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Article abstract

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Note

Alive and Kicking—The Story of Lesion and the Civil Code of Québec*

Kerianne WILSON**

Québec civil law had excluded lesion between majors entirely from the Civil Code of Lower Canada. *The changing social climate of the 1950s and 1960s and the accompanying popularity of the philosophy of contractual justice set the stage for the Civil Code Revision Office and a dramatic reversal of the place of lesion in Québec law. But this expectation came to nothing as lesion between majors was, for all intents and purposes, excluded from the* Civil Code of Québec. *In recent years, however, the judiciary has used other means, namely abusive clauses and economic error, to reach the same end to a large extent. The result is desirable, but the legitimacy of this initiative remains controversial.*

Le droit civil québécois avait entièrement exclu la lésion entre majeurs du Code civil du Bas Canada. *Le changement de climat social des années 50 et 60 ainsi que la philosophie de la justice contractuelle qui en faisait partie ont préparé le terrain pour l'Office de révision du Code civil et un renversement dramatique de la place de la lésion en droit québécois. Toutefois, ces attentes ont été anéanties alors que la lésion a*

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* The author would like to thank Professor Pierre-Gabriel Jobin for his invaluable assistance in writing this essay.

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été, en fait, exclue du Code civil du Québec. *Récemment, les tribunaux ont cependant comblé cette lacune en se servant d'autres moyens, soit les clauses abusives et l'erreur économique, pour arriver aux mêmes fins dans une large mesure. Le résultat final est certes souhaitable, quoique la légitimité de cette initiative demeure controversée.*

The philosophical climate at the time of the *Civil Code of Lower Canada*'s drafting was not conducive to equitable remedies. Once the Commissioners had decided to adhere wholeheartedly to the doctrines of autonomy of the will and freedom of contract, the exclusion of lesion between majors was a *fait accompli*[1]. It should not come as a surprise to anyone, then, that the push to reintroduce lesion between majors into the *Civil Code of*

1. QUÉBEC, COMMISSIONERS FOR THE CODIFICATION OF THE LAWS OF LOWER CANADA RELATING TO CIVIL MATTERS, *Civil Code of Lower Canada*, vol. 1 "First Report of the Commissioners for the Codification of the Laws of Lower Canada relating to Civil Matters, appointed under the Statute 20 Vic. Cap. 43", Québec, Desbarats, 1865, p. 8 and 9.

Québec[2], among many other equitable remedies, stemmed from a change in the philosophical heart in Québec.

As history recounts, unfortunately, allegiance to contractual justice was fleeting : under substantial pressure from the business and professional sector, including the Québec Bar, the Government heavily revised the provision of a general rule on lesion recommended by the Civil Code Revision Office, the final result being disappointingly similar to the provision of the XIX[th] century. In the intervening years, Québec courts have devised creative ways of sanctioning lesionary situations using existing alternate means. Raising questions of judicial activism, the legitimacy of this approach is debatable.

1 Lesion and the Reform of the Civil Code

1.1 Contractual Justice — Changing Loyalties

Contractual justice was born of the new social reality of the 1950s and 1960s : "la concentration des forces économiques, les nouvelles structures de distribution des biens et services, la formation insuffisante des gens ordinaires faisant affaires avec les industriels, commerçants et banquiers, et d'autres facteurs[3]". Out of these social facts emerged an image of the vulnerable individual attempting to contract with powerful professionals or corporations. In response, Professor (later Justice) Albert Mayrand was eloquently vocal in his support of a sanction of lesion between majors :

> "*Les majeurs ne peuvent être restitués contre leurs contrats pour cause de lésion seulement*" [emphasis in original] ; cette règle semblait hier une nécessité juridique. *On en a fait un veau d'or à qui l'on offrait le sacrifice des faibles en expiation des abus des forts* [*emphasis added*][4].

What began as a few dissenting voices became an important movement. First, the fear of judicial intervention, so characteristic of civilian systems, particularly the French system, began to lessen. Second, awareness that freedom of contract, long-touted as the be-all and end-all of contractual

2. *Civil Code of Québec*, S.Q. 1991, c. 64.
3. Pierre-Gabriel Jobin, "La stabilité contractuelle et le *Code civil du Québec* : un rendez-vous tumultueux", in Québec Research Centre of Private and Comparative Law (ed.), *Mélanges presented by McGill colleagues to Paul-André Crépeau*, Cowansville, Éditions Yvon Blais, 1997, p. 417, at page 419.
4. Albert Mayrand, "De l'équité dans certains contrats. Nouvelle section du Code civil", in Germain Brière *et al.*, *Lois nouvelles*, Montréal, Presses de l'Université de Montréal, 1965, p. 51, at page 71.

fairness, could actually perpetuate injustice blossomed[5]. The mindset shifted clearly from "qui dit *contractuel* dit *juste*[6]" to "[q]ui oserait encore affirmer que tout contrat, parce que voulu par les parties, est nécessairement juste[7] ?".

At the height of this movement, in 1979, Professor Claude Masse dramatically wrote that "[s]i l'on veut entendre par contrat, un accord qui résulte d'une libre négociation entre deux parties informées à la fois sur la portée économique de leur transaction mais aussi sur les relations juridiques qui leur servent de support, on doit admettre que *l'institution du contrat est morte* dans notre société lorsqu'il s'agit de consommation[8]."

Given the rapid and favourable evolution of the doctrine's vision of lesion as the reform of the *Civil Code of Lower Canada* gained momentum, the expectation was that the *Civil Code of Québec* would be radically different from the *Civil Code of Lower Canada* in its treatment of lesion[9].

1.2 Revolutionary Reforms — The Proposals of the Civil Code Revision Office

It was in the 1970s that the Civil Code Revision Office (C.C.R.O.) seriously undertook its task of revising and reforming the *Civil Code of Lower Canada*[10]. With all of the social and corresponding legislative changes of the 1960s behind it, the C.C.R.O. felt that the time was ripe to firmly entrench the principle of contractual justice in the new Civil Code. This belief can be clearly seen by the emphasis placed on good faith in what afterwards became articles 6 and 7 C.C.Q[11]. The path would seem to have been clear for a full-scale reform of the treatment of lesion.

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5. Pierre-Gabriel Jobin, "L'équité en droit des contrats", in Pierre-Claude Lafond (ed.), *Mélanges Claude Masse. En quête de justice et d'équité*, Cowansville, Éditions Yvon Blais, 2003, p. 473, at page 487.
6. Alfred Fouillée, *La science sociale contemporaine*, 2nd ed., Paris, Hachette, 1885, p. 410.
7. P.-G. Jobin, *supra*, note 3, at page 419.
8. Claude Masse, "L'information et l'exploitation des consommateurs", (1979) 10 *R.G.D.* 90, 97 [emphasis added].
9. Louise Rolland, "Les figures contemporaines du contrat et le *Code civil du Québec*", (1998-1999) 44 *McGill L.J.* 903, 913.
10. John E.C. Brierley and Roderick A. Macdonald (eds.), *Quebec Civil Law. An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, nº 73, p. 86.
11. Paul-André Crépeau, "Pour un droit commun de la lésion mixte entre majeurs", in Brigitte Lefebvre (ed.) with the collaboration of Sylvie Berthold, *Mélanges Roger Comtois*, Montréal, Éditions Thémis, 2007, p. 229, at pages 239 and 240.

Contrary to expectations, however, the Committee took the position that a reversal of the *Civil Code of Lower Canada*'s exclusion of lesion, embodied in article 1012 C.C.L.C., was necessary[12]. The C.C.R.O. was well aware that to grant a larger role to lesion in the new Civil Code would be revolutionary. However, after extensive consultation with professional organisations in Québec, as well as civilians and comparatists in France, the C.C.R.O. followed the recommendation of the Committee and proposed the sanction of "mixed" lesion, meaning situations in which one party exploits the other, and there is a serious disproportion in prestations[13].

Lesion between majors, as presented above, is a defect vitiating consent in a similar fashion to fraud and fear, all of which run counter to the requirements of good faith. A serious disproportion in prestations alone does not constitute mixed lesion : the serious disproportion must flow from the exploitation of one party's condition by the other[14].

This proposal demonstrated a willingness to radically depart from past practice, both in terms of the conditions and the scope of the application of the regime on lesion[15]. This article had an unlimited scope, rendering the legislative advances that had been made over many decades completely superfluous. More eloquently, this article made it possible "d'espérer que la lésion sortirait des secteurs particuliers dans lesquels elle était cantonnée pour entrer dans le droit commun des contrats[16]".

This increase in the status of lesion was perfectly in character with the rest of the Draft Civil Code, however : the requirement of exploitation made it entirely appropriate that the article should have a general application, as "the requirement of 'exploitation' [was but] a concrete application of the doctrine of good faith[17]". Article 75 of the Draft Civil Code was another application of good faith. It introduced the doctrine of *imprévision*, which allowed the court to "resiliate or revise a contract the execution of which

12. Paul-André Crépeau with the collaboration of Élise M. Charpentier, *The Unidroit Principles and the Civil Code of Québec : Shared Values ?*, Scarborough, Carswell, 1998, p. 89. See *infra* Section 2.2 for further details.
13. Québec, Civil Code Revision Office, *Report on the Québec Civil Code*, vol. 1 "Draft Civil Code", Québec, Québec Official Editor, 1978, art. 37 [hereinafter "Draft Civil Code"]. See Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les obligations*, 6th ed. by P.-G. Jobin with the collaboration of Nathalie Vézina, Cowansville, Québec, Éditions Yvon Blais, 2005, n^{os} 277-281, p. 324-328, for more information on the three kinds of lesion.
14. P.-A. Crépeau and É.M. Charpentier, *supra*, note 12, p. 89.
15. P.-A. Crépeau, *supra*, note 11, at page 241.
16. Pierre-Gabriel Jobin, "L'étonnante destinée de la lésion et de l'imprévision dans la réforme du Code civil au Québec", *R.T.D. civ.* 2004.4.693, 695.
17. P.-A. Crépeau and É.M. Charpentier, *supra*, note 12, p. 91.

would entail excessive damage to one of the parties as a result of unforeseeable circumstances not imputable to him[18]".

On a substantive level, article 37 of the Draft Civil Code was received favourably by many as a reasonable compromise between objective and subjective lesion. The requirement of a disproportion between the prestations satisfied the need for a concrete criterion, while the requirement of exploitation of one contracting party by the other satisfied the need for flexibility. Thus, two problems were avoided: the proposal "ne laisse au juge qu'une discrétion raisonnable [et elle] évite l'automatisme, car elle ne sanctionne pas les contrats dans lesquels il n'y a pas eu de comportement répréhensible, malgré les apparences créées par la disproportion entre les obligations[19]".

The proposal was thus in keeping with the spirit of the new Civil Code and was substantively reasonable. Moreover, there was a general consensus among Québec doctrinal writers that a general sanction of lesion between majors would eliminate several situations of exploitation[20]. As a result, the era was one of pure hope. Professor Pierre-Gabriel Jobin wrote in 1979 that "[l]a lésion devrait donc connaître d'ici quelques années son plein épanouissement[21]."

1.3 From Daring to Disappointing — The First Retreat of the Government

The auspicious beginning to the adoption of lesion between majors was not crushed all at once. The process was a gradual one, and largely runs parallel to the meandering path followed by the C.C.R.O.'s report ("the Report").

The C.C.R.O. completed the Report and submitted it to the Minister of Justice, who deposited it with the National Assembly in 1978[22]. Contrary to expectations, the Government did not adopt the new code full-scale, but instead stated that "[l]e nouveau Code civil [serait] donc adopté par tranche[23]", in order of priority. Family law was in urgent need of immediate

18. Draft Civil Code, *supra*, note 13, art. 75.
19. Pierre-Gabriel JOBIN, "Les prochaines dispositions sur l'exploitation", (1979) 10 *R.G.D.* 132, 137.
20. C. MASSE, *supra*, note 8, 103.
21. P.-G. JOBIN, *supra*, note 19, 139.
22. Jean PINEAU, "Le nouveau Code civil et les intentions du législateur", in Benoît MOORE (ed.), *Mélanges Jean Pineau*, Montréal, Éditions Thémis, 2003, p. 3, at page 7.
23. René DUSSAULT, "Le rôle de l'État dans la mise en œuvre du nouveau Code civil proposé par l'Office de révision du Code civil", in André POUPART (ed.), *Les enjeux de la révision du Code civil*, Colloque sur la révision du Code civil organisé par la Faculté de l'éduca-

reform. Consequently, when the new Civil Code was adopted in 1980, it contained only a single chapter, on family law[24]. It was only in 1987 that the Government proposed a Draft Bill on the Law of Obligations[25].

The intervening years between the completion of the Report and the presentation of the Draft Bill had not passed quietly, with many voicing their fierce opposition to the Report's proposal on lesion[26]. The Government was well aware of this fact, and, in response, suggested article 1449, which deviated significantly from the Report's proposal[27] :

La lésion vicie le consentement lorsqu'elle résulte de l'exploitation de l'une des parties par l'autre et entraîne une disproportion importante entre les prestations des parties ; le fait même qu'il y ait disproportion importante fait présumer l'exploitation.	Lesion vitiates consent when it arises from the exploitation of one of the parties by the other and entails a considerable disproportion between the prestations of the parties ; the mere fact that a considerable disproportion exists creates a presumption of exploitation.
La lésion ne peut être invoquée que par une personne physique et seulement si l'obligation n'est pas contractée pour l'utilité ou l'exploitation d'une entreprise.	Lesion can only be invoked by a natural person and only if the obligation is not contracted for the purposes or the operation of an enterprise.

The first paragraph essentially restated the Report's proposal, but the Government felt that it was necessary to add the second paragraph, which restricted the application of lesion to consumers and other persons not contracting for the purpose of an enterprise (such as in the purchase of a car by a student from another student for personal use)[28]. It is worth noting that consumers were already protected against lesion by article 8 of the *Consumer Protection Act*[29]. The Government's hope was that "une place discrète laissée à la lésion n'inquiéterait pas le monde des affaires,

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tion permanente de l'Université de Montréal, les 3 et 4 mai 1979, Montréal, Presses de l'Université de Montréal, 1979, p. 373, at page 383.

24. *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39.
25. *An Act to add the reformed law of obligations to the Civil Code of Québec*, Draft Bill (introduced by Mr Herbert Marx), 1st sess., 33rd leg. (Qc) [hereinafter "Draft Bill"].
26. Jean PINEAU, Danielle BURMAN and Serge GAUDET, *Théorie des obligations*, 4th ed. by J. PINEAU and S. GAUDET, Montréal, Éditions Thémis, 2001, nº 102, p. 209-211. For example : Richard NADEAU, "La réforme du droit des obligations. Le point de vue du Barreau du Québec", (1989) 30 *C. de D.* 647.
27. Draft Bill, *supra*, note 25, art. 1449.
28. P.A. CRÉPEAU and É.M. CHARPENTIER, *supra*, note 12, p. 93.
29. *Consumer Protection Act*, R.S.Q., c. P-40.1.

puisque dans cette schématique elle ne pourrait pas être invoquée dans les contrats entre entreprises[30]".

The Government was, however, very concerned that article 1449 would still be considered too protectionist. The Draft Bill was designed as a way of "checking the pulse" of the groups, individuals and enterprises affected by lesion[31]. After depositing the Draft Bill, the Minister of Justice put out the call for comments. More than 200 reports were submitted to the Ministry, all of which were studied and analyzed carefully[32]. Moreover, the Draft Bill was the object of a general consultation by a Parliamentary Commission just after its release[33]. In his opening remarks at the general consultation, the Minister of Justice stated that any reform of the law of obligations had to be grounded "sur les principes fondamentaux de l'autonomie de la volonté, de la liberté contractuelle [et] de la force obligatoire du contrat[34]". No mention was made of good faith, which had been elevated to a general principle of law. The Minister may as well have been speaking at the introduction of the *Civil Code of Lower Canada*[35].

As history recounts, the Government's attempt to find a middle ground was a resounding failure. Article 1449 pleased virtually nobody and generated enormous controversy, on both sides of the issue. Québec was fiercely divided on the matter: "d'un côté, les organismes professionnels — tels le Barreau du Québec, la Chambre des Notaires — et le milieu des affaires en général s'insurgèrent contre l'introduction au Code civil du principe de la sanction, même limité dans sa portée: d'un autre côté, certains reprochèrent au gouvernement sa timidité[36]".

Most doctrinal writers fell under the latter category, and were thus of the opinion that the Government had given up too much ground with article 1449. Professor Maurice Tancelin was particularly expressive, making the point that article 1449 was merely "un retour à une solution de l'Ancien droit, écartée en 1866 au nom d'un libéralisme forcené[37]". His main reaction

30. P.-G. Jobin, *supra*, note 16, 696.
31. J. Pineau, *supra*, note 22, at page 9.
32. *Id.*, at page 10.
33. P.-A. Crépeau, *supra*, note 11, at page 249.
34. Québec, National Assembly, *Journal des débats. Commission parlementaire*, Sous-commission des institutions, 2nd sess., 33rd leg., 25 October 1988, fasc. nº 1 "Consultation générale sur l'avant-projet de loi portant réforme au *Code civil du Québec* du droit des obligations (1)", p. SCI-2 (Hon. Gil Rémillard).
35. P.-A. Crépeau, *supra*, note 11, at page 250.
36. J. Pineau, D. Burman and S. Gaudet, *supra*, note 26, nº 104, p. 216.
37. Maurice Tancelin, "La réforme du droit des obligations. La mesure des principaux changements proposés en matière contractuelle", (1988) 29 *C. de D.* 865, 873.

was sadness that the Government had squandered an opportunity to effect real change. He concluded by stating that while some would rejoice at the pre-eminence of contractual liberalism, "[o]n ne peut quant à nous manquer de regretter qu'une aussi grosse réforme aboutisse à un résultat aussi peu en rapport avec les besoins économiques et monétaires de l'ensemble de la population[38]."

Me. Serge Gaudet's reaction was very different from the majority of doctrinal writers. Rather than rejecting article 1449 because of its insufficient protection, he did not support it because "la lésion […] est une technique curative [et il préférerait] une technique préventive[39]". His suggested preventative technique was encouraging the public to be wary of entering into contracts, because of their binding nature and the consequences thereof. This suggestion seems to indicate that Me. Gaudet saw lesion as a "get out of jail free card", rather than a genuine defect of consent.

Professor Michel Coipel's approach to the introduction of article 1449 was similar to that of Me. Gaudet. In his mind, sanctioning lesion was not appropriate in the context of freely negotiated contracts, as these contracts have "toutes les chances de déboucher sur un contrat équilibré ; [le menant à se demander] s'il faut garder en pareil cas, comme le fait l'article 1449 de l'avant-projet, la règle sur la lésion entre majeurs[40]".

Professor Danielle Burman was one of the few writers who felt that article 1449 struck an acceptable balance between protectionism and freedom of contract. In her words, article 1449 could help "mettre un peu plus de justice dans les rapports contractuels, sans trop brimer la liberté[41]". Ultimately, however, even this conciliatory position was rejected by the professional world.

1.4 The Québec Bar, the Chamber of Notaries and the Business World — Voices for Tradition

The Government was perfectly justified in fearing the disapproval of the legal and business communities. In contrast to the doctrinal writers' outcry that the Report's proposal on lesion had been gutted and that article

38. *Id.*, 881.
39. Serge Gaudet, "L'illusion de la lésion : commentaires sur l'introduction en droit québécois de la lésion entre majeurs", (1988-1989) 19 *R.D.U.S.* 15, 30.
40. Michel Coipel, "La liberté contractuelle et la conciliation optimale du juste et de l'utile", in *Enjeux et valeurs d'un Code civil moderne. Les Journées Maximilien-Caron 1990*, Premières Journées Maximilien-Caron tenues à la Faculté de droit de l'Université de Montréal du 14 au 16 mars 1990, Montréal, Éditions Thémis, 1991, p. 79, at page 91.
41. Danielle Burman, "Le déclin de la liberté au nom de l'égalité", (1990) 24 *R.J.T.* 461, 470.

1449 was a betrayal of the contractual justice movement, the Québec Bar, the Chamber of Notaries and the business world felt that article 1449 was still entirely too radical.

Me. Richard Nadeau led the charge for the Québec Bar in a virulent article entitled "Le point de vue du Barreau du Québec". Me. Nadeau wholeheartedly opposed article 1449 as a clear threat to Québec society and to Québec legal culture. On the subject of article 1449 and the other proposed equitable provisions, Me. Nadeau stated that the Québec Bar did not agree with "le principe de la création, en guise de nouveau Code civil, d'une *gigantesque Loi de protection du consommateur* qui risque dorénavant de fausser les relations contractuelles et, possiblement, *de nous placer dans un ghetto commercial*[42]". Me. Nadeau concluded the article with the apocalyptical entreaty that we had to make the Government listen to reason : "la sécurité de notre système de droit en dépend trop[43]".

Me. Guy Gilbert, bâtonnier for the Québec Bar, was also vehement in his opposition to article 1449, stating that it was an institutionalization of "l'infantilisme juridique[44]". He mocked the necessity for such a provision, declaring that "[l]e législateur vient prendre par la main tous ses concitoyens en leur disant : Ne vous inquiétez pas. Si un jour vous vous êtes embarqués, entre guillemets, on verra à ce que ce soit corrigé[45]."

The Chamber of Notaries echoed the sentiments of the Québec Bar, finding that to sanction lesion generally between majors would be to break ties with economic liberalism[46]. The president of the Chamber of Notaries at the time, Me. Jean Lambert, testified at the general consultation that the regime had to be rejected "pour des raisons d'instabilité contractuelle[47]". The banks and the business world were staunch allies of the Québec Bar and the Chamber of Notaries in this battle. Me. Wilbrod Gauthier, Q.C., for

42. R. Nadeau, *supra*, note 26, 653 [emphasis added].
43. *Id.*, 656.
44. Québec, National Assembly, *supra*, note 34, 8 November 1988, fasc. nº 6 "Consultation générale sur l'avant-projet de loi portant réforme au *Code civil du Québec* du droit des obligations (6)", p. SCI-258 (Me Guy Gilbert).
45. *Id.*
46. Québec, Chamber of Notaries, *Mémoire portant sur « L'avant-projet de loi portant réforme au Code civil du Québec du droit des obligations »*, Montréal, October 1988, p. 22.
47. Québec, National Assembly, *supra*, note 34, 8 November 1988, fasc. nº 6 "Consultation générale sur l'avant-projet de loi portant réforme au *Code civil du Québec* du droit des obligations (6)", p. SCI-292 (Me Jean Lambert).

the Canadian Bankers Association, also testified before the general commission that the regime was nothing but "une espèce de droit paternaliste[48]".

The above statements are merely a few drawn from the many that were made before the Parliamentary Commission. This outpouring of outrage obviously eliminated any last chance that the Government's proposal would miraculously be accepted.

1.5 Complete Collapse — The Rout of the Government

The Government's hope for a compromise between the two main factions had come to nothing. The majority of doctrinal writers were convinced that a general sanction of lesion was essential to guarantee contractual justice for every Quebecker. However, "la résistance des ordres professionnels fut forte et déterminée[49]". In the Minister's own words, "[j]e me heurtais manifestement à un mur. Il m'appartenait donc de prendre les dispositions requises pour rétablir les ponts tant avec les avocats qu'avec les notaires[50]." With the entire reform of the law of obligations stalled in consequence, the Government felt obliged to make a choice about lesion without alienating the professional orders.

The choice, however, for which the Government opted was actually no choice at all. The Government chose to appoint a "comité de sages" presided over by Mr. Justice Jean-Louis Baudouin of the Court of Appeal, along with Me. Michel Jolin (Bâtonnier), Professor Raymond Landry (Dean, Civil Law Section, Faculty of Law, University of Ottawa) and Professor Robert Koury (Notary, Professor, Faculty of Law, University of Sherbrooke)[51]. This committee, called the "Comité aviseur" ("the Committee") had the mandate "d'aplanir les difficultés d'harmonisation et de faire les ajustements qui s'imposent pour traduire le plus fidèlement possible la réalité sociale québécoise d'aujourd'hui et de demain[52]".

In his 2005 article about the Committee, Mr. Justice Baudouin clearly distinguishes the Commitee from the C.C.R.O. on the basis that the Committee's report was an "œuvre de praticien, tout en l'appuyant sur

48. *Id.*, 25 October 1988, fasc. nº 1 "Consultation générale sur l'avant-projet de loi portant réforme au *Code civil du Québec* du droit des obligations (1)", p. SCI-18 (Mᵉ Wilbrod Gauthier).
49. P.-A. Crépeau, *supra*, note 11, at page 253.
50. Gil Rémillard, "Le nouveau Code civil : un véritable contrat social", in Serge Lortie, Nicholas Kasirer and Jean-Guy Belley (eds.), *Du Code civil du Québec. Contribution à l'histoire immédiate d'une recodification réussie*, Montréal, Éditions Thémis, 2005, p. 283, at page 299.
51. P.-A. Crépeau, *supra*, note 11, at page 254.
52. G. Rémillard, *supra*, note 50, at page 300.

une base philosophique fondée sur l'équité, la bonne foi et l'honnêteté dans les rapports juridiques[53]". This is quite an interesting statement, considering that Me. Jolin was the only practicing lawyer or notary on the Committee. Nonetheless, the Committee considered the C.C.R.O.'s report to the Minister of Justice very carefully. Mr. Justice Baudouin describes the Report as the "somme critique des interrogations et des irritants que le Comité de réforme du Code civil avait alors identifiés[54]". One of those "irritants" was "faut-il maintenir la lésion comme cause générale d'annulation de contrat[55] ?"

After considering the above query in its "practitioner" optic, the Committee's conclusion was the following :

> 26. Le comité est d'avis qu'il n'est probablement pas opportun d'introduire *en bloc* le principe de la lésion entre majeurs pour les raisons suivantes[56].

The Committee's report was long kept confidential at the request of the members of the Committee, excepting the conclusions reached therein[57]. It was only in 2005 that the full report was released to the public, accompanied by the above article[58].

The four reasons given for the above suggestion were : 1) fear of significant contractual instability ; 2) the provisions on good faith, notably on error, fraud and *imprévision*, give courts sufficient instruments to maintain a high standard of contractual morality ; 3) a gradual, step-by-step introduction of lesion is more appropriate ; and 4) Québec contracting parties should not be perpetually treated as minors.

One may think what one will of these reasons. Professor Paul-André Crépeau, a staunch supporter of a general principle of lesion between majors, has been fiercely critical of the reasons given, refuting each easily and directly in his 2007 article : 1) article 8 of the *Consumer Protection Act* did not result in significant contractual instability ; 2) the general principle of good faith cannot be served by half-measures ; 3) this approach is not consistent with the civilian vision of a Code as establishing general principles ; and 4) mixed lesion does not treat contracting parties like minors.

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53. Jean-Louis Baudouin, "Le Comité aviseur sur la politique législative du nouveau Code civil", in S. Lortie, N. Kasirer and J.-G. Belley (eds.), *supra*, note 50, p. 321, at page 335.
54. *Id.*, at page 324.
55. *Id.*, at page 325.
56. *Id.*, Annexe "Rapport du Comité aviseur sur la politique législative du nouveau *Code civil du Québec*", at page 349.
57. J. Pineau, D. Burman and S. Gaudet, *supra*, note 26, nº 104, p. 216, at footnote 402.
58. J.-L. Baudouin, *supra*, note 53.

It is only objective lesion that automatically invalidates contracts if certain criteria are met[59].

The Committee's reasons and Professor Crépeau's corresponding responses are interesting to examine, and the points that Professor Crépeau raises will be examined further in section 2.1. In the interim, the crucial point is that following the reception of the Committee's report in July 1989, the Government presented Bill 125, the *Civil Code of Québec*, featuring article 1402[60]:

La lésion ne vicie le consentement que dans certains cas expressément prévus par la loi ou à l'égard de certaines personnes, tels les mineurs et les majeurs en tutelle ou en curatelle.	Lesion vitiates consent only in certain cases specifically provided by law or in respect of certain persons such as minors and persons of full age under tutorship or curatorship.

As can be seen upon comparison, this is very close to the final shape that lesion between majors takes in the *Civil Code of Québec*.

Once this decision was made, the remaining steps unfolded smoothly. Article 1402 was amended to the text now found at article 1405 C.C.Q. in order to indicate more clearly the exceptional nature of lesion[61]. There was one rather surprising move: the Minister made a last-minute addition to article 1402 of Bill 125, by inserting a definition of lesion[62]. The definition was that of mixed lesion, and later became article 1406, paragraph 1 C.C.Q. The Minister explained the amendment as an attempt to "circonscrire clairement la notion de lésion de manière à dissiper toute ambiguïté qui pouvait subsister quant aux conditions d'existence de ce vice de consentement[63]". In fact, this addition was nothing but a final conciliatory gesture to the Québec Bar and the Chamber of Notaries.

When examining the long path followed by lesion between the C.C.R.O.'s Report and the final version of the *Civil Code of Québec*, it is important to note that 13 years had elapsed between the two events, and that mindsets had evolved. The contractual justice movement, while

59. P.-A. CRÉPEAU, *supra*, note 11, at pages 257-262.
60. *Civil Code of Québec*, Bill 125 (introduced by Gil Rémillard – 18 December 1990; assented to – 18 December 1991), 1st sess., 34th leg. (Qc), art. 1402.
61. QUÉBEC, NATIONAL ASSEMBLY, *Journal des débats. Commissions parlementaires*, Sous-commission des institutions, 1st sess., 34 leg., 9 October 1991, fasc. nº 13 "Étude détaillée du projet de loi 125 – *Code civil du Québec* (11)", p. SCI-565 (Hon. Gil Rémillard).
62. P.-A. CRÉPEAU, *supra*, note 11, at pages 266 and 267.
63. QUÉBEC, NATIONAL ASSEMBLY, *Journal des débats. Commissions parlementaires*, Sous-commission des institutions, 1st sess., 34 leg., fasc. nº 30 "Étude détaillée du projet de loi 125 – *Code civil du Québec* (27)", 5 December 1991, p. SCI-1212.

extremely strong in the 1960s and 1970s, had lost ground to a resurgence of contractual freedom by the early 1990s[64]. A retreat of overly-protectionist legislation was consequently expected in the domain of obligations, although not necessarily regarding lesion, which was a delicate topic. However, ultimately, it came down to a matter of influence and clout. The parties against a general sanction of lesion between majors proved to be more powerful and more politically dangerous than the parties in favour of a general sanction. The result was that "le repli, ici, s'imposa, voire la reddition[65]". It was a complete and utter rout.

2 Lesion and the *Civil Code of Québec*

2.1 Lesion, Stagnation and the *Civil Code of Québec*

The final product of this long process was article 1405 C.C.Q., which provides that lesion between majors is not sanctioned, except for where it is expressly provided by law. Any early hope that the Legislator had given himself a loophole was in vain, as it has been used sparingly. There are only three exceptions to article 1405 C.C.Q. in the *Civil Code of Québec* that mention lesion explicitly : article 424 C.C.Q. (renunciation of the partition of the family patrimony), article 472 C.C.Q. (acceptance or renunciation of the marriage regime) and article 2332 C.C.Q. (loans of money), all of which existed in substance before the reform of the Civil Code[66].

The *Civil Code of Québec* also contains two exceptions to article 1405 C.C.Q. that do not expressly mention lesion, but address situations of exploitation and consent : article 1609 C.C.Q. (settlements in connection with bodily or moral injury) and article 1793 C.C.Q. (sale of residential immovables)[67]. Nonetheless, even if the two quasi-exceptions are counted as full-fledged exceptions to article 1405 C.C.Q., the *Civil Code of Québec* still contains only five exceptions. This situation is problematic in two respects : 1) Québec is not in line with the treatment of lesion in most other jurisdictions ; and 2) Québec's treatment of lesion generates internal inconsistency in the Civil Code.

64. P.-G. Jobin, *supra*, note 5, at page 504.
65. J. Pineau, *supra*, note 22, at page 16.
66. Didier Luelles and Benoît Moore, *Droit des obligations*, Montréal, Éditions Thémis, 2006, nº 882, p. 416 ; J.-L. Baudouin, P.-G. Jobin and N. Vézina, *supra*, note 13, nº 283, p. 329 and 330.
67. J.-L. Baudouin, P.-G. Jobin and N. Vézina, *supra*, note 13, nº 284, p. 330 and 331. See *supra*, Section 1.1 for more details about these provisions.

First, while the Québec approach is in line with the treatment of lesion in France and Louisiana[68], it falls short of the higher bar set by Switzerland, Germany and Italy, all of which have a general principle of lesion[69]. Of course, Québec is under no obligation to conform to legislative choices made in other civilian countries. However, it is noteworthy that the economic strength of the three above-mentioned countries refutes one of the main arguments for Québec's treatment of lesion : the three countries have strong economies, and yet they still have a general principle of lesion[70]. It is also significant that Québec's treatment of lesion deviates from the position adopted by the wider legal community, as demonstrated by the *Unidroit Principles*[71] as well as the common law doctrine of unconscionability[72]. One could even say that the choice to reject the general principle of lesion has placed Québec in a "ghetto commercial", rather than the contrary, as was argued by the Québec Bar. Québec is presently surrounded by nine provinces and forty-nine American states that all admit unconscionability[73] !

Second, and more significantly, the treatment of lesion in the *Civil Code of Québec* is inconsistent with the elevation of good faith as a general principle of the Civil Code. This was not an empty act, without supporting content. To the contrary, "[l]a bonne foi est le nouveau leitmotiv du code et de nombreuses dispositions y font allusion[74]", namely, articles 6, 7 and 1375 C.C.Q. In *La réforme du Code civil*, Professor Jean Pineau discussed the above articles and the role of good faith in the *Civil Code of Québec*, stating that they meant that "la bonne foi doit régner à tout moment au cœur des relations de droit entre les personnes[75]". How then, can the Legislator impose a duty of good faith in the formation, performance and extinction of contracts on one hand, and, on the other hand, refuse to intervene when a contract is concluded with one contracting party exploiting the other ?

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68. French Civil Code, art. 1118 ; LA. CIV. CODE art. 1965.
69. Swiss Obligations Code, art. 21 ; art. 138 (2) B.G.B. ; Italian Civil Code, art. 1448.
70. Pierre-Gabriel JOBIN, "La modernité du droit commun des contrats dans le *Code civil du Québec* : quelle modernité ?", (2000) 52 *R.I.D.C.* 49, 57.
71. *Unidroit Principles of International Commercial Contracts*, Rome, Unidroit, 2004, art. 3.10.
72. Stephen M. WADDAMS, *The Law of Contracts*, 5th ed., Aurora, Canada Law Book, 2005, nº 401 ff., p. 289 ff.
73. P.-G. JOBIN, *supra*, note 16, 698.
74. Natalie CROTEAU, "Le contrôle des clauses abusives dans le contrat d'adhésion et la notion de bonne foi", (1996) 26 *R.D.U.S.* 401, 405.
75. Jean PINEAU, "Théorie des obligations", in BARREAU DU QUÉBEC and CHAMBRE DES NOTAIRES DU QUÉBEC (eds.), *La réforme du Code civil*, t. 2 "Obligations, contrats nommés", Sainte-Foy, Les Presses de l'Université Laval, 1993, p. 19, at page 29.

A Code, by definition, is treated as a coherent whole. This choice has several important consequences. As we all know, repeated terms are deemed to have the same meaning throughout, for example. More to the point, provisions in one area of the Code are supposed to be read in conjunction with all related provisions in the rest of the Code. How important it is, then, for the Code to be internally coherent ! The Minister of Justice himself emphasized this aspect of the Code in his introduction of Bill 125[76] :

> Le Code est un instrument ordonné, cohérent, qui facilite la connaissance de l'ensemble des règles du droit privé en les regroupant dans un même document. En recherchant la cohérence des textes et, derrière eux, des principes qui y sont exprimés, [le Code] se centre sur la cohérence des institutions.

A general sanction of lesion does not say anything more than what the text of article 1375 C.C.Q. says[77]. As Professor Pineau brilliantly expresses, "ce n'est pas dire autre chose, mais c'est le dire de façon plus précise, en y mettant des balises que le juge n'a pas le droit d'ignorer[78]". Upholding the principle of good faith and excluding the general sanction of lesion are two mutually exclusive legislative choices.

In an attempt to deflect attention from this incoherence, forces opposing a general sanction of lesion between majors have argued that lesion between majors cannot be sanctioned generally because it diminishes citizens' sense of responsibility[79]. Professor Crépeau has refused to allow this distraction, pointing out that the function of lesion is "to sanction the bad faith of the exploiter and to instil a sense of responsibility in otherwise unscrupulous contracting parties, in keeping with the requirements of the fundamental principle of good faith in legal relations[80]". Lesion is not about allowing a contracting party to get out of his contractual obligations on any pretext : it is about protecting a contracting party against exploitation in the course of his contractual activities. It is important not to lose track of this crucial distinction.

Professor Crépeau, of course, goes beyond the mainstream criticism of the *Civil Code of Québec*'s treatment of lesion. While it is true and unfortunate that the *Civil Code of Québec* is internally inconsistent, he holds that "[i]l s'agit certes ici de cohérence législative, mais, bien plus,

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76. Québec, National Assembly, *Journal des débats*, 1st sess., 34th leg., 4 June 1991, vol. 31, fasc. nº 133, "Projet de loi 125. Adoption de principe", p. 8765 (Hon. Gil Rémillard).
77. Art. 1375 C.C.Q. : "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished."
78. J. Pineau, D. Burman and S. Gaudet, *supra*, note 26, nº 104, p. 217.
79. S. Gaudet, *supra*, note 39, 26 ; M. Coipel, *supra*, note 40, at page 97.
80. P.-A. Crépeau and É.M. Charpentier, *supra*, note 12, p. 113.

d'exigence morale[81]". He argues that sanctioning the exploitation of one contractual party by the other ensures the respect of human dignity. This is certainly an argument worth exploration. However, it is enough to say that the *Civil Code of Québec* is internally inconsistent. The reason for this, as already touched upon briefly, is the change of heart in the 13 years elapsed between the C.C.R.O.'s Report and the introduction of Bill 125. Although the general principle of good faith had been implemented, the political will for a general sanction of lesion had evaporated in the intervening years. Once more deferring to the eloquence of Professor Tancelin, "[o]n reproduit [ainsi] le même type de décalage qu'en 1866 par rapport à la situation de l'époque. Devra-t-on dire du *Code civil du Québec* ce qu'on disait de l'armée française au cours du dernier siècle : elle était toujours en retard d'une guerre[82] !"

2.2 The Virtues of an Indirect Attack — Lesion by Another Name ?

At face value, the reform process regarding lesion was a complete failure. After 14 years, two special committees, one Parliamentary Commission, and numerous consultations, the final provision on lesion was, on a practical level, hardly different from that in the *Civil Code of Lower Canada*. If one were to simply examine the provisions and pronounce judgment, the *Civil Code of Québec* would certainly be found wanting. Any person restricting his study to the bare bones of the provisions, however, would be fatally limiting his enquiry. After the Legislator's failure to achieve any meaningful reform in the area of lesion, it is the judiciary that has stepped forward and has covertly implemented two possible means of achieving a comparable result by a different name : 1) abusive clauses ; and 2) error.

2.2.1 Abusive Clauses

The first alternate route that the judiciary has identified is article 1437 C.C.Q., which allows for the striking down or reduction of abusive clauses in consumer contracts and adhesion contracts. The provision is based on equity, rather than the validity of consent, as lesion is. The sanctions under article 1437 C.C.Q. are nonetheless very similar to those in a situation of lesion. Lesion results in either the entire contract or one of its obligations being reduced, whereas it is generally just the abusive clause that is reduced, although if the clause in question is central to the contract, the entire contract is nullified[83].

81. P.-A. Crépeau, *supra*, note 11, at page 257.
82. M. Tancelin, *supra*, note 37, 874.
83. See art. 1407 and 1437 C.C.Q.

At first glance, this provision seems like a workable solution to the absence of a general sanction of lesion between majors for adhesion contracts[84]. However, two essential characteristics of a Code in a civilian legal system are the presumptions that "the Legislator is never silent" and that any provision must be interpreted in light of all other codal provisions. At article 1405 C.C.Q., the Legislator clearly restricted sanctioning lesion between majors to exceptional circumstances. The main debate has thus been whether article 1437 C.C.Q. can be applied to the principal object of a contract (notably the price or the main prestation), notwithstanding the exceptional nature of lesion between majors. In the words of Professor Jobin, this approach is audacious, "car elle [semble] permettre de faire indirectement ce qu'il est interdit de faire par l'article 1405[85]".

Most doctrinal writers see the provision as sanctioning a form of lesion between majors. Me. Nathalie Croteau, for one, holds that the elements of subjective lesion (exploitation of one party's weakness by the other, and lack of good faith) can "aisément se comparer aux exigences de bonne foi contenues à l'article 1437 C.c.Q.[86]". Speaking more generally, Professor Brigitte Lefebvre states that article 1437 "reconnaît une forme de lésion entre majeurs en droit civil québécois, où la bonne foi joue un rôle de protection et impose des limites dictées par ce qui est moralement et socialement acceptable[87]".

Although there was no unanimity, several trial decisions used article 1437 C.C.Q. to arrive at the same result as if lesion between majors were generally sanctioned[88]. It was only in *Québec (Procureur général)* c. *Kabakian Kechichian*, however, that the Court of Appeal pronounced on this jurisprudential development[89]. In that case, the respondents, a husband and wife, had signed a sponsorship contract for the wife's parents with the government. The parents had subsequently claimed for an alimentary pension on top of the sponsorship support. The Court of Appeal ultimately found that there was a *sui generis* recourse rather than an alimony claim, but it went out of its way to clearly state what it would consider to be abusive. In particular, the Court of Appeal said that it would be

84. This application of article 1437 C.C.Q. is less relevant for consumer contracts, as article 8 of the *Consumer Protection Act*, *supra*, note 29, is available.
85. P.-G. Jobin, *supra*, note 16, 699.
86. N. Croteau, *supra*, note 74, 415.
87. Brigitte Lefebvre, "La bonne foi dans la formation du contrat", (1991-1992) 37 *McGill L.J.* 1053, 1059.
88. J.-L. Baudouin, P.-G. Jobin and N. Vézina, *supra*, note 13, p. 152, at footnote 135.
89. P.-G. Jobin, *supra*, note 16, 698; *Québec (Procureur général)* c. *Kabakian Kechichian*, [2000] R.J.Q. 1730 (C.A.), REJB 2000-18855.

abusive "[d']exiger du contractant l'exécution d'une obligation pratiquement impossible à remplir ou *totalement disproportionnée par rapport à l'obligation corrélative*[90]".

One cannot help but remark on the similarity of language between the above statement and the definition of lesion found in article 1406, par. 1 C.C.Q. This interpretation of what constitutes an abusive clause seems to indicate a willingness to use article 1437 C.C.Q. to indirectly sanction lesion between majors for adhesion contracts.

Professors Lluelles and Moore clearly distance themselves from this interpretation on two grounds : one technical and one theoretical. First, they hold that the amount or price of a prestation "ne constitue pas pour autant une *clause*, mais un *chiffre*[91]". Over and above this technical objection, the authors expose the dance in which writers and the judiciary have been engaging, declaring that "il importe tout de même de respecter la volonté du législateur — si clairement exprimée à l'article 1405 –, même si son choix est contestable : réduire un prix dans un contrat d'adhésion, sous couvert de clause abusive, équivaudrait tout bonnement à nier la règle de l'article 1405 C.c.Q.[92]". It remains to be seen whether the Supreme Court of Canada will eventually confirm the Court of Appeal's interpretation in some other case, but in the meantime, "on peut penser que la jurisprudence est résolue à remédier à l'erreur du législateur[93]".

2.2.2 Error

The second alternative means of circumventing the principle of article 1405 C.C.Q. via the rule on error (art. 1400 C.C.Q.) is even more controversial than the first. The premise is simple : if a party truly mistakes the value of his prestation, and that error is considerable and is at the heart of the party's obligation, the contract should be nullified[94]. Lesion is, in fact, an economic error, and thus this is quite clearly lesion between majors in everything but name[95]. Using error to sanction lesion between majors is thus tantamount to sidestepping the Legislator's political choice by reinterpreting the classical rules of the Civil Code.

90. *Id.*, par. 55 [emphasis added].
91. D. LLUELLES and B. MOORE, *supra*, note 66, nº 900, p. 427 [emphasis added].
92. *Id.*, nº 901, p. 428.
93. P.-G. JOBIN, *supra*, note 16, 699.
94. *Id.*, 699.
95. J.-L. BAUDOUIN, P.-G. JOBIN and N. VÉZINA, *supra*, note 13, nº 226, p. 286.

This approach was first formulated by the Court of Appeal in *Morin-Légaré* c. *Morin*[96]. The respondent had sold her shares to her brother-in-law for $50,000 less than their real value, subjectively believing them to have that value. The Court of Appeal nullified the sale on the basis of the respondent's subjective error. While sanctioning lesion between majors with one hand, the Court of Appeal then turned around and affirmed with the other that lesion "ne constitue pas une cause d'annulation des contrats entre majeurs aptes, sauf dans les cas spécifiques prévus par la loi[97]".

It is clear that the Court of Appeal is merely paying lip-service to the Legislator while simultaneously embarking on an "ouverture courageuse vers une meilleure justice contractuelle[98]". Professors Lluelles and Moore would certainly not be happy with such a blatant contradiction ! Nonetheless, such is the current status of lesion between majors in Québec civil law.

Conclusion

The tale of lesion and the *Civil Code of Québec* raises two points of debate : the interaction between law and politics, and the law-making role of the judiciary. In the first case, a review of lesion in Québec civil law reveals the striking cause-and-effect relationship between the politics of the day and the law. The general sanction of lesion between majors proposed by the Civil Code Revision Office was rejected by the Minister of Justice, an elected Member of the National Assembly, due to political pressure by what are essentially powerful lobbyists whose only argument was that lesion was a serious threat to freedom of contract and contractual stability — a case which is, indeed, hard to make in real life. This state of affairs is very much open to criticism. Bowing to pressure from specific segments of society is hardly the way to see justice done.

The second point is a direct outcome of the first. In an attempt to remedy the Minister's political retreat and render our laws more equitable, the Québec Court of Appeal has acted boldly and has, in part, circumvented the absence of a general sanction of lesion between majors using alternate routes. While the result is desirable, it appears to be at odds with the traditional civilian suspicion for judicial activism[99]. Nonetheless, in this context, the Court of Appeal is better placed than the National Assembly to determine policy, for two reasons ; first, the tribunals are on the front lines, to use a colloquialism, and see the concrete and often shocking results of the

96. *Morin-Légaré* c. *Légaré*, [2002] R.J.Q. 2237 (C.A.), REJB 2002-33389.
97. *Id.*, par. 78.
98. P.-G. Jobin, *supra*, note 16, 699.
99. *Id.*, 693.

lack of a general sanction of lesion ; and second, the Court of Appeal has a duty to guide the development of the law when controversial or ambiguous legal situations arise[100]. Consequently, while perhaps unpalatable theoretically, it is legitimate for the tribunals to reshape the choice made by the Government and the Legislator in the domain of lesion between majors.

The need for a general provision on lesion between majors, in the style of article 37 of the *Draft Civil Code*, is clear. In the words of Professor Crépeau, "the conscious exploitation of a human being's vulnerability […] is too high a price to pay for a 'just equilibrium' [between freedom of contract and justice][101]". In the absence of such a provision, we must applaud the proactive approach being taken by the Québec Court of Appeal. And yet : a deliberate legislative choice was made, which is not an easy thing to disregard.

It is a question of necessary evils : is a judicial solution better than none at all ? My answer is a firm yes. Moreover, there has been a surprising air of restraint to the whole affair. Québec courts have successfully trod a very fine line between deference and open rebellion : they have not struck down the prohibition of article 1405 C.C.Q., preferring to simply and indirectly add exceptions to the ones already provided for by the Legislator. It is to be hoped that the Supreme Court will demonstrate the same sensitivity and share the vision of the Court of Appeal, when it rules on the matter in the future. In the meantime, situations of vulnerability and exploitation will continue to arise and Québec courts will attempt to rule fairly, compensating for an insufficient repertoire of directly relevant sanctions in the Code. Only time will tell whether we have chosen wisely.

100. Guy GILBERT, "La réforme de la Cour d'appel. Pour une Cour suprême du Québec", (1990) 31 *C. de D.* 525, 528.

101. P.-A. CRÉPEAU and É.M. CHARPENTIER, *supra*, note 12, p. 115.