessor or not.

Article 1614 refers to a warranty "against *all* defects in the thing leased," not just *latent* defects. However, this article has been interpreted as applying only to hidden defects. Faribault, commenting on article 1614 writes: "[l]e locateur ne peut être tenu des vices qui sont de notoriété publique ou qui sont inhérents à la situation de la chose louée."[81]

In 1973, *Bill 2*, which became *An act concerning the lease of things*, brought important changes to the contract of lease in the *Civil Code of Lower Canada*, but did not substantially modify the articles on the warranty for latent defects. The statute introduced articles 1604 and 1606 into the *Code* with respect to the lessor's basic obligations towards the lessee. Article 1604 C.C.L.C. read as follows:

> The lessor must:
>
> 1. deliver the thing in a good state of repair in all respects;
> 2. maintain the thing in a condition fit for the use for which it has been leased;
> 3. give peaceable enjoyment of the thing during the term of the lease.

Article 1606 C.C.L.C. read:

> The lessor must warrant the lessee against latent defects in the thing leased which prevent or diminish its use, whether or not they are known to the lessor.
>
> The lessor who knew or was presumed to know of the defects is also liable for the damage suffered by the lessee.

In these two articles, the Legislator was inspired by the Civil Code Revision Office's ("C.C.R.O.") 1970 *Report on the Contract of Lease and Hire of*

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[81] L. Faribault, *Traité de droit civil du Québec*, vol. 12 (*Du louage (art. 1600 à 1700)*) (Montreal: Wilson & Lafleur, 1951) at 95.

Things,[82] which enumerated the lessor's principal obligations under the contract of lease at article 4, and explained the warranty for latent defects at article 7. The text of article 4 read:

> The lessor must:
>
> 1. deliver the thing leased;
> 2. maintain the thing in a fit condition for the use for which it has been leased;
> 3. give peaceable enjoyment of the thing during the continuance of the lease.

And article 7 read:

> The lessor is obliged to warrant against latent defects in the thing which prevent or diminish its use, whether known to him or not.
>
> He is not liable in damages unless he knew of them or is legally presumed to have known of them.[83]

According to the C.C.R.O.'s Committee on the Law of Lease and Hire of Things, which drafted this preliminary report, the above articles would not modify existing law. Even article 7, paragraph 2 would merely codify the principle that the lessor could be found liable in damages to the lessee if he had actual or presumed knowledge of the defects in the property.[84]

The regime of the warranty for latent defects remained unchanged from 1973 until the current *Civil Code* reform process.[85]

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[82] Civil Code Revision Office, Committee on the Law of Lease and Hire of Things, *Report on the Contract of Lease and Hire of Things* (Montreal: Civil Code Revision Office, 1970) [hereinafter *Report on Lease*].

[83] *Ibid.* at 9, 11.

[84] *Ibid.* at 10, 12.

[85] There was considerable debate in the Civil Code Revision Office on the issue of the lessor's knowledge of the defects in the property leased: Was this a relevant factor in determining whether the lessor conld be held liable for the damages suffered by the lessee because of those defects? The C.C.R.O., in its 1971 *Final Report on Lease* (Montreal: Civil Code Revision Office, 1971) [hereinafter *Final Report on Lease*]) removed the exoneration available to lessors ignorant of latent defects, even though this provision had been included in the *Report on Lease*.. The Committee came to the conclusion that "knowledge of the defect is a factor which, according to the circumstances, may have a determining influence on the debtor's responsibility but which will not be decisive in all cases" (*Final Report on Lease*, *ibid.* at 10-12). However, the C.C.R.O.'s proposed *Draft Civil Code*, published in 1978, imposed liability on the lessor for *all* damages suffered by the lessee, whether or not the lessor had knowledge of defects in the property (Civil Code Revision Office, *Report on the Civil Code of Québec*, vol. 1 (*Draft Civil Code*) (Montreal:

The lessor's obligation to repair at the time of delivery, the obligation to perform repairs and generally provide enjoyment of the property during the term of the lease, and the warranty for latent defects were substantially modified in 1987 when the *Draft Bill on Obligations*[86] was introduced. That *Bill* contained the first version of the new *Code*'s provisions on the law of obligations, and introduced important changes to the structure of the law of lease. It replaced articles 1604 and 1606 C.C.L.C. with proposed article 1912:

> The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with the peaceable enjoyment of the property throughout the term of the lease.
>
> He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.

The *Draft Bill* removed from the *Code* the vocabulary of "warranty for latent defects" still used in the law of sale (see article 1726 and following C.C.Q.), and made "fitness for purpose" a central element of the lessor's obligation to provide the lessee with enjoyment of the property.[87] One must also note a difference in the drafters' approach to this guarantee: while article 1606 C.C.L.C. focused on the lessor's *negative* obligations towards the lessee (the lessor must warrant the lessee against latent defects in the property), article 1912 D.B.O. imposed *positive* obligations on the lessor (he must provide the lessee with property which can be used for its purpose, and maintain it throughout the term of the lease). The text of article 1912 of the *Draft Bill* was

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Bibliothèque nationale du Québec, 1978) [hereinafter *Draft Civil Code*]). Article 496 of the *Draft Civil Code* read:

> The lessor must warrant the lessee against latent defects in the thing which prevent or diminish its use, whether or not they are known to the lessor.
>
> *He is also responsible for the damage sustained by the lessee* (*ibid.* at 408 [emphasis added]).

Since the criterion of knowledge was absent from the second paragraph of the article, it could no longer serve as an exoneration for the lessor.

Note that the *Civil Code of Québec* has also eliminated the knowledge requirement for the lessor's liability in damages when the property is defective (see *supra* text accompanying note 28).

[86] *Supra* note 7.

[87] Though this marked an important change in the law of lease, the Barreau du Québec did not have any comments on this section, nor any modifications to propose (Barreau du Québec, *Mémoire sur l'Avant-projet de loi portant réforme au Code civil du Québec du droit des obligations (Du crédit-bail et du louage)*, presented to the Sous-commission des institutions, October 1988).

carried over unchanged to *Bill 125*[88] (article 1842), and subsequently to the *Civil Code of Québec* (article 1854). As the Minister writes in the *Commentaires*, the fitness for purpose requirement "est liée à l'obligation qu'a le locateur de procurer la jouissance du bien et à l'obligation d'entretien qu'il doit assumer pendant la durée du bail."[89] The new article emphasizes the lessee's enjoyment of the property and the lessor's obligation to maintain it for the duration of the contract, two concepts which characterize the contract of lease.

The law of lease has therefore evolved considerably, at least in form, since the pre-1973 *Civil Code of Lower Canada*. The changes adopted during the current reform of the *Civil Code* have affected the conditions and effects of the warranty which applies to leased property. Of course, we must recognize the difficulty involved in trying to separate the guarantee of fitness from the warranty for latent defects. Because these concepts are inevitably interrelated, any comparison of them will reveal nuances rather than marked differences. However, a shift has occurred in the drafters' approach to the contract of lease since the *Civil Code of Lower Canada*, as evidenced by the new *Code*'s emphasis on the lessor's obligation to take *active* steps to allow the lessee to enjoy the property. The question still remains whether the scope of the warranty available to the lessee has actnally changed in the new *Code*.

2) The Law of Sale

The warranties in the law of lease have traditionally mirrored those existing with respect to the law of sale. The independence of the guarantees of fitness for purpose and durability in the contract of sale, or their connection to the warranty for latent defects, could thus provide a helpful analogy between sale and lease.[90]

In the chapter on the law of sale, the *Civil Code of Québec* clearly associates the fitness for purpose guarantee with the warranty for latent defects. Paragraph 1 of article 1726 C.C.Q. reads as follows:

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[88] *Civil Code of Québec*, 1st Sess., 34th Leg., Quebec 1990 [hereinafter *Bill 125*].

[89] *Commentaires*, *supra* note 14, art. 1854.

[90] This broad approach is consistent with the method of interpretation of a civil code:

> [D]roit commun, le Code civil s'interprète de façon large plutôt qu'étroite; on peut raisonner par analogie à partir des principes qu'il expose; le juge peut favoriser une approche évolutive et dynamique plutôt qu'une approche statique (Côté, *supra* note 76 at 30).

> The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, *free of latent defects which render it unfit for the use for which it was intended* or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.[91]

This article barely differs from article 1522 C.C.L.C., which reads:

> The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

In these provisions, evidence of the property's lack of fitness for purpose goes to the proof of latent defects.[92] The doctrine and case law have *not* interpreted article 1522 C.C.L.C. as creating distinct warranties for the buyer of property, one for latent defects and the other for fitness for purpose.[93] Furthermore, any reference to the common law in trying to understand this provision would be unjustified, given that article 1522 has its roots in French law: it almost textually reproduces article 1641 of the French *Code civil*.[94]

Section 38 of the *Consumer Protection Act* inspired article 1729 C.C.Q., set out below, which provides the buyer with a guarantee of durability:

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[91] [Emphasis added].

[92] P.-G. Jobin, in *La vente dans le Code civil du Québec* (Cowansville, Que.: Yvon Blais, 1993) at 119 [hereinafter *La vente dans le C.c.Q.*], notes that article 1726 C.C.Q. essentially reproduces articles 1522-23 C.C.L.C. with respect to the content of the warranty made available to the consumer. The major innovation introduced by article 1726 C.C.Q. comes from its second paragraph, which removes the requirement that the purchaser call on an expert to inspect the property for defects. In the *Commentaires* on the new *Code*, *supra* note 14, art. 1726, the Minister states: "[Le second alinéa] consacre, en fait, une règle qui se dégage de la jurisprudence majoritaire en matière mobilière et l'étend au domaine immobilier."

[93] This differs from the situation under the *Consumer Protection Act*, which has separate sections on the requirement of fitness for purpose (s. 37), and of durability of the property (s. 38), and for the warranty for latent defects (s. 53). As we will see below, some controversy exists as to whether sections 37 and 38 C.P.A. provide *independent* warranties, or merely create a presumption of latent defects.

[94] Article 1641 C.N. reads:

> Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage, que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus.

> A defect is presumed to have existed at the time of a sale by a professional seller if the property malfunctions or deteriorates prematurely in comparison with identical items of property or items of the same type; such a presumption is not made, however, where the defect is due to improper use of the property by the buyer.

This provision codifies much of the case law which has interpreted section 38 C.P.A. and article 1522 and following C.C.L.C., and which associated the guarantee of durability with the warranty for latent defects.[95] On this point, Jobin notes that "[à] la fin de l'ère du Code civil du Bas-Canada, la jurisprudence en était venue à reconnaître qu'une durabilité insuffisante constitue essentiellement un problème de vice caché."[96] It would thus be difficult to conclude that article 1729 C.C.Q. provides the purchaser with any protection beyond the warranty for latent defects.

In spite of the above conclusions on the law of sale, however, one could argue that article 1854, paragraph 2 C.C.Q. provides a guarantee conceptually autonomous from the warranty against latent defects. An argument in favour of the independence of these warranties may arise from the Quebec *Consumer Protection Act*, particularly at sections 37, 38 and 54.

C. Consumer Law

One could have doubts about the relevance of a comparison between the *Consumer Protection Act* and the *Civil Code of Québec*. In fact, the statute was enacted in 1978 to provide additional safeguards to the consumer that were not available under the *Civil Code of Lower Canada*. Yet the C.P.A. has had a pervasive influence on the new *Code*, particularly on the general chapter on contracts, and the chapters on the contracts of sale and lease. As the Minister's *Commentaires* show, the drafters drew extensively from the C.P.A. in their work on these parts of the *Code*.[97]

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[95] See *infra* notes 104-107 and accompanying text for cases decided under section 38 C.P.A., where courts have held that the issue of durability is related to the quality of the property (*i.e.* to the existence of defects in that property).

[96] *La vente dans le C.c.Q.*, *supra* note 92 at 129.

[97] Note for example the definition of a consumer contract at article 1384 C.C.Q., and the provisions which protect consumers against illegible or incomprehensible clauses (art. 1436 C.C.Q.) and against abusive clauses (art. 1437 C.C.Q.). In the law of sale, article 1729 C.C.Q. on the durability of the property was seen above. Note also articles 1745-49 C.C.Q. on instalment sales, a section directly inspired by the C.P.A. Although the drafters have not indicated the C.P.A. as a source for any specific article in the chapter on lease, the broad language used, especially at arti-

An analysis of the *Consumer Protection Act*'s Division on "Warranties", and especially of sections 37, 38 and 54, might thus provide useful suggestions for the interpretation of the *Civil Code of Québec*'s provisions on the quality of property. Furthermore, because the C.P.A. explicitly applies to *both* sale *and* lease,[98] any conclusion on the guarantees available under the statute could validly be carried over to our interpretation of the contract of lease.

In the C.P.A., "goods" is limited to "movable property", as is the case with the *Sale of Goods Act* in the common law provinces.[99] Sections 37 and 38 C.P.A. provide specific measures of protection for consumers with respect to the quality of goods:

> 37. Goods forming the object of a contract must be *fit for the purposes* for which goods of that kind are ordinarily used.
>
> 38. Goods forming the object of a contract must be *durable in normal use for a reasonable* length *of time*, having regard to their price, the terms of the contract and the conditions of their use.[100]

The two sections cited above should be compared with section 53, paragraph 1 C.P.A.:

> A consumer who has entered into a contract with a merchant is entitled to exercice [*sic*] directly against the merchant or the manufacturer a recourse based on a *latent defect in the goods* forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.[101]

The *Consumer Protection Act* therefore contains two *distinct* sets of provisions, one which creates a warranty for the fitness for purpose of the goods (section 37) and for their durability (section 38), and another which provides a recourse for the existence of latent defects in the property (section 53). If it could be shown that sections 37 and 38 C.P.A. have a content autonomous from that of the warranty for latent defects, then it may be possible

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cles 1854, 1861 and 1863, and 1910-21 (on the condition of leased dwellings), clearly demonstrates the C.P.A.'s influence on the *Code*'s regulation of lease.

[98] Section 34 C.P.A., the introductory section of the statute's "Division on Warranties", reads:

> This division applies to contracts of sale or of lease of goods or services and to mixed contracts of sale and lease.

[99] Para. 1(d) C.P.A.

[100] [Emphasis added].

[101] [Emphasis added].

to argue by analogy that the concept of fitness for purpose at article 1854, paragraph 2 C.C.Q. has a scope different from that of the warranty for latent defects.

1) Analysis of the *Consumer Protection Act*

First, a text-based analysis of the relevant provisions of the *Consumer Protection Act* seems to support an independent guarantee of fitness for purpose. Section 53 provides consumers with a recourse when goods have a latent defect, while section 54 confers upon them a right of action for violations of the warranties of fitness for purpose and durability at sections 37 and 38 C.P.A. The first paragraph of section 54 C.P.A. reads as follows:

> A consumer having entered into a contract with a merchant may take action directly against the merchant or the manufacturer to assert a claim based on an obligation resulting from section 37, 38 or 39.

A comparison of sections 53 and 54 C.P.A. evokes the following question: Why would the Legislator have enacted two *different* provisions regarding the consumer's recourses if the guarantees of fitness for purpose and durability are merely subsets of the warranty for latent defects? Since the law never speaks unnecessarily,[102] the statutory language used points to the Legislator's intention to create distinct remedies in sections 37 and 38, and 53 C.P.A.

Most cases dealing with sections 37, 38 and 53 of the *Consumer Protection Act*, however, draw no distinction between these remedies but rather lump them together within the warranty for latent defects.[103] Some judgments explicitly comment on the close relationship between these concepts. For example, in *Desbiens* v. *Desmeules Automobiles Inc.*[104] where an action for damages was undertaken by the purchaser of a used car with a number of defects (worn-out

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[102] Commenting on the "literal" method of statutory interpretation, Côté writes:

> En lisant un texte de loi, on doit en outre présumer que chaque terme, chaque phrase, chaque alinéa, chaque paragraphe ont été rédigés délibérément en vue de produire quelque effet. Le législateur est économe de ses paroles: il ne "parle pas pour ne rien dire" (Côté, *supra* note 76 at 259).

[103] Most of the relevant case law dealt with defects in *movable* property: *Busque* v. *Meuble Jacques Veilleux ltée*, [1984] C.P. 269 (television set); *Cusson* v. *À l'enseigne de la bonne voiture Inc.* (22 September 1986), Montreal 500-32-001740-861, J.E. 86-1012 (C.P.) (automobile); *Blouin* v. *Meunerie Alain Tremblay Inc.* (16 February 1990), Rimouski (Matane) 125-02-000077-884, J.E. 90-637 (C.Q.) (seeds); *Tremblay* v. *Hydrogain Inc.* (19 August 1993), Montreal 500-02-010559-917, J.E. 93-1547 (C.Q.) (heat pump).

[104] (7 June 1990), Baie-Comeau 655-02-000207-875, J.E. 90-1228 (C.Q.).

brakes, defective heating device, *etc.*), the Court examined the warranties of quality and durability separately, but found them to be merely different applications of the latent defects argument. In *Tinmouth* v. *General Motors of Canada Ltd.*,[105] which dealt with a fire under the hood of a car, the Court stated:

> En vertu de l'article 38 de la *Loi sur la protection du consommateur*, un bien doit pouvoir servir "à un usage normal pendant une durée raisonnable." *Cette garantie est assimilable à la garantie pour vices cachés.* L'article 38 est souvent jumelé à l'article 53 pour créer une présomption d'existence du vice au moment de l'achat du bien et ainsi, lier le manufacturier et le vendeur. ...
>
> *Il suffira donc au consommateur de prouver que le bien acheté n'a pas une durabilité raisonnable compte tenu de son prix et des conditions normales d'utilisation pour que l'on présume qu'il s'agit d'un vice caché.* Cette preuve permettra également de présumer la connaissance du vice par le manufacturier et le vendeur.[106]

The courts have therefore generally taken the view that sections 37 and 38 C.P.A. simply create presumptions for the application of the warranty for latent defects at section 53 C.P.A.

Nonetheless, some influential doctrinal writing and case law has argued for consideration of the warranties of fitness for purpose and durability as separate from the warranty for latent defects.[107] For example, Rousseau-Houle initially took the position that "[l]a garantie de conformité d'un produit par rapport à sa destination normale couvre indéniablement un aspect de la garantie légale

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[105] [1988] R.J.Q. 1982 (C.P.).

[106] *Ibid.* at 1985-86 [emphasis added]. Perret clearly explains the reasoning behind the courts' decision to treat sections 37 and 38 C.P.A. as applications of the warranty for latent defects:

> La jurisprudence reconnaît en effet clairement que le défaut qui affecte prématurément la longevité du produit, fait présumer l'existence d'un défaut existant lors de la fabrication. Cette présomption est établie dès lors que l'acheteur a prouvé qu'il a utilisé ce bien d'nne façon normale et qu'eu égard au prix payé, une telle chose ou une telle usure n'aurait pas dû se produire en si peu de temps, si le produit avait été bien fabriqué (L. Perret, "Les garanties légales relatives à la qualité d'un produit selon la nouvelle Loi de [*sic*] la protection du consommateur" (1979) 10 R.G.D. 343 at 352).

[107] In an early article on the *Consumer Protection Act*, Poupart thought that future doctrine and case law would probably interpret sections 37 and 38 C.P.A. as merely creating legal presumptions for the availability of an action for latent defects. He also suggested that these articles could be seen as providing additional guarantees for the quality and durability of the goods, but that one could not predict with certainty the direction the courts would take on the issue (Poupart, *supra* note 6 at 261-62).

relative aux vices cachés et se rattache tant à l'article 53 qu'à l'article 54 de la loi."[108] However, in a more recent case comment on *Banque Canadienne Nationale* v. *Forget*,[109] the author reversed her position completely. Commenting on the scope of sections 37, 38 and 54 C.P.A., she wrote:

> Le législateur n'a-t-il pas voulu créer une garantie de bon fonctionnement indépendante de la garantie contre les vices cachés ? *Cette garantie viserait à assurer la qualité marchande d'un bien de consommation et à promouvoir la durée de cette qualité pendant un certain temps.* Reliée à la garantie de conformité, la garantie de durabilité devrait pouvoir être invoquée pour tout défaut affectant l'usage normal et raisonnable du bien indépendamment du caractère caché du vice ou de la preuve qu'il existait antérieurement au contrat.[110]

Rousseau-Houle's change of opinion may have been caused by the Superior Court's decision in *Létourneau* v. *Laflèche Auto ltée.* In that case, a former mechanic had purchased a used truck with a number of patent defects. The Court refused to apply the reasoning reflected in the majority of the case law to the effect that sections 37, 38 and 53 C.P.A. are essentially related to the warranty for latent defects.[111] Tourigny J. wrote:

> [L]a lecture du chapitre intitulé "Garanties de la loi, protection du consommateur" indique que deux recours différents sont prévus. ...
>
> L'intention du législateur paraît donc claire. *Si les recours peuvent être cumulés, ils n'en sont pas moins divisibles et peuvent être exercés indépendamment l'un de l'autre. Il s'agit de deux recours différents qui, s'ils se ressemblent, sont quand même distincts.*[112]

The Court found that sections 37, 38 and 53 C.P.A. provide two distinct sets of warranties, and if the consumer could not rely on the general protection against latent defects, he could invoke the gnarantee of fltness for purpose or the guarantee of durability:

> Les vices n'étaient pas "cachés" au sens de l'article 53, mais les circonstances particulières qui prévalaient ont fait que Létourneau ne les a pas

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[108] 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 347.

[109] (4 December 1986), Iberville 755-05-000125-847, J.E. 86-111 (C.S.) [hereinafter *Forget*].

[110] T. Rousseau-Houle, "Garanties légales contre les vices cachés: *Banque Canadienne Nationale* v. *Forget*; *Rochefort* v. *Automobiles A. Lavoie ltée.*" (1986) 46 R. du B. 676 at 678-79 [emphasis added].

[111] Laflèche, *supra* note 17 at 1959.

[112] *Ibid.* [emphasis added].

> constatés au moment de l'achat alors qu'ils existaient. Ces vices rendaient le camion tout à fait inutilisable, même pour une journée, à l'usage auquel il était destiné. Que l'étiquette attachée au contrat stipule qu'il n'y ait aucune garantie ne change rien à l'application des articles 37 et 38.[113]

A few other decisions have taken the same approach as did *Laflèche* in recognizing the differences between sections 37, 38 and 53 C.P.A. In *Champagne* v. *Hyundai Auto Canada inc.*,[114] which again dealt with the sale of a used automobile, the Court based its decision on the premature corrosion of the car's exterior paint, which triggered the guarantee of durability at section 38 C.P.A. Citing the *Laflèche* case and Rousseau-Houle's case comment on *Forget*, Lavergne J. found that "les articles 37 et 38 de la *Loi sur la protection du consommateur* créent un régime de garantie distinct de la garantie légale contre les défauts cachés et ne doivent pas être simplement ramenés à des moyens de preuve."[115]

In *Forest* v. *Labrecque*,[116] the plaintiff purchased a used car without any warranty. The Court of Quebec found that sections 159 and 160 C.P.A. pertaining to used vehicles were inapplicable because of the age of the car, and rejected the plaintiff's article 1522 C.C.L.C. argnment based on the presence of latent defects. Michaud J. nonetheless decided that the consumer was entitled to rely on sections 37 and 38 C.P.A. "quant à l'usage normal du bien vendu pendant une durée raisonnable."[117]

Some case law has therefore liberally interpreted the *Consumer Protection Act*, and has found that sections 37, 38 and 54 provide the consumer and the lessee with guarantees independent of the existence of defects. In these cases, the courts have based their reasoning primarily on the grammatical interpretation of the statute.[118] The warranties at sections 37 and 38 C.P.A. would thus provide consumers with a general measure of protection which goes beyond the warranty for latent defects, in that it would not require the existence

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[113] *Ibid.* at 1960.

[114] [1988] R.J.Q. 2317 (C.P.).

[115] *Ibid.* at 2319.

[116] (1 June 1990), Quebec 200-02-009928-880, J.E. 90-1115 (C.Q.).

[117] *Ibid.* at 8 (integral text of judgment).

[118] There have also been several unreported cases which have suggested that sections 37 and 38 C.P.A. create guarantees independent of the warranty for latent defects: *Pronovost* v. *Denis Boucher automobile ltée* (11 September 1985), Trois-Rivières 400-02-000998-847 (C.P.); *Gaudreault* v. *Foyers Econo ltée* (8 May 1991), Quebec 200-02-008235-881 (C.Q.); *Lavoie* v. *Chicoutimi Chrysler Plymouth (1990) ltée* (14 January 1992), Chicoutimi 150-32-000611-919 (C.Q.).

of a particular defect, but rather a serious reduction of the consumer's enjoyment of the property.

2. Relations between the *Consumer Protection Act* and the *Civil Code of Québec*

Much of the commentary on the connection between sections 37 and 38 C.P.A. and the warranty for latent defects has emerged as a result of the influence of the *Consumer Protection Act* on the reform of the *Civil Code*.[119] For example, the drafters sought to integrate the warranty of durability at section 38 C.P.A. into the *Draft Bill on Obligations* at article 1776. That article read:

> A professional seller is bound to warrant the buyer against malfunction of the property sold, resulting from a defect existing before or after the sale and occurring prematurely in comparison with identical items of property or items of the same type, unless the malfunction occurs by reason of improper use of the property by the buyer.

Deslauriers found ambiguities in the terminology used by the drafters.[120] In an article on the law of sale in the *Draft Bill on Obligations*, he questioned the rationale for replacing the warranty for latent defects with a "warranty of quality". In fact, the concept of fitness for purpose used at article 1774 D.B.O. may differ somewhat from the content of the warranty of quality.[121] Deslauriers would therefore have preferred the continued use of existing terminology in the *Civil Code of Québec*'s chapter on sale. After all, the words used by the *Civil Code of Lower Canada* in article 1522 and following are universally accepted (and understood) in all civilian jurisdictions.[122]

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[119] This influence prompted authors to discuss the conceptual relationship between the statutory regime and the *Code*. In fact, most of the relevant doctrinal writings in this section discuss the differences between the *Consumer Protection Act* and prior versions of the new *Code*'s provisions on the law of sale (such as those included in the *Draft Bill on Obligations* and *Bill 125*), which were subsequently modified by the drafters. These articles are nonetheless helpful in understanding how sections 37 and 38 C.P.A. are conceptually related to the warranty for latent defects.

[120] J. Deslauriers, "Commentaires sur les propositions concernant la vente" (1988) 29 C. de D. 931.

[121] Deslauriers writes:

> Quant à la garantie de qualité ... , l'expression est vague. Une chose peut être de mauvaise qualité mais satisfaire aux besoins de l'acheteur tel qu'il les a exprimés. Une chose peut ne pas avoir la qualité souhaitée par l'acheteur sans pour autant être affectée de vices cachés (*ibid.* at 938).

[122] *Ibid.* at 934.

Masse advanced two criticisms of the idea of a "vice postérieur à la vente."[123] First, the language used in article 1776 D.B.O. is confusing because a latent defect, by definition, *appears* after the sale, but really *comes into existence* at the design or manufacturing stages. In that sense, if the defect did not exist at the date of the sale, how could one possibly consider it to be "latent"?[124] Second, Masse criticized the parallel drawn by the drafters between article 1776 D.B.O. and the warranties of normal use and durability contained at sections 37 and 38 C.P.A. In his view, these two provisions are related to the concept of latent defect and do not constitute an independent warranty:

> [Le concept de] vice ... postérieur à la vente ... n'a rien à voir, contrairement à ce que les auteurs de l'Avant-projet croient, avec les articles 37 et 38 de la *Loi sur la protection du consommateur*. Tout ce que font ces dispositions c'est établir une présomption que le vice était antérieur à la vente lorsque le bien ne présente pas une durabilité raisonnable. Ces règles restent attachées au concept traditionnel de vice caché.[125]

Writing on the law of sale in *Bill 125*, Goldstein acknowledged the ambiguity in the text of article 1721,[126] a slightly modified version of article 1776 D.B.O., and proposed two possible interpretations.[127] Article 1721 may be said to include the gnarantee of durability at section 38 C.P.A., which would make the proof of a latent defect unnecessary, or it may simply replicate the warranty for latent defects of the *Civil Code of Lower Canada*, which requires that the property be shown to be defective.[128] Goldstein found the first interpretation more logical since it would provide some measure of protection for the lack of durability of the product which goes beyond the warranty for latent defects. However, if article 1721 were given such an expansive interpretation, it would, in Goldstein's view, make the warranty for latent defects at article 1719 almost useless in practice given the availability of the broader remedy.[129] He therefore suggested that the drafters change the language

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[123] C. Masse, "L'Avant-projet de loi sous l'angle de la responsabilité des fabricants et des vendeurs spécialisés" (1989) 30 C. de D. 627.

[124] *Ibid.* at 639.

[125] *Ibid.* at 639-40.

[126] Article 1721 of Bill 125, *supra* note 88, read:

> Le vendeur professionnel est tenu de garantir l'acheteur contre le fonctionnement défectueux du bien vendu, qui résulte d'un vice existant lors de la vente ou survenu prématurément par rapport à des biens identiques ou de même espèce; il n'y est pas tenu si le défaut est dû à une mauvaise utilisation du bien par l'acheteur.

[127] G. Goldstein, "La vente dans le nouveau Code civil du Québec: quelques observations critiques sur le projet de loi 125" (1991) 51 R. du B. 329.

[128] *Ibid.* at 357-58.

[129] *Ibid.* at 358.

of article 1721 of *Bill 125* so as to limit its scope to *latent* defects and make it more consistent with article 1719, which provides the basic warranty for latent defects in sale.[130]

A survey of the literature shows that most authors believe the guarantees of durability and fitness for purpose provided at sections 37 and 38 of the *Consumer Protection Act* overlap with the warranty for latent defects. Masse in particular makes the point that violations of these sections only provide *evidence* of latent defects, and do not involve any broader guarantees of quality of the property leased. In this light, could it still be argued that sections 37 and 38 C.P.A. provide guarantees independent of the warranty for latent defects?

The doctrinal debate has focused on the *Consumer Protection Act* and the new *Code*'s provisions on the law of sale. In both these contexts, a central provision makes the warranty for latent defects the main protection available to the buyer (by virtue of section 53 C.P.A. and article 1726 C.C.Q.). One can therefore understand most authors' reluctance to recognize warranties which would exist *independently* of the above sections. In the new *Code*'s chapter on lease, there is no separate article on "durability", and even the warranty for latent defects has been eliminated. In fact, the guarantee of fitness for purpose must *alone* fill the void left by the drafters. For those reasons, we believe that the majority view on the guarantee of fitness in the law of *sale* cannot readily be transposed to the contract of *lease*. Instead, the "fitness for purpose" guarantee at article 1854, paragraph 2 C.C.Q. should be understood in the context of lease, where the lessor's principal obligation consists of providing the lessee with the "peaceable enjoyment of the property." It differs on this point from the contract of sale, where the seller's main obligation is to transfer a right of property to the buyer. In that sense, an argument for a guarantee of fitness which goes beyond latent defects and seeks to provide property fit for its use[131] seems more coherent with the general thrust of the law of lease, and should be given careful consideration by the courts.

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[130] *Ibid.*

[131] Since the buyer of a used truck can obtain the resolution of the contract of sale because the truck could not be used for its proposed purpose (see *Laflèche*, *supra* note 17), the lessee of a residential dwelling or of movable property should benefit from some protection in those cases where the defect complained of is serious enough to hamper *his* use of the property (for example, peeling paint (home), premature corrosion (car), *etc.*), but not enough to make it unusable for *any* purpose. This interpretation of article 1854, paragraph 2 C.C.Q. would change the issue of the quality of the leased property from an *objective* standard (*i.e.* does the property have a defect which makes it unusable?) to a *subjective* standard (*i.e.* can the property be used for the lessee's particular purpose?).

Conclusion

The *Civil Code of Québec* purports to replace the warranty for latent defects in the contract of lease with a guarantee of "fitness for purpose". In the *Commentaires* on article 1854 C.C.Q., the Minister of Justice suggests that this constitutes an important change and creates a warranty better adapted to the context of lease than was the warranty for latent defects imported from the law of sale. This paper has examined the *content* of the guarantee of fitness for purpose and tried to identify sources of law, both external and internal to the law of Quebec, which help to inform the proper interpretation of this expression.

Most existing authority in Quebec law denies the existence of an independent guarantee of fitness for purpose in lease. First, the codal provisions on the contract of lease have their origins in French law, which is still based on the warranty for latent defects (article 1721 C.N. and paragraph 6b) of the *Loi Mermaz*). Second, in the law of sale under the *Civil Code of Lower Canada*, the property's fitness for its normal use was closely related to the guarantee for latent defects (article 1522 C.C.L.C.). In the relevant provisions of the new *Code* (and their prior versions in the *Draft Bill on Obligations* and *Bill 125*), and also in the *Consumer Protection Act*, the guarantees of fitness and durability have usually been interpreted as merely creating presumptions of the existence of latent defects in the property. Some cases and articles take the view that the C.P.A. provides separate guarantees of fitness and durability which go beyond latent defects, but this position has been rejected in most of the scholarship on the issue. For those reasons, one can make an argument that, in spite of the Minister's indications to the contrary, there has been no change in the actual content of the guarantee available to lessees with respect to the quality of the property leased.

However, we believe that article 1854, paragraph 2 C.C.Q. should be interpreted broadly to achieve the drafters' objective of improving the lessee's position in the context of the contract of lease. First, there has been scant commentary on the guarantee of fitness for purpose *per se* in the specific context of lease. Most doctrine and case law have examined this concept either in the contract of sale or in the *Consumer Protection Act*, where the remedies provided to the buyer are envisaged in terms of the warranty for latent defects. These authorities are of little use in interpreting article 1854 C.C.Q., given that the drafters have sought to create a new regime for the obligations of the lessor by removing the warranty for latent defects, as well as most of the conditions

for the availability of a recourse to an aggrieved lessee. Also, by phrasing the lessor's obligations to the lessee in positive rather than negative terms, the drafters have clearly indicated that the lessor must take active steps to provide the lessee with property which is reasonably fit for its intended use.

Furthermore, the *Sale of Goods Act* in the common law provinces provides a similar guarantee of "fitness for purpose" to buyers of goods, without any explicit reference to the existence of latent defects. A useful analogy can thus be made between the civil law and the common law with respect to the content of the guarantee of fitness. In the common law, if the buyer (lessee) has informed the seller (lessor) of the proposed use of the property and has thus created some form of reliance between the parties, the seller (lessor) is held to the obligation of providing his co-contractant with property which is fit for use. The seller (lessor) also assumes liability for any of its shortcomings, whether or not they were known to him at the time of the contract. We believe the developments under the *Sale of Goods Act* should be considered in interpreting the notion of fitness for purpose in the civil law contract of lease. In our view, the law of Quebec has reached a sufficient level of sophistication and maturity to open itself up to the diffusion of juridical models, rather than to reject outside influences, when its own sources provide inadequate answers to legal problems, such as is the case for the interpretation of article 1854, paragraph 2 C.C.Q. If our analogy is limited to the *content* of the warranty of fitness for purpose, we do not see how the civil law system, its spirit or its method of interpretation could be threatened.

Finally, we believe a liberal interpretation should be given to article 1854 C.C.Q. to accomplish one of the major policy objectives of the new *Civil Code*, an improved protection of the weaker party, the lessee in the present case, in a spirit of contractual justice. The guarantee of fitness in the contract of lease should no longer be limited to the concept of latent defects in a modern, consumer-oriented society.