The Emergence of Specific Performance as a Major Remedy in Quebec Law

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INTRODUCTION

Recent jurisprudence, notably two decisions rendered by the Superior Court and one by the Court of Appeal involving Les Propriétés Cité Concordia and the Royal Bank of Canada,[1] provides an excellent opportunity to re-evaluate specific performance as a remedy for the breach of a contractual obligation, particularly when the specific performance relates to an obligation to do.

Article 1065 of the Civil Code specifies that a creditor may, "in cases which admit of it", demand specific performance of an obligation in addition to, or as an alternative to, damages. Although article 964 of the 1897 Code of Procedure provided for a prohibitive injunction to specifically enforce an obligation not to do, there was said to be no procedural remedy available to specifically enforce an obligation to do.[2] When the Code of Civil Procedure was reformed in 1965, the Legislator purposely introduced the mandatory injunction, in order to provide a correlative procedural basis for enforcing the remedy of specific performance in cases of obligations to do.[3] Article 751 C.C.P. now provides that, in addition to a creditor obtaining an injunction enjoining the debtor not to do a particular act, he may, "in cases which admit of it", obtain an injunction enjoining the debtor to perform a particular act or operation. An analysis of the decisions in the *Propriétés Cité* cases and in related jurisprudence will help to illuminate the breadth of the remedy of specific performance in cases of obligations to do, as well as the meaning to be ascribed to the proviso "in cases which admit of it" found in art. 1065 C.C. and art. 751 C.P.C.

1. *Propriétés Cité Concordia Ltée* v. *Banque Royale du Canada*, [1980] C.S. 118 [hereinafter *Propriétés Cité 1*]; *Propriétés Cité Concordia Ltée* v. *Banque Royale du Canada*, [1981] C.S. 812 [hereinafter *Propriétés Cité 2* (C.S.)]; and *Royal Bank of Canada* v. *Propriétés Cité Concordia Ltée*, [1983] R.D.J. 524 (Que. C.A.) [hereinafter *Propriétés Cité 2* (C.A.)].
2. P. CUTLER, "Mandatory Injunctions in the Province of Quebec" (1963), 23 *R. du B.* 471; C.-A. SHEPPARD, "Do Mandatory Injunctions Exist in Quebec Law?" (1963), 9 *McGill L.J.* 41; and R. THIBAUDEAU, "L'injonction mandatoire" (1963), 23 *R. du B.* 460.
3. *Commissioners' Report, Code of Civil Procedure*, art. 751 C.p.c. (to be found in Bill 20 at first reading, 4th sess., 27th Legislature, 13 Eliz. II, 1965, at 154a).

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The facts giving rise to the litigation between Propriétés Cité Concordia and the Royal Bank originate in two leases entered into in February 1977 under which Propriétés Cité Concordia leased two premises in the La Cité complex to the Royal Bank. Both leases contained the following operating clause:

> From and after the Commencement Date, Tenant shall open and keep the Premises open for business at such times as are determined by Tenant consistent with Tenant's normal practice in similar locations and permitted by law.[4]

Because the rate of occupation of the La Cité complex was lower than anticipated, the Bank encountered a deficit in its operations. In January 1979, the Bank announced its intention to reduce the hours of operation at its Personal Banking Service branch in the Promenade of the Shopping Centre in La Cité from five full days a week to three hours per week, namely 5 - 8 p.m. on Thursday evenings. The Bank's action, in contravention of the operating clause in the lease, caused Propriétés Cité Concordia to petition for an interlocutory injunction to order the Bank to keep its branch open for business during normal business hours and to maintain a minimum banking staff of at least three persons.

The Superior Court, in *Propriétés Cité 1*[5] dismissed the motion for a mandatory interlocutory injunction. Benoît J. held that notwithstanding a breach of the Bank's obligation under the lease, a mandatory injunction was not the appropriate remedy. According to Benoît J., in order for the decree of specific performance to be effective, it would not be sufficient simply to require the Bank to open for business every day. Rather, the order would have to require the Bank to maintain personnel such as tellers, receptionists and employees involved in credit, investment and information services, and to carry on services such as granting loans to customers and honouring cheques drawn on other banks. Benoît J. concluded that

> [l]es tribunaux ne peuvent s'immiscer dans de tels services personnels. L'injonction mandatoire ne doit être prononcée que dans les cas où elle peut être efficace et assurer le respect intégral de l'obligation bafouée.[6]

4. Reproduced in *Propriétés Cité 1, supra*, note 1 at 119.
5. *Ibid.*
6. *Ibid.* at 128.

In light of Quebec jurisprudence in the area of specific performance of obligations to do, the 1980 *Propriétés Cité 1* decision was not particularly surprising. Quebec courts have, in the past, been reluctant to grant injunctions to specifically enforce obligations, especially obligations to do. In this regard, there has been a considerable divergence between the availability of specific performance as a remedy for the inexecution of an obligation in theory and in practice. However, a new trend is emerging. The *Propriétés Cité 2*[7] decisions reveal a new jurisprudential attitude towards the granting of specific performance.

A. The Traditionally Restricted Ambit of Specific Performance

In theory, specific performance is the classic civil law remedy. In France, specific performance is seen to be the principal remedy by both doctrine and jurisprudence;[8] in Quebec, doctrinal writers assert that specific performance is to be treated as at least on par with damages. Maurice Tancelin offers the following theoretical proposition regarding the status of the recourses of damages and specific performance in Quebec law:

> Le droit civil se distingue de la common law en matière d'exécution des actes juridiques sur un point fondamental. Alors que la common law confère un caractère normal à la sanction des dommages-intérêts et assigne à la *specific performance* un domaine limité, en droit civil l'influence canonique imposant le respect de la parole donnée (*pacta sunt servanda*) donne à l'exécution en nature un statut sinon privilégié du moins égal à l'exécution par équivalent.[9]

While this proposition is perhaps sound in theory, as Tancelin notes later,[10] the judiciary has generally displayed a restrictive attitude towards specific performance, particularly where it involves obligations to do. In fact, the dominant judicial attitude in Quebec has been to make damages the primary remedy and to ascribe to specific performance the restrictive ambit it receives in the common law. Benoît J., in *Propriétés Cité 1* states:

7. *Supra*, note 1.
8. See G. RIPERT et J. BOULANGER, *Traité de droit civil*, tome II (Paris: Librairie générale de droit et de jurisprudence, 1956) at no. 1601; and W. JEANDIDIER, "L'exécution forcée des obligations contractuelles de faire" (1976), 74 *R.T.D.C.* 700 at 704.
9. M. TANCELIN, *Des obligations* (Montreal: Wilson & Lafleur, 1984) at 363-4.
10. *Ibid.* at 364. See also J.-L. BAUDOUIN, *Les obligations* (Cowansville: Les Éditions Yvon Blais Inc., 1983) at 391.

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> Le Code civil ne prévoyait l'exécution spécifique des obligations que dans les cas exceptionnels. L'inexécution d'une obligation se traduisait en principe en dommages-intérêts.[11]

This statement by Benoît J. echoes that of Gervais J. in the early and notably restrictive decision in *Wills* v. *The Central Railway of Canada*:

> In this province, the rule is that non-execution of obligations resolves itself into damages in pursuance of art. 1065 C.C.[12]

1. *The Influence of the Common Law Approach to Specific Performance*

One of the main reasons that Quebec courts have been reluctant to accord specific performance any pre-eminence is that judges have been inclined to view the injunction under the Code of Civil Procedure as a remedy borrowed from the common law, and hence that they should look not to French civil law principles, but to common law principles. As Pigeon J. states in *Trudel* v. *Clairol Inc. of Canada*,

> Art. 752 of the Code of Civil Procedure states that one may demand an injunction by action. The circumstances in which one may do so are not specified. Consequently, it is a matter of discretionary power to be exercised having in mind the principles established in common law jurisdictions, since this is a remedy taken from them.[13]

Many Quebec decisions thus adopted the common law position that specific performance will not lie, in the form of a permanent injunction, where damages are an effective remedy.[14] The Court of Appeal in *Guaranteed Pure Milk* v. *Patry* held that

> [a] breach of the obligation gives rise to an action in damages (which is the rule), but not to an injunction (which is the exception), unless it be shown that irreparable loss which cannot be remedied by payment of money will be caused.[15]

11. *Supra*, note 1 at 123.
12. (1914), 23 K.B. 126 at 151 (Que. C.A.), confirmed by the Privy Council in (1915), 24 K.B. 102.
13. [1975] 2 S.C.R. 236 at 246.
14. W.W. KERR, *A Treatise on the Law and Practice of Injunctions*, 6th ed. by J.M. Patterson (London: Sweet & Maxwell, 1927) at 17.
15. [1957] B.R. 54. The quotation is taken from the headnote which summarizes Casey J.'s position as set out on page 56 of the judgment. The headnote has been cited in many subsequent decisions.

An injunction was not granted in that case because the breach of the non-competition clause in the parties' contract resulted in a loss of business for the employer, which could easily be measured in money and therefore could be compensated adequately by the payment of damages. This decision was followed in many cases[16] and, as recently as 1979, the following pronouncement was made by the Superior Court:

> Une jurisprudence constante, tant de notre Cour que de la Cour d'appel, démontre que l'injonction interlocutoire est un remède exceptionnel qui ne doit être accordé que s'il n'y a pas d'autre recours approprié. Dès qu'une action en dommages-intérêts est possible, et considérant que les dommages peuvent être évalués, dans ce cas, l'injonction interlocutoire doit être rejetée.[17]

It is submitted that this judicial attitude, imported from the common law, is erroneous and should have no application in the law of Quebec. Not only does it challenge the theoretical availability of specific performance as an equal, if not principal, remedy in the civil law, it also falls foul of the oft-cited proposition that the choice of the recourse belongs exclusively to the creditor. As Miquelon J. stated in *Martel* v. *Commissaires d'Écoles de Wendover*:

> En cas d'inexécution d'une obligation, c'est le créancier qui a le choix du remède. Et ce n'est que dans le cas où le remède demandé est impraticable que le créancier est forcément obligé de s'en tenir à une demande de dommages-intérêts.[18]

It is submitted that, by restricting the availability of specific performance to cases where damages are not an adequate or effective remedy, the choice of recourse purportedly given to creditors becomes illusory.

The incompatibility between the restrictive judicial attitude regarding the availability of specific performance and the choice of remedy supposedly granted to creditors is finally being acknowledged by the judiciary. In the 1984 Court of Appeal case of *Société Coinamatic Inc.* v. *Armstrong*,[19] the appellant, who, pursuant to a lease, operated

16. *Spiliopoulos* v. *Cadieux*, [1969] C.S. 72; *New Castle Products (Canada) Ltd.* v. *Modernfold (Bas St-Laurent) Ltée*, [1970] C.A. 29; and *Rainville* v. *Centre Médical Hochelaga Inc.*, [1976] C.S. 1313.
17. *Côté* v. *Fortin*, [1979] R.P. 218 at 222 (Que. Sup. Ct.).
18. [1961] C.S. 491 at 494.
19. [1984] C.A. 23.

washing machines and dryers in the laundry room of a building bought by respondent, sought an interlocutory injunction following the respondent's action in taking over the laundry room, to force the respondent to respect the lease and to give back possession of the leased premises to the appellant. In reversing the Superior Court decision, which refused the injunction on the ground that damages were easily quantifiable and were thus the most effective remedy, Mayrand J. stated:

> La loi donne au locataire le droit d'opter entre le recours en dommages-intérêts et l'exécution en nature de l'obligation du locateur de lui procurer la jouissance paisible des lieux loués (art. 1065 et 1610 C.c.). (...)
>
> *On rendrait inefficace* pour la durée de l'instance *le droit d'option* du locataire indûment délogé, si on lui refusait l'injonction interlocutoire pour le motif que le locateur pourra plus tard l'indemniser. Ce locataire peut préférer la jouissance des lieux aux dollars d'une indemnité future et il a le droit de l'exiger.[20]

A very recent Superior Court decision has gone even farther, turning the proposition enunciated in *Guaranteed Pure Milk* v. *Patry*[21] on its head. The case, *Restaurant Jasmo* v. *Drouin*,[22] concerned the alleged violation of a non-competition clause whereunder the vendor of a business agreed not to compete directly or indirectly within a radius of 8 miles for 59 months after the sale. The clause specified that, in the event of a breach, the vendor would be liable to pay the purchaser a penalty of $500 *per* day of violation as well as being subject to an injunction to cease activities in the competing business. When the vendor inherited a similar business due to the unexpected death of his wife, the purchaser took an action for damages. Savoie J. held that the clause had not been breached because, on the particular facts, the defendant did not "participate" in a competing business. However, Savoie J. stated that, had there been a breach of the clause, he would not have been disposed to grant damages because the plaintiff ought to have asked for an injunction; in this case, an injunction ordering the cessation of the illegal activities would have mitigated the plaintiff's damages. In the words of the Court:

> Lorsqu'il y a à la fois dans un contrat une possibilité de recours en injonction et une possibilité de recours en pénalité, le principe qui oblige à minimiser les dommages force le bénéficiaire de la clause à utiliser d'abord le remède de l'injonction pour mettre fin aussitôt que possible au bris de contrat ou à l'infraction de celui qui est obligé à la clause et ainsi réduire le montant des dommages ou des pénalités.[23]

Savoie J. was of the opinion that the creditor should have chosen specific performance even though damages would have been an effective and adequate remedy. Certain jurisprudence clearly evidences a new and welcome trend away from the restrictive common law approach that specific performance will lie only where damages are not an adequate remedy.[24]

However, merely ceasing to adopt the common law attitude concerning the availability of specific performance will not *alone* cause specific performance to attain the status of a principal remedy in Quebec. There are other factors which operate to limit the granting of specific performance.

2. The Nemo Praecise Rule

The primary reason given for the reluctance to order specific performance, one which is rooted in civil law theory, is the maxim *nemo praecise cogi potest ad factum*, a principle which reflects an unwillingness to force a person to accomplish an act if the only way to do so is by physical violence or constraint. As Lamothe J. stated in *Lombard* v. *Varennes*:

> Une cour de justice ne peut, par injonction, forcer un défendeur à faire un acte quelconque. Sous le droit actuel, encore plus que sous l'ancien droit, le *cogere ad factum* répugne. L'exécution d'une ordonnance de ce genre ne peut se faire qu'au moyen de violence physique sur la personne.[25]

20. *Ibid.* at 27 [emphasis added]. See also *Gulf Oil Canada Ltée* v. *Leroux* (21 January 1980), Montreal 500-09-000921-775 (C.A.), J.E. 80-105 where the Court of Appeal granted an injunction to enforce a non-competition clause. Chouinard J. stated at p. 9 of the case that "le créancier peut choisir d'exiger l'exécution en nature d'une obligation si la chose est possible sans égard à la demande de dommages-intérêts qu'il peut faire dans tous les cas".
21. *Supra*, note 15.
22. [1986] R.J.D. 435 (Que. Sup. Ct.).
23. *Ibid.* at 438. It is the author's opinion that Savoie J.'s statement is equally applicable to a case where the remedies granted to the creditor are not contractually stipulated but derive simply from art. 1065 C.C.
24. This is not to say, however, that recent jurisprudence is uniform. One still comes across cases which adopt the *Guaranteed Pure Milk* v. *Patry* approach to the availability of specific performance. For example, in the 1986 decision of *Depanago Inc.* v. *Houde* (23 January 1986), Quebec 200-05-002367-857 (Sup. Ct.), J.E. 86-317, the Superior Court held that, for the breach of a non-competition clause, if the petitioner could have a recourse in damages, he could not obtain an injunction.
25. (1922), 32 B.R. 164 at 166.

According to art. 469 C.C.P., "every judgment involving a condemnation must be susceptible of execution". If the only way to execute an order of specific performance is physically to force the debtor to perform, that mode of execution will be seen as interfering with the personal liberty of the debtor and will be considered morally unacceptable by the court. As stated by Ripert and Boulanger,[26] the reasons for not specifically enforcing obligations when it would violate the *nemo praecise* rule are two-fold:

> La raison en est que l'exécution obtenue par force serait presque toujours défectueuse et surtout qu'elle exigerait l'emploi de moyens violents, contraires à la liberté individuelle.

Where the constraint lies not upon the physical person of the debtor, but upon his property, the *nemo praecise* rule is not seen to be infringed and is thus not an impediment to an order of specific performance. That is why, in France, under the procedure of *astreinte*, specific performance is granted for all obligations, except obligations involving artistic activities and contracts of personal services.[27] Because *astreinte* is a pecuniary condemnation payable in the event of the inexecution of the principal obligation by the debtor, it does not infringe the *nemo praecise* rule. According to Massé,

> [l]e principe de la liberté individuelle, qui a servi de fondement à la règle *nemo praecise* ... n'exclut pas toutes les formes de pression susceptibles d'amener le débiteur à exécuter son obligation; seule la violence sur la personne humaine est prohibée. Aussi, a-t-on vu dans l'astreinte un mécanisme de pression respectueux de cette liberté individuelle puisqu'il opérait, non pas directement sur la personne, mais sur les biens.[28]

Although *astreinte* is not part of Quebec law, similar reasoning has led Quebec courts almost always to grant specific performance of obligations to give. Where the court orders the debtor to specifically perform an obligation to deliver money or property, that order does not conflict with the *nemo praecise* rule, because the debtor's non-performance would enable the creditor to enforce the order indirectly by seizure and sale of the debtor's property.[29] Similarly, where the order relates to a contract whereby ownership has passed to the creditor, he may enforce the order indirectly through the procedure

26. *Supra*, note 8 at no. 1609.
27. JEANDIDIER, *supra*, note 8 at 716.
28. G. MASSÉ, "L'exécution des obligations via l'astreinte française et l'injonction québécoise" (1984), 44 *R. du B.* 659 at 663.
29. Art. 565 C.C.P.

of revendication[30] or, in appropriate case, through an *action en passation de titre*. Specific performance is possible because, as Baudouin says,

> dans les obligations de donner, *l'action étant dirigée contre la chose et non contre la personne*, l'exécution spécifique se confond pratiquement avec la procédure mise à la disposition du créancier; l'exécution spécifique n'est ni plus ni moins que l'exercice d'un recours de procédure et c'est là ce qui en fait la force.[31]

However, where the order to specifically enforce an obligation to give involves an order to do something, specific performance will not be granted. In particular, where the contract is one for the sale of an uncertain or indeterminate thing, such that ownership in the thing has not yet passed to the creditor,[32] the courts will not order the vendor to specifically perform his obligation of delivering the thing to the buyer because, as was stated by Chouinard J. in the 1981 *Nault* case, "that judgment cannot be made the subject of compulsory execution by seizure".[33] To create an indirect method of enforcement, whereby the constraint would be on the debtor's property, ownership of the thing would have to pass to the buyer. In order for this to be accomplished, individualization would have to occur, but a court will not go so far as to order the debtor to perform the positive act of individualization because this would violate the *nemo praecise* rule. The *Nault* case is surprisingly restrictive. As will be seen later in the text, there are cases which have ordered debtors to do much more complicated, continuing obligations. It seems peculiar that a court would not order a debtor to do the simple act of individualization (in the *Nault* case, individualizing cutlery sets), but would require a debtor to honour a car dealership contract which involves honouring the obligation to deliver automobiles.[34]

It would be rare indeed that an order of specific performance of an obligation to do would not infringe a strictly applied *nemo praecise* rule. The principle of individual liberty would be at stake any time the court ordered a debtor to do something, no matter

30. See R. MACDONALD, "Enforcing Rights in Moveables: Revendication and Its Surrogates" (1986), 31 *McGill L.J.* 573 at 625.
31. J.-L. BAUDOUIN, "L'exécution spécifique des contrats en droit québécois" (1958-59), 5 *McGill L.J.* 108 at 113 [emphasis added].
32. Art. 1026 C.C.
33. *Nault* v. *Canadian Consumer Co.*, [1981] 1 S.C.R. 553 at 557.
34. See *Chrysler Canada Ltée* v. *Lasalle Automobile Inc.*, (27 February 1974), Montreal 500-09-000336-72 (C.A. interlocutory injunction); and (24 January 1978), Montreal 500-09-001039-742 (C.A. permanent injunction).

how minor, because force would have to be exercised to execute the order. Not surprisingly, Quebec courts, in keeping with their restrictive attitude to specific performance, have in the past held that specific performance is not an appropriate recourse except where specific performance by equivalence, *i.e.* performance by a third party, is possible. As Rivard J. states in *Quebec County Railway Co.* v. *Montcalm Land Co.*, the creditor can only get specific performance

> lorsque aucun acte personnel du débiteur n'est indispensable pour que l'obligation soit exécutée de la sorte, c'est-à-dire *lorsque l'obligation peut être faite par un autre.*[35]

This position was also adopted in the case of *Tremblay* v. *Université de Sherbrooke*[36] where students, following a unilateral cancellation by the University of a programme entitled "licence en pédagogie", took an action, *inter alia*, to compel the University to continue the programme until the registered students had completed it. Tôth J. refused to grant an order of specific performance, stating that

> un débiteur ne saurait être condamné à l'exécution effective d'une obligation de faire qu'à condition que le fait promis puisse être utilement exécuté par une autre personne que le débiteur: dans un tel cas, le fait que le débiteur refuse d'accomplir est, à ses frais, exécuté par un tiers.[37]

Because the University's obligation in continuing to offer the programme could not usefully be executed by a third party, the creditors could not obtain specific performance and had to content themselves with damages.[38]

3. *The Dichotomy Between the Enforcement of Obligations to Do and Obligations not to Do*

A further reason for the reluctance of courts to grant specific performance of obligation to do is that the judiciary created an illogical and artificial dichotomy between the treatment accorded to specific performance of obligations to do and obligations not to do. Traditionally, obligations not to do were more easily susceptible of specific performance than were obligations to do.[39] Although this dichotomy arose in large part because the 1897 Code of Procedure provided only for a prohibitive injunction and, seemingly, no mandatory injunction to enforce an obligation to do,[40] it was also because the judiciary felt that specifically enforcing obligations not to do was not as repugnant to the *nemo praecise* rule. As Choquette J. stated in *Teinturerie Québec Inc.* v. *Lauzon*,

> [q]uand, comme ici, l'obligation consiste à ne point faire quelque chose, l'injonction dont il est question aux articles 957 et suivants C.P. «permet» sûrement d'obtenir l'exécution de l'obligation même. L'injonction n'oblige pas le débiteur à poser un acte, mais lui défend de le poser sous peine des sanctions prévues par la loi. *Cette mesure ne viole donc pas la règle nemo praecise cogi potest ad factum.*[41]

It is submitted that this dichotomy is both artificial and unjustifiable. The first criticism is that, *prima facie*, the *nemo praecise* rule should apply equally to obligations to do and not to do. Just as much personal action can be required when a court orders the debtor not to do, as when it orders the debtor to do, a particular act. A good example of the need for the debtor's personal action involving an obligation not to do can be found in the numerous cases where an injunction ordering a debtor to cease violating a contractually stipulated non-competition clause is granted.[42] When a court enjoins the debtor not to breach the clause and orders the debtor to cease working for a competitor or to cease operating a competing business, the court is, in effect, making an order which involves his personal participation and restricts his individual liberty. This principle was recognized by Jetté J. in *Pitre* v. *L'Association Athlétique d'Amateurs Nationale*,[43] a case involving an application by the Association for an injunction enjoining Pitre, a hockey player who had contracted to play exclusively for the Association, to cease violating that agreement by no longer playing for the rival "Les Canadiens". The Court of Appeal refused to grant the injunction, stating that the only available recourse was damages, on the ground that the principle of human liberty estopped the Court from ordering

35. (1929), 46 K.B. 262 at 269 [emphasis added]. See also *Amyot* v. *Antonin Dion Construction*, [1972] C.S. 351.
36. [1973] C.S. 999.
37. *Ibid.* at 1003-1004.
38. It is possible that this decision would be different today in light of the Superior Court and Court of Appeal decisions in *Propriétés Cité 2, supra*, note 1, which shall be discussed *infra* at p. 65-66.
39. See BAUDOUIN, *supra*, note 31 at 121.
40. Art. 964 C.P.; and see *supra*, note 2.
41. [1967] B.R. 41 at 46-47 [emphasis added]. See also *Quebec County Railway Co.* v. *Montcalm Land Co., supra*, note 35 at 267.
42. *Mount Royal Dairies* v. *Russman* (1934), 72 C.S. 240; *Selnekovic* v. *Matusky* (1936), 39 R.P. 260 (Que. Sup. Ct.); *Nebesny* v. *Demitroff*, [1944] C.S. 413; *Richstone Bakeries* v. *Margoles*, [1953] R.P. 56 (Que. Sup. Ct.); and *Leblanc* v. *The Borden Co.*, [1961] B.R. 804.
43. (1911), 20 B.R. 41.

Pitre not to play hockey for a third party. Jetté J. adopted the following statement by the doctrinal writer, Laurent, with approval:

> Dans les obligations de faire, la liberté de l'homme est en jeu, en ce sens que l'obligation ne peut pas être exécutée en faisant violence au débiteur. Il va sans dire que l'on ne peut pas séquestrer celui qui s'est obligé à ne pas faire, ce serait un attentat à la liberté, un crime. (...) Un acteur s'engage à ne pas jouer sur tel théâtre: il manque à son engagement; peut-on, pour l'empêcher d'y manquer, le faire enlever de la scène par la force publique?[44]

The second criticism of the dichotomy created by the judiciary is that it is artificial to apply, *a priori*, a different approach to the *nemo praecise* rule as it applies to obligations to do and not to do simply because it is often difficult to classify obligations as one or the other. Problems of classification are often semantic in origin, and so many orders have been phrased as orders not to do when it would have been just as legitimate to phrase them positively as orders to do. This proposition can be illustrated by referring to two cases, both dealing with similar facts, but where, in one, the Court granted a prohibitive injunction and, in the other, a mandatory one. In *Zais* v. *Briaud*,[45] the Court of Appeal confirmed the Superior Court's decision to grant an interlocutory injunction ordering the appellant to "*cesser d'empêcher* l'intimé d'avoir accès à une ruelle".[46] The appellant had blocked access to the lane by putting up a fence. The injunction, which was phrased negatively, in fact involved a disguised order to do a positive act, namely, to take down the enclosure. More recently, the Court of Appeal in *Crawford* v. *Fitch*[47] was faced with a petition for an injunction on very similar facts. The appellant had a right of passage in a lane which he claimed that the respondent had obstructed by putting up a fence. The recourse demanded in this case, however, was for a *mandatory* injunction to order the respondent to remove the illegal construction. Turgeon J. granted the mandatory injunction, holding it to be the appellant's effective legal remedy. A comparison of the two cases shows how an order enjoining the debtor to do a positive act can, through the use of different phraseology, be transmuted into one enjoining him to cease doing something and thus fall into the more

44. Cited in *ibid.* at 47.
45. [1959] B.R. 258.
46. *Ibid.* [emphasis added].
47. [1980] C.A. 583.

liberal category of prohibitive injunctions specifically enforcing obligations not to do.

Similarly, in the recent Superior Court case of *La Commission des Droits de la Personne* v. *La Fédération Québécoise de Hockey sur Glace Inc.*, Meyer J. granted a permanent injunction enjoining the respondent hockey league to "*cesser d'interdire* aux joueurs de sexe féminin, sur la seule base de leur sexe, de participer aux activités et aux joutes des équipes ...".[48] This negatively phrased order had the effect of ordering the hockey league to perform the positive act of permitting a girl, who had previously been prohibited from playing hockey for discriminatory reasons, to play with the league.

The inability to divide obligations into the two absolute categories of obligations to do and obligations no to do demonstrates why there should not be a different rule, or even a different philosophical approach, applied to each category. The question whether a mandatory injunction lies has been resolved by art. 751 C.C.P., and the next step is to remove any remnant of the artificial distinction between the remedies granted for breaches of obligations to do and obligations not to do. As Tancelin states,

> [o]n peut donc poser en règle aujourd'hui que les principes de fond qui régissent l'octroi des injonctions sont les mêmes pour les obligations de faire et de ne pas faire et que les distinctions antérieures faites à ce sujet ne sont plus applicables.[49]

4. Problems of Supervision

Aside from the *nemo praecise* rule and the inherent judicial prejudice in specifically enforcing obligations to do, a less articulated but equally influencial reason behind the reluctance of the courts to grant specific performance is the problem of supervising the order. The problem of supervision is recognized by common law authors. According to Sharpe,

> [w]here performance of the defendant's obligation would require a complex series of acts or the maintenance of an ongoing relationship, the remedy of specific performance will ordinarily be refused. The reason usually given is that the court will not make an order which would require it to watch over and supervise performance.[50]

48. [1978] C.S. 1076 [emphasis added].
49. *Supra*, note 9 at 372.
50. R.J. SHARPE, *Injunctions and Specific Performance* (Toronto: Canada Law Book Limited, 1983), at 285.

Reiter and Swan agree:

> The traditional approach of equity has always been cautionary in cases where decreeing specific performance would require the supervision of a complex series of acts.[51]

Problems of supervision played a large role in the decision of Benoît J. not to grant a mandatory injunction in *Propriétés Cité 1*. He stated that

> [l]e Tribunal n'entend pas ordonner de respecter partiellement l'obligation. Par exemple, ouvrir les portes et y placer un gardien de sécurité ne servirait à rien.[52]

The enforcement of an *effective* court order, which would involve ordering the Bank to carry out normal banking services and to employ banking personnel, would require too much court supervision.

Although problems of supervision remain an impediment to the granting of specific performance in the common law and, in a less articulated fashion, in the civil law, recent common law authorities are suggesting that supervision no longer poses the same threat to the granting of specific performance that it once did. For example, Slade J. in *Gravesham Borough Council* v. *British Railways Board* stated that,

> I would accept that it cannot be regarded as an absolute and inflexible rule that a court will never grant an injunction requiring a person to do a series of acts requiring the continuous employment of people over a number of years. Nevertheless the paucity of authority illustrating a grant of injunctions of this nature in my judgment indicates that the jurisdiction is one that will be exercised only in exceptional circumstances.[53]

According to Reiter and Swan,

> [r]ecent cases indicate that the traditional concern for problems of supervision is receiving less and less emphasis. There is clearly an increasing willingness to decree specific performance of long term or complex obligations which do involve the risk of future supervision problems.[54]

51. B.J. REITER & J. SWAN, eds., *Studies in Contract Law* (Toronto: Butterworths & Co. (Canada) Ltd., 1980) at 144.
52. *Supra*, note 1 at 128.
53. [1978] Ch. 379 at 405. See also *Shiloh Spinners Ltd.* v. *Harding*, [1973] A.C. 691 (H.L.) at 724, Lord Wilberforce; and *Tito* v. *Waddell (No. 2)*, [1977] Ch. 106 at 321-322, Magarry V.-C.
54. *Supra*, note 51 at 146.

Citing Megarry V.-C. in *Tito* v. *Waddell (No. 2)*[55] with approval, Reiter and Swan adopt the view that "the real question is whether there is a sufficient definition of what has to be done in order to comply with the order of the Court".[56] As will be seen from an examination of the *Propriétés Cité 2* decisions, this more liberal attitude towards problems of supervision is being recognized by Quebec courts.

5. Civil Imprisonment

A purely doctrinal argument that has been raised against the availability of specific performance is that it brings in, through the back door, imprisonment for civil matters,[57] which was abolished in Quebec by article 1 of the 1965 Code of Civil Procedure.[58] The argument runs that because the sanction for the non-performance of a court's order of specific performance is contempt of court, this leaves the debtor open to the possibility of being imprisoned for a period of up to one year.[59]

Although there is credibility to this argument, it is not reason enough to bar the recourse of specific performance. First, the argument would apply to both mandatory and prohibitive injunctions. The acceptance of the argument would therefore lead to a situation where the recourse of specific performance would be completely eradicated in Quebec law, which is clearly not the intent of the Legislator. Secondly, the intent behind art. 1 C.C.P. was to abolish the possibility of imprisonment for the non-payment of a sum of money. Jurisprudence allows specific performance of an obligation to pay money[60] because it is possible to execute such an order through proprietary constraint, thus eliminating the need to constrain payment through the sanction of imprisonment. Finally, it must be pointed out that the imprisonment of the debtor would not be due directly to his non-performance of a civil obligation but is, strictly speaking, a sanction for something more serious, the

55. *Supra*, note 53.
56. *Supra*, note 51 at 146.
57. See BAUDOUIN, *supra*, note 10 at 392.
58. Art. 1 C.C.P. reads: "Notwithstanding any contrary provision of any general law or special act, imprisonment in civil matters is abolished, except in cases of contempt of court".
59. Art. 761 C.C.P.
60. See *Cité de Trois-Rivières* v. *Syndicat National Catholique des Employés Municipaux de Trois-Rivières*, [1962] B.R. 510 which classified the obligation to pay money as an obligation to give.

refusal to perform a court order which amounts to disrespect for the judiciary. It is therefore submitted that the argument based upon the prohibition of civil imprisonment should not limit the availability of specific performance as a recourse in Quebec law.

B. Emerging Jurisprudential Trends

1. The Propriétés Cité 2 Decisions

The decisions by the Superior Court and the Court of Appeal in *Propriétés Cité 2*[61] evidence a definite move away from the traditionally restricted ambit of specific performance in Quebec law. This case concerned the same parties as *Propriétés Cité 1* and focused upon the identical operating clause in the lease, reproduced above.[62] In April 1981, the Bank informed its customers that it was terminating its banking operations at the two La Cité branches. The proposed closure of the branches prompted Propriétés Cité Concordia to launch a second petition for a mandatory interlocutory injunction to order the Bank to respect the operating clause and to continue carrying on its banking operations on a daily basis.

It is startling that, on very similar facts to those in *Propriétés Cité 1* and involving the same parties, Hurtubise J. in the Superior Court, affirmed by a unanimous decision of the Court of Appeal, chose to grant the mandatory interlocutory injunction and thereby rendered a decision which was drastically different than that of Benoît J. pronounced just one year earlier.

The Bank contested the availability of an injunction on the three following grounds: first, the operations the petitioner was seeking to specifically enforce were of too personal a nature to be susceptible of specific performance; secondly, the Court could not order the Bank to carry on operations that would force it to incur a deficit; and, thirdly, this was a case where the Court could not supervise the proper execution of the order and, hence, an injunction was not an appropriate remedy.

Because the respondent was a corporation, Hurtubise J. did not have much difficulty rebutting the first argument raised by the Bank against the mandatory injunction, namely, that the services involved were of too personal a nature to be susceptible of specific performance. Hurtubise J. cited with approval earlier unreported decisions such as *Chrysler Canada Ltée* v. *LaSalle Automobile Inc.*[63]

61. *Supra*, note 1.
62. *Supra*, note 4.
63. *Supra*, note 34.

and *Les Propriétés Cité Concordia Ltée* v. *Loews Hotel Montreal Inc.*,[64] in which mandatory injunctions were granted against *corporate* respondents. In the former case, the Court of Appeal first granted an interlocutory, and then a permanent, injunction enjoining Chrysler Canada to respect the terms of its dealership contract with LaSalle Automobile, a contract which Chrysler Canada had attempted to terminate unilaterally. In the latter case, Propriétés Cité Concordia (Concordia)[65] had entered into a management agreement with Loews Hotel (Loews) whereby Concordia undertook to build a hotel to be managed by Loews. Concordia unilaterally terminated the management agreement which prompted Loews to seek an interlocutory injunction. One of Concordia's arguments was that a court could not, by injunction, force individuals to render services. Dubé J. answered this argument by saying,

> il ne s'agirait pas dans le présent cas de services individuels, mais du travail d'administration à être fait par une *compagnie* et non pas par des individus en particulier.[66]

Hurtubise J. relied on the distinction between contracts entered into by individuals and those involving corporations when he stated that the *Loews* decision "distinguait un contrat pour services personnels d'un contrat entre deux grosses corporations, distinction qui convient parfaitement à notre cas".[67]

It seems correct that the *nemo praecise* rule is not infringed when the order sought is against a corporate body. The problem of respecting human liberty is not encountered when the court orders a corporation, rather than a specified person, to carry out an obligation. An argument could be made that because corporations only act through their agents, necessarily physical persons, an order against a corporation to execute an obligation *indirectly* forces individuals to perform specified acts and thereby infringes the *nemo praecise* rule. One can counter that argument simply by stressing that in such cases, no specified physical persons are being ordered to perform an act. If the corporation's agents do not want to act, they will not be forced to do so but, rather, the corporation will be forced to find new agents to carry out the obligation.

The argument that ordering a corporation to execute an obligation indirectly infringes the *nemo praecise* rule applies only

64. (2 August 1979), Montreal 500-05-012189-799 (Sup. Ct.); (17 December 1979), Montreal 500-09-001124-791 and 500-09-001125-798 (C.A.).
65. The same party involved in the *Propriétés Cité* decisions.
66. *Supra*, note 64, Court of Appeal at p. 5 [emphasis added].
67. *Supra*, note 1 at 817.

in two limited circumstances. The first is where the relevant corporation is a closely held corporation and it would be reasonable to pierce the corporate veil. The second circumstance arises in cases where only a small number of persons are able to carry out the corporation's obligation, due to its highly specialized nature. Apart from those two situations, there seems no reason to apply a restrictive approach to the granting of an order of specific performance when it affects a corporate body. It is in this regard that one can question the decision not to grant specific performance in the previously discussed case of *Tremblay* v. *Université de Sherbrooke*.[68] By analogy to *Propriétés Cité 2*, in *Tremblay* the Court would not be ordering specified persons to carry out the obligation of continuing to offer the educational programme, but would rather be ordering a corporate body, the University, to do so.[69].

The Bank's second argument, to the effect that specific performance should not lie because it would result in a deficit in the Bank's operations, was not addressed expressly by the Courts. It was, of course, implicitly rejected in that the Courts held in favour of the petitioner, Propriétés Cité Concordia. It is submitted that the deficit argument ought not to be judicially adopted. To do so would be to allow specific performance only in cases where the contract concerned was economically advantageous to the party in breach (in which case a breach would probably not have occurred). Although in such case, damages would still be available to the creditor, he would be losing a very important and beneficial remedy through no fault of his own. This would result in an inappropriate protection of defaulting parties who entered into bad bargains because they would be shielded from the obligation of specifically performing their contract. The notion of *pacta sunt servanda* requires a contracting party to be bound by his voluntarily assumed obligations.[70] By removing a recourse against a defaulting party when he contracts an obligation detrimental to his business interests would offend that notion.

The respondent based its deficit argument on an English decision, *A.G.* v. *Colchester Corporation*,[71] wherein Lord Goddard

68. *Supra*, note 36.
69. Problems of supervision may however justify the decision actually rendered in *Tremblay*, but it is the author's opinion that the *nemo praecise* rule ought not to have been the basis of the decision.
70. Quebec civil law does not, at present, admit lesion art. 1012 C.C. or imprevision (*Canada Starch* v. *Gill & Duffus* (6 December 1983), Montreal 500-05-001746-823 (Sup. Ct.)).
71. [1955] 2 All E.R. 124.

stated that an injunction would not be granted to order a person to carry on a business where the business is a losing concern.[72] It is submitted that the respondent employed Lord Goddard's statement out of context. The *Colchester* case involved a party who ceased operating a public ferry service because it resulted in a loss. The Attorney General, representing an inhabitant of one of the villages that benefitted from the ferry services, unsuccessfully applied for a mandatory injunction to order the defendant to continue operating the ferry as a public service. It is to be stressed that the *Colchester* case did not involve a contract between two business enterprises where the obligations were freely assumed. It may be justifiable for a court to protect a party from incurring a deficit in the provision of a public service, but it is not reasonable to protect a contracting party, who was on an equal bargaining footing with his co-contractant, and simply entered into a bad bargain.

The Bank's final argument, that an order enjoining it to stay open for business would require too much court supervision, was successful in *Propriétés Cité 1*,[73] a decision which belongs to the older and more restrictive trend of jurisprudence in this area, but did not succeed in *Propriétés Cité 2*. Hurtubise J., in the Superior Court, canvassed the recent common law authority in this area[74] and adopted the more liberal position that, as long as the obligations are sufficiently defined, supervision will not stand in the way of an order of specific performance. In sharp contrast to Benoît J. in *Propriétés Cité 1*, who feared that the Court could not adequately supervise the execution of the Bank's obligation to stay open for business, Hurtubise J., in *Propriétés Cité 2* (C.S.), held there to be no supervision problem because

> une ordonnance exigeant de l'intimé qu'il respecte ses engagements et poursuive ses opérations bancaires (...) est *suffisamment claire et précise*.[75]

One finds today numerous cases in which Quebec courts are granting specific performance of an obligation to do where problems of supervision would once have stood in the way of such orders. For instance, in the case of *Favre* v. *Hôpital Notre-Dame*,[76] the Court of Appeal ordered a hospital not to transfer a quadraplegic patient to another hospital and enjoined it to continue providing health

72. *Ibid.* at 128.
73. *Supra*, note 52.
74. *Supra*, notes 50, 51 and 53.
75. *Supra*, note 1 at 820 [emphasis added].
76. [1984] C.A. 548. See also *Place Desjardins Inc.* v. *Bokobza*, [1980] C.S. 1100.

services to the patient. The obligation to provide health services to a quadraplegic patient in the hospital for long term care certainly involves just as many, if not more, supervision difficulties than does the obligation of a Bank to remain open for business. In particular, an order requiring a hospital to provide health services to a patient requires the hospital to do more than simply provide a bed (just as for Benoît J., the order requiring a Bank to respect an operating clause requires the Bank to do more than open its doors for business). The order in *Favre* requires the hospital, *inter alia*, to provide nursing and medical care, to administer medication and to provide food and laundry services.

The necessity of continual court supervision remains an impediment to the granting of a mandatory injunction where the petitioner requests the court to order a debtor to perform an obligation *adequately*. This occurred in the case of *C.* v. *Hôpital Q.*[77] in which the petitioner sought a mandatory interlocutory injunction to order the respondent hospital, which was in the course of providing psychiatric treatment to the petitioner's daughter, to provide adequate treatment. The Superior Court refused to grant the mandatory injunction and held that it was not an appropriate remedy when the obligation is one of means and the adequacy of its performance is at issue. Mélançon J. stated:

> Comment, dans le contexte médico-légal, qui comporte une obligation de moyens et non de résultats, appliquer une ordonnance et juger qu'elle fut appliquée ou ne le fut pas?
>
> (...) il serait oiseux d'imposer par ordonnance ce qui se fait déjà substantiellement et que compliquerait une intervention judiciaire de quasi tous les instants, ce qui n'entre pas dans les attributions d'un Tribunal.[78]

2. The Effect of the Propriétés Cité 2 Decisions

Hurtubise J. made two important contributions to the law on specific performance which should be applauded. First, he spoke out definitively against the reliance by Quebec courts on the restrictive common law position relating to specific performance. Cases since 1965 demonstrate that, by and large, Quebec courts have

77. [1983] C.S. 1064.
78. *Ibid.* at 1069-70. It must be pointed out, however, that Mélançon J. relies heavily on Benoît J.'s decision in *Propriétés Cité 1* stating that Mr. Justice Benoît's decision represents "l'état exact du droit en matière d'injonction mandatoire interlocutoire" (p. 1068).

remained wedded to the common law attitude towards the availability of specific performance viewing it as an exceptional remedy. While Hurtubise J. does not advocate the complete disassociation from common law authority,[79] he does urge Quebec courts to cease applying blindly the restrictive common law approach:

> Notons encore que si l'injonction tire son origine du common law dont on peut s'inspirer, il ne faut pas confondre la procédure et le fond ni l'exécution spécifique en nature de l'article 1065 C.c. avec la spécifique performance du droit anglais.[80]

Secondly, Hurtubise J. recognized that the amendment to the Code of Civil Procedure in 1965, introducing the mandatory injunction, was intended to change the *status quo* in the area of specific performance of obligations to do. In the fifteen years that followed, the judiciary had virtually ignored the intent of the Legislator by remaining stubbornly unwilling to use the amendment to change the restrictive attitude to specific performance. Hurtubise J. chose to follow rather than to further frustrate legislative intent and he posited a liberal interpretation of article 751 C.C.P.

> Cet ajout au Code de procédure civile doit recevoir un accueil positif qui vise à lui faciliter l'atteinte de son objectif et une interprétation libérale qui lui reconnaisse sa pleine signification et lui permette de répondre au malaise envisagé par le législateur.[81]

This same philosophical approach was articulated by Turgeon J. in the Court of Appeal case of *Crawford* v. *Fitch*. While Turgeon J. recognized that the mandatory injunction is of common law origin, he stated that,

> [c]omme il appert à la lecture du rapport des commissaires, *ce n'est pas un recours de caractère exceptionnel*. C'est un recours mis à la disposition des justiciables pour faire respecter un droit.[82]

CONCLUSION

Three principal factors have contributed greatly to the new trend towards expanding the availability of specific performance. The first is the rejection of the common law attitude that specific

79. In fact, he cites common law authority, for example, Halsbury's *Laws of England*, Reiter & Swan and the English case of *Evans Marshall & Co.* v. *Bertola SA*, [1973] 1 All E.R. 992.
80. *Supra*, note 1 at 816.
81. *Ibid.*
82. *Supra*, note 47 at 585 [emphasis added].

performance lies only where damages are not an effective remedy.[83] The second is the gradual erosion of the artificial distinction between obligations to do and obligations not to do.[84] The third is the recognition that obligations undertaken by a corporate body can almost always be specifically enforced without offending the principal obstacle to specific performance, the *nemo praecise* rule.[85] This new trend, while tardy, is welcome; the efforts by the courts in the 1980's to make specific performance a principal recourse is laudable.

The author must, however, signal a potential difficulty. Although the recent cases cited in this paper demonstrate that, by and large, the courts are evidencing a willingness to accord specific performance a pre-eminent role, there exists the possibility that courts might attempt to distinguish *Propriétés Cité 2* on its particular facts. This concern is prompted by the recent case of *Avis Immobilien GMBH* v. *National Trust*.[86] The case involved a 29 year lease entered into by the lessee, National Trust, who was to occupy seven of the fifteen floors in an office building. Nine years before the expiry of the lease, the lessee informed the lessor that it was vacating the premises, but that it would continue to pay the rent during the remainder of the term of the lease and went so far as to offer security for the payment of such rental. Despite the contractual possibility of subleasing the premises, no sublessee had been found, and at the date of the hearing, three months after the lessee had vacated the building, the premises remained unoccupied. The lessor sought specific performance under art. 1628 C.C. to order the lessee to occupy the premises.

Mailhot J. held that "[*a*]*t the present time*, there is no apparent breach of the lease (...) in vacating the premises while looking for subtenants, paying the rent and offering security for such payment".[87] Mailhot J. went on, however, to examine the possible effect of permanent vacancy by the lessee which might result in a change of destination of the leased premises. Assuming such a situation, Mailhot J. would still be unwilling to award a mandatory injunction. She stated that

> [t]he discretionary power of the Courts in injunctive matters should be exercised with caution and wisdom and mandatory injunction although available in some cases («cas qui le permettent» 1628 C.C.) for specific performance is not a proper remedy in the *present set of circumstances*.[88]

Mailhot J. sought to distinguish *Propriétés Cité 2*. First, she emphasized that in the *Propriétés Cité* case, the lease contained an express clause while the lease in the case at bar did not. Secondly, unlike National Trust, the lessee in *Propriétés Cité*, the Royal Bank, was an important tenant for it was a prestigious contributor to a "mixed-use development" project. In addition, the Royal Bank was an "anchor tenant" for it could potentially attract other tenants.

It is submitted that on the facts, the judgment rendered in *Avis Immobilien GMBH* v. *National Trust* is correct, for Mailhot J. found no present breach of the lease. However, her treatment of the hypothetical situation wherein National Trust would commit a breach by changing the destination of the premises is less than satisfactory. Although Mailhot J. expressed no specific disagreement with the principles enunciated in *Propriétés Cité 2*, she displayed an unfortunate tendency to read down that decision and to restrict it to its particular facts.

It is to be hoped that the liberalized trend, which began in the decisions of *Propriétés Cité 2* to increase the importance of specific performance in Quebec law, will not be stopped short in its tracks. The gap between the civilian theory that specific performance is the principal recourse and the past practice by the Quebec courts relegating that recourse to an inferior status should continue to be narrowed for several reasons. On a juridical basis, the overly restricted availability of specific performance offends the important principle that a creditor possesses a choice of remedies.[89]

On a practical level, an order of specific performance will often be a better remedy for the creditor. A creditor taking an action in damages usually must wait a long time for his damage award, whereas an interlocutory injunction can produce fairly immediate results. A claim in damages may also entail difficulties in proof and, quite often, the compensation awarded by the court will be inadequate to cover the real loss suffered. Furthermore, in many cases involving commercial parties, what is important to the creditor is the ability to continue his operations, not to get damages enabling him to reorganize his business activities. For example, in *Chrysler Canada*[90]

83. See *Société Coinamatic* v. *Armstrong, supra*, note 19 and *Gulf Oil Canada Ltée* v. *Leroux, supra*, note 20.
84. See *Crawford* v. *Fitch, supra*, note 47.
85. *Les Propriétés Cité Concordia Ltée* v. *Loews Hotel Montreal Inc., supra*, note 64 and *Propriétés Cité 2, supra*, note 1.
86. [1986] R.J.Q. 1794 (Sup. Ct.). The decision has been appealed no. 500-09-000752-865.
87. *Supra*, note 86 at 1797.
88. *Supra*, note 86 at 1798 [emphasis added].
89. *Supra*, note 18.
90. *Supra*, note 34.

the car dealer was much better off with an injunction ordering Chrysler to respect the dealership contract than with damages which would have required him to reconstitute his business and start up a new dealership.

As a matter of civil law theory, the foundation of contractual obligations in Quebec continues to be the autonomy of the will. If the will of the parties is the source of contractual obligations, the will of the parties, as evidenced in the contract, dictates that contractual obligations actually be performed. The obligation to pay damages is clearly subsidiary. Thus, while there will always be cases where specific performance cannot lie and damages are the only appropriate remedy,[91] specific performance should be considered the principal recourse for creditors whose debtors breach their contractual obligations.

91. In cases of the provision of purely personal and individual services (see *Lombard* v. *Varennes, supra*, note 25) and in cases specific performance is physically or legally impossible.