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NULLITY OF CONTRACTS IN QUÉBEC LAW

AN OVERVIEW AND COMPARISON WITH THE COMMON LAW OF ILLEGAL CONTRACTS

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Background

[1] In 1991, the Québec legislature adopted the *Civil Code of Québec* ("Civil Code"), which came into effect on 1 January 1994. The Civil Code is the result of 40 years of extensive research and consultation led by Québec's foremost jurists.[1] It contains a comprehensive restatement of the civil law of persons, family, successions, property, obligations, prior claims and hypothecs (secured transactions), evidence, publication of rights and private international law. Several provisions of the Civil Code are intended to harmonize Québec law with international conventions or with the common law of the other Canadian provinces.[2]

[2] Given the recent adoption of a brand new Civil Code, most areas of Québec civil and commercial law are not presently felt to be in need of urgent reform. The Conference has nevertheless taken the view that uniform legislation in the realm of civil or commercial law ought to take into account a civil law perspective and any relevant provisions of the Civil Code. The drafting of uniform legislation provides a welcome opportunity for exchange between jurists of both legal traditions. It is at least plausible that the Civil Code will contain solutions of interest to the common law provinces, while the drafting of uniform legislation provides Québec jurists with the opportunity to review critically and suggest ways in which to update their own legislation.[3]

[3] I am very grateful for the opportunity which I have had to discuss the law of illegal contracts with Arthur Close and the other members of the Civil law section, leading up to the completion of a draft Uniform Illegal Contracts Act ("UICA"). I have found our exchanges very stimulating and welcome the chance which I am now given both to present and re-examine the law of Québec in light of the UICA.

[4] This paper, which will be presented in Regina at the August 2004 meeting of the Civil Law Section, outlines the law of Québec relating to the nullity of contracts and is completed by more specific commentaries, which I have contributed to the draft UICA presented by Arthur Close. The relevant provisions of the Civil Code are reproduced in both languages in a schedule to this paper.

Nullity

[5] A contract which is contrary to the rules governing its formation or conditioning its validity may be annulled (art. 1416 C.c.Q.).

[6] There are two sorts of rules which may bring about the nullity of a contract. The first are those which relate to the procedure of contract formation: offer and acceptance, certainty, intention to create legal relations, capacity, fraud, error, fear, lesion, etc.[4] The second are those which concern public order, either statutory or based on general moral or social imperatives recognized by the courts. Of course, the two categories may overlap, since certain statutory requirements also relate to the procedure of contract formation.

Rule of Benevolent Construction

[7] In the case of a statute directly or indirectly prohibiting certain conduct which may be the object of a contract, there exists in Québec a rule of benevolent construction. A contract which contravenes an enactment is null only if the enactment explicitly states that such a contract is null or if fulfilment of the purpose of the enactment requires it. Although this rule has not been codified in the Civil Code, it clearly is recognized by the courts.[5]

[8] In order to determine whether nullity is required for the fulfilment of the purpose of an enactment, a court must consider the existence of other remedies or sanctions provided by the enactment and securing compliance therewith. It also must weigh the risks associated with upholding or annulling the contract for all parties involved. Codification of this rule in the Civil Code would be desirable.

Illegal Formation vs. Performance

[9] In the civil law, no distinction is made according to the manner in which a contract violates rules of public order. The only relevant consideration is whether at the time of formation, the contract is contrary to public order, taking into account its terms and the common intention of the parties.[6]

Distinction between Absolute and Relative Nullity

[10] There is a fundamental distinction in Québec law between absolute and relative nullity, very similar to the common law distinction between void and voidable contracts.[7] The main thrust of the distinction is as follows. Where the nullity is relative, only one party, the party protected by the rule, may have the contract annulled; he or she may also

opt to confirm the contract (art. 1420 C.c.Q.). Where the nullity is absolute, any person who has a legal interest in doing so (i.e. standing to sue), may have the contract annulled (art. 1418 C.c.Q.). Even a party who is guilty of knowingly breaching the law may invoke the absolute nullity of a contract, whether or not he or she has "repented", for it is in the public interest that the contract be annulled. It will be seen below that such party may be sanctioned by a court refusing to order restitution in his or her favour.

Distinction between Public Order of Protection and Public Order of Direction

[11] In the course of the 20th century, civil law scholars in France, followed by Québec, established a distinction between rules of public order which exist to protect a contracting party, such as consumer legislation, and rules of public order which exist in the general interest, such as criminal law[8]. The important implication of this distinction is that nullity is relative in the first instance and absolute in the second instance. Contracts which are contrary to public order therefore may be either "void" or "voidable". This distinction is now codified (art. 1417, 1419 C.c.Q.). It is interesting that the common law has occasionally come close to adopting a similar approach: breach of a statute established for the protection of the weaker party to a contract might render a contract voidable, rather than void.[9]

[12] The distinction is useful in explaining why the nullity of a contract which contravenes certain kinds of enactments (those relating to public order of protection) must work only in favour of the protected party, who may also opt to confirm the contract.

[13] It is my belief that the relative nullity of such a contract may only be invoked in cases where the protected party has been affected negatively by a violation of the enactment.[10] The reason is that a protected party should not be able to invoke the technical breach of a rule established for his or her protection, in order to avoid a contract, where it is shown that such party in no way suffered from the violation, in the circumstances of the case.

[14] The distinction between public order of protection and public order of direction has proven to be difficult to apply in certain cases where the law protects the interests of a group: the best examples are labour legislation and legislation limiting or regulating the exercise of certain trades and professions. In a sense, such legislation exists to protect a weaker party to a contractual relation (the worker in a labour relation, the consumer in a

contract of sale or service); but it also exists to regulate social and economic activity in the general interest. S. 347 of the *Criminal Code* concerning illegal rates of interest is also a good example of this difficulty.

[15] Although the distinction is sometimes difficult to draw in practise, it remains useful and relevant to ask whether a statutory provision is intended to protect the weaker party to a contract, a wider group or the interests of society as a whole. In the first instance, the appropriate sanction is relative nullity and in the second and third instances, the appropriate sanction is absolute nullity.[11]

Effects of Nullity; Restitution, Compensation and Damages

[16] The contract is not seen to be null in itself. It is considered to be tentatively valid, until and unless it is declared null by a court (art. 1416 C.c.Q.). Even relative nullity must be declared by the court at the request of the protected party – unless, of course, the parties agree to set aside the contract without recourse to a court. In practise, nullity is often raised by a party as a means of defence to an action based on the contract.

[17] As a result of the contract being annulled, it may no longer have any legal effect in the future. No action may therefore be brought for specific performance or damages based on the contract. Furthermore, any effects which have already taken place must be undone. This implies that each party must restore to the other what he or she has received under the contract (art. 1422 C.c.Q.). Where it is not possible for the parties to restore what they have received in kind, for example, because what was provided is a service, the court may order restitution by equivalence, on a *quantum meruit* basis, in order to prevent unjust enrichment (art. 1699, 1700, 1701, 1707 C.c.Q.).

[18] Where ownership of certain property has been transferred under a contract which is then found to be null, the court will retroactively “undo” the transfer of property. If, however, the ownership of such property has already passed to a third party, the court will not “undo” the transfer of property effected by the contract, but once again order restitution by monetary equivalence (art. 1701 C.c.Q.).

[19] In cases where one party to the annulled contract is at fault, and this has caused the other party to suffer a loss, the court may also award damages based on article 1457 C.c.Q., which reads as follows:

> **1457**. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

[20] A claim in damages would include expenses incurred in reliance on the contract and might also include the loss of expected profits (art. 1611 C.c.Q.).

[21] Because a contract is tentatively valid and may only be annulled by a court or by agreement of the parties, the effects of an invalid contract could conceivably be confirmed by the passage of time. The prescription period which applies to an action in nullity is 3 years from the day when the person applying for nullity becomes aware of the cause of nullity (art. 2927 C.cQ.). There is, however, no prescription of the right to raise nullity as a defence to an action (art. 2882 C.c.Q.).

Refusal to Order Restitution in Favour of a Guilty Party

[22] As mentioned, restitution either in kind or by monetary equivalence is the rule, when a contract is annulled. However, an exception is made, in the case of contracts which are absolutely null, where one or both parties have acted immorally. Conduct which is fraudulent, dishonest or morally reprehensible, or which constitutes deliberate breach of the law, will generally trigger this exception. The reason for this rule is that if the courts always ordered restitution in the case of a contract contrary to public order of direction, this would make the parties' position too secure. The risk associated with

concluding such a contract would be reduced, and the law would loose its dissuasive power.[12]

[23] Accordingly, Québec courts frequently refuse to order restitution in favour of a guilty party or parties.[13] The exception is in effect in Québec law, although it has not clearly been codified. Article 1699, in its second paragraph, only states that a court may refuse to grant restitution in exceptional circumstances.[14]

Formalities

[24] Québec law operates a clear distinction between formalities which are rules of evidence, formalities which are required to make certain rights opposable to third parties ("perfection") and formalities which condition the validity of a contract. Among the latter, some may be required as a matter of public order of direction, for example, to enable a public authority to control certain activities, or for taxation purposes. If such is the case, a contract which does not comply with the required formality is absolutely null.

[25] Other formalities which condition the validity of a contract may be required as a matter of public order of protection. For instance, formalities are frequently imposed to provide a weaker party with important information or to ensure that he or she is given the opportunity to read the contract. In such cases, the contract which does not comply with the required formality is relatively null. As mentioned, this implies that only the protected party may avail himself or herself of the nullity. Furthermore, he or she will not succeed if the other party is able to demonstrate that in the circumstances of the case, the absence of the requisite formality has had no impact on the protected party's decision to accept the contract or on the fairness of its terms.

Lack of Capacity or Power to Enter into a Contract

[26] This is a difficult area in Québec law. The most common sanction for lack of capacity or power to enter into a contract is relative nullity. This is because rules restricting a person's capacity to contract, or the power of his or her representative to contract in his or her name, usually have as their main purpose to protect that person. The protected party may therefore have the contract annulled or opt to confirm the contract.[15] In certain rare cases though, lack of capacity or power may lead to an absolute nullity (eg. art. 161 C.c.Q.).

[27] In cases where relative nullity is a possible remedy, there exist a number of specific exceptions that may prevent its application (eg. art. 447, 1323, 1362, 2162, 2163 C.c.Q.). The purpose of these exceptions is generally to protect the co contracting party having relied in good faith on the protected party appearing to have the capacity to contract or on his representative appearing to have the requisite powers (*théorie de l'apparence*).[16]

[28] One of the difficulties encountered in Québec concerns the application of the *ultra vires* doctrine, which is sometimes invoked in the realm of corporate law, although it is difficult to reconcile with civil law principles. There appears to be no justification for applying the *ultra vires* doctrine in Québec.[17]

Illegal Clauses: Severance, Reduction and Revision

[29] Where the contract contains one or more illegal clauses, these may be severed from the contract, which will still stand as valid, unless it is determined that such clauses are an essential part of the contract. This rule is now codified at art. 1438 C.c.Q., which reads as follows:

> **1438.** A clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole.
>
> The same applies to a clause without effect or deemed unwritten.

[30] Article 1438 sets out a rule which is very similar to the common law doctrine of severance, applying the so-called "blue pencil" rule. If it is possible to strike out the illegal portion of a contract without this undermining the contract as a whole, then severance is the appropriate solution.

[31] In *New Solutions Financial Corp.* v. *Transport North American Express Inc.*, a recent Ontario case involving a loan providing for a rate of interest prohibited by s. 347 of the *Criminal Code*, the Supreme Court of Canada held that a court should have an enlarged discretion going beyond the traditional common law doctrine of severance.[18] A majority of the court stated that a judge may, in appropriate circumstances, apply a doctrine of "notional severance", which consists in reducing the scope of an illegal term to the extent necessary to render it legal. It remains to be seen whether the availability of

"notional severance" is limited to cases involving a violation of s. 347 of the *Criminal Code*, or whether it is now available as a general remedy in Canadian common law.[19]

[32] The majority judgment in *New Solutions* stresses the artificiality of the "blue pencil" rule, since the possibility of severance and the extent to which it will affect the bargain of the parties are dependant on accidents of drafting[20]. It should be noticed, however, that the introduction of notional severance will create a new form of artifice, which will likely drive the courts to consider a still greater degree of interventionism: revision or variation of the contract. Notional severance provides for the reduction of an obligation which is more onerous than is permitted by law. In some instances however, the law imposes a minimum, not a maximum threshold (labour standards legislation is a good example). Should a court not then be given the power to expand the obligations provided by the contract, in order to meet this minimum threshold? If this were accepted, the position would have been reached that a court has the power to vary or revise the terms of a contract in order to bring it into compliance with the law. This solution might be considered in the context of the UICA[21].

[33] In *New Solutions*, the Supreme Court of Canada clearly indicates that a court may continue to choose from a spectrum of remedies ranging from integral application of the doctrine of illegality, which would prevent the lender from reclaiming even the principal amount due under a loan agreement, to the application of "notional severance". In choosing the appropriate remedy, a common law court must take into consideration the following factors: 1) the policy underlying a statutory provision, 2) whether one or both parties knowingly or intentionally breached the law, 3) the relative bargaining positions of the parties and whether the contract was abusive of the weaker party; and 4) whether the application of the doctrine of illegality might give rise to an unjustified windfall in favour of one party. Certainly, if notional severance is adopted as a possible remedy of general application, these factors must be given due consideration by the courts. This is the approach followed by the draft UICA (see subsections 5(1)(g) and 6(1)).

[34] In view of the above, should article 1438 C.c.Q. be modified to provide the courts with a general power to reduce an obligation or even revise the terms of a contract which is contrary to public order? And how do the four factors identified by the Supreme Court in *New Solutions* play out in Québec law?

[35] Although I would be in favour of Québec law conferring upon the courts a general power to revise a contract contrary to public order, it is unlikely that this solution will be

adopted in the near future. The preferred approach has been to give the courts a general power of severance similar to the common law "blue pencil" rule (art. 1438 C.c.Q.), and a broader power to reduce or revise contractual obligations in a number of specific cases. I will not attempt to provide an exhaustive overview of these, but a few examples may be considered.

[36] An abusive clause contained in an adhesion or consumer contract may be annulled, or the obligation reduced (art. 1437 C.c.Q.). Penal clauses may also be reduced, whether or not they are part of a consumer or adhesion contract (art. 1623 C.cQ.).

[37] In France, the courts have long exercised the power to reduce the scope of a non-competition clause which is invalid, because unreasonably broad. This solution has not been adopted in Québec, however.[22] Severance is therefore the only possible remedy.

[38] Article 2332 C.c.Q. provides that in the case of a money loan, a court may pronounce the nullity of the contract, order the reduction of the obligations arising from the contract or otherwise revise its terms, having regard to the level of risk and other circumstances surrounding the contract, and to the extent necessary to prevent an injustice.[23]

[39] Turning to the manner in which the courts exercise their power to sever, reduce or revise an illegal clause or obligation, Québec courts will tend to treat this remedy quite differently, according to the character of the rule – whether it relates to public order of protection or direction. In the first instance, the court's decision is directed towards righting the imbalance created by the contract, to the extent necessary to prevent the weaker party from suffering an injustice. In the second instance, the court will be more concerned with promoting compliance with the law through deterrence. This could be done by refusing to order restitution in favour of a guilty party, as noted above.[24]

[40] To conclude, the four considerations noted by the Supreme Court in *New Solutions* also play a role in the manner in which a civil law court applies the remedies of severance, reduction or revision, where applicable. However, the method which is followed depends on the fundamental distinction which the civil law establishes between public order of protection and public order of direction.

Conclusion

[41] To summarize what was stated above, it is useful to distinguish between the case of an invalid contract and the case of an invalid clause or obligation of the contract.

[42] When in presence of an invalid contract, the civil law proceeds through the following steps:

[43] **Step 1 - Rule of benevolent construction**

Is nullity explicitly prescribed by law in this case?

If not, is nullity an appropriate sanction or remedy?

[44] **Step 2 - Distinction between public order of protection and public order of direction**

Is the nullity relative or absolute?

If the nullity is relative, may the party invoking the nullity legitimately do so?

[45] **Step 3 – Restitution, compensation and damages**

Each party must restore in kind the benefits he or she has received under the contract.

The court orders restitution by monetary equivalence to the extent necessary to prevent unjust enrichment.

In addition, an award in damages is possible in certain cases.

[46] **Step 4 – Refusal to order restitution in favour of guilty party**

A guilty party may be barred from recovering benefits conferred under the contract.

[47] In the case of a clause or obligation contrary to public order, a solution which validates the remainder of the contract is generally to be preferred to the nullity of the contract as a whole. In order to reach this result, three approaches are possible, representing increasing degrees of judicial intervention: severance (“blue pencil” rule), reduction (“notional severance”) and revision (“variation”). Canadian common law now arguably stands in the position where notional severance or reduction is a remedy generally available to the courts. The issue is whether the UICA should go even further in admitting all three solutions, and whether Québec should move towards a similar position.

[*] I am very grateful for the research assistance of Ms. Maude Gagné, which has been most helpful.

[1] Québec's original civil code, the *Civil Code of Lower Canada*, modelled on the French *Code Napoléon*, was adopted in 1866. Work began in the 1960es to recodify the civil law of Québec. In 1977, the Civil Code Revision Office, directed by Professor Paul-André Crépeau of McGill University, produced a first complete draft civil code and commentaries (Civil Code Revision Office, *Report on the Québec Civil Code*, Québec, Éditeur officiel, 1978). Further drafts were produced and commented on by various groups, to finally reach completion under the supervision of a committee of experts led by Professor Jean Pineau of the University of Montréal.

[2] The law of sale is partly inspired by the Vienna Convention; the rules governing private international law, by The Hague conventions. The law of prior claims and hypothecs was substantially remodelled in light of the Personal Property Security Acts of the other Canadian provinces, while the *Civil Code of Québec* also permits the use of trusts in a commercial setting, whereas the *Civil Code of Lower Canada* only allowed the creation of trusts in the context of gifts and wills. In the *Civil Code of Québec*, institutions inspired by the common law, such as trusts and hypothecs, have nonetheless been recast in a civilian mold. Therefore, they are civilian in their basic structure, but tend to parallel the common law in their applications. See Québec, *Commentaires du ministre de la Justice*, Publications du Québec, 1993, Vol I at 748, 1083ff, Vol II at 1673ff, 1950ff.

[3] In 1992, the Québec legislature had resolved to implement a Québec Law Reform Institute, whose mandate would include advising the government on amendments to the Civil Code. Unfortunately, the Institute was never born.

[4] For the most part, the rules governing the procedure of contract formation are to be found at art. 1385ff C.c.Q.

[5] The *Interpretation Act*, R.S.Q. c. I-16, s. 41.3, actually states that "[p]rohibitive laws entail nullity, even if nullity is not pronounced therein." Even so, the courts favour the benevolent construction approach: P.-G. Jobin, "Les effets du droit pénal ou administratif sur le contrat : où s'arrêtera l'ordre public?" (1985) 45 *R du B.* 655; J. Pineau, D. Burman & S. Gaudet, *Théorie des obligations*, 4th ed. by J. Pineau and S. Gaudet, Montréal, Thémis, 2001, para. 170; *Fortin* c. *Chrétien*, [2001] 2 S.C.R. 500 at 511 : "although arts. 1411 and 1413 C.C.Q. create a presumption of the invalidity of a juridical operation that contravenes a prohibitive law, that presumption may be rebutted where it appears that the legislature's objectives require that the nature, circumstances and effects of that juridical operation be examined." A codification of the rule of benevolent construction would help to clarify the law on this issue.

[6] J.-L. Baudouin & P.-G. Jobin, *Les obligations*, 5th ed., Cowansville, Yvon Blais, 1998, para. 371.

[7] M. Cumyn, *La validité du contrat suivant le droit strict ou l'équité : étude historique et comparée des nullités contractuelles*, Cowansville, Yvon Blais, 2002, Paris, L.G.D.J., 2002 (préface de J. Ghestin).

[8] J. Ghestin, *Traité de droit civil. Les obligations. Le contrat : formation*, 2d ed., Paris, L.G.D.J., 1988, para. 729 : « Au stade de la *mise en oeuvre de la nullité* cette observation conduit à distinguer entre les règles dont le but est la protection de *l'intérêt général*, qui justifieront la *nullité absolue* de l'acte, et celles qui ne visent qu'à protéger un *intérêt particulier*, dont la sanction sera une *nullité relative*. » Also see Pineau and Gaudet, *supra*, note 5, no 182.

[9] *Advance Rumely Thresher Co.* v. *Yorga*, [1926] S.C.R. 397; *Dorsch* v. *Freeholders Oil Co.*, [1965] S.C.R. 670; *Pinsky* v. *Wass*, [1953] 1 S.C.R. 399, but see *British American Oil Co*. v. *Kos*, [1964] S.C.R. 167.

[10] The *Consumer Protection Act* contains an explicit rule to this effect, although the burden of proof is on the merchant to prove that the consumer has not suffered any ill effects from a violation of the law (R.S.Q.

c. P-40.1, s. 271). See also *An Act Respecting Prearranged Funeral Services and Sepultures*, R.S.Q. c. A-23.001, s. 55; *Securities Act*, R.S.Q. c. V-1.1, s. 222; M. Cumyn, *supra*, note 7, para. 352.

[11] *Fortin* v. *Chrétien*, *supra*, note 5 ; *Garcia Transport Ltd* v. *Royal Trust Co.*, [1992] 2 S.C.R. 499.

In most instances, I have found specific enactments calling for absolute or relative nullity of a contract to be consonant with the distinction established in the Civil Code, between public order of direction and public order of protection. There remain a few cases where one might question the choice that was made to impose an absolute nullity: *An Act Respecting Private Education*, R.S.Q. c. E-9.1, s. 68, 75; *An Act Respecting Labour Standard*, R.S.Q. c. N-1.1, s. 82, 93, 101; *An Act Respecting Assistance and Compensation for Victims of Crime*, R.S.Q. c. A-13.2.1, s. 21; *Automobile Insurance Act*, R.S.Q. c. A-25, s. 12.

[12] Peter Birks calls this the risk of "self-stultification": the law, by allowing recovery of value transferred under an illegal contract, is liable to soften the impact of illegality and thus make nonsense of its own position in relation to the illegal contract: P. Birks, "Recovering Value Transferred Under an Illegal Contract", [2000] *Theoretical Inquiries in Law*, http://www.bepress.com/til/default/vol1/iss1/art6.

[13] *Québec (Sous–ministre du Revenu)* v. *B.D.*, [2002] R.J.Q. 54 (C.A.); *Les Amusements St-Gervais inc.* v. *Legault* , J.E. 2000-550 (C.A.) ; *Allard v. Socomar International (1995) inc*., J.E. 2001-588 (C.S.) (appeal confirmed: AZ-03019587).

[14] The rule is generally expressed in the form of two Latin maxims : *Nemo auditur propriam turpitudinem allegans* (no one shall be heard, who invokes his own guilt) and *In pari causa turpitudinis cessat repetitio* (where both parties are guilty, no one may recover). There is some discussion surrounding this rule, since the legislative intent appears to have been to do away with it altogether at art. 1699 C.c.Q.: "[L]e principe de la restitution des prestations, applicable dans toutes les situations visées, exclut ainsi un courant jurisprudentiel qui tend à refuser aux parties le droit à la restitution ou à la remise en état lorsque l'acte en cause est immoral. Une telle tendance, qui s'appuie, entre autres, sur l'adage que nul ne peut invoquer sa propre turpitude, n'a pas paru devoir être conservée, car elle conduit bien souvent à ajouter une seconde immoralité à la première, en provoquant l'enrichissement indu de l'une des parties." (Québec, *Commentaires du ministre de la Justice*, supra, note 2, Vol I at 1056-1057). This has not prevented the courts from continuing to apply the rule, although its exceptional character is now better recognised, in view of art. 1699, para. 2. See: Baudouin & Jobin, *supra*, note 6, para. 787 ; Pineau & Gaudet, *supra*, note 5, para. 219 ; V. Karim, *Les obligations*, 2d ed., Montréal, Wilson et Lafleur, 2002 at 822ff. Also see *An Act Respecting Petroleum Products and Equipment*, R.S.Q. c. P.-29.1, s. 13.

[15] M. Cantin Cumyn, *L'administration du bien d'autrui*, Yvon Blais, Cowansville, 2000, para. 339ff.

[16] *Ibid*., para. 345ff.

[17] R. Crête & S. Rousseau, *Droit des sociétés par actions : principes fondamentaux*, Montréal, Thémis, 2002 at 226ff. The *Interpretation Act*, R.S.C. c. I-21, s. 8.1, states that "[b]oth the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied." See also art. 300, 321ff. C.c.Q., the *Companies Act*, R.S.Q., c. C-38, s. 123.30, 123.31, the *Canadian Business Corporations Act*, R.S.C. c. C-44, s. 16(3)). In *Ville de Repentigny* v. *Les Habitations de la Rive-Nord inc*., J.E. 2001-1088, the Court of Appeal declared that a contract containing a term which was *ultra vires* the powers of the municipality ought to be treated in the same way as any contract violating a rule of public order.

[18] 2004 CSC 7 [hereinafter *New Solutions*].

[19] The majority judgment states that "[g]iven the desirability of remedial flexibility in cases of statutory illegality arising in connection with s. 347 of the *Code*, the evolving nature of the law regarding statutory illegality generally and the sound policy basis in which the concept is rooted, I find that notional severance is available as a matter of law as a remedy in cases arising under s. 347." (*New Solutions*, para. 5). But as mentioned by Bastarache J. in dissent, "there is no legal or other principled reason to limit the application of the new approach endorsed by my colleague, that is notional severance, to the application of the criminal rate of interest. This means that other illegal provisions would be open to judicial redrafting." (*New Solutions*, para. 59).

[20] Even if it is true that the doctrine of illegality is liable to produce results that are unpredictable and even arbitrary, this is not necessarily unfair or undesirable, since the purpose of the doctrine must be to promote compliance with applicable legislation through deterrence. In *New Solutions*, the effective interest rate under the impugned loan agreement was no less than 90.9% per annum! By applying the doctrine of notional severance, the Supreme Court reduced the effective rate to 60%, the maximum interest rate permitted by the *Criminal Code*. It is undeniable that this judgment will not have the same dissuasive power as it would have had, had the traditional doctrine of severance been applied. This again raises the argument against « self-stultification »: *supra*, note 12.

[21] See for example the *Illegal Contracts Act*, Stat. N.Z. 1970, n^{o} 129, s. 7 (1).

[22] Art. 2089 C.c.Q. does not confer upon the courts the power to reduce the scope of a non-competition clause in an employment contract, contrary to an earlier draft: Pineau & Gaudet, *supra*, note 5, para. 135. This solution had previously been rejected by the Supreme Court in *Cameron* v. *Canadian Factors*, [1971] S.C.R. 148, despite the strong arguments presented by Pigeon J. in dissent. It remains to be seen, in cases where both art. 1437 and 2089 C.c.Q. are applicable, which of the two will prevail.

[23] There are also examples to be found outside the Civil Code, such as the *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 8, 272; *Securities Act*, R.S.Q. c. V-1.1, s. 214ff.

[24] Thus the approach is different in applying s. 347 of the *Criminal Code*, relating to public order of direction and art. 2332 C.c.Q., relating to public order of protection.