A COMPARATIVE STUDY OF THE EFFECTS OF CONTRACTS: RISK AND FRUSTRATION

by

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ABSTRACT

Risk and Frustration or Impossibility of Performance

Contracts which have become impossible to perform will have varying effects upon the parties concerned according to the express conditions of the contract as well as those rules imposed by the courts when contracts are silent. Canadian common law courts must apply the doctrines of risk and frustration to determine the rights and liabilities of the parties. Quebec civil law turns to the Civil Code which expressly enunciates the manner in which obligations are extinguished, and to doctrine and jurisprudence to establish the underlying foundation of the principles. The main legal problems involved are: the exact moment ownership in goods is transferred; the locus of the loss when impossibility of performance occurs, and the events which must be proved to constitute a successful plea of frustration or impossibility of performance.

RESUME

Le risque ou l'impossibilité d'exécution.

Les contrats dont l'exécution est devenu impossible auront des effets variables sur les parties intéressées selon que ces contrats comporteront des conditions expresses ou que les tribunaux imposeront des règles lorsque les contrats seront muets sur la question. Les tribunaux de "common law" du Canada doivent appliquer les théories du risque de façon à determiner les droits et responsabilités des cocontractants. Quant au droit civil québécois, le Code Civil décrit expressément les modes d'extinction des obligations alors que les interprétations jurisprudentielles et doctinales établissent les bases fondamentales des principes applicables en la matière. Les principaux problèmes que se posent alors sont: le moment exact du transfert de propriété des biens; le locus de la perte lorsqu'il y a impossibilité d'exécution, et les évènements dont il faut faire la preuve pour invoquer avec justesse le plaidoyer de risque ou d'impossibilité d'exécution.

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> (T)he legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.[1]

I. INTRODUCTION

Every businessman who concludes a contract for the sale of goods is hopeful no problems will occur which might cause difficulties in the course of the transaction. Every legal system imposes certain obligations upon the seller and the buyer. This essay will not be concerned with preliminary obligations resulting from the formation of the contract, nor with the implied or express warranties or conditions imposed on the parties. Rather, the effects of the contract when it must be performed are the topics of this work. In particular, the doctrines of risk and frustration or impossibility of performance will be explored in an effort to see how they affect the rights and obligations of the parties to the contract. This is intended to be a comparative study of the Canadian common law system and the civil law of Quebec. There will be a short discussion of the law

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[1] Zweigert, Konrad, and Kotz, Hein. An Introduction to Comparative Law, vol. I. The Framework. Amsterdam, North Holland Publishing Co., 1977, p. 25.

of the United States pertaining to the passing of property and risk.

II. CHOICE OF LAW

In a contract which involves a seller and buyer from two different legal jurisdictions one generally looks for a governing law clause which expressly provides which legal system will apply. Unfortunately this detail is often overlooked, or, if provided, is expressed in terms too vague for the courts to construe. Generally "...a contract is governed by the law which the parties intend to apply to their agreement or, if they have not formed such an intention, the law with which the contract is most closely connected. The law is...called the proper law of the contract".[2]

The parties are free to choose any legal system to submit their contract. However, where the parties have failed to stipulate the governing law the courts must ascertain the legal system with which the contract is most closely connected. The court must examine all circumstances surrounding the contract.

> The single facts to which the courts have attached importance are manifold. Amongst them are: the place where the contract has been concluded, the place where the contract has to be performed, the language and terminology employed by the parties,

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[2] Schmitthoff, Clive M. The Export Trade, 6th ed., London, Stevens & Sons, Ltd., 1975, p. 110.

> the form of the documents made with respect to the transaction, the personality of the parties, the subject-matter of the contract, a submission to arbitration, the situation of the funds which are liable for the discharge, or security of the obligation, a connection with a preceding transaction, the effect attributed to the transaction by a particular legal system.[3]

Generally where the contract is performed in the same country where it is concluded there is a presumption the law of that country will prevail. Where the contract is to be performed in a country other than the one where the contract is concluded, the law presumes in favour of the law of the place where the legal obligation was formed. However, in the latter case, the courts have divided the law to be applied into one system of rules to be applied for the formation of the contract, and another system of rules to be applied relating to the performance of the contract. The courts are hesitant to "subject different incidents of the contract to different law readily or without good reason".[4]

Assuming the parties to the contract are located in two different jurisdictions (Ontario and Quebec) the question as to which law will be applied has particular importance when the goods are damaged or lost. If the

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[3] Schmitthoff, Clive M. The English Conflict of Laws, 3rd ed., 1954, pp. 110-111 quoted Ibid., p. 112.

[4] Ibid., p. 110.

parties indicate the law of Ontario is the law of the contract, The Sale of Goods Act[5] will be the governing statute. If the law of Quebec is to be applied, the Civil Code of Quebec[6] will be the governing law. The parties are also free to choose the Uniform Law on the International Sale of Goods.[7] This Law applies only to contracts for the international sale of goods unless the parties expressly agree to adopt the Law. Article I.1(a-c) defines an international sale as follows:

a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one state to the territory of another;

b) where the acts constituting the offer and acceptance have been effected in the territories of different States;

c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

The law of Ontario and England maintains a tenacious hold on the notion of risk and property passing together

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[5] 1970 R.S.O. C-421.

[6] Civil Code of Quebec.

[7] Uniform Law on the International Sale of Goods. Second Diplomatic Conference on the International Sale of Goods (Corporeal Moveables). The Hague, April 2-24, 1964.

while the Uniform Commercial Code[8] and the Uniform Law on the International Sale of Goods[9] have managed to avoid the pitfalls of the property connection. The Civil Code of Quebec[10] provides another interpretation, particularly to the formation of contracts which has a definite influence on the effects of contracts. In order to assess properly the Canadian common law position on the risk of loss or deterioration, one must examine the rules governing the passing of property.

III. PASSING OF PROPERTY -- CANADIAN COMMON LAW

Generally, the property passes according to the intention of the parties which is governed by the contract. Delivery is not necessary to pass the property unless the parties expressly state delivery is a condition precedent to the property passing. Two important results follow the passage of property: 1) the risk normally passes with the property.[11] and 2) the seller is not entitled to sue for the price of the goods unless property has passed. That is, if the goods are still the seller's he must mitigate his damages and if the goods have becomethe buyer's the seller may sue for the price in debt.

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[8]Uniform Commercial Code. National Conference of Commissioners on Uniform State Laws, 1962.

[9]Supra, note 7.

[10]Supra, note 6.

[11]1970 R.S.O. C-421, s. 21.

The exact moment property passes depends upon whether the goods are specific or ascertained. The Sale of Goods Act[12] lays down a framework of presumptions regarding specific goods. Section 1(m) defines specific goods as goods identified and agreed upon at the time the contract of sale is made. Section 18(1) provides that property in specific goods will pass at such time as the parties to the contract intend it to be transferred. Section 18(2) provides that one may ascertain the intention of the parties through the terms of the contract, the conduct of the parties, and the circumstances of the case. This presumption regarding the intention of the parties is generally considered the same for a contract for unascertained goods.[13]

Where the parties have failed to indicate their intention regarding the passing of property and the courts are unable to ascertain that intention by applying section 18, the Act provides five (5) rules in section 19 to aid the court in determining the moment when property will pass. Rules 1, 2, and 3 apply to specific goods; Rule 4 applies to sales on approval, and Rule 5 applies to unascertained goods.

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[12] Supra, note 5.

[13] Atiyah, P.S. The Sale of Goods, 5th ed. London, Pitman Publishing, 1975, p. 145.

A. Rule 1 --Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

As mentioned above, specific goods means the goods identified and agreed upon at the time the contract of sale is made. In the case Kursell v. Timber Operators and Contractors Ltd[14] the plaintiff sold the defendent all the trees in a forest which conformed to certain measurements on a particular date. The government confiscated the forest, and the plaintiff sued the defendent for the price claiming the goods were specific enough to fall within the terms of the Act. The court held the property in the trees had not passed to the defendents as the goods were not sufficiently identified since not all the trees were to pass but only those conforming to the stipulated measurement. If the contract had been for all the trees regardless of size the goods would have been specific enough to pass property in the trees and cause the defendent to be liable for the price even though there was no longer any property to be delivered.

Rule 19(1) speaks in terms of an unconditional contract. The major problem with the term "unconditional" arises due to the presence of section 12(3) of the Act

[14] [1927] 1 K.B. 298.

which denies the buyer the right to reject goods if there is a breach of condition by the seller when the property has passed to the buyer. The buyer must treat the breach of condition as a breach of warranty and can only recover damages. Therefore, to avoid this harsh interpretation, the courts give an extraordinary definition of unconditional contract in 19(1). The courts have defined such a contract as one which does not contain a term which is a condition. Since all contracts must contain at lease one condition, this definition virtually erases the effect of 19(1). This juggling by the court can be seen in the case of Varley v. Whipp.[15] That case involved the sale of a second hand reaping maching represented as being nearly new by the seller. It turned out to be very old when delivered to the buyer who, in turn, sued for rescission of the contract and return of the price. In order to avoid the effects of s. 12(3) the court ruled it was not an unconditional contract for the sale of specific goods and the property had not passed. The court ruled the contract contained promissary conditions such as description and merchantability, and the buyer was entitled to reject the goods for breach of an implied condition of description.

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[15] [1900] 1 Q. B. 513.

Rule 19(1) also speaks of goods in a deliverable state which generally means everything has been done which the seller has undertaken prior to the delivery of the goods. It should be noted that deliverable state is not the same as the right to reject. That is, the goods may be deliverable but rejectable because of the breach of another condition. The application of this rule can be seen in Jerome v. Clements Motor Sales Ltd.[16] The plaintiff contracted to buy a 1955 car from the defendent dealer. Two cars were dealt in exchange with a $900. balance to be paid. The agreement had a clause "no warranties or representations whatever are made upon any second hand car". The seller undertook to make repairs to the 1955 car. The repairs were made and the car was ready to be delivered. However, before delivery could be made, the shop burned and the car greatly deteriorated in value. The defendent was unable to make delivery of the car, and the plaintiff took an action to recover the $900. paid and the value of the two cars in trade. The court held where the seller has undertaken to carry out some work on goods prior to delivery, the goods were not in a deliverable state until the work was completed and notice was given to the buyer. The court also ruled it was immaterial that work to be done would be trivial in nature. Therefore, the property

[16] [1958] O.W.N. 245, 14 D.L.R. (2d) 745; aff'd. [1958] O.R. 738; 15 D.L.R. (2d) 689.

had not passed which in turn meant the risk had not passed to the buyer. The risk remained on the seller who must return the price and value of the two cars.

The postponement of payment or delivery is stated to be immaterial to the passing of property. In the case of R. v. Dilling[17] the buyer bought goods on a layaway plan. He paid part of the purchase price and the goods remained in the seller's store. The buyer paid $500. of a total of $655. and then the seller went bankrupt. The Crown seized all of the goods in a receivership action. The court held the property passed at the time of the contract of sale and not at the time set for subsequent delivery. The goods belonged to the buyer, because they were specific, designated goods, held for a particular purchaser. It would be interesting to see how the court might have ruled if a fire had burnt down the store and destroyed the property.

> B. Rule 2 -- Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

As seen in Jerome v. Clements Motor Sales Ltd[18] the lack of notice to the buyer was considered crucial enough to the

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[17] [1971] 1 W.W.R. 76 (Man. Q.B.).

[18] Supra, note 16.

court to prevent the property from passing. One author has suggested the notice does not have to emanate from the seller. That is, actual knowledge on the part of the buyer that the thing is done will be enough to pass the property on proof of such knowledge.[19]

C. Rule 3 -- Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

This rule applies only to the seller and imports a condition into the contract flowing from the duty of the seller. This section does not apply where goods are sold for a lump sum since the price of the goods is already ascertained without an exact count of the goods in question.[20]

Since Rule 3 is referring to an agreement which is subject to the fulfillment of a condition precedent, there is little doubt the seller, as owner, must bear the risk of loss if the goods are damaged or lost unless the buyer expressly agrees to accept it before the condition is fulfilled. It will be seen later that assent by the buyer may be express or implied from his actions.

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[19]Guest, A. G., ed. Benjamin's Sale of Goods. London, Sweet & Maxwell, 1974, p. 320.

[20]Ibid.

Even with the buyer's express intent to accept the risk, he is not expected to do so unless the goods have in some sense been identified to the contract. This would prevent the seller from appropriating goods otherwise undesignated which are known to have perished, and relying on the buyer's assumption of risk to justify his claim for the price.[21]

D. Rule 4

This rule is concerned with specific goods delivered to the buyer on approval or on sale or return. The property passes to the buyer 1) when he signifies approval or acceptance of the goods or does any act adopting the transaction or 2) where the buyer does not signify approval or acceptance but retains the goods, without giving notice of rejection. In the latter case property passes where there is a time fixed for return of goods on the expiration of that time. When there is no time fixed for return of the goods, property passes on the expiration of a reasonable time which is always a question of fact. This type of sale is construed prima facie as a bailment with an option to purchase, rather than a sale with a right to reject. In this case, the seller as owner of the goods is considered to retain the risk of the goods. Generally in a contract which is

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[21] Sealy, L.S. "Risk in the Law of Sale." 31 Cambridge Law Journal 225, p. 241.

considered a "hire-purchase" the risk is transferred to the buyer either expressly in the contract or by implication. In the former case, the fact that the goods cannot be returned intact due to a risk event does not amount to an adoption within Rule 4.[22]

If the transaction is considered as a sale with a right to reject, the contract may have the effect of passing the property either at once or at a subsequent time. The property vests in the buyer subject to a condition subsequent. If the sale is rescinded caused by the happening of the event, the property revests in the seller. It is usually agreed that until the failure of the condition, the risk remains on the seller.[23] If the risk is with the buyer pending the fulfillment or failure of the condition, rescission will be possible only if restitutio in integrum can be made. If rescission is possible, the risk is considered to revest in the seller retroactively to the time of the sale.[24]

Generally Rules 2-4 refer to specific instances of conditions suspending passing of property. Section 20(1) covers any other conditions suspending the passing of property. If the seller reserves the right of disposal until some conditions are fulfilled, the property does

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[22]Ibid., p. 240.

[23]Head v. Tattersale [1871] L.R. 7 Ex. 7.

[24]Supra, note 21, p. 241.

not pass. "In most cases such a conditional contract will have no effect as regards risk; it will remain with the proposed seller."[25]

E. Unascertained Goods

The meaning of unascertained goods is generally considered to cover three types: 1) goods to be manufactured or grown by the seller; 2) purely generic goods, and 3) an unspecified portion of a specified bulk.[26] Section 17 of the Act provides that in a contract for sale of unascertained goods, the property does not pass until the goods are ascertained. This situation is also governed by the intention of the parties. The mere fact that goods are ascertained does not mean property automatically passes to the buyer. One must ask first if there has been an ascertainment and then look for the parties' intention per section 18 of the Act. Where the parties express an intention there is no problem; however, with no such express intention one has to rely on the prima facie rule in section 19, Rule 5. This rule provides when a contract is for unascertained or future goods the goods must be appropriated unconditionally to the contract. That is, the goods must be identified and set aside and nothing further need be done to the

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[25] Ibid., p. 240.

[26] Atiyah, supra, note 13, p. 155.

goods. This unconditional appropriation to the contract must be either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The assent may be either express or implied and can come either before appropriation or after appropriation. Where there is a conditional appropriation, the goods irrevocably attach to the contract but the property is reserved in the seller and is not to pass until the fulfillment of a condition such as payment. In this latter case, it would be considered a conditional contract and the risk would remain with the seller.

i) Rule 5(i), -- Jurisprudence

(a) Unspecified Part of Specified Whole

In the case Aldridge v. Johnson[27] the buyer contracted to buy 100 quarters of barley out of 200 quarters which he had inspected. The parties agreed that the buyer was to send his own sacks into which the barley was to be put and the sacks were then to be taken to the train station and put on the cars by the seller. The buyer did not send enough sacks, but the seller filled those sacks sent. The seller did not send the barley to the railway due to lack of transportation. The seller went bankrupt and emptied out the sacks filled. The court ruled that putting the barley into the sacks was an unconditional appropriation of the goods and property in those sacks passed to the buyer. The court

[27](1857) 7 E. & B. 885; 119 E.R. 1476.

implied prior assent by the buyer, because he has inspected and approved the barley in bulk and had sent the sacks as an indication of his approval. The court found an implied understanding of the parties that filling the sacks was equal to appropriation. It is interesting to note the seller still had an obligation to perform, that is, to take the goods to the railway for shipment. The court held this obligation made no difference in the passage of the property to the buyer.

In the Canadian case of Zaiser v. Jesske[28] there was a contract for 1200 bushels of wheat which was stored in a bin with other wheat. The seller gave the buyer the key to the bin where the wheat was stored. Subsequently, the contract failed and the buyer sued the seller in conversion. The court held the property did not pass, because there was no unconditional appropriation of the 1200 bushels to the contract. Handing over the key was not symbolic of delivery of the 1200 bushels, because the bin contained more than the contract amount. The handing over of the key could not pass property until the contract amount was separated from the bulk and appropriated to the contract. The handing of the key was equally consistent with the intention to retain the property as with passing it to the buyer. Certainly if a risk event had occurred

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[28] [1918] 3 W.W.R. 757 (Sask. C.A.)

the seller would bear the loss.

(b) General Considerations

In the case Carlos Federspiel v. Charles Twigg[29] The plaintiff buyer ordered tricycles to be manufactured by the seller (future goods). The seller manufactured the goods, packed them in boxes with the buyer's name and address on them. The buyer was informed and requested shipment as soon as possible. Before the seller could ship the goods he became bankrupt. There was no subsequent assent so the buyer had to show previous assent. The court held the property had not passed to the buyers, because the goods were not appropriated to the contract. The court found the goods would be appropriated only when delivered to the ship for carriage to the buyer. It is difficult to justify this decision when compared to the case of Aldridge v. Johnson[30]. It might be possible to distinguish the case on the grounds the buyer sent his own sacks and there was constructive delivery to the buyer when the barley was put into the sacks. The seller would then become the bailee of the goods for the buyer. This still does not ring satisfactorily due to the seller's remaining obligation to

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[29] [1957] 1 Lloyd's Rep. 240.

[30] Supra, note 27.

put the barley on the railway when one of the main reasons for holding the property had not passed in Carlos Federspiel was the seller's obligation to put the goods on the ship.

Carlos Federspiel is also important for the five basic principles regarding appropriation laid down by Pearson J. The principles are: 1) the mere setting aside of the goods by the seller is not enough for appropriation for he can change his mind. The parties must have the intention to irrevocably attach the goods to the contract; 2) the appropriation may be made by agreement although sometimes assent may be conferred in advance (i.e. Aldridge v. Johnson); 3) if the seller holds the goods on behalf of the buyer it is considered as actual or constructive delivery. If the seller retains possession of the goods, he does so as bailee; 4) The Sale of Goods Act normally associates risk as passing with property,[31] but where the goods remain at the seller's risk prima facie the property has not passed; 5) usually the appropriating act is the last thing to be done by the seller. If a further act is to be done by the seller that is prima facie evidence that property does not pass until such a condition is fulfilled.[32]

One author suggests it is very difficult to tell

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[31] 1970 R.S.O. C-421, s. 21

[32] Supra, note 29, pp. 255-6.

the intention of the parties in an export sale and the five presumptions in Carlos Federspiel are not appropriate to export sales. In an export sale, the seller may: 1) reserve the property in the goods until certain conditions are fulfilled or 2) he may not have made the transfer of the property conditional. In the first instance, the property does not pass until all the conditions are met even though there may be delivery to the buyer, his agent, or to the carrier. This reservation of property requires express stipulation in the contract of sale. There are 2 rebuttable presumptions in favour of a conditional transfer of property in The Sale of Goods Act. The first is found in section 20(2) which indicates where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, it is presumed the seller retains property in the goods until delivery of the Bill to the buyer or his agent. Secondly, where the seller has drawn on the buyer for the purchase price and transmits the Bill of Exchange and Bill of Lading together to the buyer to secure acceptance or payment of the Bill of Exchange, property will not pass to the buyer if he does not honour the Bill of Exchange. He would also have to return the Bill of Lading. (Sec. 20(3)) [33]

Where the seller fails to stipulate the passing of

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[33] Schmitthoff, supra, note 2, p. 68.

property is conditional and neither 20(2) nor (3) can be invoked, the passing of property will depend on the form of the Bill of Lading and whether or not there is delivery of the Bill. If the seller has taken out the Bill of Lading to the order of the buyer or his agent and delivers the Bill to the buyer or his agent, the inference is irresistible that the seller intended to transfer property. However, merely taking out the Bill of Lading in the name of the buyer does not necessarily reveal the seller's intention of passing the property. Where there is no duty to deliver a Bill of Lading, delivery to the carrier prima facie passes property to the buyer.[34] Under a C.I.F. and C. & F. or F.O.B. contract with a Bill of Lading property passes conditionally when the Bill is delivered to the buyer or his agent. The property reverts to the seller if the goods are not in accordance with the contract.[35] Finally, deliberate retention of the Bill of Lading by the seller may indicate an intention of the parties that property shall not pass to the buyer on such an anticipated delivery.[36]

(c) Assent

Sometimes the court will imply subsequent assent

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[34] Ibid., pp. 68-9

[35] Kwei Tek Chao v. British Traders & Shippers Ltd [1954] 2 Q.B. 459, p. 487.

[36] Cheetham & Co. Ltd v. Barrow Haematile Steel Co. [1966] 1 Lloyd's Rep. 343, p. 353.

from the mere silence of the buyer. In Pignatoro v. Gilroy[37] there was a contract for unascertained goods. The defendent delivered 125 bags of rice out of 140 to the plaintiff. The remaining 15 bags were located another place. The seller wrote the buyer stating the bags were set aside and requested the buyer to pick up the goods. The plaintiff buyer did nothing for a month and the bags were stolen. The court held the property had passed on the basis of a subsequent implied assent. If the buyer was going to object, he should have done so promptly so as not to place upon the vendors the risk of continued possession of the goods.

ii) Rule 5(ii)

This rule provides the seller is deemed to have unconditionally appropriated goods to the contract when he delivers goods to the buyer or carrier or bailee for the purpose of transmission without reserving the right of disposal. This rule is subject to section 17 which states in a contract for the sale of unascertained goods, property does not pass until the goods are ascertained. That is, if the goods are still in bulk when delivered, section 17 can override Rule 5(ii) of section 19 and delay the transfer of property. An example of this can be seen in the case of Healy v. Howlett.[38] In that case

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[37] [1919] 1 K.B. 459.

[38] [1917] 1 K.B. 337.

the seller put 190 boxes of fish on the train. Twenty boxes were for the buyer, but they were not specified at the time the goods were put onto the train. The seller instructed the railway officials to earmark 20 boxes for the buyer and the remaining boxes for 2 other consignees. The train was delayed and,before the buyer's boxes were earmarked, the goods had deteriorated. The court held the property did not pass when the boxes were put on the train, because there had been no separation of the particular boxes going to the buyer. The property in the fish had not passed to the buyer before the boxes were earmarked, therefore, the goods were still at the seller's risk when they deteriorated. Where an unidentified part of a bulk is sold there can be no appropriation until there is a severance of the part sold from the rest. Therefore, Rule 5(ii) is subject to goods being ascertained under section 17. Though there must always be a distinct separation and identification for property to pass, it does not mean risk cannot pass.

IV. DOCTRINE OF ALLOCATION OF RISK--Canadian Common Law

> The Sale of Goods Act, s. 21 -- Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, but
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> a) where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault; and

> b) nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.[39]

The notion of risk is not defined in the Act, and, other than s. 21 is mentioned in only two other sections of the Act which will be dealt with later in the essay. Generally, the incidence of risk is determined as a matter of law, and, in most instances, is tied to the notion of ownership in the goods. A risk event is one which affects the physical state of the goods through damage, destruction or deterioration. There are many "risks" involved in any contract of sale. That is, the buyer assumes all risks as to quality and fitness of goods except for those implied or express warranties. This doctrine of caveat emptor has nothing to do with "the risk" which is spoken of in the statute. One must infer that "the risk" in the statute is the risk that, without any fault on the part of the seller or buyer, the goods may perish or be lost or damaged. The central notion of "the risk" is loss and incidentally of damage or deterioration resulting in partial loss.[40]

The consequences of a risk event involves the liability to pay the price and the price only. Any other obligations such as damages for non-delivery or non-acceptance will depend on whether or not the contract has

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[39] 1970 R.S.O. C-421, s. 21.

[40] Sealy, supra, note 21, pp. 226-7.

been frustrated. Consequential losses may only be recovered when a damage action is brought and only then when the damages are not too remote and also within the reasonable contemplation of the parties.[41]

Where the buyer accepts the risk he must pay the price even though the goods may have been wholly or partially lost or damaged. If the payment of the price is conditional on the delivery of the goods, the buyer is assumed to have waived his right to require delivery when the goods are lost. The buyer does not assume an absolute obligation to pay the price; he can reject damaged goods as a breach of condition whether it involves an implied condition of merchantability or late delivery.[42]

Where the risk is on the seller, the buyer need not pay the price if the goods are lost and the seller may be in breach of the contract for failing to deliver. Where the property has passed to the buyer, but the riak remains with the seller and the goods are destroyed before the contract is fulfilled; the buyer can recover any amount already paid. The courts usually interpret the property as having passed defeasibly. Therefore, when the risk event occurs, the property revests in the seller.[43]

As mentioned above, risk of accidental loss passes prima facie when property passes. This allocation of risk

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[41]Hadley v. Baxendale (1854) 9 Ex. 341.

[42]Sealy, supra, note 21, pp. 237-8.

[43]Ibid., p. 239.

can be seen in the maxim res perit domino which indicates when a thing is destroyed, the loss is to the owner. This adoption by common law Canada from the civil law system can be seen in the Quebec case Mechutan Fur v. Carl Druker Furs Inc.[44] This was a contract for the sale of furs to be shipped from New York to Montreal. The furs were stolen in transit. The court held that once a sale is complete and the seller has no further obligations, the risk passes to the buyer even if the goods are not delivered into his possession.

There are three exceptions to the rule risk passes with property: 1) where there is an express contrary intention that risk and property are to pass together; 2) where the goods are unascertained, but part of a specified bulk, and 3) where the goods involved in the contract are intended for export. In the Ontario case Inglis v. James Richardson[45] the buyer bought 4000 bushels of wheat which were stored in a warehouse holding 20,000 bushels. The buyer received a delivery order which gave him the right to immediate delivery of the wheat as he wished. After 1000 bushels were delivered fire damaged the rest of the wheat located in the warehouse. This damaged wheat was sold as salvage, and the buyer sued the seller for conversion. The court held

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[44][1962] C.S. (Que. S.C.)

[45](1913) 29 O.L.R. 229 (Ont. C.A.)

the property had passed once the goods were in the hands of the bailee and the seller no longer had had any control over those goods. The court found an attornment by the bailee when he accepted the delivery order. The court also held that even if the property had not passed, the risk had passed, so the buyer could sue in conversion. With due respect, it seems a mistake to allow the buyer to sue the seller. The buyer should have sued his bailee and, as he bore the risk, he could not sue the seller for failure to deliver.

Perhaps an easier case to understand and reconcile is Sterns Ltd v. Vickers Ltd[46]. The defendent sold 120,000 gallons of spirit which was part of a total quantity of 200,000 gallons in a storage tank belonging to a third party. The plaintiffs obtained a delivery order which the third party accepted, but the plaintiffs decided to leave the spirit in the tank for the time being for their own convenience. The spirit deteriorated in quality between the time of sale and the time the plaintiffs eventually took delivery of the 120,000 gallons. The buyer sued the seller, claiming the property and, therefore, the risk had not passed. The court held the seller not liable. The buyer had acquired an undivided share of a larger bulk, insurable by the buyer, and carried with it the risk of deterioration. The seller's obligations were

[46] [1923] 1 K.B. 78 (C.A.)

discharged once the bailee undertook to deliver the contract quantity out of the bulk to the purchaser. The seller has no more control once this happens. The acceptance of the delivery warrant was regarded as a crucial factor since it was this which gave the buyer an immediate right to possession. This last point is considered the distinguishing feature between Sterns and Healy v. Howlett[47]. That case held that the risk in 20 boxes of fish, where were dispatched to the buyer as part of a total of 190 boxes, none of which had been earmarked for him, was still on the seller. The railway in that case did not inform the buyer they were holding goods for him. The seller still had sufficient interest to stop delivery. If the delivery order had been assented to by the railway, one might be able to argue risk had passed.

Though not specifically mentioned in The Sale of Goods Act, the passage of risk and transfer of property are regularly separated in export trade law. The statutory presumption is displaced by the parties. In the absence of special arrangements, risk generally passes when the goods leave the custody of the seller. In a contract ex works and f.o.t. the risk passes when goods are delivered to the buyer or his agent or to the railway. In a f.a.s. contract, risk passes when goods are placed alongside the ship. In f.o.b. and c.i.f. contracts, risk passes when

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[47] Supra, note 36.

the goods are delivered over the ship's rail. The c.i.f. buyer must pay the price and accept shipping documents even when he knows goods have been lost in transit.[48]

It is important to distinguish between the risk of accidental loss and the risk of deterioration of goods in transit. Section 32 of the Act applies to destination contracts, and, as a result of this section, the whole risk does not pass to the buyer. the section apportions risk as follows:

> i) Buyer's risk: deterioration in the goods necessarily incident to the course of transit, even though the seller agrees to deliver at his own risk.
>
> ii) Seller's risk: All risks over and above those borne by the buyer. That is, he is liable for extraordinary deterioration which does not flow from a defect in the goods.

The general rule is: upon delivery of the goods to a carrier the whole of the risk passes to the buyer. The statute in s. 32 distinguishes risk of accidental loss and risk of deterioration, but this applies only to destination contracts. The case of Mash and Murrell v. Emmanuel[49] has introduced this distinction into the common law, and it applies to any f.o.b. or c.i.f. dispatch contract for perishable goods with implied conditions of merchantable quality. The seller's risk is that the goods not suffer any necessary or inevitable deterioration during the transit so as to render them unmerchantable.

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[48] Schmitthoff, supra, note 2, pp. 69-70.

[49] [1961] 1 W.L.R. 862.

If any goods would have deteriorated then the seller is not liable. However, if a particular parcel is defective then the seller is liable. The buyer's risk is that the goods not suffer any extraordinary deterioration due to abnormal condition. That is, the deterioration does not flow from a defect in the goods.

The effect of Mash & Murrell depends upon the extent of the seller's obligation to deliver merchanctable goods. If all goods of the general contract description must necessarily deteriorate in transit, the undertaking as to merchantability will not extend to the duration of the transit. Mash & Murrell obviously conflicts with s. 32, but one might restrict s. 32 by saying it only applies to destination contracts. Section 32 goes farther than Mash & Murrell when it throws extraordinary deterioration on the seller and ordinary and necessary risk. The seller's attorney should be aware of this extra responsibility and avoid any contract which calls for delivery at destination.

Though the courts generally accept the notion of the separation of property and risk in c.i.f. and f.o.b. contracts, it is interesting to note how far the courts will go to avoid such a separation when equity is demanded. In The Julia[50] a contract for the sale of a quantity of rye was expressed to be on c.i.f. terms,

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[50] [1949] A.C. 293.

but also provided for delivery at Antwerp. The buyer had paid against a delivery order when Antwerp became an enemy port and delivery in terms of the contract was no longer possible. The delivery order did not pass property or possession since the quantity was part of a larger bulk and therefore no appropriation could be made until delivery. On the authorities, it was arguable to assume the risk had passed. However, the court chose to focus on the question as to whether or not there was a total failure of consideration based on the nature of the seller's obligation. That is, whether the buyers paid for documents as representing goods or for delivery of the goods themselves. The court held on the true construction, the contract was an "arrival" contract and not c.i.f. The buyers succeeded because neither the property nor the risk had passed. The sellers were considered to have shipped the goods wholly at their own risk

V. COMMON LAW RISK AND FRUSTRATION DISTINGUISHED

Risk affects the physical state of the goods such as damage, destruction, and deterioration. Theft or government intervention does not affect the state of the goods and, therefore, is not a risk event. The doctrine of risk determines who pays the price and is only invoked when the loss or damage is accidental and without fault of either party. When frustration is established the whole contract is discharged and there is no

right to damages. If the frustrating event affects the physical state of the goods, at the very least there is a risk event. In this case, use the doctrine of risk to determine whether the price is payable and then ask if it was also a frustrating event. It is important to know the moment in time when the contract is considered frustrated, because only obligations which arise after the frustrating event are abolished.

VI. ALLOCATION OF RISK -- UNITED STATES AND INTERNATIONAL

In discussing the Uniform Laws on International Sales Act[51] one author discussed the passing of risk as a change from the traditional common law approach:

> ...the provisions governing the passing of risk are a refreshing departure from the concentration on the passage of property in the Sale of Goods Act. The basic rule is that the risk is to pass to the buyer upon delivery of the goods. Delivery consists in the handing over of goods which conform with the contract and where the contract involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer. ....based on the sensible consideration that the person in possession is in the best position to guard and to insure the goods.[52]

The Americans have adopted the above policy and have managed to codify the great body of commercial laws into a practical and equitable approach to the law of sale. The

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[51] Supra, note 7.

[52] Feltham, J.D. "Uniform Laws on International Sales Act 1967." 30 Mod. L. Rev. 670, p. 675.

policy concerning risk is to place the loss upon the one most likely to have insured against it and most likely to take precautions to protect against loss.[53] Who had title to the goods at the time of the loss is no longer the governing factor in American law.

The main sections governing the apportionment of risk are sections 2-509 and 2-510 of the Uniform Commercial Code.[54] It should be noted that the parties are free to establish risk in any manner they wish, thus avoiding the mechanism of the Code.

Section 2-509 divides sales contracts into three categories: 1) where the contract requires or authorizes the seller to ship the goods by carrier. This section is further divided into 2 sections: a) shipment contract which does not require the seller to deliver the goods at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier; b) destination contract which requires delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are tendered to enable the buyer to take delivery. 2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer when the bailee

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[53] White, James J. and Summers, Robert S. Handbook on the Law Under the Uniform Commerical Code. St. Paul, 1972, p. 138.

[54] Supra, note 8.

acknowledges the buyer's right to possession; and 3) residuary rules a) if the seller is a merchant, the risk of loss passes to the buyer on his receipt of the goods (physical possession) and b) if the seller is not a merchant the risk passes to the buyer on tender of delivery.[55] In effect, these rules governing allocation of risk have codified the rules regarding the separation of risk and property in common law Canada. It appears to be an approach which is very desirable and one could hope that our various Law Reform Commissions might take notice of the realities.

Section 2-510 provides for the effect of a breach by the seller and buyer on the risk of loss. Generally, where either party is in breach, the risk of loss remains on that party. For example, the risk does not pass to the buyer until either the buyer accepts the nonconforming goods or the seller cures the nonconformity.

VII. PASSING OF PROPERTY -- QUEBEC CIVIL LAW

In order to maintain the symetry of the essay, the transfer of ownership in Quebec civil law will be discussed at this time. It should be noted that the theory of risk in Quebec is inextricably tied to impossibility of performance. As noted in chapter V, risk and frustration in common law are not necessarily wed which

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[55] Supra, note 53, pp. 140-146.

explains the discussion of passing of property and risk before any discussion of the doctrine of frustration. The foundation and doctrine of impossibility of performance will be discussed in detail in a later chapter.

Just as in common law, the exact moment property passes depends on whether the goods are "certain and determinate" or "uncertain and indeterminate". The Civil Code provides a corollary to sec. 18 of The Sale of Goods Act in art. 24C.c. by indicating the kinds of obligations which arise by contract. It is essential to determine the intention of the parties before one can effect a transfer of ownership. The content of the obligation is sought in the "meeting of the minds" between the parties. If the exact content of the contract is not readily discoverable one must turn to doctrine and the Civil Code to establish that content. Article 24C.c. indicates that a contract can give rise to two kinds of obligations. First would be the express obligations of the contract. That is, the contract is the law between the parties who can freely adjust their contractual relation to their best legitimate interests, so long as they do not offend public policy or good morals.[56] In addition, there are certain implicit obligations in a contract which allow the courts to fill the silence of the parties when they are forgetful or neglect to

[56]Art. 13C.c.

indicate the number or extent of the obligations they want to assume. It is thus for the courts to articulate the contractual relationship and to insert the obligations which arise "according to its nature, and by equity, usage or the law..."[57] [58]

Thus, the intention of the parties as to when the transfer of ownership will occur is to be given first priority by the courts regardless of general principles enunciated in the law. As an example, ordinarily in a contract for the sale of a specific lot of merchandise at so much per unit, property and risk will pass to the buyer when the contract is made, but the courts will give effect to the clear expression of a contrary intention.[59] In Logan v. Le Mesurier[60], a Quebec case decided before the Civil Code, Lord Brougham indicated the common ground shared by civil and common law systems concerning intention:

> The question must always be, what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller, before delivery

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[57]Art. 24C.c.

[58]Crépeau, Paul-André. "Le contenu obligationnel d'un contrat." (1965) 43 C.B.R. 1, pp. 2-6.

[59]LeDain, Gerald E. "The Transfer of Property and Risk in the Sale of Fungibles." 1 McGill L.J. 237, p. 252.

[60](1847) 6 Moore P.C. 116.

> of possession, then the sale cannot be deemed perfected, and the property does not pass until the thing is done.[61]

Once the contractual obligations are established, it is helpful to discuss the intensity of each of these obligations to determine if each party has fulfilled his obligations. There are three levels of intensity in Quebec law and doctrine known as 1) an obligation of diligence; 2) an obligation of result, and 3) an obligation of warranty.[62] The obligation of diligence is one where the debtor need not obtain a determined result, but should act in the reasonable manner that a "bon père de famille" would use in the hope that a desired result will be achieved.[63] Thus, it follows, if the debtor of an obligation to deliver a thing is one of diligence and, despite all reasonable care, the thing has been destroyed, he may be relieved of any further obligation. The obligation of result is one where a definite end must be achieved or the debtor will be held liable for damages unless he can exonerate himself by proving "cas fortuit". The obligation of warranty is one where the end is absolutely guaranteed and the debtor cannot exculpate himself at all.[64]

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[61] Ibid., pp. 132-3

[62] Crépeau, supra, note 58, p. 29.

[63] Ibid., p. 34.

[64] Ibid., pp. 35-36.

A. "Certain and Determinate"

The Civil Code provides general rules regarding the transfer of ownership. The transfer of risk in the law of sale in Quebec takes place, in the absence of agreement or usage to the contrary, at the same time as the transfer of ownership.[65] Therefore, it is necessary to determine exactly when ownership is transferred in order to fix the locus of the loss when a supervening event occurs.

The alienation of a thing certain and determinate makes the purchaser owner of it by the consent of the parties, without the necessity of delivery.[66] In addition, sale is perfected by consent alone of the parties, although the thing sold is not then delivered.[67] These two principles embodied in the Civil Code provide a grounds for comparison to sec. 19, rule 1 of The Sale of Goods Act. That is, where the goods are identified and agreed upon at the time the contract of sale is made, ownership passes at that moment.

In the case Mechutan Fur v. Carl Druker Furs some furs were stolen in transit from New York to Montreal. In discussing who should bear the loss of the furs, the

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[65] LeDain, supra, note 59, p. 239.

[66] Art. 1025C.c.

[67] Art. 1472C.c.

question of ownership was tied to the theory of risks. The effect of such a transfer can be seen in the words of the court:

> Considérant que la vente est complète par le consentement des parties et qu'au moment de la perte de la chose, la compagnie défenderesse était propriétaire des peaux de vison en question et que, dans les circonstances, l'axiome res perit domino doit recevoir toute son application...[68]

B. Sales on Condition

The suspensive conditional sale has the effect of retarding the transfer of ownership until the arrival of the condition.[69] Art. 1087C.c. requires the debtor to deliver once the condition is realized unless the object has been destroyed since the moment of the contract. Consequently, some authors[70] argue the seller, remaining owner, assumes the risks of the thing. That is, other than losing the object of the obligation he is deprived from the right to demand the price from the buyer.

Article 1475C.c. provides that the sale of a thing on trial is presumed to be made under a suspensive condition. Consequently, if the loss occurs after the thing is "sold" and is in the hands of the eventual buyer, it is the owner-seller who must bear the loss. This

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[68] [1962] C.S. 429, p. 431.

[69] Jacoby, Daniel. "Les risques dans la vente: de la loi romaine à la loi de la protection du consommateur." (1972) 18 McGill L.J. 343, p. 354.

[70] Faribault, tome VIII bis, no. 87 in Jacoby, ibid.

interpretation of 1475C.c. can be seen in the case Laurin v. Ginn:

> ...L'appelant avait un délai raisonnable pour examiner lesdits timbres, et faire connaître à l'intimé, sa décision quant à leur achat...c'est pendant ce délai raisonnable que ce vol avec effraction eut lieu...l'appelant n'est pas en faute; ...dans les circonstances, la perte lesdits timbres doit être supportée par l'intimé, resté prepriétaire d'iceux, et non par l'appelant. 71

The decision that the seller, as long as he remained owner, supported the loss was accepted in Quebec jurisprudence and doctrine until 1957. At that time the courts realized there must be a realization that such a harsh interpretation was not always equitable.

Letourneau v. Laliberté[72] involved a sale of a mechanical saw with a reservation of ownership in favour of the seller until full payment of the price. After the buyer was given possession the saw was stolen, and the seller claimed the price of the sale. The buyer, on the basis of strong judicial authority, argued ownership had not passed and, therefore, neither had the risk. The court denied the buyer's argument and rendered judgment on behalf of the seller. It is important to note the reasons for judgment as they have had and will continue to have a great deal of influence on sales where the seller reserves the title in a thing but gives possession to the buyer.

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71 (1908) 14 R.L. n.s. 439.

72 [1957] C.S. 428.

> ...tant que l'acheteur n'a pas payé le prix complet et bien qu'à tous points de vue pratique, ce soit lui le maître, le vendeur conserve encore le titre de propriété dans la chose. Mais ce titre, il s'est déjà engagé dès l contrat à le transférer à l'acheteur et, dès que le prix est payé, ce transfert se fait automatiquement et avec rétroaction à la date du contrat, sans qu'il soit nécessaire pour le vendeur de faire le moindre geste quelconque (a.1085 C.c.)
>
> A la lumière de ces principes, je me vois forcé de conclure contre le défendeur. Au moment où la scie fut volée entre les mains de défendeur, le demandeur avait exécuté absolument toutes ses obligations en vertu du contrat de vente. Il est donc impossible de dire que le contrat s'est trouvé frustré à raison de l'inaccomplissement, par le demandeur, de l'un quelconque de ses engagements...Après la livraison de la scie par le demandeur au défendeur, il n'y a plus que le défendeur qui, des deux, ait encore une obligation à accomplir, celle de payer le prix. De plus, le défendeur a la possession, la garde, la maîtrise, l'usage et la jouissance de la scie et il doit en prendre le soin d'un homme raisonnablement prudent. ...(Le défendeur) est le seul des deux contractants à qui il reste à exécuter une obligation en vertu du contrat. Il a eu la possession physique de la scie et c'est lui qui l'a exposée au danger...[73]

The above judgment was recognized and reinforced in the 1958 decision Latreille v. Isabel[74]. The defendent had promised to sell a house to the plaintiff for $4500 payable by a initial downpayment of $450. and monthly payments of $40. The seller reserved the transfer of ownership until one-half of the price was paid. The

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[73] Ibid., p. 431.

[74] [1958] B.R. 431.

buyer took immediate possession of the house. When the house was destroyed by fire before ownership was transferred, the buyer demanded the resolution of the agreement and the reimbursement of the initial deposit. Of course, he argued the loss must be supported by the seller-owner, that is, res perit domino. The court dismissed the plaintiff's action. In Superior Court the problem was considered under the existing theory of risks. The question was posed in another manner in the Appeal Court level. This will be discussed in the chapter on the theory of risks.

In common law this type of sale is known as "hire-purchase", and the risk is transferred to the buyer either expressly in the contract or by implication. Ownership, however, remains in the hands of the seller until the condition for transfer (i.e. full payment of the price) is fulfilled. In sales other than "hire-purchase" where the seller reserves the right of disposal until some conditions are fulfilled, neither the property nor the risk will pass.[75]

C. Sales "En Bloc"

This section refers to fungible goods (or in common law, purely generic goods) which are mainly primary products and foodstuffs. A sale "en bloc" is considered a sale of a specific lot of goods sold for a lump sum,

[75] Supra, note 25.

and the problem of ownership and risk is quite simple. The quantity (or general indication of quantity) and the price are established at the moment of the contract, and, therefore, as per 1025C.c. and 1472C.c. the transfer of ownership occurs at the moment of the contract.

D. "Uncertain and Indeterminate"

The meaning of uncertain and indeterminate goods is generally considered to cover alienation of things determined as to kind and sales by weight, number or measure. The problem arises where there is a sale of a specific lot of goods, not for a lump sum but for a price which is estimated at so much per unit. It has the attributes of a sale "en bloc" but it is necessary to weigh, or measure to ascertain the total price and to determine the thing sold.[76] If a thing is uncertain or indeterminate, the creditor does not become owner of the thing until it is certain or determinate and he has been legally notified that it is so.[77] In addition, the sale is not perfect until the thing has been weighed, counted or measured.[78]

In the sale of a thing determined as to kind, the transfer of ownership and, by consequence, the risk, is suspended until the specification of the alienated

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[76]Le Dain, supra, note 59, p. 238.

[77]Art. 1026C.c.

[78]Art. 1474C.c.

object. The object must be individualized and the buyer must receive notification of this.[79]. Just as in common law, the goods must be identified and set aside. The civil law does not necessarily require assent on the part of the buyer. That is, so long as the seller can prove the buyer has had actual knowledge of the appropriation to the contract, it is unimportant how he obtained such knowledge or whether he assented.[80]

Until 1923 judicial opinion concerning a sale of a specific lot of goods, not for a lump sum was that the sale did not transfer ownership until the goods had been weighed, counted or measured and the total price ascertained.[81] The leading Quebec case Cohen v. Bonnier[82] held that ownership had passed in a specific lot of scrap iron sold at a set price per ton even though the iron still had to be weighed to determine the total price. The major thrust of the argument was the difficulty of reconciling the interpretation of art. 1474C.c., which was allegedly based on Pothier's definition of sale "en bloc", with art. 1025C.c. Pothier's definition treats the sale of a specific lot of merchandise at so

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[79]Jacoby, supra, note 69, p. 353.

[80]Le Dain, supra, note 59, p. 255.

[81]Hurley v. Gumach (1919) 25 R.L. n.s. 432.

[82][1924] 4 C.B.R. 352; 36 Que. K.B. 1.

much per unit as a sale by measure and not a sale "en bloc".[83] The majority in Cohen concluded that the Quebec codifiers did not necessarily apply Pothier's definition to art. 1474C.c. as there was considerable confusion at that time (i.e. 1866) in France on the same question. The majority concluded that 1474C.c. contains, for the case of sale, a qualification of the general principle enunciated in 1025C.c. That is, 1474 C.c. is concerned not merely with the determination of the thing sold but with the "perfection" of the sale and the sale of a thing uncertain or indeterminate is not exactly synonymous with a sale by weight, number or measure.[84] Therefore, the court found that the iron was sufficiently individualized to be a sale "en bloc" which had the effect of transferring ownership at the time of the contract. The weighing, measuring and counting were not necessary to determine the merchandise sold but were necessary only for the calculation of the price, the elements of which were defined in the contract. This decision was affirmed and accepted into Quebec jurisprudence by several successive judgments.[85]

At common law where there "is a contract for the

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[83] Le Dain, supra, note 59, p. 240.

[84] Ibid., pp. 240-5.

[85] Tardiff v. Fortier [1946] Que. K.B. 356.
Re Beaudoin [1953] Que. S.C. 156.

sale of specific goods in a deliverable state, but where the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for purpose of ascertaining the price"[86] the presumption is the parties do not intend the property to pass until the thing is done. The presumption in Quebec law is that ownership and risk are to pass when the contract is made.

Ownership in goods sold by weight, number or measure and not "en bloc" will pass according to the terms of a particular contract including implied terms of commercial usage. Where there is no express agreement or commercial usage, the civil law, in theory, requires the goods to be made certain and determinate in the presence of the buyer and seller or their representatives. Practically, the selection is made by the seller who notifies the buyer of such a selection. Upon such notification, property and risk pass. This does not in any way deny the buyer his recourses if the materials are not of contract description or quality.[87]

In the common law, it is recognized there is a separation between ownership and risk in export contracts. Risk is considered to pass at the moment of

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[86]1970 R.S.O. C-421, s. 19(3)

[87]LeDain, supra, note 59, pp. 254-5.

shipment and ownership passes at a later date when the proper papers are forwarded to the buyer or his agent. In Quebec, the carrier in f.o.b. or c.i.f. contracts is considered to be the buyer's agent to receive the notice required by 1026C.c.[88] Therefore, in civil law ownership and risk will pass together at the time of shipment by operation alone of the Civil Code. In Quebec the transfer of ownership is not suspended by the mere fact the seller has made the Bill of Lading in his or his agent's name to assure payment before the goods are released to the buyer. It does not create a presumption that the right of disposal has been reserved, whereas at common law such a presumption is raised.[89]

VIII. THEORY OF RISKS -- QUEBEC CIVIL LAW

The common law speaks of "risk" in connection with the physical state of goods, and the doctrine of risk is applied to determine who will bear the loss or damage when neither party is at fault. As seen, the risk event is not necessarily one which frustrates or extinguishes the obligations of the parties. The notion of the theory of risks in Quebec is essentially the effects

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[88] F.A. Rodden & CO.Ltd, Ross, es-qualité v. Cohn Hall Marx Co. and Bryce Terminal Warehousing Co. Ltd. (1929) 46 Que. K.B. 42.

[89] LeDain, supra, note 59, pp. 255-6. Vipond v. Montefusco(1917) 26 Que. K.B. 490.

upon the co-contracting party of the rules of supervening impossibility and the doctrinal attempts to explain these effects.[90] This notion is perhaps best stated in the words of Mignault:

> ...une convention synallagmatique, nous supposons un obligation corrélative à l'obligation de livrer, c'est alors que se présente la question des risques, c'est-a-dire celle savoir si, quand l'obligation de livrer la chose est éteinte par la perte de cette chose, l'obligation corrélative est également éteinte, ou si au contraire, elle continue d'exister.91

In synallagmatic contracts the theory of risks is applied to discover who will bear the risk of the loss resulting from the impossibility for the debtor through an irresistible force or fortuitous event to perform his part of the bargain. Sometimes, inexecution of contractual obligations is imputable to the debtor; therefore the rules of contractual responsibility apply. This essay, however, is concerned with the case where inexecution results from a "cas fortuit" or "force majeure", and its implications on requiring (or not requiring) performance of obligations of debtor and creditor.

With respect to the debtor, in a synallagmatic contract, the Civil Code provides that where there is

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[90]Bell, Joel I. "The Theory of Risks in Quebec Law of Contract and Quasi-Contract." Montreal, McGill Essay, 1964, p. 15.

[91]Mignault . Le droit civil canadian, tome V, Montréal, C. Théoret, 1901, p. 402, in Bell, ibid.

a "cas fortuit" or "force majeure" the debtor is exonerated from responsibility; therefore his contractual obligation is extinguished, and he is not liable to compensate the loss.[92] As a result, one must ask if the creditor of the party failing to execute because of a "cas fortuit", still must execute his reciprocal obligation.[93] There are two solutions possible: 1) the creditor should bear the risk of the loss of the contract, because the inexecution is NOT the fault of the debtor, and the debtor should be able to claim the execution of the corollary obligation; 2) the debtor should bear the risk of the loss of the contract, because since the debtor CANNOT execute his obligation, it is therefore equitable that the creditor should NOT have to execute his corollary obligation. The civil law deals with this problem under two headings: periculum contractus: the risk of the (bilateral) contract and periculum rei: risk of property (thing) transfer.

A. Risk of the Contract

The common law does not clearly distinguish the risk of the contract from the risk of the thing. As mentioned above, there are many "risks" involved in any

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[92]Arts. 1200 & 1202C.c.

[93]Note that in synallagmatic contracts, because obligations are reciprocal, each party is both creditor and debtor.

contract, but the common law generally speaks of risks in connection with the sale of goods. In Quebec civil law there is a clear distinction. Risk in an ordinary bilateral contract is governed by the general principle res perit debitori following the French example. Where the debtor of an obligation to do is incapable of executing his undertaking following a "cas fortuit" or "force majeure" he may not demand the execution of the correlative obligation of his co-contractant.[94] This "cas fortuit" or "force majeure" automatically extinguishes not only the debtor's obligation but also the creditor's obligation. The extinction applies to the past (i.e. retroactive effect) as well as the future. Though the Civil Code does not expressly provide the rule res perit debitori the concept can be found in particular applications of the Code. Article 1686C.c. speaks of a contract of enterprise where the workman furnishes the work and materials for the purpose of producing a finished product. If the thing is destroyed before completion he cannot recover wages for time spent. In addition 1202C.c. appears to embody the rule res perit debitori when it speaks of both parties being liberated from the contract. The creditor is

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[94]Baudouin, Jean-Louis. Les obligations, traité élémentaire de droit civil. Montréal, Université de Montréal, 1970, p. 190

only bound under 1202C.c. to pay for any benefit actually received. The authors and jurisprudence are not in agreement when it comes to the underlying foundation of this principle res perit debitori. Some try to explain it on the theory of cause; others on the interdependence of the obligations, and still others on the presumed intention of the parties.

i) Theory of Cause

984C.c. requires four essential elements to a valid contract. The fourth essential element is a "lawful cause or consideration". 989C.c. states that were there is no consideration, or when consideration is not lawful, the contract has no effect. The motives which influence parties to enter into a contract are not the cause. The cause of a contract is the objective juridical reason a person contracts. It is the reason for an obligation and is the answer to the question "Why is the obligation owed?". That is, cause is the impersonal, logical, abstract, objective reasons which induced the contractant to enter into the contract. Principles by Domat and Pothier show that "in every contract of a given type, the cause will always be the same. In bilateral contracts, the cause consists in the mutual undertakings of the parties."[95] Following this theory, if there is an

[95] Newman, Harold. "The Doctrine of Cause or Consideration in the Civil Law." (1952) 30 C.B.R. 662., p. 667.

extinction of the debtor's obligation to do, the obligation of the seller is void for lack of subject matter (object), and the obligation of the buyer is void for lack of consideration(cause).

Though cause is considered to be an essential element to form a contract, it has been extended in France to the post-formation period by the courts. This can be seen in a judgment rendered by the Cour de Cassation.

> ...dans un contrat synallagmatique, l'obligation de l'une des parties a pour cause l'obligation de l'autre et réciproquement, en sorte que, si l'obligation de l'une n'est pas remplie, quel qu'en soit le motif, l'obligation de l'autre devient sans cause.96

In addition French lawyers have developed the so called "théorie des risques" based on the concept of cause and the interdependence of the undertakings of the parties. It should be noted this principle does not apply where property in the goods has passed to the buyer.[97] This "théorie des risques" is best described in the words of Prof. Weill:

> Quand un cas de force majeure empêche l'un des contractants d'accomplir sa prestation, non seulement celui ce est exonéré, mais l'autre contractant est également libéré. Cette solution est commandée par la notion de cause: les obligations réciproques

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[96] Conjoints Ceccaldi c. Albertini. Civ. 14 avril 1891, D.P. 1891.1.329.

[97] Markesinis, B. S. "Cause and Consideration: A Study in Parallel." (1978) 37 Cambridge L.J. 53, p. 62.

> des parties dans les contrats synallagmatiques se servant mutuellement de cause, quand l'une disparaît par impossibilité fortuite d'éxécution, l'autre s'eteint également, faute de cause.98

In Quebec the notion of cause has raised a great deal of controversy between those who affirm the necessity of cause and those who hold the view the notion of cause has no value. The Civil Code revision office has proposed the abolishment of the notion of cause. Regardless, cause remains an essential element and, as such, where the cause in a bilateral obligation disappears the obligations of the parties are extinguished, because the object of each person's prestation is the cause for the other person's prestation. This would indeed support the principle res perit debitori of 1202C.c. As will be seen, this theory of cause does not support the principle enunciated in 1200C.c.

ii) Interdependence of the obligations.

This approach is based on the reciprocal nature of a bilateral contract. That is, one party need only perform his obligation if the other party has performed or is capable of performing his obligation. As an example, in a contract of lease entered into between A (the lessee) and B (the lessor) each party has obligations

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98 Weill. Droit civil, les obligations (1975), no. 498, in Markesinis, ibid.

to perform. Lessee A undertakes to pay a monthly rent depending on B's undertaking to provide peaceable enjoyment of the premises. Before A is able to take possession the premises are destroyed by fire without fault on the part of B. Debtor B's obligation is extinguished by "cas fortuit" (1202C.c.) and creditor A's obligation is also extinguished since B CANNOT perform, so A need NOT perform.

iii) "Volonté presumée des parties."

This approach is based essentially on the interdependence of the obligations, but originates from the intention of the parties rather than from the nature of the contract. That is, each party intends his obligation to be conditional upon the performance of the reciprocal obligation.[99]

B. Risk of the Thing.

Roman law applied the rule res perit creditori to contracts of sale. The creditor of the obligation to give carried the risk. This was due to the fact in Roman law of sale that the contract transferred risk but not property. Pothier applied the rule res perit creditori, but for another reason. The basis for his presumption was that the obligation of the purchaser was perfect and he must, therefore, pay the price in

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[99]Bell, supra, note 90, p. 112.

spite of the destruction of the object before delivery.[100]

The naturalists, during the time of Pothier, felt it was inequitable to make the creditor assume the risk when he was neither the owner nor in possession of the thing. Consequently, they introduced the maxim res perit domino which put the seller in charge of the risks as he remained the owner. This rule was accepted by the French codifiers, but only when the notions of tradition and delivery with respect to ownership were abolished. That is, the codifiers accepted the notion that contracts themselves were capable of transferring ownership without anything more. Thus the maxim res perit domino in contracts translative of ownership became the rule.[101]

The commentators in Quebec invoke three rules of application in the matter of contracts immediately translative of ownerhip. Faribault proposed the maxim res perit debitori by arguing the debtor, having been liberated, should support the loss of the object destroyed by "cas fortuit" before the delivery.[102] This doctrine embodies the resolution of the contract with, as a consequence, the re-establishment of the pre-contractual

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[100] Jacoby, supra, note 69, pp. 345-7.

[101] Ibid., pp. 347-8.

[102] Faribault, L., tome VIII bis, no. 802 in Jacoby, ibid., p. 372.

situation. If the buyer has already paid the price, he will be able to demand the reimbursement.[103]

Some commentators[104] maintain the maxim res perit creditori is the rule in contracts translative of ownership. That is, the charge of the risks is to the buyer so long as he is creditor of the obligation to deliver. This reasoning is based on the Quebec codifiers comments on 1200C.c. when they referred to Pothier's rule res perit creditori. It has been noted that Pothier's writings which inspired 1200C.c. only analysized the unilateral obligation of the debtor and spoke of the correlative obligation of the creditor in another manner (i.e. that the creditor's obligation is perfect at the moment of sale). It is true that 1200C.c. is silent with respect to the creditor which has led some to argue this silence as regards 1202C.c. permits one to believe the obligation to give is ruled by the inverse principle res perit creditori since the rule in 1202C.c. is res perit debitori.[105]

It appears that the maxim res perit domino in contracts immediately translative of ownership has been accepted in Quebec by the codifiers, jurisprudence and the commentators. Article 1200C.c. appears to be an

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[103] Jacoby, supra, note 69, p. 372.

[104] A. Bohemier and F. Fox.

[105] Jacoby, supra, note 69, pp. 372-4.

exception to the general res perit debitori as the seller is released from performance but the buyer is still bound to pay the price where the obligation to give (or deliver) a certain and specific thing. The problem arises when destruction occurs, because ownership and not possession determines who bears the risk of the loss. It is, therefore, very important to determine the moment ownership is transferred as well as the exact moment the object is lost or destroyed. The importance of a detailed examination of transfer of ownership as seen in the preceding chapter is emphasized by the rule res perit domino.

It is difficult to rationalize the rule res perit domino with the theories of cause and the interdependence of the obligations:

> Le principe...est que les risques sont pour le débiteur qui n'a pas pu exécuter: res perit debitori; l'inexécution de l'une des obligations du contrat synallagmatique due à la force majeure entraîne la disparition de l'autre obligation.

The answer given for the case of 1200C.c. being:

> ...une exception, au moins apparente, et dont la portée pratique est considérable: dans les contrats synallagmatiques créant une obligation de livrer un corps certain; les risques sont pour le créancier de la livraison lorsqu'il est devenue propriétaire: res perit domino.106

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106 Mazeaud. Leçons du droit civil. Tome II, Editions Martchrastian, 1956, p. 900, no. 1107, in Bell, supra, note 90, p. 106.

One might argue that the exception created by 1200C.c. was not meant to have any underlying foundation other than the principle of equity.

Where there is partial deterioration of the object of an obligation the Civil Code requires the buyer to bear the loss so long as the seller is not at fault. That is, the debtor is freed from liability "by delivery of the thing in the condition in which it is at the time of the delivery".[107]

The major area of concern with the rule res perit domino is the contract where the seller reserves his right of ownership until some condition has been fulfilled. As seen in the chapter on passing of property in Quebec the decision in Latreille v. Isabel[108] did not apply the rule res perit domino even though the seller had reserved his right of ownership until the complete price was paid. As stated earlier, in Superior Court the problem was considered under the existing theory of risks as being an application of the rule res perit creditori. In fact, it was at the Appeal Court level where the court applied a new maxim to this type of contract. The risk is to be supported by the one who is in possession of the object; the one who exposes

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[107] 1150C.c.

[108] [1958] B.R. 431.

the object to the risk of deterioration or destruction. The Civil Code Revision Office has adopted this approach with respect to risks of moveable things in its Report on Obligations. In the comments on art. 80 the committee made the following statement.

> It seemed more consistent with legal reality and with equity to have the loss of a thing borne by the person who has possession, and hence custody, of the thing and who consequently is in a better position to protect it or to guard it against total or partial destruction.109

If art. 80 of the Draft Civil Code is adopted, Quebec will move closer to the American position on the question of risk. Actual delivery will play a more important role than the question of ownership.

IX. DOCTRINE OF FRUSTRATION -- COMMON LAW CANADA

The doctrine of frustration is relevant when one party is suing for consequential damages. As noted earlier, an event which is capable of frustrating a contract is not necessarily one which is a risk event. In English and Canadian common law there is a distinction between "common law frustration" and "statutory frustration". Each type of frustration will be discussed and then the effects of frustration on the parties will be explored.

A. "Common law frustration"

There has been a great reluctance on the part of

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109 Civil Code Revision Office, Committee on the Law of Obligations. Report on Obligations. Montreal, 1975, p. 127

the courts to remake bargains. The notion of freedom of contract embraces the idea that parties to a contract should protect themselves and not rely on the courts to relieve them from a contract which has become undesirable to complete.[110]

The traditional common law notion with respect to contracts was that non-performance of the promisor's obligation would never, under any circumstances, be excused.[111] This harsh interpretation was relaxed to excuse the promisor where physical destruction of the subject matter made it impossible for the promisor to perform his part of the contract. In Taylor v. Caldwell[112] a music-hall had been leased for concerts on four specified nights. After the contract was completed but before the first night, the hall was destroyed by fire. The court chose to base its decision not on the express terms of the contract, but rather on an "implied" term. Perhaps the judges were taking a cue from Art. 24C.c. which allows the court to interpret contracts according to their nature, usage and the law. The implied term theory was applied to frustrate the contract if one could imply a term to the contract that the parties, looking at the contract objectively,

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[110]Percy, David R. "The Application of the Doctrine of Frustration in Canada." Studies in Canadian Bus. Law. Toronto, Butterworths, 1971, p. 49.

[111]Paradine v. Jane (1647) 82 E.R. 897.

[112](1863) 122 E.R. 309.

must have intended that the contract would be discharged on an event which has, in fact, occurred.[113] The scope of the court's investigation was limited to the existing contract. The decision was limited for awhile to cases of impossibility due to destruction of the subject matter of the contract or to the death of some person who was essential to the performance of the contract.[114]

In Jackson v. Union Marine Insurance Co. Ltd[115] the doctrine of frustration was extended to situations where there was a "frustration of the common venture". In that case, a ship required, under a charterparty, to proceed from Liverpool to Newport to load cargo destined for San Francisco ran aground the first day at sea. The ship was out of commission for six months. The court found that the time necessary for repairs was enough to put an end in the commercial sense to the agreement entered into by the shipowners and the charterers.

When the implied term theory was extended to cover a wider range of more complex cases, it was recognized as little more than a convenient fiction. Lord Denning carried the doctrine to the extreme in the case of Harbutt's Plasticine Ltd v. Wayne Tank & Pump Co. Ltd[116]

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[113]Fridman, G. H. L. "The Theory and Practice of Frustration." (1977) 25 Chitty's Law Journal 37, p. 38.

[114]Percy, supra, note 110, p. 52.

[115][1874] L.R. 10 C.P. 125.

[116][1970] 1 Q.B. 447.

Lord Denning applied Taylor v. Caldwell to say where there has been a physical destruction of the subject matter, the contract is destroyed as well, along with its exemption clause which purports to limit the liability of the parties on the occurrence of such an event. It is generally agreed that the doctrine of frustration cannot apply where the parties have regulated the consequences of a catastrophe. Nevertheless, there is strong judicial authority that even if the parties, at the time of contracting actually foresaw the event, it does not necessarily prevent the doctrine of frustration from applying. Goddard J. in Tatem v. Gamboa stated:

> ...it makes very little difference whether the circumstances are foreseen or not. If the foundation of the contract goes, it goes whether or not the parties have made a provision for it... . If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, ...the performance of the contract is to be regarded as frustrated.[117]

With the gradual erosion of the implied term theory the courts developed a new rule regarding the frustration of contracts. Lord Reid in Davis Contractors Ltd v. Fareham indicated the courts "must construe the terms... in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances

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[117] [1939] 1 K.B. 132, at pp. 137-9.

when the contract was made".[118] This rule directed the court to search for the 'original obligation' and to compare it to the 'new obligation' created by the supervening event to see if the 'new obligation' was a 'radical' or 'fundamental' change.[119]

This so called 'rule of construction' was taken up and expanded in the House of Lords decision of British Movietonenews v. London & District Cinema.[120] In that decision the court received the view of Denning L.J. on frustration on the Appeal level with cool disdain and favoured the construction rule of Davis Contractors. It was the view of Denning L.J.that the courts could exercise a power to do what was just and reasonable even when there was no frustrating event, but merely an uncontemplated turn of events.[121] The House of Lords rejected this suggestion and firmly established the rule of construction as seen in the following passage by Simonds L.J.:

> The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate--a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the

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[118] [1956] A.C. 696, pp.720-1.

[119] Chitty on Contracts, 23d ed. London, Sweet & Maxwell, 1968, vol. I, p. 589.

[120] [1952] A.C. 166

[121] Percy, supra, note 110, p. 54.

> light of the circumstances, existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point--not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.[122]

The major problem with both theories is that the courts must stay within the confines of the written contract. In neither case can extrinsic evidence be admitted to resolve the question before the court.[123]

Though Canadian courts tend to follow the conservative English decisions, often judgments rendered by Denning L. J. have persuasive impact on decisions in Canada. In 1951 Denning L.J.'s view in British Movietonenews was supported in the British Columbia Court of Appeal decision of Cohan v. Fraser.[124] The view was also accepted in the Ontario Court of Appeal decision of Capital Quality Homes Ltd v. Colwyn Construction Ltd[125] where Evans J.A. criticized the implied term and rule of construction and indicated it had "been replaced by the more realistic view that the court imposes upon the parties the just and reasonable solution that the new situation demands".[126]

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[122] [1952] A.C. 166

[123] Fridman, supra, note 113, p. 38.

[124] [1951] 4 D.L.R. 112, p. 115.

[125] (1976) 61 D.L.R. (3d) 385.

[126] Ibid., p. 391.

The "basis of the contract" theory implies that the court does not have recourse to the intention of the parties, but rather views the contract in accordance with principles of justice, reason and fair play that appeal to the court.[127] That is, once it is established that a) the contract is one to which the doctrine of frustration can apply and b) the situation involves a recognized frustrating event, the court is free to intervene and reconstruct the contract.

Events which constitute a frustrating event.

1. Contracts for Personal Services or a Given Thing.

Where the performance of the contract depends on the continued existence of a given person or thing and that person or thing has been physically destroyed after the conclusion of the contract, the courts will generally hold the contract frustrated. A contract where a singer/actress was hired to play a role in an opera was considered frustrated because, due to illness, she was unable to perform on opening night and several nights thereafter. The court found the inability to perform went to the root of the contract.[128]

On the other hand, where there is a contract for purely generic goods, the contract is rarely frustrated.

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[127] Fridman, supra, note 113, p. 39.

[128] Poussard v. Spiers and Pond (1876) 1 Q.B.D. 410.

If the event affects the specific quality of the goods the contract may be frustrated. The decision in In re Badische Co.[129] held that a contract to supply unascertained goods which both parties knew could only be obtained from Germany was frustrated by the outbreak of the war. The commercial object of the contract had been frustrated and the contract was dissolved.

2. Subsequent Legal Change and Supervening Illegality.

Where any sovereign body (Parliament, Provincial or Municipal) intervenes by legislative action or issues administrative orders which affects the legal situation of the contracting parties the contract will, under most circumstances, be frustrated.[130] In Denny, Mott and Dickson Ltd v. James B. Fraser & Co. Ltd[131] there was a contract for the sale and purchase of lumber. This contract contained an option for the appellants to purchase a lumber-yard if the contract was terminated or notice given by either party. In 1939 an Act of Parliament made further transactions under the contract illegal. In 1941 the appellants gave notice to terminate the contract and to exercise their option to purchase. The court found the 1939 Act frustrated the contract and the

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[129] [1921] 2 Ch. 331.

[130] Chitty, supra, note 119, p. 595.

[131] [1944] A.C. 265.

option lapsed upon the frustration since the option arose only if the contract was terminated by notice from one of the contracting parties. The change in the legislation which renders performance impossible or more onerous should be unexpected and not an undertaking which the promisor accepted at the time of the contract.[131a]

If an export contract provides for actual delivery to a destination and the place where the contract has to be performed has passed under the control of an enemy in time of war, the contract is frustrated.[132] Generally, the outbreak of war renders all intercourse between Canadian subjects and alien enemies illegal. Any contract with such intercourse is automatically dissolved.[133]

Frustration may be invoked when export and import prohibitions are introduced after the contract has been concluded. The effect of such prohibitions may be to suspend or postpone performance. The prohibition acts as a frustrating event only if it is final and extends to the whole time still available for the performance of the contract.[134]

3. Cancellation of an Expected Event.

Where the contractual obligation is dependent upon the occurrence of some event and that event does not

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[131a] Percy, supra, note 110, p. 66.

[132] Fibrosa Spolka v. Fairbairn (1943) A.C. 32.

[133] Robson v. Premier Oil (1915) 2 Ch. 124.

[134] Schmitthoff, supra, note 2, p. 97.

occur the courts have held contracts frustrated. The most famous decisions in this area are known as the Coronation cases. They have been cited as examples where the contract is "commercially frustrated". In Krell v. Henry[135] the defendent agreed in writing to hire rooms in the plaintiff's flat on two days to view the Coronation procession of Edward VII. The contract made no reference to the processions. When the processions were postponed due to the King's illness the defendent refused to pay for the rooms. The court allowed parol evidence to prove the subject matter of the contract was gone (i.e. to view the coronation) and,therefore, the contract could not be performed. Both parties were discharged for the same reason.

In a later decision[136] the contract was made for a stated purpose. The plaintiff's steamboat was hired for two days to view the Naval Review and a day's cruise around the fleet. The Review was cancelled and the defendent neither paid the balance nor used the ship. Some try to reconcile this decision with Krell by saying the fundamental purpose of the contract was not destroyed as the fleet remained anchored and the ship could have been used to cruise around the fleet.[137]

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[135](1903) 2 K.B. 740.

[136]Herme Bay Steamboat v. Hutton (1903) 2 K.B. 683.

[137]Chitty, supra, note 119, p. 601.

4. Contract Becomes More Onerous Without Being Impossible.

Where there has been a change in circumstances, common law courts are very hesitant to find frustration if the contract is not completely and fundamentally a different one under the new circumstances. This can best be seen in Harman L.J.'s statement in Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H., a Suez Canal decision:

> Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied upon with success. It is, in fact, a kind of last ditch, and ...it is a conclusion which should by reached rarely and with reluctance.138

Concerning the question of expense, Lord Denning indicated in a decision regarding an export licence that if the licence could only be granted at a cost one-hundred times the contract price would it be a "fundamentally different situation" and the seller would not be bound to pay.[139] Therefore, an increase in expense will not justify frustration unless it is of drastic significance and perhaps sufficient to render the contract virtually impossible of performance.

B. Statutory Frustration

Section 8 of The Sale of Goods Act[140] provides:

> Where there is an agreement to sell specific goods and subsequently the goods without any fault of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided.

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[138] [1962] 2 Q.B. 318, 370.

[139] Brauer & Co. v. Clark (1952) 2 All E.R. 497.

Every part of section 8 must be complied with for the section to apply. The effect of section 8 is to import common law consequences of frustration, because The Frustrated Contracts Act[141] excludes any contract to which section 8 applies or a contract which is frustrated by a perishing event.

i) How "Specific" Must the Goods Be?

Specific goods are generally those identified and agreed upon at the time of the contract of sale. A broader definition arguable regarding section 8 is where the source is precisely defined, the goods can be regarded as specific. This broad definition was accepted in Howell v. Coupland[142] which, in turn, forms the basis for section 8. This involved a sale of 200 tons of potatoes to be grown on a particular piece of land. Disease attacked the crop and only 80 tons were produced. The seller delivered the 80 tons to the buyer who then sued for damages and non-delivery. The court held the seller was not liable and the contract was frustrated. The seller was not free to obtain goods from another source. The court placed an emphasis on the fact the crop was to be grown on a specific piece of land and chose to import another section of the Act which infers the goods will be in existence at the date set for delivery.

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[141] 1970 R.S.O. C-185.

[142] [1876] L.R. 1 Q.B.D. 258.

This decision should be compared to Sainsbury Ltd v. Street[143] where the court held a sale of 275 tons of barley to be grown on a particular farm was not a sale of specific goods. The effect of the perishing of the goods in such circumstances must, therefore, be a matter for the common law. Here the defendent agreed to sell a crop of about 275 tons of barley to be grown by him on his farm. In fact, owing to general crop failure, only 140 tons were produced which the defendent sold and delivered to a third party at a substantially higher price. The court held that although the contract was frustrated as to that part of the crop which failed, this did not exonerate the defendent from offering the crop actually produced to the plaintiffs. This suggests where part only of the goods perish, the seller may well be obliged to offer the remaining goods to the buyer. The buyer, however, may not be obligaed to take them.

ii) "Perish" Without Fault of Seller or Buyer.

Perish means at least a risk event and more. The risk must affect the physical state of the goods and have the effect of destroying their commerciality. Mere deterioration is not enough. A declaration of war might be a frustrating event, but it is not perishing within the meaning of the statute. Where goods are stolen, the courts have ruled that this is a perishing. Perishing

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[143] [1972] 1 W.L.R. 834.

of part of the goods might be a perishing of the whole if the contract is entire. That is, the buyer's obligation to pay the price only arises when all the goods are delivered. If part of the goods perish, the buyer is no longer bound to pay the price, and it can be said that the whole consignment has perished. For example, a contract for the sale of 100 tons of nuts, delivery in 10 installments of 10 tons, price only payable when all installments delivered. If before any deliveries 10 tons perish, the buyer is relieved from having to accept any goods under the contract. The seller cannot tender the remaining 90 tons, because the buyer's obligation to pay is only at the end of all deliveries. If some deliveries had been made and accepted the situation would be different.

C. The Effects of Frustration

1. Common Law Consequences as Result of Statutory Frustration.

Unless the parties have expressly or impliedly provided for the consequences of frustration the following rules will prevail: a) the parties are discharged from future performance which has not yet accrued at the time of the frustrating event. There is no retroactive effect. The buyer need not pay the price and the seller need not deliver. However, the rights and liabilities which accrue before the frustrating event remain unaffected; b) if there is a total failure of consideration, then any part of the price paid in advance is recoverable.

In the case Logan v. LeMesurier[144] there was a contract for the sale of timber. The actual price was to be determined upon the buyer measuring the exact quantity upon delivery. The timber was destroyed in a storm. The court held the contract was not frustrated. If the seller had not contracted absolutely to deliver the logs, the contract would have fallen within section 8 and been frustrated. Due to the nature of the seller's obligation to deliver, section 8 was displaced. Therefore the buyer could recover money paid and damages as well.

The buyer may escape accrued liability if there was a total failure of consideration, but if there is no total failure of consideration and the buyer has received any part of the benefit, he cannot recover anything. However, it is possible to argue if part of a non severable contract has been accepted the buyer can recover for failure of consideration on a proportionate basis. The court allowed recovery for partial failure of consideration in Devaux v. Conolly[145] but it should be noted that the case was not a frustrating event, but rather a simple breach of contract. If the event was frustrating it is open to speculation whether this case would succeed.

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[144] (1846) 13 E.R. 628.

[145] (1849) 137 E.R. 658.

Where the price is payable in advance and is recoverable by the buyer for total failure of consideration, the seller is not entitled to keep any money for expenses. If the contract was entire, and the seller has conferred some benefit on the buyer, the buyer need not pay. However, when it can be shown the buyer had a choice and freely accepted the benefit, the seller may bring an action in quantum valebant. The facts must be capable of supporting an implied contract for the partial delivery.

If part of the goods perish and part survive, the rule in Sainsbury v. Street[146] provides where there is a frustrated contract, then it is frustrated pro tanto (for as much as may be), and the seller must tender surviving goods. However, the buyer may have an option under this implied term according to section 29 regarding short delivery.

Three main areas of injustice appear as a result of common law consequences: 1) the seller cannot recover his expenses; 2) the seller is limited in recovering for partial performance; and 3) the buyer can only recover the price if there is a total failure of consideration. The Frustrated Contracts Act[147] was designed to counter injustices of common law consequences.

2) Frustrated Contracts Act Consequences as a Result of Common Law Frustration

The Act is concerned only with consequences. One

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[146] Supra, note 143.

[147] 1970 R.S.O. C-185.

must rely on the common law to decide if the contract has been frustrated. The Act stipulates where the contract provides for consequences it is not applicable. The main purpose of the Act is an attempt to cure the deficiencies of the common law. Section 3(1) provides where there is a total failure of consideration, sums paid are recoverable as money had and received. Sums payable cease to be payable even if there is no total failure of consideration. Section 3(2) deals with expenses. The seller can only recover expenses out of sums paid in 3(1), therefore he must show that sums were payable or due before the event occurred. If the contract did not stipulate payment at a date prior to the event, the seller recovers nothing. The amount paid is at the discretion of the court, but the maximum recoverable is the sum under section 3(1). Section 3(3) provides the right to collect if a valuable benefit is conferred prior to the frustrating event. This is applied even where nothing is paid prior to the frustrating event. There is no upper limit. The courts use this section to avoid the rigours of s. 3(2). If the contract was severable, the court will treat five deliveries made out of ten contracted for as a separate contract and apply frustration only to the remaining deliveries. Unfortunately, prepaid sums are not recoverable under section 3(1).

3) The Effect of Goods Perishing Prior to the Conclusion of the Contract

Section 7 of The Sale of Goods Act is a prima facie

rule which can be displaced by the intention of the parties. Where there is a contract for the sale of specific goods which have perished without knowledge of the seller at the time the contract was made, the contract is frustrated. The distinction between section 7 and section 8 is that something happens prior to the contract being formed. If either party has undertaken an absolute liability, section 7 will be displaced.

In the case Barrow, Lane & Ballard v. Phillip Phillips & Co.[148] the plaintiffs contracted to sell to the defendents 700 bags of nuts which were believed to be lying in a certain warehouse. In fact, 109 of the bags had disappeared, presumably by theft, at the time when the contract was made, and a further 450 bags disappeared before the buyers attempted to obtain delivery two months later. Though this seems to be a simple case of breach of contract by the sellers, in fact, the court held the perishing of part amounts to a perishing of the whole and section 7 applied to void the contract. This section will only apply providing the contract is entire and the price payable only on delivery of the whole.

In contrast to Barrow, Lane is McRae v. Commonwealth Disposals Commission[149]. This involved a ship-wrecked tanker sold to the plaintiff for salvage. In fact, the tanker had never existed. The government offered to return

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[148] [1929] 1 K.B. 574.

[149] (1951) 84 C.L.R. 377.

the price, but the plaintiff had spent much more than the price in trying to salvage the non-existent tanker. The court held where goods never existed, it cannot be a frustrating event, because there was nothing to be frustrated. The court is free to imply a term that the seller warranted the existence of the goods and section 7 could not apply.

X. IMPOSSIBILITY OF PERFORMANCE -- QUEBEC CIVIL LAW

The civil law of Quebec traces its origins to Roman law. Under Roman law, consent between parties was considered an essential element of a contract. Due to this element, parties were assumed to have entered contracts fully informed and of their own free will. It followed, therefore, that the law would require parties to complete any obligations arising from such a contract. Perhaps the common law rule enunciated in Paradine v. Jane[150] that a party had an absolute duty to perform a promise he made or to protect himself against non-performance was taken from the Roman example. This notion, of course, is known in the common law as freedom of contract which recognizes the right of individuals to engage in contractual intercourse, but also lays a heavy burden on each individual to protect his interests. Freedom of contract is equally accepted in Quebec. One questions if the courts and codifiers who established the rules envisioned the standard form contracts which are so much a part of commercial transactions today.

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[150](1646) Aleyn 26.

Eventually the idea grew in Roman law that a person should not be held to do something which had become impossible. That is, if a thing was impossible in itself or an event arose subsequent to the formation of the contract which prevented the performance of the obligation. -- Nemo tenetur ad impossibilia -- This maxim coupled with Pothier's writings and 1302C.N. forms the basis of Quebec civil law on impossibility of performance as a means of extinguishing an obligation.[151]

Article 1138C.c. provides inter alia for the fulfillment or dissolvement of a contractual obligation "by the performance of it becoming impossible". As emphasized earlier, the courts must first give priority to the terms of the contract to determine the obligations the parties have undertaken. Where one party has absolutely guaranteed the fulfillment of a promise, the articles in the Civil Code providing for extinction of obligations can never be exercised to excuse non-performance. The common law also does not allow one who promises performance to escape liability. Therefore, it is very important to determine the content of any contract. Where the parties have failed to give expression regarding specific obligations or to provide for catastrophe, the Civil Code supplements the silence of the contract in articles 1071, 1072, 1200, 1201, and 1202.

1071C.c. requires the debtor to pay damages when he

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[151]Wasserman, Gertrude: "Impossibility of Performance in the Civil Law of Quebec." (1952) R. du B. 366.

cannot establish "cas fortuit", whereas 1072C.c. exempts the debtor from damages when he is able to establish "cas fortuit". 1200C.c. has the effect of extinguishing the obligation of the debtor, but, as seen in the chapter on risks in Quebec, does not extinguish the corollary obligation of the creditor if ownership in the goods has passed. 1202C.c. has the effect of liberating both parties to the contract.

With such important results flowing from the establishment of "cas fortuit" or "force majeure" the two terms should be clearly defined. In various articles throughout the Code the two terms are used interchangeably. In other articles the terms are used singularly. However, it is accepted in Quebec that the two terms are synonymous. "Le cas fortuit ou la force majeure est définie par la doctrine classique comme un événement extérieur à l'homme, que celui-ci ne pouvait prévoir, auquel il ne pouvait résister et qui a rendu absolument impossible l'exécution l'obligation."[152]

A. Elements Constituting "Cas Fortuit".

i) Intrinsic characteristics

a) Unforseeability

Article 17 paragraph 24 demands that the debtor could not have foreseen the event. In addition, jurisprudence and doctrine demands it must be absolutely and objectively

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152 Baudouin, supra, note 94, p. 304.

impossible.[153] Generally, at common law, if an event has been anticipated and provided for, the courts will not allow a successful plea of frustration. Note, however, the exceptional decision of Lord Denning in Harbutt's Plasticine regarding frustration and exemption clauses which purport to establish the liabilities of the parties on the happening of an event.[154]

b) Irresistible

The debtor's activity is analyzed before, during or after the event to determine if he has done all within his power to avoid the event which has occurred nevertheless. Though the common law does not speak specifically in terms of an irresistible force it does "construe the terms...in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made".[155] This same thought is continued by examining all the circumstances including, most particularly, the debtor's activity.

ii) Extrinsic Characteristics

a) Impossibility of Execution

The debtor must take all possible steps to accomplish his promise. The impossibility must be objective and not personal to the debtor. If the event renders the contract

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[153] Jacoby, Daniel. "Réflexions sur le concept de cas fortuit." (1972) 32 R. du B. 121.

[154] Supra, p. 61.

[155] Davis Contractors v. Fareham (1956) A.C. 696, pp. 720-1.

more difficult or onerous it will not merit a plea of "cas fortuit".[156]

B. Conditions Necessary to Establish the Debtor's Liberation Under 1200C.c.

Although this section speaks only of 1200C.c. the requirements for proving "cas fortuit" are the same under 1202C.c.

i) The Obligation Must Concern the Delivery of an Individualized Object.

A general rule of Quebec law, inherited from Roman tradition, is that things of a kind cannot be lost.[157] The common law also adheres to this rule and rarely allows the debtor to excape liability when purely generic goods are the object of the contract. Article 1200C.c. is not limited to simple material loss of the object. The article recognizes that delivery may become impossible from other events capable of bringing on the impossibility of performance such as theft, embargo and war. Thus, in one short article, the civil law embraces the possibility of a "perishing " event as well as other events which may bring an end to the debtor's obligations. As seen earlier, an event which is capable of frustrating a contract in common law is not necessarily a "risk" event as well.

ii) Absolute Impossibility.

Article 1200C.c. requires the debtor to "prove the fortuitous event which he alleges". In addition, doctrine and

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[156]Jacoby, supra, note 153, pp. 126-7.

[157]Jacoby, supra, note 69, p. 366.

jurisprudence requires that the debtor only be liberated if execution is absolutely impossible. The requirement entails four qualifications.

a) The debtor must not be able to do anything which profits the creditor; otherwise he must execute to the extent of the contract which may be filled. He must deliver any deteriorated object to the creditor (1150C.c.).[158] The common law applies the same rule in Sainsbury v. Street[159] which requires the seller to tender surviving goods. The buyer, however, is not required to accept the goods if he so chooses. It is submitted the situation is the same in Quebec.

b) The Execution of the Obligation Must Not be Possible in Itself.

The impossibility must not be relative to the debtor only. The debtor is generally responsible for his personal situation. The major reason for this stipulation is the need for certainty in commercial transactions and such certainty can only be attained where the dissolution of contracts is very difficult.[160]

> Cette impossibilité doit avoir été absolue; si l'exécution de l'obligation, bien qu'impossible pour le débiteur, était possible pour d'autre personnes, il ne peut être exonéré car il a commis une imprudence en s'obligeant.161

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[158] Bohemier, Albert et Fox, Francis. "De l'effet des changements de circonstances sur le contrats dans le droit civil québecois." (1962) 12 Themis 77.

[159] (1972) 1 W.L.R. 834.

[160] Bohemier, supra, note 158, p. 79.

[161] Faribault, L. "Traité de droit civil du Québec." in Bohemier, ibid.

c) Impossible vs. More Onerous.

Generally, the obligation must be materially, physically or legally incapable of being performed. The Quebec jurisprudence follows Pothier's rule that the impossibility must be absolute. In Biron v. Meloche the court stated:

> (l)'obligation de donner ou de faire n'est éteinte pour cause d'impossibilité que si cette impossibilité est complète, permanente et perpétuelle, et forme absolument obstacle à l'execution de l'obligation...162

An even stronger recognition of Pothier's rule is seen in the Supreme Court decision Rivet v. La Corporation du Village de St-Joseph[163]. A contractor had undertaken work on a sewer for a municipality. Quicksand, which was unapparent on the surface, caused the obligation of the contractor to increase financially and physically to a much greater obligation than he had originally undertaken. The court rendered judgment against the contractor indicating this was a risk of the trade he must assume. The common law, as well, will not free a debtor where the situation is merely more onerous, but will free the party when the venture has become "commercially impracticable". Quebec courts generally apply the strict rule of absolute impossibility but there are a small number of decisions which suggest the application of commercial impracticality.

In the early part of this century the French adopted

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[162](1927) 65 C.S. 535.

[163][1932] S.C.R. 1

the theory of "l'imprévision". The economic dislocations brought about by the 19th century boom and depression plus WWI allowed the parties to assume the execution of the contract would take place under normal conditions which existed at the time of the contract. Any extraordinary circumstances would allow the parties to modify the contract or even resiliate it.[164] This theory was never accepted in Quebec, but its affect may be seen in some decisions which suggest the application of commercial impracticality. One author argues this is an Anglo-Saxon influence and must be rejected as contrary to the fundamental rules of civil law.[165]

In Maddens v. Demers[166] there was a contract for the delivery of gravel. When the original site was changed after the completion of the contract, the debtor was not able to use the equipment (horses and carts) which he contemplated using at the time of the contract. The new site required the use of mechanized equipment as the site was inacessible otherwise. One member of the court concluded that the creditor had demanded something more onerous than the original contract considered and therefore liberated the debtor.

In Furness Withy & Co. Ltd v. The Great Northern Railway Co.[167] a railway could not haul freight because a bridge on its line was destroyed. The creditor argued that

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[164]Wasserman, supra, note 151, pp. 369-370.

[165]Bohemier, supra, note 158, p. 81.

[166](1920) 29 B.R. 505.

[167](1907) 32 S.C. 121.

an alternative route or method should be employed. The court replied: "La chose peut être physiquement possible, mais pratiquement, elle était impossible, et elle l'était surtout au point de vue commercial".[168] This certainly compares to common law decisions on commercial impraticality, but there does not seem to be strong continued judicial support in this area.

d) The Impossibility Must be Absolute.

The defence must argue that the impossibility is not imputable to the debtor, but this absence of fault will only serve the debtor if he has established the previous existence of absolute impossibility. As an example, in a contract of transport, the debtor is ordinarily engaged in a general fashion and may only be relieved of his obligation if all means of transport are rendered absolutely impossible by the unforeseeable event, but if the parties have explicitly or implicitly provided a particular mode of transport, the debtor will be liberated, if the means provided him is rendered absolutely impossible.[169]

iii) The Impossibility Must not be Imputable to the Debtor.

The inexecution of a contractual obligation presumes fault on the part of the debtor. To escape liability he must establish that the change in circumstances which rendered the execution absolutely impossible was a "cas fortuit".[170]

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[168] Ibid., p. 133.

[169] Bohemier, supra, note 158, p. 84.

[170] Ibid., p. 87.

Article 1063C.c. requires the debtor of "an obligation to give involves the obligation to deliver the thing and keep it safe until delivery". In addition, the debtor has an obligation to keep the thing safely (1064C.c.). Where he cannot prove that he has kept a thing safely, he must pay damages as per 1071C.c.

A "cas fortuit" is not a maximum or absolute force but a force appreciated within the intensity of the obligation envisioned in the express terms of the contract or the implied terms the court may apply. As mentioned in an earlier chapter, there are three levels of intensity in Quebec: 1) an obligation of diligence; 2) an obligation of result; and 3) an obligation of warranty. Generally, most contractual obligations are considered to be obligations of diligence. That is, if the debtor can prove that he acted as a "bon père de famille" and could not reasonably have foreseen or resisted an event he will escape liability. One author has argued effectively that when a debtor has exercised due diligence, and the obligation has become impossible to perform, the debtor has, nevertheless, fulfilled his obligation rather than having it extinguished. That is,

> a debtor may be released from achieving a result, not because the means are more difficult, but because he is not bound to do anything more than what he contractually committed himself to perform. ...The debtor must prove he acted according to the intensity of his obligation and he must prove the actual event which caused the impossibility rather than merely showing he acted according to the necessary care required by his obligation.171

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171 Bell, supra, note 90, pp. 47-9.

Where a debtor has guaranteed a result (i.e. an obligation of warranty) he can never plead under 1200C.c. even though a "cas fortuit" has occurred, because he has expressly assumed the risk of the fortuitous event. The common law looks for fault on thepart of the party in breach of contract and, if it is present, a successful plea of frustration will not be allowed.

In Soulier v. Lazarus[172] a watch left as a pledge was stolen. The court found that the pawnshop was locked securely and the theft was not due to the negligence of the pawnbroker. Therefore, his obligation to return the watch was extinguished. It would be just as easy to argue he had fulfilled his obligation by acting with all due diligence and impossibility occurred nevertheless. As a comparison, a later decision where a clerk left a large sum of money in a room without protection, found the negligence of the employee prohibited the successful plea of "cas fortuit" due to his fault.[173]

iv) The Event Must Occur Before the Debtor is in Default.

If the debtor has not delivered the object at the time promised, he must support the loss in the sense that he must give the creditor a just compensation or a thing of the same nature (1065C.c.). If, on the other hand, he can establish

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[172](1877) 21 L.C.J. 104.

[173]Grand Trunk Railway Co. v. Citizens Insurance Co. (1878) 1 L.N. 485.

that the loss would have, despite everything, occurred in the hands of the creditor, he will not be held responsible nor will he be required to pay damages.[174]

C. Events Which Constitute "Cas Fortuit".

The events which constitute "cas fortuit" may originate from many sources, but no such source constitutes "cas fortuit" in itself unless it meets the conditions of 1200C.c. and 1202C.c.[175]

i) "Fait du Prince"

This event is directly comparable to the common law notion of subsequent legal change. It is an act by a sovereign body taken in the public interest. Quebec jurisprudence does not offer many examples but there are some which give the courts guidance.

In Copeman v. Kinnear[176] the conscription of a man into the army making it impossible to continue a commercial lease constituted a "fait du prince" and freed him from his lease. In another decision, Stanford v. Nicolau[177], a Roumanian consul was not released from the lease of a home even though he had been recalled to his country due to outbreak of war. Due to his profession, the consul was deemed to have accepted the risk of the fortuitous event. He was in a better position to foresee the event and

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[174] Jacoby, supra, note 69, p. 368.

[175] Bell, supra, note 90, p. 50.

[176] (1924) 62 S.C. 71

[177] (1943) R.L. n.s. 154.

should have protected himself accordingly.

The "fait du prince" must apply to the population in general and not to a restricted class of persons. In Commercial Loan Co. v. Fleury[178] a dentist was prevented from using an illuminated sign he ordered. This was due to a by-law passed by the College of Dental Surgeons. The by-law was not a law passed for the general public.

ii) War

War does not, per se, constitute a "cas fortuit". The war must interfere directly with the debtor's performance of his obligation. In addition, the non-performance must meet the rigid test of absolute impossibility. In Duchaine v. La Cie Marier et Trudel (Ltée)[179] the debtor had undertaken to supply the creditor with leather goods in Sept., 1916. It was understood that English leather was required. When the debtor was unable to perform, he was not allowed to plead "cas fortuit" as the war conditions existed at the time of the contract and he was presumed to have accepted the risk. On the other hand, in Bisaillon v. Union Grain[180] an embargo on the railway shipment caused by war conditions was considered a "cas fortuit".

iii) Strikes

Normally, as in common law, the strike does not of itself constitute "cas fortuit" but will depend on the

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[178](1937) 75 S.C. 421.

[179](1918) 53 C.S. 302.

[180]28 R.L.n.s. 387.

circumstances in each case. In Quebec, under some circumstances a strike will equal a "cas fortuit" in an obligation to do. If there is a strike which paralyzes the factory where a sub-contract is being carried out and the debtor is prevented from executing his obligation he may be excused. He must prove that he has tried, without success, to employ others to complete the sub-contract in similar industries.[181] On the other hand, if the seller is obligated to deliver a certain, specific thing, the strike may not be a "cas fortuit". The reasoning behind this is that no reference is generally made to the work to be done and the seller should protect himself by an exemption clause.[182] Others hold the view that a strike constitutes a "cas fortuit" whenever it is a general strike which involves a majority of personnel and extends to workers of the same profession.[183]

iv) Material Destruction of the Object of the Obligation to Deliver Under 1200C.c.

Generally, fires and thefts are considered "cas fortuit" and have the effect of liberating the debtor if he is completely without fault.[184]

v) Permanent vs. Temporary Impossibility

Normally, temporary impossibility will not end a contract, but it may be capable of suspending the contract.

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[181] Galardo v. Dépatie (1921) 59 C.S. 377.

[182] Wasserman, supra, note 151, p. 386.

[183] Ibid.

[184] Jacoby, supra, note 153, p. 122

between the parties. The judge takes into consideration the nature of the contract, the duration of the obstacle, the good will of the parties and all circumstances of the case.[185]

D. Restitution

The civil law is faced with the same problems seen in the common law concerning benefits received by parties unjustly or monies lost in preparation and perliminary work when contracts become impossible to perform. Generally, in Quebec the debtor accepts the risk of the contract and must entirely support the loss. Either there must be progressive jurisprudence in this area or an amendment to the Civil Code.

XI. CONCLUSION

As indicated earlier, every legal system faces the same problems. Each system will employ its own methods to determine the legal responsibilities of the parties. The civil law of Quebec traces its origins to the Romans and the doctrine of respected authors in France. It is a system well grounded in fundamental civilian tradition. There are those in Quebec who fear the encroachment of the common law and who would wipe all traces of its influence from the system. On the other hand, Quebec is a bi-systemic legal society by virtue of the public law which comes to us due to Quebec's membership in the larger confederation of Canada. Administrative, criminal and constitution law import the notions of common law into Quebec. However, private law which regulates

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[185] Ibid., p. 127.

members of Quebec society has managed to maintain the traditional civilian approach. This is not to say there has been no civilian influence on the common law. Indeed, the common law, which cannot claim such noble origins as Quebec, does show the influence of its civilian neighbour.

The main legal problems discussed in this essay were the exact moment ownership passes in goods, the locus of the loss when impossibility of performance occurs, and the events which must be proved to constitute a successful plea of frustration or impossibility of performance. With respect to transfer of ownership, the common law indicates by statute a rather detailed set of rules to guide the courts in determining the transfer of ownership. Quebec also in the chapter on Sales coupled with articles from the chapter on Obligations sets forth guidelines for transfer of property. Both systems stress the importance of giving effect to the parties' intention whether expressed in the contract or implied by the law. It is only where no such intention is apparent that both systems resort to the guidelines provided. The major area of difference concerns sale of a specific lot of merchandise which must be weighed, counted, or measured to determine the price. In common law there is a presumption that ownership will not pass until the weighing, counting or measuring; whereas in Quebec the presumption is the property passes at the moment of the contract.

With respect to the locus of the loss when impossibility of performance occurs, both systems rely on the maxim res

perit domino when the contracts are for the sale of goods. The common law has taken this maxim from the civil law and applied it with the same interpretations. Therefore, the importance of the transfer of ownership cannot be emphasized too much. Neither system expressly provides for risk. Rather, one must resort to jurisprudence and doctrine to interpret the responsibilities of the parties. The theory of risks in Quebec is directly tied to the rules governing impossibility of performance; whereas in common law it is possible that the application of the doctrine of risk will not necessarily involve a frustrating event.

The events which constitute a "cas fortuit" or a frustrating event are basically the same in both systems. The civil law, however, is more precise in detailing the requirements for a plea of impossibility of performance than the common law. In common law, one can never be sure which theory of frustration will be applied which leaves the certainty of the contract somewhat in question. The common law is more likely to render judgment where there is commerical impracticality than the civil law system.

It appears that the proposed Civil Code is taking a progressive step with respect to the transfer of ownership of moveable property. The civilians take a more realistic view and make possession of the goods the primary consideration for the locus of the loss. It would do no harm for the common law to adopt the same rule.

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