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Angers Larouche

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Résumé de l'article

L'auteur étudie l'effet du droit statutaire en matières civiles sur le Code civil. Il s'attarde plus spécifiquement aux effets dérogatoires, complémentaires ou extensifs des dispositions du Code civil qui ont été produits par la *Loi de protection du consommateur*, la *Charte de droits et libertés*, la *Loi des accidents du travail*, la *Loi des accidents automobiles* et autres lois statutaires.

LEGISLATION DEROGATING FROM THE QUEBEC CIVIL CODE

by Angers LAROUCHE*

ABSTRACT

The author studies how, by the introduction of Statute Law in Civil matters, the Civil Code is been modify. He focuses mainly on the Consumer Protection Act, *the* Charter of Rights and Freedoms, *the* Workmen's Compensation Act, *the* Automobile Insurance Act, *and other Statutes that either derogate, complete or enlarge the scope of the provisions of the Civil Code.*

RÉSUMÉ

L'auteur étudie l'effet du droit statutaire en matières civiles sur le Code civil. Il s'attarde plus spécifiquement aux effets dérogatoires, complémentaires ou extensifs des dispositions du Code civil qui ont été produits par la Loi de protection du consommateur, *la* Charte de droits et libertés, *la* Loi des accidents du travail, *la* Loi des accidents automobiles *et autres lois statutaires.*

Since 1866, the date that the *Civil Code of Lower Canada* came into effect, the legislature of Québec has enacted various legislation making exception to and supplementing the principles of the Code. Legislation which thus derogates from the Civil Code has been necessary in certain spheres of activity, in which it appeared to the Legislature that the provisions of the Code could no longer meet society's needs.

In contractual matters, the Legislature enacted the *Consumer Protection Act* in 1971,[1] and replaced it with a more detailed Act in 1978.[2] By 1950, the legislature had enacted an Act to promote conciliation between landlords

* Professeur titulaire, Faculté de droit, Section de droit civil, Université d'Ottawa.

1 *Consumer Protection Act,* S.Q. 1971, c. 74.

2 *Consumer Protection Act,* S.Q. 1978, c. 9.

and tenants.[3] This Act was intended to ensure some protection for tenants against rent increases and to encourage renewals of leases. After it had been revised, and particulary expanded, this legislation found its place in the *Civil Code,* in the chapter of the lease of things, in 1980.[4] However, it is interesting to note that a statute, the *Act respecting the Rental Board,*[5] which gives to a board exclusive jurisdiction over matters that had until then been within the jurisdiction of the Provincial Court, provides for penal sanctions for breach of the provisions of the *Civil Code* in matters of residential leases. We shall not consider rentals further here, since the derogatory Act is now part of the *Civil Code,* except in the question of penal sanctions which were mentioned above.

In the area of responsibility, and by derogation from the general principles, the legislature adopted workmen's compensation legislation in 1909,[6] which legislation has developed substantially over the years, the most recent significant amendments having occurred in 1978:[7] this important legislation is known as the *Workmen's Compensation Act.*[8] Again in the area of responsibility, we cannot overlook the *Automobile Insurance Act,* enacted in 1977,[9] which was preceded by an important derogatory Act in 1961, the *Highway Victims Indemnity Act.*[10]

Finally, we cannot omit reference to the *Charter of Human Rights and Freedoms,* a Québec Act dating from 1975,[11] and which, by the generality of its provisions, covers both contractual and extra-contractual responsibility.

Thus we propose to present the essence of each of these pieces of legislation in light of the principles of the *Civil Code* from which they derogate or which they expanded or clarified. In order to do this, we shall divide this paper into two parts: the contractual field and the field of extra-contractual civil responsibility.

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[3] *An Act to promote conciliation between lessees and property owners'*, S.Q. 1950-51, c. 20.

[4] Art. 1650 to 1665.6 C.C. and particularly, 1658 to 1661.5 C.C.

[5] S.Q. 1979 c. 48.

[6] *An Act respecting the responsibility for accidents suffered by workmen in the cause of their work, and the compensation for injuries resulting therefrom,* S.Q. 1909, c. 66.

[7] *An Act to amend the workmen's Compensation Act,* S.Q. 1978, c. 57.

[8] *Workmen's Compensation Act,* R.S.Q. 1977, c. A-3.

[9] *Automobile Insurance Act,* S.Q. 1977, c. 68.

[10] 9-10 Eliz II, S.Q. 1960-61, c. 65.

[11] S.Q. 1975, c. 6, amended by S.Q. 1982, c. 61.

I. THE CONTRACTUAL FIELD

Article 13 of the *Civil Code* provides that "no one can by private agreement, validly contravene the laws of public order and good morals." The Code also provides that the consideration and object of a contract may not be contrary to public order and good morals. Pursuant to these provisions, our courts had declared that racial discrimination was unlawful in matters of residential rentals. However, not wishing to leave anything to chance, the Quebec legislature enacted a statute to prohibit all discrimination in any form whatsoever on the basis of race, colour, sex, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition or handicap. This prohibition applies to all juridical acts, including matters of employment and access to public transportation or a public place and to the goods and services available there. Any distinction, exclusion or preference on the basis of abilities or capacities required in good faith for employment, however, are not deemed to be discriminatory. The *Charter of Rights and Freedoms* is thus a significant addition to the *Civil Code,* and clarifies the concept of public order in contractual matters.

In addition, the *Consumer Protection Act* very specifically regulates all contracts for goods and services entered into between a consumer and a merchant.

Section 8 of the Act provides that the consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable. This rule is an exception to the *Civil Code,* which provides that persons of the age of majority are not entitled to relief from their contracts for cause of lesion only (Art. 1012 C.C.).

Penalty clauses, allowed in principle by the *Civil Code,* are not permitted under the *Consumer Protection Act:* In the event of non-performance by the consumer of his obligation, no costs may be required of him other than the interest accrued; any clause which stipulates costs other than interest is void (sec. 13).

In the case of doubt or ambiguity, the contract must always be interpreted in favour of the consumer (sec. 17); this provision is derogatory to all rules of interpretation providing that the common intention of the parties must be sought, and that as a last resort the doubt is to be interpreted in favour of the person who contracted the obligation in dispute (Art. 1019 C.C).

The *Consumer Protection Act* also gives great weight to the regulation of the warranty against latent defects (sec. 34 & ss.), given by the merchant to the consumer in contracts for the sale or lease of goods or services. It may

be said that several of these rules relating to the warranty against latent defects are not necessary derogatory to the *Civil Code:* they are, however, at least an explanatory addition to the *Civil Code,* which itself simply states that the seller is bound by the warranty against latent defects, as follows: "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, it he had known them; and the seller is not bound for defects which are apparent and which the buyer might have known of himself (1522 C.C.)."

By virtue of the *Consumer Protection Act,* 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 (sec. 38). This concept of "reasonable length of time" is a new concept attached to the warranty of the thing. The Act also provides that if goods being the object of a contract are of a nature that requires maintenance, replacement parts and repair service must be available for a reasonable length of time after the making of the contract, unless the merchant warns the consumer in writing, before the contract is entered into, that he does not supply replacement parts or repair service (sec. 39).

It was traditionally believed in the legal world that the remedies based on the warranty against latent defects could be exercised by the purchaser only against his own seller. However, based on the opening created by the case law in recent years, the Supreme Court, in *Kravitz* v. *General Motors* in 1979,[12] clearly allowed a direct remedy by the purchaser against the manufacturer, by recognizing the legal, rather than contractual, nature of the obligation to warrant against latent defects provided in the Civil Code, and by rejecting as contrary to public order any warranty issued by the manufacturer when such a warranty would be an obstacle or constitute a restriction on a full direct remedy by the consumer-purchaser against the manufacturer.

It is interesting to note that the *Consumer Protection Act,* which the Supreme Court could not rely on in the *Kravitz* case, has in a way enshrined the "legislation" of the Supreme Court. The *Consumer Protection Act* in fact provides that the consumer may exercise the remedy based on a latent defect directly against the merchant or against the manufacturer (sec. 53, 54). Is it the *Consumer Protection Act* or is it the decision of the Supreme Court that was derogatory to the Civil Code at the time it was handed down?

Given that the Supreme Court reached the same solution as the one provided in the *Consumer Protection Act* through its interpretation of the

[12] [1979] 1 S.C.R. 790.

Civil Code, we may be forced to think that the *Consumer Protection Act* does not derogate from the provisions of the *Civil Code;* it may be a duplication of the *Civil Code* provisions!! Whatever the case may be, the *Consumer Protection Act* goes further than the decision of the Supreme Court, since it gives the subsequent purchaser of goods a remedy against the manufacturer directly. It also gives to the consumer a direct remedy against the manufacturer in the case of a warranty based on the "reasonable length of time" for which the goods are to be durable, which is presented as a different warranty from that against latent defects (sec. 54).

The *Consumer Protection Act* also provides an exception to the principle of the obligatory force of agreements provided in the *Civil Code,* by permitting a consumer who enters into a contract relating to goods or services with an itinerant merchant, (that is, a merchant who, other than at his address, solicits a consumer or makes a contract with a consumer) to cancel unilaterally such a contract, at the discretion of the consumer, within ten days following that on which each of the parties is in possession of a duplicate of the contract (sec. 59). Unilateral cancellation is also possible for contracts for the loan of money and contracts involving credit between a merchant and a consumer. In the case of these contracts, however, the consumer must cancel the contract within two days following that on which each of the parties is in possession of a duplicate of the contract (sec. 73).

In addition to regulating contracts for goods and services between a merchant and a consumer in this general way, the *Consumer Protection Act* also specifically regulates certain types of contracts. Thus, without studying all this specific legislation in detail, it might be noted that contracts for credit, that is, in particular, contracts for the loan of money, contracts extending variable credit (credit cards) and contracts involving credit, between a merchant and a consumer, are subject to very detailed regulation. This is regulation of a matter of public order: the entire *Consumer Protection Act,* moreover, is a matter of public order. The essence of this regulation is to subject the formation of a contract for credit to certain formalities, that is, the requirement that a document in writing be signed, which must necessarily contain certain detailed information and specific clauses in order for the consumer to be aware of the exact cost of credit and the respective rights and obligations of the parties in the event that the consumer fails to fulfil his or her obligations.

In addition, in the event of a default by the consumer, the rights of the merchant are subject to a number of rules and restrictions, contrary to the situation under the *Civil Code.* Thus, for example, except in the event of a merchant claiming overdue payments, that is, in the event that the merchant wishes to require the balance owing under an acceleration clause, or to repos-

sess the goods sold under an instalment sale agreement, the merchant must give 30 days notice to the consumer, during which time the consumer may remedy the default and thus avoid the worst (sec. 105-106, sec. 139-140). In this time, the consumer may even go to court, when the merchant is claiming the balance owing, to have the method of payment modified or to obtain authorisation to return the goods to the merchant and be discharged from the balance of his or her obligation. In the event that the merchant wishes to repossess the goods, he must have the permission of the court if the consumer has paid at least half of his or her obligation at the time of the default. It goes without saying that repossession of the goods extinguishes the consumer's obligation for all that remains owing at the time of the repossession. These rules clearly derogate from the *Civil Code,* since the rights of the merchant in the case of a default by the consumer were not subject to such rules; the principle of contractual freedom had in fact resulted in the courts recognizing the validity of practically all the rights that the merchant granted itself in the contract in the event that the consumer came to be in default.

In addition, the *Consumer Protection Act* specifically regulates contracts for used cars and motocycles (sec. 151 & ss.). The most significant aspect of this regulation is the obligatory warranty that the vehicle will remain in good working order, the warranty varying with the degree to which the automobile sold has been used; however there is no requirement of a warranty for an automobile older than five years or with more than 80 000 kilometres of travel. The Act also specifically regulates contracts for the repairs of automobiles and motorcycles (sec. 167 & ss.), the salient points of this regulation being: (1) the obligation of the merchant to provide a written estimate to the consumer before carrying out any repairs, unless the consumer waives this estimate, in writing, and (2) the obligatory three month or 5 000 kilometres guarantee attached to the repairs. In the same way, the Act regulates contracts for repairs of household appliances such as a kitchen range, a refrigerator, a freezer, a dishwasher, a clothes washer, a clothes dryer or a television set (sec. 182 & ss.).

Finally, it should be noted that the *Consumer Protection Act* also regulates what it calls leases of services involving sequential performance, that is, contracts which object is to obtain instruction, training or assistance for the purpose of developing, maintaining or improving the health, appearance, skills, qualities, knowledge or the intellectual, physical or moral faculties of a person, or the object of which is "personality" courses. This regulation obviously does not cover contracts made by universities, school boards, and so on, that is, public educational institutions. The *Consumer Protection Act* also regulates contracts with physical fitness studios, that is, an establishment

providing goods or services designed to help improve a person's physical fitness through a change of weight, weight control, treatment, diet or exercise. The purpose of this regulation is clearly to protect the consumer against legal abuses, by preventing them and by providing the consumer with precise information about the exact nature of the rights and obligations of each of the parties to the contract (sec. 188 & ss.).

This basic overview of the *Consumer Protection Act* thus shows clearly the great importance that statute law has acquired recently in relation to the *Civil Code* in contractual matters, to the point that we cannot really talk of the common law of contracts without hastening to point out the *Consumer Protection Act* as a very important derogation from or supplement to the *Civil Code* from both the theoretical and the practical points of view.

We shall now briefly consider derogatory legislation in the area of extra-contractual responsibility, which by habit is generally described as responsibility based on offences and quasi-offences.

II. EXTRA-CONTRACTUAL RESPONSIBILITY

The principles of responsibility are general, and there are only a few in the *Civil Code*. For the purposes of this paper, we should simply recall the basic rule:

> Every person capable of discerning right from wrong is responsible for the damage caused by this fault to another, whether by positive act, imprudence, neglect or want of skill (1053 C.C.).

The first piece of legislation that should be mentioned in relation to extra-contractual responsibility, because of its general nature, is undoubtedly the *Charter of Rights and Freedoms*. In addition to prohibiting discrimination, as we have already noted, and to explicitly making of it an offence or quasi-offence as a result, the Charter details or explains the concept of the prudent and diligent person, by providing the right of every human being whose life is in peril to assistance, and the obligation on everyone to come to the aid of anyone whose life is in peril, unless it involves danger to himself or a third person, or he has another valid reason.

The Charter also provides for fundamental freedoms, ranging from freedom of conscience through freedom of expression to freedom of peaceful assembly. It enshrines the right to honour, respect for one's private life, the inviolability of one's home and also, of course, the right to personal physical integrity. Article 1053 could be sufficient to protect all these rights and to provide for the reparation of damage caused by the violation of such rights. However, and this should be emphasized, the Charter provides that in the

case of unlawful and intentional interference with a right or freedom recognized in the Charter, the person guilty of it may be condemned to pay exemplary or punitive damages.

When we know that under the *Civil Code* punitive or exemplary damages have never been granted, because responsibility is only perceived as being for reparation of the damage caused, the possibility of awarding exemplary damages is an important derogation. We have no alternative but to believe that *offences* under Art. 1053 of the *Civil Code* can now give rise to punitive damages, as a result of the *Charter of Rights and Freedoms*.

Another statutory derogation from the common law of responsibility was created by the Québec legislature in 1909, in the *Workmen's Compensation Act,* which instituted a system intended to provide compensation to workers who were victims of accidents in the course of their employment, without having to establish that their employer was responsible, and without having the possibility of using the victim's fault against him. Today, we may say generally that all employers and employees are subject to the Act, except for domestic employees, professional athletes and self-employed workers. The employee is entitled to compensation provided in the Act for the type of injury he or she has suffered for any accident suffered in the course of employment. The right to compensation cannot be refused to a victim nor can it be diminished even if the accident was the employee's own fault, unless the accident was a result of his or her gross negligence or voluntary act; even in the latter case, the indemnity will be paid if the victim dies or suffers serious disability. It must be said that the indemnity ensured by the Act is only incomplete indemnity in relation to that to which the employee would be entitled at common law. In the case of an accident on the job, the victim is thus unable to bring action against the employer or his or her fellow employees, whose fault may have caused the accident. However, the victim may, at his or her option, bring action for the total damage suffered against any other person whose fault may have caused the accident, provided that such person is not an employer whose industry is subject to the Act, unless the fault is a criminal act or a criminal infraction, in which case action may be brought against that employer as against any other third party at fault.

As well, the victim may always bring action against any employer other than his or her own, and against any third party other than an employee of an employer whose industry is subject to the Act, to obtain supplementary compensation, at common law, in order that together with the indemnity to be received under the Act he or she will obtain complete reparation according to the principles of civil law. All things considered, the *Workmen's Compensation Act* is a serious derogation from the common law of responsibility, especially in the case of a negligent employee who is the victim of an accident

in the course of employment, and in the legal relations of the worker, whether negligent or not, with his or her employer and other employees.

There is another very significant derogation from the *Civil Code* in the area of responsibility in the provisions of the *Automobile Insurance Act*.

Victims of bodily injury resulting from an automobile accident are compensated out of a government fund, on the basis of predetermined rules, without consideration of the fault of anyone. Even a victim who is totally responsible for his or her own misfortune will be indemnified as completely as a fully innocent victim. Of course, if a foreign victim or the foreign driver and owner of an automobile registered outside of Québec are involved in an accident, compensation of the victim or the liability of the driver or owner will then be determined according to the common law principles.

In addition, in the case of property damage, apart from the damage to the vehicles themselves, resulting from an automobile accident in Québec, the *Automobile Insurance Act* provides for specific rules to determine liability.

First, any driver of an automobile involved in an accident is presumed to be at fault, to the extent that in a collision between two or more cars, all the drivers are presumed to be equally at fault. A driver may exonerate himself by proving that the accident was caused by the fault of the victim or a third party, or by a fortuitous event other than one resulting from his state of health or the fault of a passenger. An owner is necessarily liable when the driver of the car has been unable to exonerate himself, unless such driver was in possession of his vehicle by theft or was a third person or repair shop who had the vehicle for storage, repair or transportation, and if in such case the accident happens off a public road. In addition, the owner is liable for the accident even if the driver is exonerated when the accident results from the state of or working order of the automobile.

In the specific case in which property damage has been done to a vehicle, the owner who has a liability insurance policy, as is required by the Act, must exercise his claim and, if appropriate, his remedy against his own liability insurer, in accordance with the system instituted under the Act. In this system, the insurer is subrogated to the rights of its insured against the person liable, but insurers have legally decided not to use this remedy against each other, in order to accelerate and facilitate compensation and repair of damage to vehicles.

We should perhaps complete this paper by adding to this discussion of the *Workmen's Compensation Act* and the *Automobile Insurance Act* the note that the legislature has enacted other legislation by which, without derogating

as such from the common law, the common law is expanded in a significant practical way, by adding to it the possibility of claiming statutory compensation, that is, compensation of a social nature.

The best example, of course, is the *Crime Victims Compensation Act,*[13] in which the legislature has ensured certain compensation for those who suffer bodily injury as a result of the commission of a criminal act. The common law liability of the perpetrator of the act is in no way terminated, but the victim is sure to obtain some compensation: he or she is not left to the mercy of the insolvency of the criminal.

We also have in Québec the *Act to promote good citizenship.*[14] Without altering the common law principles of responsibility, this Act ensures that a rescuer will receive certain statutory compensation for the injury he or she may suffer in conducting a rescue; here again, this law may mitigate the effects of the insolvency of the person responsible. However, it even ensures compensation for a rescuer who would not be entitled to any compensation under common law principles from the person who was rescued.

This overview of legislation derogating from the *Civil Code* shows us that statute law is taking on more and more importance, and is making greater inroads on the practical interest of the *Civil Code,* to the point that a study of the *Civil Code* which does not include the relevant statute law would include barely half of the law that applies, in practice, to contractual and extra-contractual matters.

And so our civil law becomes more and more statutory! We could perhaps go so far as to say that the *Civil Code* is often teaching material for the training of the student's mind; the applicable law itself is often found in statute Law.

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[13] S.Q. 1971, c. 18, now 1977 R.S.Q., c. I-6.
[14] S.Q. 1977, c. 7,now 1977 R.S.Q., c. C-20.