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ABSTRACT

Few would deny that contract law is filled with default rules, but there has been a great deal of scholarly debate about their purposes and functions. Some American scholars have argued that there are default rules that do not align with most parties' expectations; indeed, they impose a burden on one or both parties if they are not departed from. Departing from these default rules typically requires one or both parties to share information that they might have otherwise kept to themselves. These have been called "penalty default rules." While there is a significant amount of scholarship on penalty default rules in the United States, mostly by law and economics scholars, civilian scholars have not paid much attention to this concept. In this paper, I bring the concept of penalty default rules out

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of the United States, the common law tradition and the law and economics scholarship. I demonstrate that there are many penalty default rules in Quebec contract law. I continue by arguing that these penalty default rules serve two valuable functions. First, they enhance the parties' freedom of contract by equipping them with information. I focus on how this enables them to reach a fair allocation of risks. Second, they complement the duty of good faith by supplementing the limited duty of disclosure and by altering what sort of conduct is reasonable and therefore not abusive.

Keywords: penalty default rules, obligations, contracts, information sharing.

I. INTRODUCTION

It would be hard to imagine a world in which people enjoy the freedom to form contracts without a legal system that has at least some default rules in place. What would happen if parties render their contract nonsensical or inoperative by overlooking a key detail? Default rules plug these gaps without inhibiting freedom of contract since the parties remain free to depart from them. Thus, by many accounts, default rules ought to resemble what parties hypothetically would have agreed to.[1]

But some have argued that default rules often do more than simply fill gaps. Ian Ayres and Robert Gertner coined the term "penalty default rule" to describe default rules that do not align with the parties' expectations, or at least create an undesirable outcome if they are not departed from. This gives the parties an incentive to depart from them.[2] Ayres and Gertner also argued that penalty default rules are desirable because they, among other things,

1. *See e.g.,* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 CAL. L REV. 261 (1985).

2. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999).

"encourage the parties to reveal information to each other or to third parties (especially the courts)" since information sharing is necessary to depart from them.[3] However, in response, Eric Posner argued that there are no penalty default rules in American contract law,[4] and Eric Maskin argued that there ought not to be penalty default rules.[5] Ayres responded with a blunt "ya-huh" and argued again that there are and ought to be penalty default rules in contract law.[6]

In this paper, I contribute a new perspective to this debate, one that comes from both a different country and a different legal tradition. I argue that there are penalty default rules in Quebec contract law and that they serve valuable functions. I do so by analyzing four aspects of contract law—contract formation, the content and interpretation of contracts, changed circumstances and remedies for breach—to reveal an assortment of penalty default rules. Then, I argue that penalty default rules enhance parties' freedom of contract by facilitating the sharing of information between them. This enables parties to make informed decisions and to better protect their own interests. I focus on how this facilitates the pursuit of a fair allocation of risks. Moreover, penalty default rules complement the duty of good faith in two ways. One way is by encouraging information sharing in a wider range of circumstances than what is required by the duty of disclosure that is part of the duty of good faith. Another is by informing what sort of conduct is reasonable and therefore not abusive. Overall, I show that the concept of penalty default rules that Ayres and Gertner outlined need not be confined

3. Ayres & Gertner, *supra* note 2, at 91; *See also* Lucian Arye Bebchuk & Steven Shavell, *Reconsidering Contractual Liability and the Incentive to Reveal Information*, 51 STAN. L. REV. 1615 (1999); Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J.L. ECON. & ORG. 284 (1991).

4. *See* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law,* 33 FLA. ST. U.L. REV. 563 (2006).

5. *See* Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U.L. REV. 557 (2006).

6. *See* Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U.L. REV. 557 (2006).

to the United States[7] or to the common law tradition, or even to law and economics scholarship. Rather, it offers a useful lens through which we can learn more about the nature and functions of contract law in a wide range of legal systems, including in Quebec's civilian system.

The term "default rule" might, at first blush, seem to be confined to the common law tradition. After all, most civilians would prefer to use the term "suppletive rules" to describe rules that the parties can depart from if they choose to. Suppletive rules, if understood narrowly, are only those rules that clearly invite the parties to depart from them. However, some of the penalty default rules that I identify are not suppletive rules in this narrow sense; as I will note, they are mandatory or imperative rules that can behave like default or suppletive rules in some situations. I consider these rules to be default rules. Much like Ayres, "if something quacks like a duck and walks like a duck,"[8] I consider it to be duck. With this in mind, I suggest that the concept of "penalty default rules" is best understood as a "meta concept" that does not call any legal tradition home.[9] Instead, it can be used to describe concepts from different legal traditions, including some default rules in the common law tradition, suppletive rules in the civil law tradition and other rules that might not readily seem like default or suppletive rules at all. Any rule that parties can depart from, directly or indirectly, that imposes a burden on one or both parties if they fail to depart from it could be called a penalty default rule.

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7. There is a limited amount of Canadian scholarship that engages with the concept of penalty default rules. For an example of an article that engages with the concept in the context of corporate law, *see* Mohamed F. Khimji & Jon Viner, *Oppression-Reducing Canadian Corporate Law to a Muddy Default*, 47 OTTAWA L. REV. 123 (2016). In the context of family law, *see* Robert Leckey, *Cohabitants, Choice, and the Public Interest*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 115 (Elizabeth Brake & Lucinda Ferguson eds., Oxford U. Press 2018).

8. Ayres, *supra* note 6, at 593.

9. *See generally* Olivier Moréteau, *The Words of Comparative Law*, 6 J. INT'L & COMP. L 183 (2019).

I should emphasize that this paper stretches the concept of penalty default rules into a domain that Ayres and Gertner might not have anticipated, not only because I bring it to a different jurisdiction that operates within a different legal tradition. This paper does not offer an economic analysis. I do not focus, at least not directly, on how penalty default rules may or may not enhance efficiency. Rather, I borrow a concept that, while initially born out of scholarship from the law and economics movement, provides a useful lens to analyse the notions of freedom of contract and good faith in Quebec. That said, for the sake of completeness and for the convenience of readers who are not familiar with the existing scholarship on penalty default rules, I begin by briefly outlining the debate on penalty default rules and their ability (or lack thereof) to enhance economic efficiency.

II. SHORT (AND PARTIAL) SUMMARY OF THE AMERICAN DEBATE

In their first article on this subject, Ayres and Gertner described penalty default rules as default rules that are unappealing to at least one party if they are not departed from. This gives the parties an incentive to depart from them, and in so doing it forces them to reveal information to the other party.[10] Ayres and Gertner went on to argue that penalty default rules enhance efficiency.[11]

This idea eventually came under attack from two fronts at a symposium that led to papers in the *Florida State University Law Review*: one empirical and one normative. Posner analyzed the examples of penalty default rules that Ayres and Gertner offered, including the rule that is sometimes seen to have emerged in *Hadley v. Baxendale*.[12] In *Hadley*, an English court held that victims of

10. Ayres & Gertner, *supra* note 2, at 91.
11. *Id.* at 93–95.
12. *See* Posner, *supra* note 4; *see also* Hadley v. Baxendale (1854) 156 Eng. Rep. 145 (Eng.). However, it should be noted that this rule has deep civilian roots, and that it emerged in common law jurisdictions prior to *Hadley*. See e.g. ROBERT JOSEPH POTHIER, TRAITE DES OBLIGATIONS, SELON LES REGLES TANT DU FOR DE LA CONSCIENCE, QUE DU FOR EXTERIEUR 177 (Paris: Debure l'aîné 1764); Blanchard v Ely, 21 Wend 342 (NY Sup Ct, 1839); Joseph M Perillo, "Robert J. Pothier's Influence on the Common Law of Contract" (2005) 11:2 TEX. WESLEYAN

breaches cannot recover damages for injury that was not reasonably foreseeable or foreseen. Of course, injury could become foreseeable if the party that might suffer the injury communicates this possibility to the other party prior to the formation of the contract. But the default rule is that such loss will not be compensable if the adverse party is not told that it might occur, unless the parties allocate the risks of unforeseeable harm.[13] According to Ayres and Gertner, this rule is unappealing to a party that might suffer injury that is not reasonably foreseeable or foreseen by the other party, which is understandable because it would leave them without full compensation. Therefore, it gives them an incentive to make the other party aware of this possibility, which means that the rule serves as a "purposeful inducement" that facilitates the sharing of information.[14] Without summarizing Posner's entire argument, it suffices to say that he challenged the idea that *Hadley* is a penalty default rule by arguing that it often aligns with the parties' expectations. Posner wrote that "the usual reason for thinking that the *Hadley* rule is not a majoritarian rule is that it is counter to the notion of efficient breach." Since "the efficient breach theory says that contract damages should equal actual loss" but "the *Hadley* rule excludes the unforeseeable portion of any loss, [therefore] it is not majoritarian." However, Posner argued that "this view…oversimplifies the analysis of optimal damages rules." Expectation damages – the typical remedy for breach of contract in the common law tradition – "force the breacher to provide insurance to the victim against whatever event causes the breach."[15] The breaching party, who would have to pay expectation damages to compensate for all injury caused by the breach, is not always "the cheaper insurer" against any and all potential risks.

L. REV. 267; Robert M Lloyd & Nicholas J Chase, "Recovery of Damages for Lost Profits: The Historical Development" (2016) 18:2 U. PA. J. BUS. L. 315; Wayne Barnes, "Hadley v. Baxendale and Other Common Law Borrowings from the Civil Law" (2005) 11:2 TEX. WESLEYAN L. REV. 627.

13. *Id*.
14. *See* Ayres & Gertner, *supra* note 2, at 101.
15. Posner, *supra* note 4, at 574.

Posner argued that "if this is right, then most parties would want liability limited to foreseeable loss,"[16] which means that the *Hadley* rule aligns with most parties' expectations.[17]

In reply, Ayres wrote that "[i]f we go far enough back behind the veil of ignorance, all information-forcing rules are majoritarian."[18] With this apparent reference to John Rawls' work,[19] Ayres suggested that the *Hadley* default could align with a majority of parties' expectations when it leads to "fully compensatory damages" or when "a majority of contracting parties would prefer the rule that deters the strategic withholding of information by an unrepresentative minority."[20] But for Ayres, *Hadley* is nevertheless a penalty default rule because "its efficiency stems from its inducing some contractors to contract around the default, rather than from enabling parties to save on the costs of contracting around it."[21] While Ayres conceded that "the *Hadley* example is not the cleanest example of a penalty default" since it does not "[induce] a majority of contractors to contract around" it, it is nerveless an illustration of how penalty default rules work because it shows "the informational impact of contracting around was an important consideration in choosing among competing defaults."[22]

Maskin argued that Ayres and Gertner's claim with respect to the efficiency of penalty default rules is "logically in error."[23] In short, Maskin argued that parties could reach a more efficient contract by adhering to the *Hadley* default rather than contracting around it.[24] Ayres replied that Maskin's "counterexample merely displaces one type of contracting cost with another," therefore "it is hardly a serious challenge to the possibility that penalty defaults can be

16. *Id.* at 575.
17. *Id.* at 574–575.
18. Ayres, *supra* note 6, at 612.
19. *See e.g.,* JOHN RAWLS, A THEORY OF JUSTICE (Harvard U. Press 1971).
20. Ayres, *supra* note 6, at 612.
21. *Id*.
22. *Id.* at 613.
23. Maskin, *supra* note 5, at 557.
24. *Id*. at 561–562.

efficient."[25] But regardless of whether it was Maskin or Ayres that arrived at the most economically efficient calculation, both arguments overlook other potential benefits that flow from information sharing that penalty default rules encourage. Therefore, I push beyond this debate to identify some of these other benefits in Quebec contract law.

III. Penalty Default Rules in Quebec Contract Law

A. Contract Formation

The *Civil Code of Quebec* contains two penalty default rules that apply to how contracts are formed, and more specifically to the power of an offeror to revoke an offer. Parties, particularly sophisticated parties, probably expect that offers can be revoked by offerors at any time prior to acceptance, as is the case in every other Canadian province[26] and in the United States.[27] Commercial expectations are often drawn from how the law is generally seen to operate. For example, this is why the Supreme Court of Canada in *Bhasin v. Hrynew*[28] recognized good faith as an organizing principle of contract law in common law provinces, explaining that part of its reason for doing so was to align Canadian common law with commercial expectations that are influenced by American and Quebec law. Thus, the fact that Quebec is physically surrounded by, and has deep commercial ties with, jurisdictions that allow offers to be revoked at any time prior to acceptance suggests that parties, particularly those that do some or even most of their business outside of Quebec, would expect that this would hold true in Quebec as well. It could also be argued that this expectation is intuitive or even commonsensical; if I offer to sell you something, we did not yet form an

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25. Ayres, *supra* note 6, at 617.
26. *See e.g.,* JOHN MCCAMUS, THE LAW OF CONTRACTS 83–90 (2d ed., Irwin Law 2012).
27. *See e.g.,* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §42 (1981).
28. Bhasin v. Hrynew, [2014] S.C.R 71 (Can.).

agreement, and in fact I probably did not even *promise* to sell it to you. But the *Civil Code of Quebec* contains two default rules that are inconsistent with this expectation.

First, unlike in other Canadian provinces and in the United States, offers that are made with "terms," which are best understood as timelines for acceptance, cannot be revoked unilaterally by the offeror.[29] These offers are almost like options contracts that are used in common law systems; in both cases, the offeror is required to keep the offer open. When one reads the articles in the *Civil Code of Quebec* that set out this rule, it appears to be a mandatory rather than a default rule. Seemingly mandatory language, like "[w]here a term is attached, the offer may not be revoked before the term expires,"[30] leads to this perception. But this rule behaves like a default rule because an offeror can avoid it by simply not attaching a term to their offer, or they could probably avoid it by indicating that the timeline that they propose is not a binding term but instead a suggested timeline. Moreover, this rule behaves like a penalty default rule because it imposes a burden on the offeror—presumably the party with more information available to them at the time that the offer is made—by holding them to the timelines that they propose unless they take deliberate action, which must involve communicating with the offeree, to depart from it.[31]

Second, when an offer does not include a term, the offeror is nevertheless bound to keep it open for a reasonable amount of time if the offeree indicates that they are interested in considering the offer.[32] Again, this has the effect of creating what is almost an options contract because it causes the offeror to lose their power of revocation. And again, while the *Civil Code of Quebec* establishes this rule using what seems like mandatory language, it behaves like a default

29. C.C.Q. art. 1390 ¶2.
30. *Id*.
31. Even if a proposed timeline is more advantageous to the offeror than what might otherwise be reasonable (i.e., what they might be held to if their offer becomes the subject of a promise to contract, discussed below), requiring the offeror to keep the offer open for the duration of that timeline is still a burden on them if they want the flexibility to revoke their offer whenever wish.
32. C.C.Q. art. 1396.

rule because the offeror could exempt themselves from it by altering their communication to change its status from an offer to what could be called an 'invitation to treat.' For example, instead of saying "I will sell you my diamond ring for $10,000," which would likely be an offer, one could say "I might be interested in selling you my diamond ring for $10,000; contact me if you want to discuss this further." In the second scenario, the formal offer would likely only come from the apparent offeree, and probably only after the parties have communicated further to establish mutual interest in the transaction. Thus, by using carefully chosen language to depart from what is effectively a default rule, the offeror can avoid being bound to keep their offer open simply because the other party expressed noncommittal interest. This is a penalty default rule because it subjects the offeror to a burden—that of having to keep their offer open for a reasonable amount of time, which might not be desirable for them—if they fail to depart from it.

Taken together, these two penalty default rules force the offeror to either disclose the extent to which they are serious about the offer being accepted or risk experiencing a burden that extends protections to the offeree. If someone makes an offer knowing that the offeree is not in a position to accept it yet—something that happens frequently in large transactions where the offeree might, for example, need to secure financing before being in a position to seriously consider whether they should accept the offer—they have an incentive to say so and to take steps to depart from these penalty default rules.

B. Content and Interpretation of Contracts

Parties generally expect that clauses in their contracts will be given legal effect, which is the general rule in Quebec. But in consumer contracts[33] and contracts of adhesion,[34] the *Civil Code of*

33. C.C.Q art. 1384.
34. C.C.Q art. 1379.

Quebec sets out two exceptions that are penalty default rules. First, art. 1435(2) provides that external clauses in consumer and adhesion contracts are null unless the party that prepared the contract brought them to the attention of the consumer or adhering party prior to the formation of the contract or if they can prove that the consumer or adhering party knew of them when the contract was formed.[35] Second, art. 1436 provides that illegible or incomprehensible clauses are null if they cause injury to a consumer or adhering party unless the party that prepared the contract explained "the nature and scope of the clause . . . to the consumer or adhering party."[36] Both of these rules function as penalty default rules because they put a burden on the party that prepared the contract (i.e., rendering these clauses null) if they fail to take steps to communicate information about these clauses to the consumer or adhering party in advance.

Arts. 1435 and 1436 are perhaps more effective than other penalty default rules that exist in other jurisdictions. J. H. Verkerke argued that, while many American penalty default rules do encourage information sharing between the parties, they do not often lead sophisticated parties to clearly or effectively communicate information to less sophisticated parties because this information sharing often takes the form of "boilerplate language in largely unread contract documents."[37] By contrast, arts. 1435 and 1436 ensure that boilerplate language is unhidden, legible, and comprehensible. Thus, there is at least a minimum amount of comprehensible communication between the parties in consumer and adhesion contracts, even if it is true that most consumers and adhering parties will not bother to make themselves aware of what has been communicated to them. In these situations, the consumer or adhering party has at least been provided with an opportunity to be fully informed of the content of the contract. This perhaps does not go nearly as far as "requiring an oral recitation of all or part of the contract, quizzing

35. C.C.Q. art. 1435.
36. C.C.Q. art. 1436.
37. J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 906 (2015).

parties about their understanding of key contract terms, or perhaps mandating the participation of an attorney in certain transactions,"[38] but it at least gives most consumers and adhering parties a chance to be properly informed. In reality, many consumers and adhering parties will not take advantage of this opportunity—whether we admit it or not, most of us have not taken the time to read all clauses in every consumer or adhesion contract that we have ever entered into with care—but if parties have a fair opportunity to read and understand those clauses, there is a possibility that this penalty default rule will have an impact on the parties' behavior.

One might argue that arts. 1435 and 1436 are aligned with rather than opposed to parties' expectations and therefore they cannot be seen as penalty default rules. By this view, parties would expect that their consent only extends so far as to cover clauses that they were aware of or could have reasonably been aware of, and that they would therefore not expect their consent to cover unknown external clauses or unexplained illegible or incompressible clauses. But it is common for people to be presented with lengthy consumer and adhesion contracts that they might not bother to read from top to bottom.[39] This often happens online when people sign up for digital accounts or purchase goods. Usually, a lengthy set of clauses will appear, and the adhering party will have the opportunity to accept them within seconds through a click of their mouse or a tap of their finger. Thus, it would be difficult for one to argue that parties have a reasonable expectation that all clauses in contracts will be brought explicitly to their attention since they regularly scroll past and click to accept contracts the content of which they do not fully know. One day, this might change. Indeed, there is (at least arguably) some indication that consumer and adhesion contracts in Canadian common

38. *Id.* at 907.
39. Indeed, in a recent paper, Aditi Bagchi went so far as to argue that boilerplate or adhesion contracts should be regarded as the norm. *See* Aditi Bagchi, *Risk-Averse Contract Interpretation*, 82 LAW & CONTEMP. PROBS. 1 (2019).

law provinces will need to be made shorter and more legible,[40] which might cause parties' expectations to shift. But at the moment it is likely that parties do not expect that there are default rules like arts. 1435 and 1436 that penalize the party that prepared a contract if they fail to protect the consumer or adhering party by sharing certain information.

Another penalty default rule—one that has been identified in the American literature[41]—is *contra proferentem* interpretation of contracts. According to this canon of interpretation, ambiguous contracts are interpreted in a manner that disfavors their drafters. Courts rarely turn to *contra proferentem* interpretation because, so long as "the words of the contract are clear, the court's role is limited to applying them to the facts before it."[42] If the words are ambiguous, courts must look contextually for the common intention of the parties consistent with a holistic reading of the contract.[43] However, art. 1432 provides that if this exercise still leaves courts with doubts, they must resolve these doubts in a manner that favors the debtor in a contract that was open to negotiation, or "[i]n all cases . . . in favor of the adhering party or the consumer."[44] This means that *contra proferentem* interpretation is available for at least some ambiguous consumer and adhesion contracts. While this might look like a mandatory rule because it does not openly invite parties to depart from it, it is best understood as a default rule because it can be ignored if the contents of contracts are made clear, particularly through clear drafting.[45] Further, it is best understood as a penalty default rule

40. *See* Uber Technologies Inc. v. Heller, [2020] S.C.R. 16, 71 (Can.) (in which the majority wrote that an inequality of bargaining power, which is one part of the test used to determine whether contracts can be set aside for unconscionability, can arise because one party could not understand the content of an adhesion contract due to, for example, "dense or difficult to understand terms").

41. *See e.g.,* Ayres, *supra* note 6, at 596.

42. Uniprix inc. *v.* Gestion Gosselin et Bérubé inc., [2017] SCC 43, para. 36

43. *See* C.C.Q. arts. 1425–1431.

44. C.C.Q. art. 1432. *See also* Didier Lluelles, *Les règles de lecture forcée « contra proferentem » et « contra stipulatorem » : du rêve à la réalité*, 37 R. J. T. 235 (2003).

45. Ayres, in defending the position that *contra proferentem* can be seen as a default rule, argued that "resolving the ambiguity [in the contract] through an act of interpretation is analogous to filling the obligational gap with a default.

because it gives parties that prepare contracts, especially consumer and adhesion contracts, a strong incentive to draft clearly. If they fail to do so, they could find themselves in a burdensome situation in which their ambiguous clauses are at best not given full legal effect or at worst given an effect that will harm them.[46] Thus, it is difficult for these parties to hide their true intentions behind ambiguous terms in contracts; art. 1432 forces them to share enough information through clear drafting so that the court can discern a common intention of the parties in order to avoid *contra proferentem* interpretation.

C. Changed Circumstances

Parties generally expect that contractual obligations will be performed, or at least that damages will be paid. However, many endeavors that contracts facilitate run the risk of being upended by changed circumstances. The *Civil Code of Quebec* contains some recognition of this reality. Although parties have a broad duty to fulfil their contractual obligations,[47] arts. 1470 and 1693 provide that they can be excused from liability for non-performance if the injury caused by their failure to perform results from a "superior force."[48] A superior force must be both "unforeseeable" and "irresistible;" this means that it could not have been foreseen by a reasonable person in the position of the parties when the contract was formed and that there is nothing that could have been done to stop it.[49] Although

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Where that act of interpretation is carried out according to a predictable rule, parties will contract around it just as they would a pure statutory default." *See* Ayres, *supra* note 6, at 596.

46. As Ayres put it, "[t]he *contra* in *contra proferentem* rightly suggests a penalty; the interpretative presumption is not chosen because we think that the most negative interpretation is what the drafter or even the draftee normally wants, but rather because the rule of construction is a stick to force drafters to educate nondrafters." *See* Ayres, *supra* note 6, at 596.

47. C.C.Q. art. 1590.

48. C.C.Q. art. 1470.

49. *See* SEBASTIEN GRAMMOND, ANNE-FRANÇOISE DEBRUCHE & YAN CAMPAGNOLO, QUEBEC CONTRACT LAW ¶363–644 (2d ed., Wilson Lafleur 2016);

there are some inconsistencies in the jurisprudence,[50] few risks are considered to be truly unforeseeable.[51] Even fewer risks are considered to be truly irresistible. As Vincent Karim notes, "any resistance by the debtor to the event must be ineffective, useless and futile…such that it is absolutely and permanently impossible for them to perform the obligation."[52] Thus, arts. 1470 and 1693 are of little help to parties that fail to allocate the risks associated with many, if not most, unforeseen circumstances.

If they are far enough behind the veil of ignorance—that is, if they do not yet know whether they might benefit from or suffer because of a change in circumstances—parties will likely expect that the law will require that, at minimum, contractual obligations be revised or renegotiated in the event that they are harmed. But there is no provision in the *Civil Code of Quebec* that grants relief to parties in circumstances that do not meet the high bar of superior force. Thus, in order to give legal effect to their expectations, parties need to reach an agreement on how the risks of circumstances changing will be allocated. If they fail to do so, they run the risk of being left without recourse if a major change in circumstances that is not quite a superior force comes along in the future and harms them.

While it is common for parties to be far behind the veil of ignorance in the sense that neither expects that a major change in

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VINCENT KARIM, 2 LES OBLIGATIONS, paras 3774, 3779 (5th ed., Wilson Lafleur 2020).

50. *See e.g.,* Gestion Initiative Développement GID Ltée v. Québec New York 2001, 2004 CanLII 647 ¶11 (Can. Qc. S.C.). In this case, the parties agreed that "*les attentats terroristes du 11 septembre 2001, à deux pas du site de l'exposition, constituaient une force majeure*" [the terrorist attacks of September 11, 2001, close to the exhibition site, was a superior force]. Faced with different facts, the Superior Court held that "*les tragiques incidents survenus le 11 septembre 2001 ne constituent pas un événement de force majeure pour Bombardier puisqu'ils n'en ont pas le caractère suffisant au terme du contrat intervenu entre les parties et qu'ils ne rencontrent pas plus les critères définis par la loi*" [the tragic incidents that occurred on September 11, 2001 do not constitute a superior force for Bombardier because they do not have the required carachter based on the contract between the parties and they do not meet the criteria established by law]. *See* Caisse Desjardins de St-Paulin v. Bombardier Inc., [2008] QCCS 3725 (Can.)

51. *See* PIERRE-GABRIEL JOBIN AND NATHALIE VÉZINA, LES OBLIGATIONS 844–849 (7th ed., Yvon Blais 2013).

52. KARIM, *supra* note 49, para. 3779 [translation by author].

circumstances will occur, it is not difficult to imagine situations in which one of the parties knows more about how circumstances might change than the other. But even in these situations, the party with more information might still find themselves behind the veil of ignorance to the extent that they do not know whether or not they will benefit from a change in circumstances. For example, a manufacturer of hand sanitizer could conceivably benefit from a pandemic due to increased demand or they might be harmed because they will be stuck selling their product for a fixed price when they could have sold it to other customers that are suddenly willing to pay more. Thus, even parties that know more information will probably want to allocate the risks associated with at least some changes in circumstances. If they fail to discuss these risks with the other party and reach an agreement, they are penalized by being left without recourse unless there is a superior force. Arts. 1470 and 1693, taken together, can therefore be seen as a penalty default rule. It is a default rule because it can be departed from, and it penalizes the parties if they fail to initiate a discussion on the topic by depriving them of protections that they might want while they are still behind the veil of ignorance. Even if one party does not know more information than the other, arts. 1470 and 1693 still operate as a penalty default rule by denying both parties the opportunity to make themselves feel more comfortable with the amount of risk that they are taking on in the contract unless they have a discussion and agree on who will bear the risks of circumstances changing.

D. Remedies for Breach

Without rehashing the debate, which was briefly discussed earlier, about whether *Hadley* is a penalty default rule, I should note that the *Hadley* rule has deep civilian roots.[53] It is thus unsurprising

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53. *See e.g.,* ROBERT JOSEPH POTHIER, *supra* note 12, at 177. See also Blanchard v Ely, 21 Wend 342 (NY Sup Ct, 1839) at 348–350; Joseph M Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11:2 TEX. WESLEYAN L. REV. 267 (2005); Robert M Lloyd & Nicholas J Chase, *Recovery of*

that the *Civil Code of Quebec* contains a provision that is similar to the *Hadley* rule. Art. 1613 provides that "the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted" if the breach is not the result of "intentional or gross fault" on the part of the breacher.[54] One easy way to render injury that might otherwise be too remote foreseen is for the party with knowledge of the potential for such injury to alert the other party. If they fail to do so, art. 1613 penalizes them in the event of a breach by denying them recovery for such injury.

IV. VALUE OF PENALTY DEFAULT RULES IN QUEBEC

So far, I have revealed that there are a number of penalty default rules in the *Civil Code of Quebec* that facilitate the sharing of information. The party that knows less stands to benefit from the existence of penalty default rules either because they favor them if they are not departed from or because the other party will act on their incentive to share information. While the benefits that these rules provide to parties with less information if they are not departed from, such as protections against the revocation of an offer, might seem obvious, the benefits that these rules provide when they are departed from might be less apparent. Therefore, in what follows, I discuss two major benefits of information sharing that is facilitated by penalty default rules. First, it enhances the parties' freedom of contract. Second, it complements the duty of good faith.

A. Enhancing Freedom of Contract

Information sharing that is facilitated by penalty default rules enhances parties' freedom of contract by equipping them with information that can help them reach fair agreements. Although freedom of contract has been defined as the freedom for "autonomous and

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Damages for Lost Profits: The Historical Development, 18:2 U. PA. J. BUS. L. 315 (2016); Wayne Barnes, *Hadley v. Baxendale and Other Common Law Borrowings from the Civil Law*, 11:2 TEX. WESLEYAN L. REV. 627 (2005).

54. C.C.Q. art. 1613.

self-interested parties" to form any contract,[55] meaning "that the content of a contractual obligation is a matter for the parties, not the law,"[56] the Supreme Court of Canada has recently recognized that "[a]t the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process."[57] This relies on the assumption that there is at least a degree of equality between the parties.[58] Of course, there is room for "economically rational actor[s] engaged in commercial negotiation[s] . . . to achieve the most advantageous financial bargain . . . at the expense of the other negotiating party,"[59] which might be seen as part of the broad concept of freedom of contract. But this freedom is not absolute. As Justice Binnie wrote, "[f]reedom of contract, like any freedom, may be abused."[60] Although I have thus far referred to common law cases and materials, the idea that freedom of contract, like other rights,[61] is not absolute is well entrenched in Quebec civil law.[62] Therefore, it could be said that a proper understanding of freedom of contract in Quebec would include the assumption that, while parties have the freedom to agree to whatever they wish that is within the bounds of public order, both parties should have a shared understanding of at least some information so that they can interact on a somewhat level playing field.[63] When penalty default rules facilitate the sharing of information, the party that would have had less information is better equipped to negotiate clauses that reflect the realities revealed by that information and to decide whether they want to enter into the contract at all. Penalty default rules therefore

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55. MCCAMUS, *supra* note 26, at 24.
56. STEPHEN A. SMITH, CONTRACT THEORY 59 (Oxford U. Press 2004).
57. *Heller*, *supra* note 40, at ¶56.
58. *Id.*
59. Martel Building Ltd. v. Canada, [2000] SCC 60 ¶62 (Can.).
60. Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] SCC 4 ¶118 (Can.).
61. *See e.g.,* C.C.Q. art. 7.
62. *See* generally 6362222 Canada inc. *v.* Prelco inc., 2021 SCC 39, § 39.
63. Indeed, Pierre-Gabriel Jobin and Nathalie Vézina note that, while freedom of contract is an important tenet of contract law in Quebec, it has never been endorsed in its most extreme form. *See* JOBIN & VÉZINA, *supra* note 51, at ¶84.

serve to enhance the parties' freedom of contract by equipping the party with less information with the information that they need to negotiate.

When parties engage in pre-contractual negotiations, the penalty default rules that I identified which apply at this stage enhance the parties' freedom of contract by shaping how the parties negotiate. As previously discussed, if an offeror makes an offer without disclosing how serious they are about the offer being accepted, the law will effectively presume that they are serious and it will therefore build in protections for the offeree against sudden revocation of that offer. These protections impose a burden on the offeror. For example, if A offers to sell B gold at the present day's spot price but the spot price fluctuates upward a few days later, A stands to miss out on the opportunity to sell the gold for more money if B accepts the offer. A would probably want to revoke the offer before B could accept it, but unless they told B in advance that they might do so, this would probably not be allowed. B therefore enjoys either protection or disclosure in advance of the potential for sudden revocation. The benefits for B are obvious if the default rules are not departed from. Yet, if the default rules are departed from, both B and A stand to benefit from the information sharing that would be required to depart from them. If, for example, A tells B that the offer is only open for a short period of time, such as 24 hours, B cannot reasonably rely on the offer being open for longer than that. A would not need to worry about opportunistic acceptance of the offer beyond that set period of time. Alternatively, if A tells B that the offer could be revoked at any time, B will either be wary of devoting too much energy to pondering whether to accept the offer or at least do so having been forewarned that this endeavor could leave them empty-handed.

Ultimately, by A sharing information with B about the seriousness of the offer—otherwise put, whether there is a risk of sudden revocation—both A and B are better positioned to protect their own interests in the negotiation process. B could, for example, reject an offer that is not sufficiently serious on the spot, perhaps because it will not leave them with enough time to consider it, which would enable both B and A to move on to other endeavors. Alternatively, B might tell A that, given only a small amount of time to consider the offer, they would only be in a position to consider it if the price is lower, which would prompt negotiations between A and B. A might agree to lower the price (thus putting a new offer on the table), or B might walk away. In the first scenario, the risk of revocation would be built into the final offer, and more likely into the price to be paid or some other clause that is important to the parties. Regardless, by A giving B an assessment ahead of time of the risk of revocation of the offer, A and B are both better positioned to allocate the risks of sudden revocation during their pre-contractual negotiations, or if they cannot manage to do so, to move on to other endeavours. This enhances their freedom of contract because it allows both of them to negotiate on more realistic terms and to ultimately end up with an offer that both are satisfied with or to part ways sooner than they otherwise would have if they cannot find an agreeable solution.

Likewise, the penalty default rules that apply to the content and interpretation of contracts facilitate information sharing that enhances the parties' freedom of contract. Take, for example, arts. 1435 and 1436 which require that certain clauses in consumer contracts and contracts of adhesion be brought to the attention of the consumer or adhering party when the contract is formed. Of course, the consumer or adhering party will often stand to benefit from these penalty default rules when they apply by protecting them from disadvantageous clauses. But if the party that prepared the contract decides to depart from them, the consumer or adhering party is often better empowered to protect their own interests. If they, for example, are made aware of a clause that is seriously disadvantageous to them, they might decide not to enter into the contract at all or insist that the problematic clauses be modified. If, for example, the party that prepared the contract would have allocated a great deal of risk to the consumer or adhering party, the consumer or adhering party might refuse to enter into the contract unless the price is lowered.

Of course, in such a situation, the contract would no longer be an adhesion contract because the clauses of the contract would have been negotiated, but by that point arts. 1435 and 1436 would have already done their information-forcing work.[64] *Contra proferentem* interpretation of contracts that is sometimes required by art. 1432 serves a similar function by ensuring that clauses, including those that might be disadvantageous for the drafting party, are either clear or interpreted in a manner that favors the non-drafting party. Additionally, if enough consumers and adhering parties choose "exit" over "voice,"[65] this could cause systemic change by encouraging parties that prepare consumer or adhesion contracts to more fairly allocate risks between the parties so that fewer people refuse to enter into those contracts. In any event, consumers and adhering parties will enjoy enhanced freedom of contract because they will be empowered to take some steps to protect their own interests, or at least to be forewarned about potentially disadvantageous clauses even if they do not take any steps to protect their interests.

The penalty default rule that applies to changed circumstances also serves to equip parties to more fairly allocate risks. If one party knows that there is a risk of circumstances changing in a way that will harm them, they have a strong incentive to share this information with the other party in order to avoid being left without recourse if that risk materializes. If that party stands to benefit from those changed circumstances, perhaps they will not have the same incentive to share that information with the other party, but it could be argued that they would be required to do so as part of the duty of good faith. Parties must disclose information that they knew or ought to have known which is of decisive importance that the other party could not have discovered themselves, or if the other party reasonably relies on the other party to disclose it.[66] If one party

64. Ultimately, stronger parties will sometimes have a direct incentive to stay away from consumer or adhesion contracts.

65. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (Harvard U. Press 1972).

66. *See* Bank of Montreal v. Bail Ltée, [1992] 2 SCR 554 (Can.), at 586–587.

withholds information about a serious risk that circumstances might change that will benefit them, particularly at the expense of the other party, it might not be difficult to argue that this test could be met. In either case, the party with less information is likely going to be informed, which could spark negotiations about the allocation of risks. For example, if circumstances are somewhat likely to change in a manner that will harm the buyer, they might ask for a lower price in order to make it economically rational for them to move forward with the transaction. There is also the possibility, which is perhaps more common, that both parties will be equally far behind the veil of ignorance as to the risk of circumstances changing. In these situations, while there is no foreseeable risk that one party is incentivised to tell the other party about, the parties will nevertheless be incentivized to engage in negotiations as to who is best placed to bear the risk of changed circumstances because they will want to avoid the possibility that they find themselves in a seriously disadvantaged position and without recourse if circumstances change. The party that bears more risk than the other might ask to be compensated in some way, such as through a more favorable price. In both cases, the penalty default rules that apply to changed circumstances give the parties incentives to negotiate a fairer allocation of risks. This enhances their freedom of contract because it equips both of them with the tools to better protect their own interests by presumably either taking on less risk or being compensated for taking on more risk than the other party.

Finally, the penalty default rule that excludes unforeseeable or unforeseen injury from compensation is another tool that facilitates the fair allocation of risks. If one party knows that they will suffer injury that would not be reasonably foreseeable in the event of a breach, they have a strong incentive to tell the other party about it during pre-contractual negotiations so that they are not left without recourse for that injury. When this happens, the other party is essentially told that they are taking on additional risk, and this could prompt them to either ask for a more favorable price, to seek other modifications or to not enter into the contract at all. This enhances their freedom of contract because it equips them to protect their own interests in the face of varying levels of risk. Likewise, it enhances the other party's freedom of contract because it makes it feasible for them to enter into contracts that might otherwise be undesirable for them. If they know that they might suffer some sort of injury that is not reasonably foreseeable if the contract is breached but they also know that they cannot possibly have recourse for that injury if it occurs, they might not enter into the contract at all. Ultimately, by sharing information and thus departing from this penalty default rule, both parties have the opportunity to negotiate a fairer allocation of risks. While this is easiest to visualize when one party knows of the potential for unforeseeable injury to flow from a potential breach, it is also true when both parties are equally far behind the veil of ignorance as to whether unforeseeable injury might occur. In such circumstances, the harshness of the penalty default rule—that no unforeseeable injury is compensable—might give the parties incentive to allocate some or all the risks of unforeseeable injury in order to make the contract more desirable for them. One party might feel more comfortable or be better equipped to take on that risk, and in exchange they might ask for a more favorable price. It is also possible, considering Posner's analysis,[67] that the parties will accept this default rule as a desirable allocation of risks. But even if this happens, the parties may have discussed the nature of this rule (or at least recognized it themselves) and therefore they would have come to an agreement on how the risk of unforeseeable injury should be allocated. Overall, regardless of whether this penalty default rule is departed from, the parties will be equipped to negotiate a fair allocation of risks and to decide not to enter into the contract at all.

67. *See* Posner, *supra* note 4.

B. Complementing the Duty of Good Faith

Penalty default rules serve a second valuable function in Quebec by complementing the duty of good faith. Parties owe each other a duty of good faith at all times,[68] which can manifest itself in many forms, such as a duty to disclose information[69] or to not exercise rights abusively.[70] In this section, I demonstrate that penalty default rules build on top of the duty of good faith. First, they often give parties with additional information incentives to disclose more information than what the duty of good faith requires. Second, they can alter what it means to act reasonably and therefore to not exercise rights abusively.

1. Disclosure of Information

As part of the duty of good faith, parties are sometimes required to disclose information to each other. The Supreme Court of Canada outlined a test to gauge whether disclosure is necessary in *Bank of Montreal v. Bail Ltée*.[71] One has a duty to disclose information if they have "actual or presumed" knowledge of it, if that information is "of decisive importance" and if it was either impossible for the other party to find that information out themselves or if they legitimately relied on the first party to disclose it.[72] Penalty default rules might therefore seem, at first blush, to have a redundant function since information sharing is sometimes required (not merely incentivized). But this duty of disclosure is limited. In some situations, penalty default rules incentivize the sharing of information that does not need to be disclosed in order to comply with the duty of good faith.

Take, for example, the penalty default rules that give parties an incentive to share information about the seriousness of their offers.

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68. *See* C.C.Q. art. 1375.
69. *See e.g., Bail*, *supra* note 66.
70. *See e.g.,* Houle v. Canadian National Bank, [1990] 3 S.C.R. 122 (Can.).
71. Bail, *supra* note 66.
72. *Id.* at 586–587.

While it might not be hard to argue that an offeror has actual knowledge of the seriousness of their own offer and that the other party would often have no way to discover that information themselves, it is not always the case that this information is of decisive importance to the offeree. In some cases, an offeree might only be prepared to consider accepting an offer that was made very seriously. But it is not hard to imagine situations in which an offeree is prepared to rely on an offer regardless of whether it was made very seriously. A start-up might, enamored by the prospect of taking their business to the next level, make internal arrangements to eventually form a lucrative contract with a multinational corporation if that corporation makes them an offer. Of course, this reliance might be based on an assumption that the offer was made seriously, but it would not be hard to argue in at least some cases that the start-up would rely just as heavily on an offer made less seriously. A prospective contract can sometimes be so alluring that it is rational to make arrangements to enter into it even if it is not certain or even likely that it will be eventually formed. Think of distributors who invest considerable efforts to get their products into big box stores, or start-ups that create products with the sole intention of trying to convince large companies to acquire them. In these situations, it would therefore be challenging to demonstrate that the offeror would be required to disclose the seriousness of their offer to the offeree under the duty of good faith. But penalty default rules incentivize the sharing of this information. In this example, the offeror would need to disclose the seriousness (or lack thereof) of their offer in order to depart from the default rules that would extend protections to the offeree. Once equipped with this information, the offeree becomes better placed to decide whether it is worthwhile for them to rely on the offer being open for acceptance.

The same could be said about the penalty default rules that incentivize the sharing of information about the content and interpretation of contracts. In consumer contracts and contracts of adhesion, the presence of certain clauses might not be of decisive importance to the consumer or adhering party. It is common for consumers and adhering parties to sign pre-prepared written agreements without the presence or absence of certain clauses being of decisive importance for them. David Heller, the representative plaintiff in *Uber Technologies v. Heller*,[73] relied on his contract with Uber to earn a living, and it is therefore not a stretch to say that he would have entered into the contract even if the arbitration clause that was later impugned had been written in plain language and printed in bold red ink. He might not have liked the clause—in fact, we know that at least in retrospect he did not like it—but it would be hard to claim that the presence or absence of the clause was of decisive importance for Mr. Heller because his livelihood depended on that contract. But even though this information might not rise to the level of decisive importance—and is therefore not subject to a duty to disclose required by the duty of good faith—the penalty default rules on the content and interpretation of contracts would give the party that prepared the contract a strong incentive to disclose it or at least make it available in legible and easily accessible text.

It is also not hard to imagine situations in which the risk of circumstances changing would not be of decisive importance. While I noted earlier that there could be situations in which the duty of good faith would require the disclosure of such information, this is not always the case. Take, for example a publicly held corporation that, after a few quarters of poor performance, is eager to boost its stock price. If it can enter into a contract that will boost its stock price quickly, it might want to do so even if there is a possibility that circumstances will change to its detriment. This might seem improbable because corporate directors and officers owe the corporation a duty of care and a fiduciary duty,[74] which includes a duty to protect its long-term interests,[75] but so long as the directors and officers can show that their decision was reasonable, courts will defer to their

73. Heller, *supra* note 40.

74. *See e.g.* Canada Business Corporations Act, RSC 1985, c C-44, §122(1).

75. *See* BCE Inc v. 1976 Debentureholders, [2008] S.C.R. 69 ¶38 (Can.); Peoples Department Stores Inc (Trustee of) v. Wise, [2004] S.C.R. 68 (Can.). *See also* In re Caremark Int'l, 698 A.2d 959 (Del. Ch. 1996).

business judgement.[76] It could be seen as sound, or at least reasonable, business judgement to enter into a contract that would temporarily boost a corporation's stock price with the hope that this will inspire confidence in the corporation that will lead to more growth in the future. In these circumstances, a duty to disclose would not arise because the information about the potential that circumstances will change would not be of decisive importance. But the penalty default rule that applies to changed circumstances would give the parties an incentive to disclose information that they know about the potential for circumstances to change, at least when they either stand to be harmed by those changed circumstances or when they are sufficiently far behind the veil of ignorance that they cannot know whether they will be harmed or will benefit. Of course, the penalty default rule does not do a perfect job of incentivizing the sharing of information in all cases. If the party that knows about the potential for changed circumstances stands to benefit from those changes and no duty to disclose is triggered, they will probably opt not to share that information with the other party. That said, the penalty default rule and the duty of disclosure work together to force or incentivize the sharing of information about the potential for changed circumstances in many, if not most, situations.

Likewise, the risk of unforeseeable injury in the event of a breach might not be of decisive importance for parties that rely heavily on contracts, such as for their livelihoods, particularly if they do not expect that there will be a breach. But parties might still be incentivized to disclose information about unforeseeable injury by art. 1613 if they either know that they could suffer this injury upon breach or if they are sufficiently far behind the veil of ignorance that it is rational for them to act as if they might be harmed. Unlike with changed circumstances where it is conceivable that one could benefit from unforeseen events, it is hard to imagine that anyone would benefit from injury to themselves. Therefore, this penalty default

76. BCE, S.C.R 69 at 75; Peoples, S.C.R 68 at 75.

rule encourages even more information sharing than the penalty default rule that applies to changed circumstances.

2. Reasonable Conduct and Abuse of Right

By incentivizing information sharing, penalty default rules complement the duty of good faith in another way: by changing what it means to act reasonably (including in the exercise of legal rights) in some circumstances. One concept that fits under the broad umbrella of good faith is "the civil law framework of abuse of rights." Under this framework, "it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised."[77] Rather, parties must act reasonably in the exercise of their rights, meaning that they must not intentionally harm others or act in an objectively unreasonable manner.[78] Put another way, they must not act "imprudently or negligently, in an intemperate manner or with an intention to harm."[79] Courts can objectively assess whether conduct is reasonable "by reference to the conduct of a prudent and diligent individual."[80] While this standard is objective, it takes context into account; courts consider how a reasonable person would have acted in the circumstances.[81] If a party knows additional information due to the circumstances, so will the reasonable person.[82] Therefore, if the circumstances surrounding the contractual dealings between parties—including penalty default rules—result in more information being shared, this could alter what would count as reasonable conduct in the circumstances.

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77. C.M. Callow Inc. v. Zollinger, 2020 SCC 45, para. 68.
78. *See* C.C.Q. art. 7; *see also* Houle*, supra* note 70.
79. Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7, para. 109
80. Houle, *supra* note 70, at 164. See also Méthot c. Banque de développement du Canada, 2006 QCCA 649.
81. *See* St Lawrence Cement Inc v. Barrette, [2008] S.C.R. 64 ¶71 (Can.). *See also* JEAN-LOUIS BAUDOUIN, PATRICE DESLAURIERS & BENOIT MOORE, LA RESPONSABILITE CIVILE 161 (8th ed., Yvon Blais 2014).
82. *See e.g.,* Labelle v. Gatineau (Ville), [1960] BR 201 (Can.).

For example, what is reasonable and therefore not abusive can be influenced by the parties' shared understanding that circumstances might change. This can come about because of the penalty default rule that applies to changed circumstances, which incentivizes the parties to disclose known risks and to allocate unknown risks. Consider, for example, the facts in *Houle v. Canadian National Bank*.[83] Canadian National Bank suddenly recalled a corporation's loan and gave only three hours for it to be repaid while negotiations were underway for its shares to be sold. This led to the shares being sold for significantly less than they would have otherwise been sold for. Under the contract, Canadian National Bank had the right to recall the loan whenever it wanted to.[84] But the Supreme Court of Canada held that Canadian National Bank abused this right by acting unreasonably.[85] While it was considered to be unreasonable to suddenly recall the loan in these circumstances, this might have been different if the parties had shared information about or allocated the risks of potential changes in circumstances when the contract was formed. Imagine that the Canadian National Bank told the debtor corporation's directors that, if there is a serious risk that the shares will be sold to third parties, they could feel less comfortable with the loan, perhaps because they prefer to lend money to corporations whose directors they know and trust. New majority shareholders in a closely held corporation will probably mean new directors, and the bank would therefore no longer trust the corporation. If that had happened, it would be more difficult to argue that recalling the loan would be abusive because the debtors were forewarned that this might happen. Even the three-hour delay might not have been abusive if, for example, the bank only found out about the pending sale on short notice. Ultimately, the same action—suddenly demanding payment—which is abusive in some situations might not be abusive in other situations, which could be influenced by how much information the parties share with each other when the contract is formed.

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83. Houle, *supra* note 70.
84. *Id.* at 130–133.
85. *Id.* at 167–176.

V. Conclusion

As I have shown, there are many penalty default rules in Quebec contract law that serve valuable functions. Although the concept emerged in the American law and economics literature, it is a useful tool to understand default rules in other jurisdictions and even other legal traditions. Penalty default or suppletive rules should not be seen as simply gap-fillers; rather, as I have shown, they can play a much greater role by enhancing the parties' freedom of contract and by complementing the duty of good faith. With this in mind, my hope is that this paper will serve as an invitation to think more about the role of default rules—particularly penalty default rules—in Quebec and in other civilian jurisdictions.