

Responsibility for Another's Debt: Suretyship, Solidarity, and Imperfect Delegation

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Volume 55, numéro 2, July 2010

URI : <https://id.erudit.org/iderudit/045085ar>

DOI : <https://doi.org/10.7202/045085ar>

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Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)

1920-6356 (numérique)

[Découvrir la revue](#)

Citer cet article

Cumyn, M. (2010). Responsibility for Another's Debt: Suretyship, Solidarity, and Imperfect Delegation. *McGill Law Journal*, 55, (2), 211–255.
<https://doi.org/10.7202/045085ar>

Résumé de l'article

L'évolution du droit est souvent rendue possible grâce à l'étude attentive de règles anciennes, qu'une interprétation trop rigide, maintes fois répétée, a fait dévier de leur sens premier. Ainsi, les présomptions mises en place aux articles 1525 et 2335 du *Code civil du Québec* pour protéger les débiteurs et les cautions ont empêché les juristes de puiser librement dans les règles de la solidarité et du cautionnement à titre de droit commun. Selon l'auteure, dès lors qu'il est établi qu'une personne est responsable pour la dette d'autrui, il devrait être possible, même en l'absence d'un contrat de cautionnement, d'appliquer par analogie le droit du cautionnement. Il devrait en être de même de l'application du régime juridique des obligations solidaires, lorsque deux personnes sont tenues d'exécuter une même obligation dans son intégralité.

L'analyse de l'auteure se déroule en trois temps : la mise en évidence de la structure de base du cautionnement et de la solidarité, l'analyse des principales différences de régime entre le cautionnement et la solidarité et, finalement, l'argument selon lequel les modèles du cautionnement et de la solidarité peuvent être exploités afin de clarifier les relations juridiques complexes qui leur sont analogues, dans lesquelles plusieurs personnes sont responsables pour la même dette. S'agissant enfin de la délégation imparfaite, à savoir la reprise d'une dette sans libération du débiteur d'origine, l'auteure démontre qu'il convient d'appliquer par analogie les règles du cautionnement aux relations juridiques entre les parties.

RESPONSIBILITY FOR ANOTHER'S DEBT: SURETYSHIP, SOLIDARITY, AND IMPERFECT DELEGATION

*Michelle Cumyn**

Legal evolution is often achieved by taking a fresh look at venerable institutions whose interpretation has become thwarted, constricted, or stale. Presumptions established to protect debtors and sureties at articles 1525 and 2335 of the *Civil Code of Québec* have prevented jurists from borrowing freely from the rules of solidarity and suretyship. Where one person is undoubtedly responsible for the debt of another, even in the absence of a suretyship agreement, the author argues it should be possible to apply the law of suretyship by analogy. Where two persons are each liable to perform the same obligation in full, it is likewise appropriate to apply the rules of solidarity.

The author's analysis proceeds in three parts: an introduction of the basic structure of suretyship and solidarity (Part I), a discussion of important differences in the law of suretyship and solidarity (Part II), and an argument that the solidarity and suretyship models should be used to illuminate analogous complex relations where multiple persons are responsible for the same debt (Part III). More specifically, in the situation of imperfect delegation, where a person assumes liability to a creditor for payment of a debt owed by another, but the original debtor is not discharged and remains liable in case of non-payment by the new debtor, it is appropriate to apply by analogy the law of suretyship.

L'évolution du droit est souvent rendue possible grâce à l'étude attentive de règles anciennes, qu'une interprétation trop rigide, maintes fois répétée, a fait dévier de leur sens premier. Ainsi, les présomptions mises en place aux articles 1525 et 2335 du *Code civil du Québec* pour protéger les débiteurs et les cautions ont empêché les juristes de puiser librement dans les règles de la solidarité et du cautionnement à titre de droit commun. Selon l'auteure, dès lors qu'il est établi qu'une personne est responsable pour la dette d'autrui, il devrait être possible, même en l'absence d'un contrat de cautionnement, d'appliquer par analogie le droit du cautionnement. Il devrait en être de même de l'application du régime juridique des obligations solidaires, lorsque deux personnes sont tenues d'exécuter une même obligation dans son intégralité.

L'analyse de l'auteure se déroule en trois temps : la mise en évidence de la structure de base du cautionnement et de la solidarité, l'analyse des principales différences de régime entre le cautionnement et la solidarité et, finalement, l'argument selon lequel les modèles du cautionnement et de la solidarité peuvent être exploités afin de clarifier les relations juridiques complexes qui leur sont analogues, dans lesquelles plusieurs personnes sont responsables pour la même dette. S'agissant enfin de la délégation imparfaite, à savoir la reprise d'une dette sans libération du débiteur d'origine, l'auteure démontre qu'il convient d'appliquer par analogie les règles du cautionnement aux relations juridiques entre les parties.

* Professor, Faculty of Law, Université Laval. The research for this article was funded by the National Program for the Integration of Both Official Languages in the Administration of Justice (PAJLO). The author is grateful for the research assistance of Sarah Tanguay, Alain Parent, and Guillaume Talbot-Lachance, all former undergraduate students at Université Laval, Faculty of Law. She is especially grateful to Frédéric Levesque and Alain Parent for their thoughtful comments on an earlier draft.

Introduction	213
I. The Basic Structure of Solidarity and Suretyship	216
<i>A. Solidarity</i>	217
<i>B. Suretyship</i>	223
<i>C. Solidarity and Suretyship in Contrast</i>	230
II. The Differences in the Rules Governing Solidarity and Suretyship	231
<i>A. Creation and Subsequent Modification of the Principal Obligation</i>	232
<i>B. Payment or Voluntary Performance</i>	233
<i>C. Responsibility in Case of Non-Payment</i>	235
<i>D. Creditor's Duty to Inform</i>	237
III. The Extension by Analogy of the Rules Governing Solidarity or Suretyship	239
<i>A. Scope of Articles 1525 and 2335 of the Civil Code of Québec</i>	240
<i>B. Extension of Solidarity</i>	242
<i>C. Extension of Suretyship</i>	244
<i>D. Imperfect Delegation</i>	249
Conclusion	253

Introduction

The project for this article arose out of a previous study examining the rules of the *Civil Code of Québec (Code)* respecting delegation.¹ Delegation is the operation by which a person (i.e., the new debtor) assumes liability to a creditor for the payment of a debt owed to that creditor by another person (i.e., the original debtor).² A typical example occurs where the purchaser of an immovable (i.e., the new debtor) promises to reimburse the vendor's hypothecary loan to a bank, and the purchase price for the immovable is reduced accordingly. In my previous study, I presented the argument that the Quebec delegation is best understood as an assignment or transfer by the original debtor of her debt to the new debtor.³ A delegation is either "perfect", where the original debtor is discharged by the creditor, or "imperfect", where the original debtor is not discharged and remains liable in the event that the debt is not paid by the new debtor.⁴ Although the *Code* contemplates both perfect and imperfect delegation, its provisions are incomplete as regards to the legal relations between the creditor, original debtor, and new debtor in situations of imperfect delegation.⁵

Like several authors writing on delegation, I have mentioned in passing that the relations between parties to an imperfect delegation are not unlike those arising out of a contract of suretyship.⁶ The original debtor's position with respect to the obligation owed directly to the creditor by the new debtor is indeed similar to that of a surety.⁷ Alternatively, it has of-

¹ Michelle Cumyn, "La délégation du *Code civil du Québec* : une cession de dette?" (2002) 43 C. de D. 601.

² See art. 1667 C.C.Q.

³ See Cumyn, *supra* note 1. For a summary of the argument, see Part III below.

⁴ See art. 1668 C.C.Q.

⁵ The section on delegation in the *Code* only provides rules concerning the defences that may be set up against the creditor by the new debtor (arts. 1669, 1670 C.C.Q.). As seen in Part III.D below, several questions are not addressed. For instance: Must the new debtor be in default before the creditor may pursue the original debtor? May the original debtor invoke the benefit of discussion? Need both the original and new debtors be parties to a modification of the obligation (such as renewal of the loan)? What is the extent of the original debtor's recourses against the new debtor to ensure that the latter pays the debt that has been delegated to him?

⁶ See Cumyn, *supra* note 1 at 638ff.

⁷ Eugène Gaudemet notes the similarity between an original debtor and a surety:

Il est probable, en effet, que le délégant n'a pas voulu procurer à son créancier un bénéfice gratuit, en lui fournissant un nouveau débiteur. Il a voulu avant tout améliorer sa propre situation : la délégation imparfaite ne lui permet pas de se libérer entièrement ; mais elle lui permet du moins, dans notre système,

ten been suggested that the original and new debtors are held *in solidum*, a characterization that brings into play the principal effects of solidary obligations.⁸

The specific goal of this article is to compare the legal regimes attaching to suretyship and solidarity in order to determine whether one or the other may be helpful in understanding the relations that arise between parties to an imperfect delegation. More broadly, it is hoped that the analysis will also contribute to a better understanding of suretyship, solidarity, and obligations *in solidum*. Finally, it is suggested that solidarity and suretyship may serve as models for understanding other complex relations in which several persons are responsible for the same debt.⁹

The rules governing solidarity and suretyship are complex and technical. Their detailed analysis makes it difficult to focus on their basic structure, which is not clearly revealed in the existing literature. Moreover, the existing literature fails to explain the essential difference between solidarity and suretyship. In this article, detailed analysis will deliberately be left aside in favour of a straightforward account of both solidary obligations and suretyship. It is particularly important to grasp their basic structure, since they represent alternative models that may help in un-

d'écarter les poursuites du créancier, en s'abritant, en quelque sorte, derrière l'obligation nouvelle du délégué, acceptée par le délégataire. Il retire ainsi de la délégation un avantage immédiat. Son obligation ne reparait que si le délégué est incapable de satisfaire le délégataire (Eugène Gaudemet, *Étude sur le transport de dettes à titre particulier* (Paris: Librairie nouvelle de droit et de jurisprudence, 1898) at 276-77).

See also Frédéric Hubert, *Essai d'une théorie juridique de la délégation en droit français* (Poitiers, France: Société française d'imprimerie, 1899) at 192. Bill 125 proposed to codify this rule:

Where the delegatee [creditor] accepts the delegation, he preserves his rights against the delegator [original debtor], unless the delegatee evidently intends to discharge him. *The delegatee cannot exact payment from the delegator, however, before first addressing the delegate* [new debtor] (*Civil Code of Québec*, 1st Sess., 34th Leg., Québec, 1990, art. 1665 [emphasis added]).

Unfortunately the emphasized rule did not find its way into the *Code* as finally enacted: compare art. 1668 C.C.Q.

⁸ See *Proulx c. Leblanc*, [1969] S.C.R. 765, aff'g (1968), [1969] B.R. 461; *Société Immobilière Maxima c. Leclerc*, [1994] R.D.I. 6 (Qc. C.A.). See also M. Tancelin, "Chronique de jurisprudence : subrogation, garantie d'éviction, vente de la chose d'autrui" (1969) 10 C. de D. 810 at 816ff.

⁹ Jurists in Quebec generally consider the terms "obligation", "debt", and "claim" to be synonyms. I too subscribe to this view. Note, however, that the three terms are distinguished in an important work: Jacques Ghestin, Marc Billiau & Grégoire Loiseau, *Traité de droit civil : le régime des créances et des dettes* (Paris: Librairie générale de droit et de jurisprudence, 2005) at para. 1ff.

derstanding other complex obligations with a similar structure, notably imperfect delegation.

The idea that one may apply by analogy either the law of suretyship or the law of solidary obligations to other complex relations immediately raises an objection. There exists in both the cases of suretyship and solidarity a legal presumption that appears to deny their application unless they have been expressly stipulated by the parties or imposed by law.¹⁰ The courts have already found it necessary to overcome this obstacle in order to import the rules of solidary obligations and apply them in a number of cases where the legal presumption established at article 1525 appears to prevent them from doing so. To this end, courts have resorted to the notion of an obligation *in solidum*.¹¹ Such an obligation is not identical to a solidary obligation, but it enables courts to draw on the rules of solidarity by analogy. There is not at present a well-established practice of applying the rules of suretyship to analogous situations. There is a further objection to overcome if one wishes to do so: unlike solidarity, which at least is defined by the *Code* as a modality applicable to obligations in general, suretyship is a nominate contract,¹² not a legal regime of general application.

Despite these objections, I will argue that suretyship and solidarity represent alternative models, both of which are valuable in explaining and regulating complex relations in which several persons are responsible for the same debt. One must apply articles 1525 and 2335 in light of their underlying objective: the protection of an alleged surety or solidary debtor. This does not preclude the application by analogy of solidarity or suretyship in appropriate circumstances, as will be shown below.

I will begin with an attempt to capture the basic structure of solidarity and suretyship (Part I), before outlining the principal differences in their legal regimes (Part II), and discussing the conditions in which the rules of solidarity or suretyship may be applied by analogy to other legal relations and, in particular, to an imperfect delegation (Part III).

¹⁰ See arts. 1525, 2335 C.C.Q.

¹¹ See *Dostie c. Sabourin*, [2000] R.J.Q. 1026, [2000] R.R.A. 321 (C.A.) [*Dostie*]; *Prévost-Masson v. General Trust of Canada*, 2001 SCC 87, [2001] 3 S.C.R. 882, 207 D.L.R. (4th) 1; *Chartré c. Exploitation agricole et forestière des Laurentides*, [2002] R.J.Q. 1623, [2002] R.D.I. 428 (C.A.) [*Chartré*]; *Gilles E. Néron Communication Marketing v. Chambre des Notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, 241 D.L.R. (4th) 577.

¹² See art. 2333 C.C.Q.

I. The Basic Structure of Solidarity and Suretyship

An obligation can be solidary only if it involves more than two parties.¹³ Where the obligation has two or more creditors, it involves active solidarity;¹⁴ where it has two or more debtors, it involves passive solidarity.¹⁵ Only passive solidarity is addressed here. For the purposes of this discussion, I will assume the presence of two co-debtors. An obligation secured by suretyship is also one where two or more persons are responsible for its non-performance: the debtor of the obligation and the surety. I will assume the presence of a single debtor and a single surety.

Simply put, the difference between solidarity and suretyship is as follows: solidary co-debtors, on one hand, are true debtors. While the creditor may obtain payment in full from one or the other of the co-debtors,¹⁶ the debt is ultimately shared between them.¹⁷ The surety, on the other hand, is not a debtor. She is responsible only in the event that the debtor fails to perform the obligation.¹⁸ The surety who has performed the secured obligation or indemnified the creditor is entitled to be reimbursed entirely by the debtor.¹⁹ Thus, solidary co-debtors are described as being engaged toward the creditor on an equal footing, as principals (i.e., *à titre principal*), whereas the surety's engagement is defined as secondary, accessory, or subsidiary in respect of the principal obligation of the debtor.

Certain features of the law of solidarity and suretyship challenge the aforementioned straightforward account. First, in the case of solidarity, co-debtors do not always share equally in the debt. In particular, the final burden of the debt may rest with only one co-debtor.²⁰ In such circumstances it becomes unclear whether the co-debtors are in a relationship of solidarity or suretyship. Second, in the case of suretyship, the creditor is not always compelled to pursue his claim first against the debtor, before turning to the surety for payment or an indemnity, since sureties often

¹³ Herein lies the essential difference between solidarity and indivisibility. An obligation is divisible or indivisible with respect to its object, whether or not there are multiple parties to the obligation (art. 1519 C.C.Q.). If the object is indivisible, that is—if the obligation cannot be performed in several parts—and if it has multiple debtors, the effects of indivisibility are similar to those of solidarity (art. 1520 C.C.Q.). This paper focuses on solidarity and suretyship.

¹⁴ See arts. 1541ff. C.C.Q.

¹⁵ See arts. 1523ff. C.C.Q.

¹⁶ See arts. 1523, 1528 C.C.Q.

¹⁷ See arts. 1536-37 C.C.Q.

¹⁸ See arts. 2333, 2346 C.C.Q.

¹⁹ See art. 2356 C.C.Q.

²⁰ See art. 1537 C.C.Q.

waive the benefit of discussion.²¹ In practice, when a debtor becomes insolvent, a creditor frequently chooses to pursue the surety directly. Once again: is this suretyship, or is it solidarity?²² A closer analysis of solidarity (Part I.A) and suretyship (Part I.B) is required before a new attempt is made to contrast them (Part I.C).

A. *Solidarity*

Sources on the earliest forms of solidary obligations are scarce and fragmentary. Their interpretation remains controversial even today.²³ In a few brief sentences, the *Institutes of Justinian (Institutes)* describe the form of solidarity that has passed into modern law.²⁴ They mention that an obligation contracted by stipulation may have more than one debtor. For such an obligation to be formed, the co-debtors must in turn each promise the same thing. Payment by one co-debtor will discharge the debt. Finally, the *Institutes* specify that it is possible for one co-debtor's obligation to be unqualified, while the other's is conditional, or for one to have the benefit of a term, but not the other.²⁵

A recent work by Antoine Hontebeyrie has been very helpful in shedding light on the basic structure of solidary obligations.²⁶ The author articulates two conflicting perspectives that arise where an obligation has more than one debtor. Hontebeyrie describes them as external and internal, for reasons that will become apparent below, but I will refer to them respectively as the "creditor's perspective" and the "co-debtors' perspective". The creditor's perspective dominates in solidary obligations, whereas the co-debtors' perspective prevails in respect of joint and divisi-

²¹ See arts. 2347ff. C.C.Q.

²² The risk of confusion between solidarity and suretyship is accentuated by certain provisions of the *Code*: "if the obligation was contracted in the exclusive interest of one of the debtors ... he is liable for the whole debt to the other co-debtors, *who are then considered, in his regard, as his sureties*" (art. 1537 C.C.Q. [emphasis added]); "[w]here the surety binds himself with the principal debtor as *solidary surety or solidary codebtor*, he may no longer invoke the benefits of discussion and division" (art. 2353 C.C.Q. [emphasis added]). Nevertheless, a solidary obligation contracted in the exclusive interest of one co-debtor is not a suretyship, and a solidary suretyship is different from a solidary obligation. See Part II, below.

²³ See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta & Co., 1992) at 128-29; Marc Mignot, *Les obligations solidaires et les obligations in solidum en droit privé français* (Paris: Dalloz, 2002).

²⁴ See J.A.C. Thomas, *The Institutes of Justinian: Text, Translation and Commentary* (Amsterdam: North-Holland, 1975) at 211.

²⁵ See art. 1524 C.C.Q., where this rule is replicated.

²⁶ See Antoine Hontebeyrie, *Le fondement de l'obligation solidaire en droit privé français* (Paris: Economica, 2004).

ble obligations (i.e., where co-debtors enjoy the benefit of division). However, both perspectives are always present in respect of an obligation with multiple debtors, whether such obligation is joint and divisible, or solidary.

The creditor's perspective views the relation between the creditor and co-debtors in such a way as to escape the possible negative implications for the creditor of there being more than one debtor.²⁷ From the creditor's perspective there is only one debt, and so it should be possible to obtain payment from either co-debtor; in other words, the creditor wishes to deal with each co-debtor as if he were the only debtor.²⁸ Thus, in a solidary obligation, where the creditor's perspective is dominant, the creditor may sue a co-debtor for the full amount of the debt,²⁹ she may issue a single notice of default that will be opposable to both co-debtors,³⁰ prescription that is interrupted with respect to one co-debtor is interrupted with respect to the other,³¹ the share of an insolvent co-debtor accrues to the other co-debtor,³² and so forth.

From the creditor's perspective, the proportions in which co-debtors share the final burden of the debt among themselves is strictly an internal matter. For example, consider the case where spouses solidarily contract a loan to purchase an immovable. It is an internal matter between them how they will divide ownership of the immovable, and the extent to which each will contribute to repaying the loan; their respective shares and contributions may in fact vary over time.³³ From the creditor's perspective, this should not have any incidence on the external relationship between the creditor and co-debtors, in which each co-debtor is liable for the entire amount of the loan, and in which the creditor may deal with the co-debtor of his choice.

²⁷ *Ibid.* at 14.

²⁸ “[Solidarity] on the part of the debtors ... consists in the obligation of the same thing being contracted by each for the whole, as completely as if each was the single debtor,” and “each should be as completely bound for the performance of the whole, as if he alone had contracted the obligation”: M. Pothier, *A Treatise on the Law of Obligations, or Contracts*, vol. 1, trans. by William David Evans (London, U.K.: Strahan, Butterworth & Cooke, 1806) at paras. 261-62.

²⁹ See arts. 1528-29 C.C.Q.

³⁰ See art. 1599 C.C.Q.

³¹ See art. 2900 C.C.Q.

³² See art. 1538 C.C.Q.

³³ See e.g. *Lallier c. Forand*, [2000] R.D.I. 637 (C.S.); *Labonne c. Robichaud* (17 July 2001), Mingan (Sept-Îles) 650-22-001092-002, J.E. 2001-1526 (C.Q.); *Forget c. Lamoureux*, [1999] R.J.Q. 853 (C.Q. civ); *Prévost c. Rivard*, [1972] C.A. 773.

From the co-debtors' perspective, however, each co-debtor is indebted only to the extent of his share in the debt.³⁴ The *Code* provides that such shares are equal, unless the co-debtors' interests in the debt are unequal and can be established by other means.³⁵ From the co-debtors' point of view, each should only have to pay the amount corresponding to his share to avoid the necessity of any contributions among them; each should also be permitted to deal with the creditor as if there were several debts. According to the co-debtors' perspective, their individual interests should be protected, and it is not fair to assume that one of the co-debtors can be relied on to represent the interests of the other. Each should benefit individually from the rules of prescription when the creditor fails to exercise his rights in a timely fashion. Finally, the risk of one co-debtor becoming insolvent ought to be allocated to the creditor, not to the other co-debtor.

In a solidary obligation, the creditor's perspective prevails nearly absolutely over the co-debtors' perspective in governing the relations of the creditor to each of the co-debtors. The co-debtors' perspective comes into play only to govern the contributions to be made between themselves where one has paid more than her share of the debt. Nevertheless, some rules allow the co-debtors' perspective to generate limited effects as between the creditor and co-debtors.³⁶

If the debt is not solidary and if it is divisible, a co-debtor may require that the creditor divide his claim among the co-debtors (i.e., through benefit of division). In such a case, the co-debtors' perspective prevails over the creditor's perspective. The creditor may compel each co-debtor to perform only his share of the debt, and he also bears the risk of a co-debtor becoming insolvent. In such a case, the obligation is said to be "joint" (*conjointe*).³⁷

According to several authors in Quebec, the expression "joint and solidary" (*conjoint et solidaire*) is incorrect since an obligation must be either

³⁴ See Hontebeyrie, *supra* note 26 at 15. See also Pothier, *supra* note 28 at para. 264: "When several persons contract a debt in solido [solidarily] it is only in respect of the creditor that they are debtors of the whole; as between themselves the debt is divided, and each of them is only debtor *pro se*, as to that part of the debt of which he was the cause."

³⁵ See art. 1537 C.C.Q. This applies to solidary obligations but also, by analogy, to joint and divisible obligations.

³⁶ See arts. 1530, 1533-35, 1538 para. 2, 1678, 1685, 1690 C.C.Q. Where the creditor of a solidary obligation sends separate accounts to individual co-debtors, each for his share of the debt, he is merely acknowledging the co-debtors' perspective, which does not mean that he has renounced the benefit of solidarity. Such renunciation takes place only within the precise conditions of arts. 1533-35 C.C.Q. See also *Juneau c. Groupe Promutuel*, [2003] R.J.Q. 2616 (C.S.).

³⁷ See art. 1518 C.C.Q.

joint or solidary, but cannot be both at once.³⁸ One wonders, then, why the expression was so widely used until recently.³⁹ The answer appears straightforward if one refers to the ordinary meaning of the word “jointly” (*conjointement*): persons who are bound jointly are persons who are bound together, by the same obligation.⁴⁰ If the relation of joint to solidary or divisible obligations is understood properly, the expression “joint and solidary” makes perfect sense, as does the expression “joint and divisible”: a joint obligation is one where several persons are obliged together, as co-debtors.⁴¹ The legal regime to be applied to such an obligation is open to a range of possibilities, due to the conflicting interests or perspectives that come into play. For the creditor’s perspective to prevail, the obligation must be solidary. For the co-debtors’ perspective to prevail, it must be subject to the benefit of division. A joint obligation is therefore solidary, divisible, or indivisible.⁴² In the last case, it is incapable of being divided,

³⁸ France Allard *et al.*, eds., *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville, Qc.: Yvon Blais, 2003) *s.v.* “jointly and severally”; Pierre-Gabriel Jobin with the collaboration of Nathalie Vézina, *Baudouin et Jobin: Les obligations*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2005) at para. 637 [Jobin, *Les obligations*]; J. Pineau, D. Burman & S. Gaudet, *Théorie des obligations*, 4th ed. by Jean Pineau & Serge Gaudet (Montreal: Thémis, 2001) at para. 397. See also *Latraverse c. 120832 Canada* (1 March 1990), Montreal 500-09-001291-897, J.E. 90-530 (C.A.).

³⁹ The *Civil Code of Lower Canada* used the expression “jointly and severally” as the English equivalent of “*solidaire*” (arts. 1688, 1836, 1865 C.C.L.C.). The French expression “*conjointement et solidairement*” was used instead of simply “*solidairement*”, but still as the equivalent to “jointly and severally” (arts. 1688, 1836, 1865 C.C.L.C.). The expressions “*conjointement et solidairement*” and “jointly and severally” have now been banished from the *Code*. It is likely that the codifiers in 1866 borrowed the English expression “joint and several” from the common law, where joint and several liability closely resembles solidarity. It would be tempting to assume further that the English common law expression “joint and several” then passed into the French language in Quebec as “*conjoint et solidaire*”. However, the latter view appears to be mistaken, since the expression “*conjoint et solidaire*” was commonly used in France as well as Quebec, and has been in use for a long time. See Hontebeyrie, *supra* note 26 at 20-22. See also Paul Ourliac & J. de Malafosse, *Histoire du droit privé : les obligations*, vol. 1 (Paris: Presses universitaires de France, 1969) at para. 303.

⁴⁰ See Catherine Soanes & Angus Stevenson, eds., *The Concise Oxford English Dictionary*, 11th ed., *s.v.* “joint” (“shared, held, or made by two or more people”); Alain Rey & Josette Rey-Debove, eds., *Le nouveau Petit Robert : dictionnaire alphabétique et analogique de la langue française*, 40th ed., *s.v.* “*conjointement*” (“[d]’une manière conjointe ; concurremment ; ensemble, simultanément”).

⁴¹ See Didier Lluellas & Benoît Moore, *Droit des obligations* (Montreal: Thémis, 2006) at para. 2551. See also Hontebeyrie, *supra* note 26 at 349-50; Ghestin, Billiau & Loiseau, *supra* note 9 at para. 226.

⁴² While the *Civil Code of Lower Canada* and the *Code Napoléon* did not define a joint obligation, both contained the following provision, which clearly supports the view that a joint obligation is the common branch from which stem solidary, divisible, and indivisible obligations: “*Chacun de ceux qui ont contracté conjointement une dette indivisible en est tenu pour le total, encore que l’obligation n’ait pas été contractée solidairement*” (art.

although not necessarily solidary.⁴³ Joint obligations have certain rules in common, whether they are solidary or subject to the benefit of division.⁴⁴ The difference between solidarity and divisibility is therefore a matter of degree, not a fundamental opposition, as is commonly supposed.⁴⁵ Still, it has to be acknowledged that under current law in Quebec, a “joint obligation” refers to an obligation that is not solidary and not indivisible, thus making it subject to the benefit of division between the co-debtors.⁴⁶ This is unfortunate, since we are now deprived of a general term for describing an obligation with more than one debtor. In this article, the expression “obligation with multiple debtors” will continue to be used.

Hontebeyrie and others have made the argument that solidarity is the “natural state” of an obligation with multiple debtors.⁴⁷ That is why Hontebeyrie describes the creditor’s perspective as external and the co-

1126 C.C.L.C; art. 1222 C.N.). See also arts. 1772, 2230 C.C.L.C. The definition of a joint obligation now reflects the view that it is necessarily divisible and cannot be solidary (art. 1518 C.C.Q.).

In common law, the joint obligation possesses its own legal regime representing yet another possible meeting point between the co-debtors’ and creditor’s perspectives. The co-debtors are treated as one entity, such that they must all be pursued together by the creditor. In this way, they are individually protected, since legal action taken against one co-debtor by the creditor is not opposable to the others and the debtor pursued may demand that the others be joined in the action. Yet once the creditor has obtained judgment against the co-debtors together, the judgment may be executed against the property of a single defendant for the full amount of the debt: the joint obligation is not subject to the benefit of division. The joint obligation was often found to be inconvenient, and the tendency has been to replace joint obligations by joint and several obligations, which closely resemble solidarity. See generally Glanville L. Williams, *Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and the Common-Law Dominions* (London, U.K.: Butterworths, 1949).

⁴³ See *supra* note 13.

⁴⁴ Whether the debt is solidary or divisible, it is contracted in common and modification of the debt requires the consent of all co-debtors: see *infra* note 88. It is necessary to determine the share of each co-debtor in the debt following art. 1537 C.C.Q. Payment of the entire debt by one co-debtor releases the other co-debtor and entitles the former to be reimbursed by the latter. In my view, this should hold true whether the debt is solidary or divisible. See e.g. arts. 1536, 1539, 1656 para. 3 C.C.Q. However, Lluellas and Moore consider that legal subrogation is not available where a co-debtor pays the full amount of a debt subject to the benefit of division (*supra* note 41 at para. 2553). See also Rémy Cabrillac, *L’acte juridique conjonctif en droit privé français* (Paris: Librairie générale de droit et de jurisprudence, 1990) at paras. 429ff., 592ff. (concerning the common effects of obligations with multiple debtors).

⁴⁵ See Hontebeyrie, *supra* note 26 at 21-22, 281ff.

⁴⁶ See art. 1518 C.C.Q.

⁴⁷ *Supra* note 26 at 385ff.; Laurent Aynès & Antoine Hontebeyrie, “Pour une réforme du code civil, en matière d’obligation conjointe et d’obligation solidaire” D. 2006. Chron 328.

debtors' perspective as merely internal to the relations between them. As he indicates, the benefit of division was introduced as a favour to co-debtors, in order to counter the harsh effects of solidarity.⁴⁸ Thus, in Roman law, obligations with multiple debtors were initially viewed as solidary, and the benefit of division appeared later in its development. However, it does not necessarily follow that solidarity is more "natural" than division. As I hope to have shown, relations between the creditor and co-debtors can be governed equally well by the idea that each co-debtor can be treated by the creditor as if he were the only debtor (i.e., creditor's perspective) or the idea that the debt must be divided among the co-debtors (i.e., co-debtors' perspective). One solution does not appear to be inherently superior, more logical, or more natural than the other, although one is clearly to the advantage of the creditor, and the other to the co-debtors'. Moreover, the argument that solidarity is more natural than division is harmful: some codifiers in recent times have proposed to make all obligations with multiple debtors solidary, thus eliminating the benefit of division except where it is provided for in a contract or by law.⁴⁹

Fortunately, the *Code* has upheld the presumption that an obligation with multiple debtors is subject to the benefit of division, unless it is contracted for the service of an enterprise or it is expressly declared to be solidary by the parties or by law.⁵⁰ However, because this rule makes it more difficult to apply solidarity in cases where a debt is not contracted for the service of an enterprise and solidarity is not provided for expressly by the parties or imposed by law, courts have resorted to the obligation *in solidum* where this was felt to be necessary in order to import the rules of solidarity. There is clearly a danger that the benefit of division will become eroded by continued expansion of the obligation *in solidum*, whose justification and scope have not yet been properly addressed.⁵¹ I will return to this matter in Part III, below.

To sum up, a solidary obligation is an obligation with multiple debtors in which the creditor's perspective prevails over the co-debtors' perspective. On the whole, this entitles the creditor to treat each co-debtor as if

⁴⁸ See Hontebeyrie, *supra* note 26 at 421-22.

⁴⁹ See e.g. Commission on European Contract Law, *Principles of European Contract Law: Part III*, ed. by Ole Lando *et al.* (The Hague: Kluwer Law International, 2003) at art. 10:102. See also *Code Européen des contrats : avant-projet*, t. 1, by Giuseppe Gandolfi (Milan: Dott. A. Giuffrè, 2004) at art. 88(1). See also Aynès & Hontebeyrie, *supra* note 47.

⁵⁰ See art. 1525 C.C.Q.

⁵¹ For the first in-depth analysis of obligation *in solidum* in Quebec law, see Frédéric Levesque, *L'obligation in solidum en droit privé québécois* (D.C.L. Thesis, Laval University and Université de Montpellier 1, 2009) [unpublished].

he were the only one liable for the full amount of the debt. The co-debtor who has paid the creditor may claim a contribution from his co-debtor according to the latter's share of the debt.

B. Suretyship

Suretyship is based upon the simple idea of imposing a sanction on a person other than the debtor where the latter fails to perform an obligation or comply with a duty.⁵² This is most apparent if one considers primitive forms of suretyship, or non-contractual forms such as judicial suretyship.⁵³ The sanctions imposed on the surety have evolved through time, and have generally taken the same forms as those imposed on a defaulting debtor. Thus, hostage-taking is one of the earliest examples of suretyship, and it existed contemporaneously with imprisonment for debt: the surety was held prisoner by the creditor until the debtor paid his debt. In times where a debtor could be sold as a slave, so could a surety. A close analogy was drawn between suretyship and the pledge of a thing, since the creditor gained control over the surety's body as if it were a thing (i.e., *plegerie*). In some instances, the rules on suretyship provided that the surety was to be imprisoned, sold, mutilated, or even put to death *instead* of the debtor. In such cases, the creditor who had accepted a surety had no recourse against the debtor. If the surety died, that put an end to any possible legal action by the creditor. The sanctions to which the surety was exposed could not be exercised against his heirs.

The purpose of suretyship has always been to secure performance of an act or of an obligation. In primitive forms of suretyship, the exposure of a family member or close friend to slavery or imprisonment must have created a powerful psychological incentive for a debtor to pay his debt. Sometimes the surety was chosen because he was in a better position than the creditor to control or influence the debtor; obviously, it was in the surety's interest to exercise that control or influence with a view to obtaining the earliest possible payment of the debt.

⁵² See generally Jean Brissaud, *A History of French Private Law*, trans. by Rapelje Howell (Boston: Little, Brown and Company, 1912) at paras. 413-15; Ourliac & Malafosse, *supra* note 39 at paras. 310, 315-16; Marcel Gambier, *Du cautionnement dans le très ancien droit romain, et le très ancien droit français* (Caen, France: Imprimerie E. Adeline, 1896).

Suretyship is among the most ancient, known legal institutions. A Sumerian tablet has been found recording a suretyship in about 2750 B.C. The Code of Hammurabi and the Old Testament also bear witness to its frequent use. See Willis D. Morgan, "The History and Economics of Suretyship: Early History of the Contract of Suretyship" (1927) 12 Cornell L.Q. 153.

⁵³ See art. 2334 C.C.Q.

The law of suretyship has evolved considerably if one compares its “modern”⁵⁴ and primitive forms, although its basic structure has remained unchanged. An important shift in the general law explains the transformation of suretyship over time. This shift pertains to the nature of legal sanctions for non-payment of a debt. The law has evolved from a system of dissuasive or punitive sanctions—where the debtor or surety was imprisoned, enslaved, mutilated, put to death, or even denied a proper burial—to one of sanctions designed to satisfy the creditor’s claim—where the debtor or surety’s property is taken to make good on that claim.⁵⁵ The perfect surety is no longer a person close to the debtor’s heart, but rather one who has sufficient property to make good on the creditor’s claim in the event of default.⁵⁶ That is not to say that the threat of legal action against the surety does not continue to have a dissuasive effect upon the debtor, nor that the psychological effects of the more primitive forms of suretyship do not continue to exist today.⁵⁷

Modern suretyship provides a new and direct means by which the creditor may obtain satisfaction for his claim. Whereas primitive suretyship secured payment only indirectly by exerting pressure on the debtor, modern suretyship allows the creditor to seize the surety’s property in order to obtain the value of his claim. There is nothing to prevent the creditor from exercising his rights directly against the surety upon default of the debtor, just as he would have been entitled to punish him immediately under the primitive model. However, in the primitive model, punishing the surety did not provide satisfaction for the creditor’s claim; if anything, the creditor only incurred additional expense, since he had to pay for the room and board of the surety, if imprisoned.⁵⁸ In modern law, seizure of the surety’s property allows the creditor to satisfy his claim irrespective of the debtor’s ability or willingness to pay. Thus, it has become more expedient in many cases for the creditor to pursue his claim directly against

⁵⁴ It must be noted that the modern notion of suretyship was already present in classical Roman law, particularly in the form of *fidejussio*.

⁵⁵ See Brissaud, *supra* note 52 at paras. 408-12. See art. 1 C.C.P.; arts. 2644-45 C.C.Q.; Jacques Deslauriers, *Précis de droit des sûretés*, 2d ed. (Montreal: Wilson & Lafleur, 1990) at 1-4, 19-20; Jobin, *Les obligations*, *supra* note 38 at para. 17.

⁵⁶ Brissaud, *supra* note 52 at para. 416ff.

⁵⁷ See Philippe Simler, *Cautionnement : garanties autonomes garanties indemnitaires*, 4th ed. (Paris: Litec, 2008) at para. 2; Alain Parent, “La libération de la caution par la mise en œuvre de l’article 2363 du *Code civil du Québec* : de la théorie à la pratique” (2006) 47 C. de D. 515 at 529-30.

⁵⁸ According to Brissaud, this gave rise to the gibe. “The banquet of a hostage is a costly banquet”: Brissaud, *supra* note 52 at para. 414, citing A. Chaisemartin, *Proverbes et maximes de droit germanique* (Paris: L. Larose et Forcel, 1891) at 264.

the surety, without taking recourse against the debtor at all. This development has drawn suretyship closer to solidarity.⁵⁹

The same development also provoked a reaction from commentators, however, and various mechanisms and doctrines were devised in order to ensure that the surety would be pursued only after it was shown that recourse against the debtor would not provide satisfaction. In other words, the *subsidiary* character of suretyship was being asserted, and this influenced the development of the law. In Roman law, it was considered to be an offence for a creditor to pursue a surety if the debtor was capable of paying his debt.⁶⁰ The benefit of discussion—requiring that a creditor first attempt to make good on his claim against the debtor’s property before pursuing the surety⁶¹—was introduced later into Roman law, as it was into French law during the thirteenth century.⁶² Many believe this measure to be ineffective, because the surety may validly renounce the benefit of discussion in the suretyship agreement, which is nearly always done.⁶³ Moreover, exercise of the benefit of discussion is onerous for the surety.⁶⁴ Nevertheless, the benefit of discussion gives expression to the important notion that a creditor ought not to pursue a surety unless recourse against the debtor is ineffective. This is especially true where the surety

⁵⁹ A similar evolution took place in English law. “Suretyship was no longer seen as the substitution of the surety’s person for that of the debtor. It came to be regarded as a contractual obligation which arose by way of accession to the debtor’s liability”: James O’Donovan & John Phillips, *The Modern Contract of Guarantee* (London, U.K.: Sweet and Maxwell, 2003) at paras. 1-12.

⁶⁰ See Zimmermann, *supra* note 23 at 130-31.

⁶¹ See art. 2347 C.C.Q.

⁶² See Ourliac & Malafosse, *supra* note 39 at para. 317.

⁶³ The Civil Code Revision Office recommended the abolition of the benefit of discussion as a matter of suppletive law:

A major change proposed is abolition of the benefits of discussion and of division. Since at present most contracts of suretyship contain clauses by which the parties renounce these benefits, it seemed more realistic to propose the opposite rule to that of the Code; since this rule would only be suppletive, the parties would always have the possibility of including it by express stipulation (Civil Code Revision Office, *Report on the Québec Civil Code : Commentaires*, t. 2, vol. 2, (Quebec: Éditeur officiel, 1977) at 584-85).

The minister of justice did not follow this recommendation. “*Il n’a pas paru souhaitable d’inverser cette règle, même si, bien souvent, dans les faits, il y a renonciation au bénéfice de discussion ; le maintien du principe du bénéfice de discussion vise à protéger la caution en lui permettant ainsi de se défendre dans la négociation d’une stipulation contractuelle*”: *Commentaires du ministre de la Justice : le Code civil du Québec*, t. 2 (Quebec: Les publications du Québec, 1993) at 1473.

⁶⁴ See art. 2348 C.C.Q.

was not remunerated and where she has not benefited from the debtor's activities.⁶⁵

The *accessory* character of suretyship has also been imposed consistently throughout the ages. The surety's responsibility is accessory in the sense that its existence depends on the validity and continued existence of the principal obligation; its scope is likewise determined by the scope of the principal obligation.⁶⁶ Therefore, the surety is discharged in case of nullity, payment, or prescription of the principal obligation, just as he may invoke the debtor's defences to reduce or repel the creditor's claim.⁶⁷ The accessory character of suretyship is one of its fundamental attributes in the French legal tradition. An independent guarantee is not and cannot be a suretyship.⁶⁸

⁶⁵ According to Pothier,

it is equitable, that in as far as it can be done, a debt shall be paid rather by those who are the real debtors and who have profited by the contract, than by those who are debtors for others; that it always goes against the grain to pay for another; therefore, it is only a reasonable indulgence that the creditor, when it makes very little difference to him, should spare the surety this mortification, and obtain payment rather from the real debtor than from him (*supra* note 28 at para. 412).

Financial institutions will generally exercise their hypothecary rights and personal recourse against the debtor first, before turning to the surety, even if the surety has renounced the benefit of discussion. This is because it is generally perceived as unfair or unethical for a creditor to pursue the surety when a recourse against the debtor stands a fair chance of success, and financial institutions must protect their reputation with the public. There is also a risk that if the surety resists and a creditor needs to take her to court, a judge will be sympathetic to the surety and more likely to invalidate the suretyship on other grounds, if it is shown that the creditor neglected to pursue his claim against the debtor. Thus the benefit of discussion gives expression to an important principle and is somewhat effective in practice, even if it is frequently renounced by the surety.

In recent times, some codifiers have been tempted to suppress the benefit of discussion, having noted that it is frequently renounced by the surety (see *supra* note 63). This fails to account for the significance of the rule as a guide for conduct and the expression of a common sense of justice or moral acceptability. Moreover, as will be seen in Part III, the benefit of discussion will avail in cases where the law of suretyship is applied by analogy to other complex relations.

⁶⁶ See Damien Grimaud, *Le caractère accessoire du cautionnement* (Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2001) at para. 7; Zimmermann, *supra* note 23 at 121ff.

⁶⁷ See arts. 2340-41, 2353 C.C.Q.

⁶⁸ Simler, *supra* note 57 at paras. 29-30, 47-51; Grimaud, *supra* note 66 at paras. 8, 39-41. Some authors are criticized for unduly extending the doctrine beyond its original scope. See Zimmermann, *supra* note 23; Grimaud, *supra* note 66 at paras. 5-6.

Note that a surety "may set up against the creditor all the defences of the principal debtor, except those that are purely personal to the principal debtor or that are ex-

The evolution of suretyship has made it increasingly difficult to set it apart from solidarity. Yet, as will be seen in Part II, below, there remain some important differences between them. Such differences relate to the idea, stated at the outset, that the surety is *not* a debtor. What, then, is the nature of the surety's relation to the debt?

Two interpretations have been provided—one in the civil law tradition, the other in the common law tradition—that help us understand the nature of the surety's responsibility for a debt that is not his own. In the civil law tradition, the dualist conception of obligations was developed by German scholars and has obtained a certain degree of acceptance in French law.⁶⁹ According to the dualist conception, the obligation has two aspects: the debt (*Schuld*), and responsibility for the debt (*Haftung*).⁷⁰ The debt describes what the debtor must do and that to which the creditor is entitled. In most instances, the debt is voluntarily performed to the credi-

cluded by the terms of his undertaking" (art. 2353 C.C.Q.). There exist other longstanding exceptions to the accessory character of suretyship: the suretyship of a natural obligation is enforceable (art. 2340 C.C.Q.), as well as the suretyship of an obligation contracted by a debtor who is incapable of contracting, even after the obligation is annulled (*ibid.*). It is generally considered that these exceptions bring into play a promise for another (i.e., *promesse du fait d'autrui* or *promesse de porte-fort*) and are themselves incompatible with suretyship (art. 1443 C.C.Q.). Thus the accessory nature of suretyship is preserved despite the presence of exceptions. See Simler, *supra* note 57 at para. 224; Grimaud, *supra* note 66 at 205, n. 188.

⁶⁹ See generally Ervin Ap. Popa, *Les notions de "debitum" (Schuld) et "obligation" (Haftung) et leur application en droit français moderne* (Paris: E. Muller, 1935); Jean Maillet, *La théorie de Schuld et Haftung en droit romain : exposé et examen critique* (Aix-en-Provence: Paul Roubaud, 1944); Fábio Konder Comparato, *Essai d'analyse dualiste de l'obligation en droit privé* (Paris: Librairie Dalloz, 1964); Nooman M.K. Gomaa, *Théorie des sources de l'obligation* (Paris: Librairie générale de droit et de jurisprudence, 1968) at paras. 282-87; Stéphane Prigent, "Le dualisme dans l'obligation" (2008) R.T.D. civ. 401. In support of the dualist conception, see also Jean Carbonnier, *Droit civil : les obligations*, t. 4, 22d ed. (Paris: Presses universitaires de France, 2000) at para. 313; Henri Mazeaud *et al.*, *Leçons de droit civil : obligations, théorie générale*, t. 2, vol. 1, 8th ed. by François Chabas (Paris: Montchrestien, 1991) at paras. 9, 22; Martine Behar-Touchais, "Le banquier et la caution face à la défaillance du débiteur" (1993) R.T.D. civ. 737 at para. 6. See also Jobin, *Les obligations*, *supra* note 38 at para. 16.

Several common law authorities seem to echo the dualist conception: *Statute of Frauds, 1677* (Eng.), 29 Cha. II, c. 3, s. 4 [*Statute of Frauds* (Eng.)]. Here, a guarantee is defined as "any special Promise to *answer for* the Debt, Default or Miscarriages of another Person" [emphasis added] (*ibid.*). See also O'Donnovan & Phillips, *supra* note 59 ("In essence, a guarantee is a binding promise of one person to be *answerable* for a present or future debt or obligation of another if that other defaults" at para. 1-18 [emphasis added]); "The *teutonic 'answer for'* is used here in a sense more accurately connoted in modern English by its romance equivalent '*be responsible for*': *Lep Air Services v. Rolloswin Ltd.* (1972), [1973] A.C. 331 at 357, [1972] W.L.R. 1175 (H.L.) [emphasis added, reference omitted, *Lep Air*].

⁷⁰ See Comparato, *supra* note 69 at para. 4; Maillet, *supra* note 69 at 4-47.

tor's satisfaction. If so, responsibility for the debt is not called into play. By responsibility for the debt, it is meant that a person or thing is answerable in case of non-performance. A recourse or sanction may then be exercised against that person or thing. For example, the person who is responsible may be ordered to perform the obligation in kind or to pay damages representing the value of performance.⁷¹ If necessary, her property will be seized to satisfy the creditor's claim.⁷² In modern law, the sanction is, in most instances, modelled on the debt itself; it is intended to satisfy the creditor's claim, but no more.⁷³ Thus, it is not always easy to identify debt and responsibility as two distinct aspects of an obligation.

First developed by Brinz as a theoretical construct,⁷⁴ the dualist conception was applied to old Germanic law and to Roman law and was found by legal historians to provide a useful framework for analyzing a number of situations where there appeared to exist separate processes for creating debt and responsibility.⁷⁵ The dualist conception has also been invoked to explain modern institutions, in particular the natural obligation (i.e., debt without responsibility) and suretyship (i.e., responsibility for another's debt). As many authors have noted, the surety is not a debtor, but is responsible—or answerable—if the debtor fails to perform the secured obligation.⁷⁶

⁷¹ See art. 1590 C.C.Q.

⁷² See arts. 2644, 2645 C.C.Q.

⁷³ See Comparato, *supra* note 69 at para. 158; art. 574 C.C.P.

⁷⁴ See Alois Brinz, *Lehrbuch der Pandekten*, vol. 2 (Erlangen: Andreas Deichert, 1879) at paras. 206-208.

⁷⁵ See Comparato, *supra* note 69 at paras. 6-9; Popa, *supra* note 69 at paras. 3-30ff. Brisaud, *supra* note 52 at para. 368; Ourliac & Malafosse, *supra* note 39 at para. 310; Gambier, *supra* note 52 at 5-6, n. 18.

⁷⁶ See e.g. Comparato, *supra* note 69 at para. 193; Carbonnier, *supra* note 69 at para. 313. Some authors have criticized the analysis of suretyship based on the dualist conception (see e.g. Grimaud, *supra* note 66 at paras. 187, 400). Others have presented a modified or transformed dualist analysis and stated that the surety's obligation borrows its debt, or an element of its debt, from the principal obligation: "*Garantir le paiement, ce n'est pas directement s'engager à payer, et, si chaque fois que la caution est cependant conduite à payer c'est, dit-on, l'obligation du débiteur qu'elle acquitte, elle l'acquitte en vertu d'une obligation qui lui est propre*" (François Jacob, *Le constitut ou l'engagement autonome de payer la dette d'autrui à titre de garantie* (Paris: Librairie générale de droit et de jurisprudence, 1998) at para. 56). The surety's obligation has variously been described as an obligation of guarantee (*obligation de garantie*), an obligation to pay another's debt (*obligation de règlement*) or, where applicable, an obligation to secure future debts (*obligation de couverture*). See Christian Mouly, *Les causes d'extinction du cautionnement* (Paris: Librairies techniques, 1979) at para. 256.

I have not found the arguments raised against the dualist conception to be decisive. They may be summarized as follows: (1) the definitions of debt and responsibility are

In the common law tradition, an analogous distinction is made between primary and secondary obligations.⁷⁷ A secondary obligation (e.g., the obligation to pay damages) arises when there is breach of a primary obligation (e.g., a contractual term). Suretyship is commonly analyzed as imposing a secondary obligation on the surety to pay damages where the debtor breaches his primary obligation, being the secured, principal obligation. The surety is not a party to the principal obligation; however, if and when the debtor defaults, the surety becomes liable by virtue of the secondary obligation to pay damages. This distinction between primary and secondary obligations is different from the dualist conception, although they are perhaps not as far apart as may seem at first. Indeed, proponents of the dualist conception do not view responsibility for non-payment of the debt as an “obligation”. It is the primary obligation itself that is composed of two aspects that may, in certain circumstances, become dissociated. It is not necessary to discuss further the relative merits or implications of these alternative interpretations of suretyship. It is sufficient to note that both recognize and give expression to the fundamental

imprecise and ambiguous; (2) the contract of suretyship, because it is a contract, necessarily gives rise to a full obligation that it imposes on the surety; and it follows that (3) the surety has a debt (not just responsibility for a debt) and is required to pay the secured obligation.

The first objection, directed against the dualist conception in general, is well founded, since dualist authors do not agree on the exact scope of debt and responsibility. However, that does not mean that the theory is invalid or that its core ideas cannot provide valuable insight into the structure of obligations.

The second and third objections concern the application of the dualist conception to suretyship. The second can be overcome if one admits that contracts may have legal effects that are not, properly speaking, obligations. For example, the modification, transfer, or extinction of a real or personal right may be effected by contract (art. 1433 C.C.Q.). They occur directly and independently of any obligation. Thus the surety's undertaking need not be conceived of as an obligation. In fact, the so-called *obligation de couverture* and *obligation de garantie* do not, on closer analysis, have the consistency of obligations, since they do not require the surety to do or not to do something (art. 1373 C.C.Q.). See Pascal Ancel, “Force obligatoire et contenu obligationnel du contrat” (1999) R.T.D. civ. 771 at para. 41. In my view, the surety becomes a debtor only when a judgment is rendered against her. For a response to the third objection, see *infra* Part II.B.

⁷⁷ On primary and secondary obligations, see generally *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 at 848-49, [1980] 2 W.L.R. 283 (H.L.). In the context of guarantees, see generally *Lep Air*, *supra* note 69 at 350-51; *Western Dominion Inv. Co. Ltd. v. MacMillan*, [1925] 2 D.L.R. 442 (Man. King's B.), *aff'd* (1925), 35 Man. R. 262, [1925] 4 D.L.R. 562 (C.A.).

One also finds references to the distinction between primary and secondary obligations in Quebec law. See Lluellas & Moore, *supra* note 41 at para. 95; *Télémedia Communications c. Samson* (1984), [1985] R.D.J. 478 (Qc. C.A.); Mazeaud *et al.*, *supra* note 69 at 7, n. 9. Mazeaud and Chabas suggest that there are really three aspects to an obligation: the debt (i.e., the primary obligation), the responsibility for the debt (i.e., the secondary obligation), and the power of constraint (i.e., the common pledge).

idea that the surety is not a party to the principal obligation she has undertaken to secure.⁷⁸

C. *Solidarity and Suretyship in Contrast*

I have shown that a solidary obligation has multiple debtors who share the debt, while a surety is responsible for a debt that is not his own. Despite this distinction, some authors have brought the two notions together. First, one might be tempted to argue that the surety is in effect solidarily liable for the debt, especially if he has agreed to be bound solidarily by renouncing the benefit of discussion.⁷⁹ If the surety may be treated by the creditor in the same way as a co-debtor, the argument might go, then there really is no difference between suretyship and a solidary obligation in which one co-debtor has no interest in the debt. This view is sometimes entertained in the literature but is ultimately rejected. First, the surety, in contrast to a co-debtor, may invoke all the defences available to the principal debtor. Second, the surety, in contrast to a co-debtor, is also not a party to the principal obligation.⁸⁰ These differences and others will be discussed in Part II, below.

Some authors have brought together suretyship and solidarity in a different way, by suggesting that solidary debtors are indebted to the extent of their share in the debt but act as sureties for one another in respect of the balance (i.e., *théorie du cautionnement mutuel*).⁸¹ It is indeed possible to defend this point of view by applying the dualist conception to solidary obligations in the following way: the debt of each co-debtor is limited to his individual share, but each remains responsible for the whole.⁸²

Solidarity, in contrast to suretyship, need not involve a dissociation of debt and responsibility.⁸³ The description of solidarity in terms of the conflicting perspectives of the creditor and co-debtors successfully accounts for the paradox that underlies solidary obligations—that each co-debtor is simultaneously debtor for the whole and debtor for his share of the debt.

⁷⁸ All authors writing on suretyship generally recognize this to some extent, although they do not always accept the dualist conception or the interpretation of the surety's undertaking as a secondary obligation. See e.g. Manuela Oury-Brulé, *L'engagement du codébiteur solidaire non intéressé à la dette : article 1216 du Code civil* (Paris: Librairie générale de droit et de jurisprudence, 2002) at para. 36.

⁷⁹ See art. 2352 C.C.Q.

⁸⁰ See Deslauriers, *supra* note 55 at 26; Simler, *supra* note 57 at para. 86; Oury-Brulé, *supra* note 78 at para. 179.

⁸¹ Mignot is a proponent of this thesis (*supra* note 23).

⁸² See Comparato, *supra* note 69 at para. 178ff.

⁸³ See Hontebeyrie, *supra*, note 26 at 381-83.

It also sets solidary obligations clearly apart from suretyship. As I have indicated, the creditor of a solidary obligation may treat each co-debtor as though he were the sole debtor and the only one responsible for the full amount of the debt (i.e., the creditor's perspective). The co-debtors, as among themselves, share both in the debt and responsibility for the debt (i.e., the co-debtors' perspective). Still, in the final analysis the most important reason for upholding the distinction between solidarity and suretyship is that there exist significant differences in the rules by which they are governed.

II. The Differences in the Rules Governing Solidarity and Suretyship

Suretyship and solidarity have many points in common. Their historical development has allowed them to converge: they frequently fulfill similar functions, and rules and remedies have from time to time been transposed from one to the other. Indeed, the laws of both solidarity and suretyship involve striking a balance between the conflicting interests of the creditor on one hand (for whom suretyship or solidarity provides security for payment of the debt), and the surety or co-debtors on the other hand (who run the risk of having to satisfy a debt which is not their own or not entirely their own). The creditor is entitled to pursue his claim for the entire amount of the debt against either a co-debtor or the surety. The co-debtor or surety who has paid the debt has the right to be reimbursed by the principal debtor or the other co-debtor to the extent of his share. It is therefore not surprising to find a number of elements common to both suretyship and solidarity, such as the complex set of rules regarding subrogation.

My purpose here is not to provide a complete overview of the law of suretyship and solidarity, nor to examine areas of convergence in their legal regimes, but only to outline the most significant differences between them. I hope to show that these can be accounted for and understood by referring to the idea that the surety, unlike a co-debtor, is not a party to the secured obligation, but is responsible only in case of non-payment.

I will now address, in turn, the rules that concern the creation and subsequent modification of the principal obligation (Part II.A), its payment or voluntary performance (Part II.B), the extent of the co-debtors' or surety's responsibility in case of non-payment (Part II.C), and the creditor's duty to inform (Part II.D).

A. Creation and Subsequent Modification of the Principal Obligation

A contractual obligation is formed by the parties consenting to it.⁸⁴ It has effect only between those parties, except in special cases provided by law.⁸⁵ It will be shown that while the co-debtors are parties to the principal obligation, the surety is not.

There can be no doubt that co-debtors must both be party to the contract by which their obligation is formed;⁸⁶ they must likewise take part in any new agreement purporting to modify the terms of their initial obligation.⁸⁷ Thus, if a co-debtor is not involved in the renewal of a hypothecary loan, the new terms to which the other parties have consented are not opposable to the co-debtor who was excluded from the agreement. The same holds true where the credit limit on a credit card is increased without a co-debtor's consent,⁸⁸ or when a lease is modified with the approval of only one lessee.⁸⁹ Any exceptions to this principle must be justified on special grounds, such as the presence of a mandate given by the excluded co-debtor to a person taking part in the agreement,⁹⁰ or the existence in the agreement of a stipulation for another, the benefit of which is accepted by the excluded co-debtor.⁹¹ It is always possible for a new debtor to be joined with the consent of all parties concerned to an existing contract or obligation, in which case he becomes a party to it.⁹²

⁸⁴ See arts. 1385, 1434 C.C.Q.

⁸⁵ See art. 1440 C.C.Q.

⁸⁶ See Oury-Brulé, *supra* note 78 at para. 62ff.

⁸⁷ See art. 1439 C.C.Q. The parties to a contract may be defined as those persons who, by means of an agreement between them, have the power to modify or put an end to the contract: Jacques Ghestin, Christophe Jamin & Marc Billiau, *Traité de droit civil : les effets du contrat*, 3d ed. (Paris: Librairie générale de droit et de jurisprudence, 2001) at paras. 695, 714.

⁸⁸ See *Banque Nationale du Canada c. Côté*, [1991] R.J.Q. 1520 (C.Q. civ.); *Ayotte c. Banque Nationale du Canada* (16 December 2002), Montreal 500-22-066454-011, J.E. 2003-207 (C.Q. civ.).

⁸⁹ This holds true whether lessees are solidary (e.g., in a commercial lease) or joint (e.g., in the lease of a dwelling, unless solidarity is expressly provided in the lease) (art. 1525 C.C.Q.). See Pierre-Gabriel Jobin, "Résiliation et renouvellement du bail conclu avec plus d'un locataire : le difficile ménage à trois" (1987) 66 R. du B. can. 305 at 331, 338-40 [Jobin, "Résiliation"]; Cabrillac, *supra* note 44.

⁹⁰ See art. 2130ff. C.C.Q.

⁹¹ See art. 1444ff. C.C.Q. See also art. 397 C.C.Q.

⁹² See Oury-Brulé, *supra* note 78 at para. 64.

A surety need not be party to the contract in which the principal obligation is created, nor to any subsequent modification of it.⁹³ A surety may in fact undertake to secure an obligation not yet in existence.⁹⁴ It cannot be argued that the principal debtor acts as the surety's mandatary, so as to make the surety a party to the principal obligation.⁹⁵ Further evidence that the surety is not a party to the principal obligation is found in the fact that his responsibility may be limited in time or that he may have the ability to terminate the suretyship.⁹⁶ Bringing the surety's responsibility to an end has no incidence on the existence and scope of the principal obligation or on the extent of the principal debtor's liability.

B. Payment or Voluntary Performance

It has just been shown that the surety is not a party to the secured obligation. In Part I above, the argument was presented that in the civil law the surety is *responsible* for the debt, although the debt is not his own.⁹⁷ If this view is correct, it follows that the surety is not expected to perform the secured obligation voluntarily, whereas the debtor and co-debtors are expected to do so. The surety becomes responsible only in the event that the debtor fails to perform the principal obligation (see below). Is this view attested by the positive law?

The *Code* states that the surety "binds himself towards the creditor ... to *perform* the obligation of the debtor if he fails to fulfill it."⁹⁸ More pre-

⁹³ See *Confédération, compagnie d'assurance-vie c. Traklin Holdings inc.* (7 April 1994), Montreal 500-05-007130-923 J.E. 94-705 (Qc. Sup. Ct.); *Vézina c. Barette* (1999), AZ-99036211 (C.Q. civ.) (AZ). Even in cases where a surety signs the agreement creating the principal obligation, such a fact does not make the surety a party to the principal obligation: *Armoires D.L.M. c. Constructions Plani-sphère* (29 January 1996), Beauce (Saint-Joseph-de-Beauce) 350-05-000230-944, J.E. 96-639 (Qc. Sup. Ct.); Ghestin, Jamin & Billiau, *supra* note 87 at paras. 701-702. Naturally, novation of the secured obligation releases the surety: *Roy c. Caisse populaire de Chibougamau* (1992), [1993] R.L. 565 (Qc. C.A.). See also *Aktiengesellschaft v. Music Mart* (1987), 7 Q.A.C. 284.

⁹⁴ See art. 2362 C.C.Q.

⁹⁵ Although the relationship between a debtor and a surety is frequently described as contractual, it is not a mandate (see Simler, *supra* note 57 at paras. 13-14, 17-19). See also Ghestin, Jamin & Billiau, *supra* note 87 at para. 717. Nor is the surety a mandatary of the debtor. See *Banque nationale du Canada c. Notre-Dame du Lac (Ville de)*, [1990] R.L. 339 (Qc. C.A.) [*Notre-Dame*].

⁹⁶ See arts. 2342, 2362 C.C.Q.

⁹⁷ According to the alternative interpretation found in the common law, the surety undertakes a secondary obligation to pay damages, but does not take part in the principal obligation of the debtor. I will refer to the dualist interpretation—the theoretical framework I prefer to employ in explaining the structure of obligations in the civil law tradition.

⁹⁸ Art. 2333 C.C.Q. [emphasis added]. See also art. 2345 C.C.Q.

cisely, the French *Code civil* states that the surety undertakes to *satisfy* the creditor's claim if the debtor does not do so.⁹⁹ The French definition underscores the surety's responsibility for the debt, whereas the Quebec definition appears to consider the surety's undertaking as one to perform the obligation itself. Still, the Quebec definition makes clear that the surety's responsibility arises only if the debtor fails to fulfill his obligation, and that the surety's assumption of responsibility attaches to the obligation *of the debtor*, not his own.

My position is that the statement according to which the surety undertakes to perform the debtor's obligation must be understood as a shorthand for the following, more complex propositions. The surety is responsible for the debtor's obligation such that all or some of the personal recourses normally available against a defaulting debtor may be exercised against the surety—and in particular, in the case of a monetary obligation, a judgment ordering the surety to pay the debt (see below). The surety may elect to pay the debtor's obligation voluntarily in order to avoid legal proceedings being taken against herself. Where the surety pays the debt voluntarily before a judgment is issued in such a proceeding, the surety is still paying the debtor's obligation, not his own.¹⁰⁰ Significantly, the surety may also take action against the debtor to compel payment of the debt¹⁰¹—a recourse not available among co-debtors of a solidary obligation, although this particular rule likely extends to a co-debtor with no interest in the debt by virtue of article 1537.¹⁰² Unlike the surety, a co-debtor pays a debt that is her own, even when she pays an amount exceeding her share in the debt.

Accordingly, the debtor of the principal obligation must be in default before the creditor may pursue the surety.¹⁰³ In the case of a solidary obligation, it is not necessary for both co-debtors to be in default before one of them may be pursued for the full amount of the debt. In fact, putting one co-debtor in default has equal effect with respect to the other co-debtor.¹⁰⁴

⁹⁹ See art. 2011 C. civ.: “*Celui qui se rend caution d'une obligation se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même*” [emphasis added].

¹⁰⁰ See art. 1555 C.C.Q. *Contra Vallée c. Roy*, [1978] C.S. 706.

¹⁰¹ See art. 2359 C.C.Q.

¹⁰² See Oury-Brulé, *supra* note 78 at para. 629.

¹⁰³ See art. 2346 C.C.Q.; *Gauthier c. Marché E Prud'homme*, [1992] R.D.J. 396 (C.A.); *Marmen v. Boudreault*, [1955] B.R. 686 at 689 (Qc. C.A.).

¹⁰⁴ See art. 1599 C.C.Q.

A surety may set up against the creditor all the defences of the principal debtor, with the exception of bankruptcy.¹⁰⁵ By contrast, a co-debtor may set up only defences that are common to both co-debtors: she may not set up defences personal to her co-debtor, even to the extent of the latter's share in the debt, with the exception of compensation, confusion, and release.¹⁰⁶

It follows that a creditor cannot invoke the rules of compensation against the surety in such a way as to apply amounts owing to the surety by the creditor—such as funds held by the surety in an account with the creditor—in payment of the principal obligation.¹⁰⁷ By contrast, there is nothing to prevent a creditor from taking an amount owing to him by a co-debtor in full payment of a solidary obligation.¹⁰⁸

C. Responsibility in Case of Non-Payment

The surety's undertaking is to satisfy the creditor's claim, should the debtor fail to perform his obligation. A variety of remedies are available against a defaulting debtor. The surety may also be subject to these remedies, to the extent provided in the suretyship agreement or permitted by law. For example, a surety may conceivably be responsible for specific performance, damages, or payment of a penalty should the debtor default. In practice though, the surety's responsibility nearly always takes the form of damages, while the surety is also at liberty to perform the debtor's obligation in kind where possible.¹⁰⁹ For example, where a financial institution has guaranteed the timely and correct performance of a contract of enterprise, it may elect to hire a new contractor to remedy the debtor's default in kind, but it is not required to do so. The actual responsibility undertaken by the surety in such a case is to indemnify the creditor by way of damages.¹¹⁰

¹⁰⁵ See art. 2353 C.C.Q.

¹⁰⁶ See arts. 1678, 1685, 1690 C.C.Q. As we have seen, such exceptions are a partial recognition of the debtors' perspective (see *supra* note 36).

¹⁰⁷ Such compensation becomes possible only once the surety is condemned by judgment. The surety who pays pursuant to such a judgment pays his own debt (see below). *Contra* Deslauriers, *supra* note 55 at 70.

¹⁰⁸ See Pothier, *supra* note 28 at para. 274.

¹⁰⁹ See art. 1555 C.C.Q.

¹¹⁰ At least based on interpretation of contractual terms and standard practice in the industry, this appears to be the dominant view. See *Notre-Dame*, *supra* note 95; *Association provinciale des constructeurs d'habitations du Québec (A.P.C.H.Q.) inc. c. Habitations Caron & Raynault* (26 March 1999), Longueil 505-02-004536-961, J.E. 99-942 (C.Q.); Simler, *supra* note 57 at paras. 42, 209; Olivier F. Kott & Claudine Roy, *La construction au Québec : perspectives juridiques* (Montreal: Wilson & Lafleur, 1998) at 651-

As is well known, it is possible for the surety to limit his responsibility to a certain amount, or in such a way that the creditor will be entitled to satisfy his claim only against a specific item of the surety's property.¹¹¹ In the latter case, the creditor is well-advised to obtain a hypothec against such property (e.g., real suretyship or *cautionnement réel*).

Before a creditor may proceed to the seizure of the surety's property in satisfaction of his claim, a judgment must be entered against the surety for a certain amount.¹¹² The judgment debt is a debt different in nature from the principal obligation. Only by virtue of a judgment does the surety truly become a debtor. The creditor may henceforth invoke compensation as between the judgment debt and an amount owing to the surety (e.g., funds in the surety's account with the creditor). The surety is expected to pay the judgment debt and is subject to seizure of his property in satisfaction of the creditor's claim.¹¹³

Several rules illustrate how the principal debtor's liability and the surety's responsibility for the debt do not operate on the same level. Although the surety's responsibility is frequently limited to a certain amount, the debtor and surety never share in the debt, contrary to the co-debtors in a solidary obligation. In cases where a solidary obligation is also secured by a suretyship, the surety who has paid may pursue either

52. Compare Louise Poudrier-LeBel, *Le cautionnement par compagnie de garantie* (Cowansville, Qc.: Yvon Blais, 1986) at paras. 221-22, 597 (arguing that the surety may be compelled to perform the debtor's obligation in kind). In the common law tradition, a surety's responsibility is always in the form of damages (i.e., secondary obligation), whereas in the civil law tradition, it might conceivably take the shape of an action for specific performance of the obligation (i.e., dualist conception). See Part I.B above.

¹¹¹ See art. 2342 C.C.Q.

¹¹² See art. 543ff. C.C.P.

¹¹³ One finds this interesting passage by Beaumanoir, writing in the thirteenth century:

If a surety is summoned for his obligation so that an order is issued before he dies, his heir must take on the obligation; for as soon as he has received an order to meet his obligation, he is the debtor for the thing. But if he dies before he has been taken to court and an order issued, the heirs are not in any way obligated, for they need not meet the obligation of their father if the father did not assume the debt or receive an order to pay (Philippe de Remi Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, trans. by F.R.P. Akehurst (Philadelphia: University of Pennsylvania Press, 1992) at c. 43, para. 1311.

Compare *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339, 43 N.R. 283, aff'g [1976] C.A. 137 (Qc. C.A.) [*Soucisse*]; arts. 2361, 2364 C.C.Q.; *Caisse populaire Desjardins de la Vallée de l'Or c. Dion*, [2001] R.J.Q. 2619 (Sup. Ct.); *Maritime compagnie d'assurance-vie c. 132809 Canada* (19 October 1997), Montreal 500-17-000035-975, J.E. 97-1945 (Qc. Sup. Ct.).

co-debtor for the full amount of the debt.¹¹⁴ The rule is of course different where a co-debtor has paid the debt: he may pursue each of his co-debtors only for their individual shares.¹¹⁵

D. Creditor's Duty to Inform

Quebec law has seen considerable development in recent years of a creditor's duty to inform, which may arise either during negotiations leading up to the conclusion of a contract, or during the contract's performance.¹¹⁶ Significantly, such a duty has frequently been imposed by the courts on creditors in the context of suretyship, but rarely, if ever, has it been found to exist in cases of solidarity. The *Code* itself expressly imposes on the creditor a duty to inform at articles 2345 and 2355,¹¹⁷ whereas no such duty is prescribed in the provisions on solidarity.

The reason for imposing a duty to inform in the context of suretyship is that the surety, not being a party to the principal obligation, typically does not have any direct means of control over its evolution. Nor does the surety have ready access to information concerning the secured obligation. The surety cannot prevent a modification of the obligation, even when exposed to greater responsibility by an increase in the principal debtor's credit limit, an extension of the term for repayment, or an increase in the interest rate.¹¹⁸ Moreover, such a modification might easily

¹¹⁴ See art. 1951 C.C.L.C, which was not reproduced in the *Code*. However, the rule continues to apply: *Schwitzguebel c. Cadieux* (25 February 2002), Montreal 500-05-013886-922, J.E. 2002-499 (C.A.); *Garantie compagnie d'assurances c. Vortek groupe conseil*, [2005] R.J.Q. 1475 (Sup. Ct.) [*Vortek*].

¹¹⁵ Art. 1536 C.C.Q.

¹¹⁶ The duty to inform, as articulated by the Supreme Court of Canada, arises where one party has information that is of decisive importance to the other party, for whom it is impossible to obtain such information. The duty also arises even if it is not impossible for a party to obtain the relevant information but where he reasonably relies on the other to provide it. See *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, 93 D.L.R. (4th) 490 [*Bail* cited to S.C.R.].

¹¹⁷ In the specific context of suretyship, the creditor has a duty to provide "any useful information respecting the content and the terms and conditions of the principal obligation and the progress made in its performance" (art. 2345 C.C.Q.). However, such duty appears to exist only "at the request of the surety" (*ibid.*). Fortunately, the courts have maintained that the creditor continues to be bound by a more general duty to inform the surety *at the creditor's own initiative*, in accordance with the criteria set out in *Bail* (*supra* note 116). Art. 2345 C.C.Q. must not be interpreted in such a way as to restrict the general duty to inform incumbent on all contracting parties as derived from good faith. See arts. 7, 1375 C.C.Q.; *Trust La Laurentienne du Canada c. Losier* (15 January 2001), Montreal 500-09-007838-998, J.E. 2001-254 (C.A.) [*Losier*].

¹¹⁸ See art. 2344 C.C.Q. Compare art. 2343 C.C.Q. ("A suretyship may not be extended beyond the limits for which it was contracted"). In some cases, the surety's responsibility

take place without the surety's knowledge.¹¹⁹ The surety frequently does not know the terms of the principal obligation or the conditions for its renewal or modification, nor whether the debt is in good standing. Yet such information may be of crucial importance to the surety, not only when he initially agrees to secure the debtor's obligation(s), but also thereafter, since the surety may have the means to influence the debtor, to demand that the debtor pay the debt,¹²⁰ or to terminate the suretyship altogether.¹²¹ Except in cases where the surety does in fact have access to the relevant information,¹²² the courts have readily imposed on the creditor a duty to inform.¹²³ Where the creditor is found to have violated his duty to inform at the time of contracting, the surety may have the suretyship annulled on grounds of error. Where the duty to inform is violated after the contract's formation, the surety may invoke a *fin de non-recevoir*, through which the creditor's recourse is declared by the court to be inadmissible.¹²⁴

is explicitly or implicitly limited to the amount of the debt and conditions for reimbursement as they stood at the time the suretyship was obtained. See e.g. *Fédération des Caisses Desjardins du Québec c. Langlois*, 2008 QCCQ 7214. See also Louise Poudrier-LeBel & André Bélanger, "L'interprétation du cautionnement : une approche nouvelle quant à la formation et à la détermination du contenu du contrat" (2000) 41 C. de D. 323 at 336-38.

¹¹⁹ See *Entreprises Roof-mart (Québec) ltée c. Filiatreault, succession* (1999), AZ-99026441, B.E. 99BE-906, EYB 1999-13303 (C.S.) (AZ) [*Filiatreault*].

¹²⁰ See art. 2359 C.C.Q.

¹²¹ See art. 2362 C.C.Q.

¹²² See e.g. *Losier*, *supra* note 117.

¹²³ *Promotions Atlantiques inc. c. Banque de Nouvelle-Écosse* (2003), J.E. 2003-1738 (C.A.); *Fiducie du Groupe Investors ltée c. Guida*, [2001] R.J.Q. 84 (C.A.); *Filiatreault*, *supra* note 119. For a critical evaluation and proposals for change, see Louise Langevin, "L'obligation de renseignement, le cautionnement et les dettes transmises sexuellement" (2005) 50 McGill L.J. 1. See also André Bélanger & Ghislain Tabi Tabi, "Vers un repli de l'individualisme contractuel? : l'exemple du cautionnement" (2006) 47 C. de D. 429.

¹²⁴ The leading case on *fin de non-recevoir* is the Supreme Court of Canada's decision in *Soucisse* (*supra* note 113). The heirs to a succession did not know that the deceased had provided a suretyship to his bank in order to secure the present and future debts of a friend of the deceased. Had they known this, the heirs could easily have revoked the suretyship, thus avoiding liability for subsequent debts. The court found that the bank had violated its duty of good faith in not informing the heirs of the existence of the suretyship. It therefore dismissed the bank's action against them with respect to subsequent debts. For an early and excessively broad statement of the extent and consequences of the creditor's duty to inform the surety, see *Cloutier v. Dumas*, [1954] B.R. 720 at 724:

It is the clearest and evident equity not to carry on any transaction without the knowledge of the surety, who was necessarily concerned in every transaction with the principal debtor. If a change is made without the knowledge of the surety he will be discharged. If, however, without inquiry, it is evident

The creditor's duty to inform has not taken hold in the law of solidary obligations, which is unsurprising, since both co-debtors are party to the debt and to any modification of its terms, failing which a modification is inopposable to the absent co-debtor. In suretyship, the existence of a duty to inform compensates for the surety's lack of knowledge and control. In solidarity, both co-debtors as parties to the obligation normally have such knowledge and control.¹²⁵ Of course, that is not to say that a duty to inform could not arise in the context of a solidary obligation if special circumstances were present. The existence of a duty to inform always depends on the facts of each case.¹²⁶

To conclude, suretyship and solidarity represent different manners in which two or more persons may share responsibility for the same debt. In the case of solidarity, the co-debtors are both parties to the obligation, either of them is expected to perform the debt voluntarily, and either may be held responsible in case of non-performance. As for the surety, he is not a party to the secured obligation, he is not expected to perform it voluntarily, but he *is* responsible in case the debtor defaults. To ensure protection of the surety's interests, the creditor is required, as a rule, to inform the surety of any important changes affecting the principal obligation(s), including a deterioration of the debtor's ability to meet his obligations. The question that remains to be addressed is whether solidarity or suretyship may be applied by analogy to resolve issues arising in the context of other complex relations, particularly in the case of imperfect delegation.

III. The Extension by Analogy of the Rules Governing Solidarity or Suretyship

This section considers whether the alternative models represented by solidarity and suretyship might be used to explain similar complex relations, even where such legal relations have come into being other than by a creditor contracting with multiple debtors or a surety undertaking to guarantee the payment of another's debt. As mentioned at the outset, ar-

that the change is unsubstantial or is beneficial to the surety, he will not be discharged.

¹²⁵ See Oury-Brulé, *supra* note 78 at paras. 29, 50.

¹²⁶ The Quebec Court of Appeal entertained the possibility of imposing a duty to inform in the context of a solidary obligation in the case of *Lacharité c. Caisse populaire Notre-Dame de Bellerive*, but finally rejected the argument based on the facts of the case (2005 QCCA 577, [2005] R.J.Q. 1408). The court noted the resemblance between suretyship and solidarity, and hypothesized that one might be just as likely to find a duty to inform in a solidary obligation, as one might in a suretyship (*ibid.* at paras. 45-46). In expressing this view, the court does not appear to have considered the differences between the two institutions exposed in this section.

ticle 1525, in the case of solidarity, and article 2335, in the case of suretyship, appear to preclude this possibility. However, that view does not hold, as I demonstrate by discussing the meaning and scope of both articles (Part III.A), before noting that solidarity has been extended to analogous situations either by law or by the courts making use of the obligation *in solidum* (Part III.B), while a similar extension of the rules governing suretyship is also possible, although it has generally been approached with caution (Part III.C). Finally, I will explain why it is appropriate to apply by analogy the rules governing suretyship to imperfect delegation (Part III.D).

A. *Scope of Articles 1525 and 2335 of the Civil Code of Québec*

Article 1525 is found in the section of the *Code* concerning obligations with multiple debtors. It should be recalled that an obligation is “joint between two or more debtors where they are obligated to the creditor for the same thing but in such a way that each debtor may only be compelled to perform the obligation separately and only up to his share of the debt.”¹²⁷ An obligation is “solidary between the debtors where they are obligated to the creditor for the same thing in such a way that each of them may be compelled separately to perform the whole obligation and where performance by a single debtor releases the others towards the creditor.”¹²⁸ Article 1525 then states that “[s]olidarity between debtors is not presumed; it exists only where it is expressly stipulated by the parties or imposed by law.”

The purpose of article 1525 is to protect co-debtors by establishing in their favour a presumption that they are jointly liable for their common debt. To overcome the presumption, it must be stipulated expressly by the parties or provided by law that the obligation is solidary. Article 1525 also contains a reverse presumption in cases where the obligation is contracted for the service of an enterprise. In such a case, the obligation is solidary unless the parties have provided that it is joint. One reason for reversing the presumption is that the creditor in such a case is likely to be in greater need of protection than the co-debtors.

Article 2335 appears in the chapter of the *Code* devoted to suretyship. It states that “[s]uretyship is not presumed; it is effected only if it is express.” Suretyship is well known to be a dangerous contract for the surety. The purpose of article 2335 is to ensure that no suretyship will be found to exist unless the surety’s consent to such a contract has been given in ex-

¹²⁷ Art. 1518 C.C.Q.

¹²⁸ Art. 1523 C.C.Q.

press terms. Indeed, it often happens that the intention to guarantee the debt of another cannot be made out clearly. In some cases, a person may have intended only to give assurances that the debtor is trustworthy, which must not be construed as a guarantee.¹²⁹ In other cases, it may be uncertain whether a person has signed an agreement in her personal capacity as surety, or only as a witness or representative of the principal debtor.¹³⁰ For example, it often happens that a clause is inserted in a loan or credit agreement to the effect that the undersigned, while signing the agreement on behalf of the debtor company, also agrees in his personal capacity to guarantee the debtor's obligations.¹³¹ In such instances, article 2335 plays an important protective role: a suretyship will not be found to exist unless the defendant's intention to act as a surety has been clearly expressed.¹³²

The function of articles 1525 and 2335 is to resolve a situation where the parties' intention to create a solidary obligation or a suretyship is ambiguous by giving co-debtors or the alleged surety the benefit of the doubt. In a contract that creates an obligation with multiple debtors, the obligation is presumed to be joint if it is not for the service of an enterprise. In an agreement where a party's intention to guarantee the obligations of another is uncertain, a suretyship is presumed not to exist. But where it can be established without doubt that two persons are each liable to per-

¹²⁹ *Paquette c. 151082 Canada* (13 December 1999), Montreal 500-05-017841-931, J.E. 2000-187 (C.S.). See also *W.T. Rawleigh Co. v. Dumoulin*, [1926] S.C.R. 551, [1926] 4 D.L.R. 141.

¹³⁰ See *Huiles M.R.G. Drouin inc. c. Fortier* (25 August 2000), Beauce (Saint-Joseph-de-Beauce) 350-22-000216-989, J.E. 2000-1945 (C.Q.).

¹³¹ In such cases, the clause is frequently declared to be invalid if the debtor's representative was unaware of its presence within the loan or credit agreement. See *Carquest Canada c. Boulianne*, 2008 QCCQ 142 (C.Q. civ. (div. pet. cré.)); *Vidéo L.P.S. c. 9013-0451 Québec* (22 November 1996), Montreal 500-05-017485-960, J.E. 97-343 (C.S.) (AZ); *Boiseries Raymond c. 2848-4475 Québec* (18 February 1997), Montreal 500-02-017307-948, B.E. 97BE-233 (C.Q. civ.); *Distribution Denbec c. Gendron* (1 June 2000), Saint-Jérôme 700-22-001097-970, B.E. 2000BE-858 (C.Q. civ.); *Bonneville Portes et fenêtres c. Constructions J.S.M. Ouellet inc.* (29 March 2001), Quebec 200-22-006769-988, J.E. 2001-837 (C.Q. civ.); *Matériaux Décoren c. Bannwarth* (17 April 2001), Beauce (Saint-Joseph-de-Beauce) 350-02-000078-993, B.E. 2001BE-509 (C.Q. civ.).

¹³² According to Pothier,

[a]lthough [suretyship] may be made by letter, or even verbally, nevertheless, great attention must be paid not to regard what a person says or writes as such an engagement, unless the intention of becoming surety be clearly expressed; therefore if I have told you, or written to you by letter, that a man who wished to borrow money from you was solvent, that cannot be taken for an engagement as surety; for in this case I might have had no other intention than to intimate to you what I thought, and not to oblige myself (*supra* note 28 at para. 401).

form the same obligation in full, it may be appropriate to apply the rules of solidarity by analogy, even though no express stipulation can be found to that effect. Where one person is undoubtedly responsible for the debt of another independently of the existence of any suretyship agreement, it may likewise be appropriate to apply by analogy the law of suretyship.

B. Extension of Solidarity

I have thus far considered only the cases where several debtors contract an obligation together. In such cases, one must determine whether the debt is joint or solidary. As we have just seen, article 1525 contains the rules that must be used to answer that question.

It is now necessary to consider the development of solidarity outside the realm of contracts, particularly in the field of civil responsibility, and in the case of joint wrongdoers. This development has followed a different course and raised a different set of legal issues. Conceptually, the situation initially presents itself as follows. Suppose that X and Y have each committed a fault resulting in a loss suffered by Z. Assume further that Z is able to establish independently a claim against either X or Y, each of which would allow her to be compensated fully for her loss. It is clear that Z cannot obtain full compensation from both X and Y. If Z obtains full compensation from X, then she will not succeed in an action against Y, since there will no longer be any loss to compensate.¹³³ Moreover, unless there exists a contractual relationship between X and Y (e.g., a mandate or insurance agreement), X initially does not appear to have an action to recover from Y any part of the amount paid to Z. The matter might simply have been left at that, with the plaintiff having the choice to pursue any or all of the persons responsible for her loss until fully compensated. A defendant in this scenario could not require others also liable for the plaintiff's loss to share the debt, except in the presence of separate rules to that effect governing the relations between defendants.

Instead, it was determined—sometimes by statute, sometimes by case law—that applying the principal effects of solidarity would provide a more efficient and just result in such cases.¹³⁴ Accordingly, a plaintiff may still

¹³³ In early Roman law, where an award in damages had a punitive as well as a compensatory function, the plaintiff could obtain cumulative payments from each defendant. This rule was abandoned once the compensatory nature of damages came to prevail. See Ernst J. Cohn, "Responsibility of Joint Wrongdoers in Continental Laws" (1935) 51 *Law Q. Rev.* 468 at 471. See also Mignot, *supra* note 23 at paras. 312, 241-42.

¹³⁴ See arts. 1480, 1526 C.C.Q. In 1804, the drafters of the *Code civil des Français* did not think to include a provision stating that joint wrongdoers are solidarily liable to the victim (Cohn, *supra* note 133 at 478), while later codifications remedied this omission (art. 1106 C.C.L.C.). In French law, the courts originally declared joint wrongdoers solidarily

claim from any one defendant the full amount of a loss, but the defendant may now demand that all parties responsible for the loss share in the ultimate burden of compensating the plaintiff. The plaintiff's rights are undiminished, except insofar as control of the allocation of the damages among the defendants is lost. Applying the rules of solidarity ensures that all parties liable for the plaintiff's loss share in the debt, a solution that has been found preferable with a view to securing the dissuasive objectives of civil responsibility and equitable treatment of the defendants.¹³⁵ The legal means by which this result has been achieved have varied. In some cases, the defendants' liability was defined by law as solidary; in others, the defendants were determined by the courts to be liable *in solidum*—a characterization found to bring into play the principal effects of solidarity.¹³⁶

In other situations as well, courts have decided that rules governing solidarity should apply. It is not necessary to examine those circumstances here, although one instance—imperfect delegation—will be addressed below. It is sufficient to note that solidarity has frequently been

liable, but eventually resorted to the obligation *in solidum*, which represents the state of the law today. In Quebec, the obligation *in solidum* is applied in cases not covered by arts. 1480 or 1526 C.C.Q., most notably where one wrongdoer is liable by virtue of a contract (art. 1458 C.C.Q.), and the other on the basis of extra-contractual liability (art. 1457 C.C.Q.). See also *supra* note 11. See generally Pierre Raynaud, "La nature de l'obligation des coauteurs d'un dommage. Obligation 'in solidum' ou solidarité?" in *Mélanges dédiés à Jean Vincent* (Paris: Dalloz, 1981) 317; François Chabas, "Remarques sur l'obligation 'in solidum'" (1967) 65 R.T.D. civ. 310; Levesque, *supra* note 51.

¹³⁵ One difficulty arising out of this solution is that it becomes necessary for the courts to determine the co-defendants' respective shares in the debt. Several approaches are possible, none of which has been followed consistently. The first is to apportion liability according to the seriousness of the fault of each co-defendant (art. 1478 C.C.Q.). A second approach is to apportion liability in equal shares between the co-defendants, which is the default rule provided for solidary obligations (art. 1537 C.C.Q.). A third approach tends to view one co-defendant's liability as supplanting the other's. See e.g. *Dostie, supra* note 11; *Chartré, supra* note 11; *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.); *Eclipse Bescom Ltd. c. Soudures d'auteuil inc.*, [2002] R.J.Q. 855 (C.A.) [*Eclipse Bescom*]. The latter solution is easy to understand in cases where co-defendants are parties to a contract that attributes the loss to one party (e.g., through an insurance claim), or where it is attributed by law (see e.g. art. 1463 C.C.Q.). It may also be explained in cases where one defendant in particular has been enriched as a result of the plaintiff's loss, as in *Chartré (supra* note 11) or *Dostie (supra* note 11). However, in other cases, such as *Eclipse Bescom (supra* note 135), it is unclear why one co-defendant must ultimately bear the full extent of the plaintiff's loss. In particular, suggestions that the responsibility of one defendant is principal, while the responsibility of the other is secondary or accessory, appear unhelpful and unconvincing.

¹³⁶ Not all the effects of solidarity are extended to the obligation *in solidum*. See Jobin, *Les obligations, supra* note 38 at para. 647; Pineau, Burman & Gaudet, *supra* note 38 at para. 391; Lluelles & Moore, *supra* note 41 at para. 2598. See also *Vortek, supra* note 114.

extended by analogy to new situations.¹³⁷ The courts have generally reached this result by declaring the parties to be liable *in solidum*.¹³⁸

Until the nature and scope of the obligation *in solidum* are better known, there is a danger that the benefit of division will be lost in some cases where it ought to apply. In particular, courts must resist any temptation to apply the obligation *in solidum* to cases where an obligation is contracted in common by multiple debtors, not for the service of an enterprise, and without any express stipulation in the contract that the debt is solidary.¹³⁹

C. *Extension of Suretyship*

While they have been relatively bold in extending by analogy the rules of solidarity to novel situations, jurists in France and Quebec have been very cautious in applying the rules of suretyship to instances where the relations between parties are similar to those between a debtor, creditor, and surety.¹⁴⁰ Yet article 2335 of the *Code* does not stand in the way of such an analysis, since the purpose of that article is to prevent a court from implying the existence of a contract of suretyship in cases where no clear intention to conclude such a contract exists. If, however, responsibility for another's debt does exist independently of any contract, then there appears to be no reason why one could not draw on the rules of suretyship to the extent that they are consonant with the nature of the relations being examined. It should be noted that the rules of suretyship are likely to be invoked by the person responsible for the debt (who is in a position analogous to that of a surety) because they provide effective rights and remedies against the creditor and debtor of the obligation. It must be re-

¹³⁷ Levesque, *supra* note 51.

¹³⁸ *Ibid.*

¹³⁹ See Lluelles & Moore, *supra* note 41 at paras. 2589-90, 2605; Jobin, *Les obligations, supra* note 38 at para. 649; Jobin, "Résiliation", *supra* note 89 at 311.

¹⁴⁰ See Jérôme François, *Droit civil : les sûretés personnelles*, t. 7, by Christian Larroumet (Paris: Economica, 2004) at para. 79. *D.I.M.S. Construction (Trustee of) v. Quebec (A.G.)* provides a recent example of the cautious approach of the courts regarding any possible extension of the law of suretyship (2005 SCC 52, [2005] 2 S.C.R. 564, 258 D.L.R. (4th) 213 [*D.I.M.S. Construction*]). According to the court, "[t]his cannot be a true case of suretyship, since a warrantor under the AIAOD has no choice in taking on the obligation, whereas consent is an essential aspect of suretyship, which is by definition a contract. The Quebec Superior Court judge's statement of the law to the effect that s. 316 AIAOD establishes a legal suretyship is therefore wrong" (*ibid.* at para. 21 [reference omitted]). While the court was correct in finding that there was no legal suretyship in this case, it should have considered more carefully the possibility of referring to suretyship *by analogy* in appropriate cases, even in the absence of a contract. As will be seen below, however, this would not have been an appropriate case.

membered that article 2335 is designed to protect the alleged surety, not the creditor or the debtor of the obligation. This provision should not be used to bar the application of rules and remedies that benefit the party whom it is intended to protect.

Where a person is responsible for the debt of another, although he is not himself a debtor, suretyship provides a valuable model for defining the relations between the parties, which present the same basic structure as suretyship. Solutions have been developed over time, in the context of suretyship, to respond to the legitimate needs and interests of the creditor, debtor, and person responsible for the debt. Many of the rules and mechanisms of suretyship were designed specifically to resolve difficulties inherent in such relations. It is therefore relevant to refer to suretyship where no other or better rules are available. This approach is frequently used in the law of obligations and in private law generally, and it is an important feature of civil law methodology.

In cases involving complex obligations, it will often be necessary to choose between applying by analogy the law of suretyship or the law of solidarity. One will then ask whether persons responsible for the debt are all true debtors, in which case solidarity should be referred to by analogy,¹⁴¹ or whether one person is merely responsible for the other's debt, in which case suretyship is the appropriate reference. Where the debt is ultimately to be shared among the debtors, the facts clearly point to solidarity. Where only one debtor has an interest in the debt, the solution is more difficult, because this factor does not exclude the possibility (nor does it imply) that the relations between the parties are analogous to suretyship.¹⁴² As we have seen, a solidary obligation in which one co-debtor has no interest in the debt is distinct from suretyship, in particular because both co-debtors must take part in any modification of the debt, and either co-debtor is expected to pay the debt. The surety is not expected to pay until the debtor is in default and the surety's responsibility has been converted into a debt by judgment (although he may elect to pay the debt before then, if only to avoid proceedings being taken against him).¹⁴³

In *D.I.M.S. Construction*, the Supreme Court of Canada briefly considered applying the law of either solidarity or suretyship to an obligation

¹⁴¹ See *Barbe c. Ellard* (1906), 15 B.R. 526 (C.S.).

¹⁴² See *Toronto Dominion Bank c. Coronet Sportswear & Clothing Mfg. Ltd.*, [1980] C.A. 386. See also *Fonds d'indemnisation des victimes d'accidents d'automobile c. Deblois*, [1975] C.A. 262.

¹⁴³ See Jacob, *supra* note 76. "Il faut comprendre que, même quand le cautionnement est solidaire, l'intervention de la caution n'est jamais un moyen de paiement, mais le moyen de procurer un surcroît de sécurité" (*ibid.* at para. 57 [reference omitted]).

with multiple debtors created by statute.¹⁴⁴ Section 316 of the *Act Respecting Industrial Accidents and Occupational Diseases*¹⁴⁵ provided that the *Commission de la santé et de la sécurité du travail* could claim from an employer the amounts payable to the commission by a contractor, in cases where the employer had retained the contractor's services.¹⁴⁶ The section further provided that the employer had a right to be reimbursed by the contractor, after having paid the commission. The court analyzed the relations between the parties as follows:

In the case at bar, solidarity is not mentioned in s. 316 AIAOD and cannot be presumed. Nor can the employer's obligation be characterized as being *in solidum* with the contractor, since the instant case does not involve two concurrent debts having the same object. The contractor must first be obliged to pay. It might be thought that this is a legal suretyship under art. 2334 C.C.Q., but the suretyship referred to in that article is one that a debtor must furnish when obliged to do so by the legislature. In the case of s. 316 AIAOD, the obligation is imposed directly on the warrantor, not on the debtor. This cannot be a true case of suretyship, since a warrantor under the AIAOD has no choice in taking on the obligation, whereas consent is an essential aspect of suretyship, which is by definition a contract. The Superior Court judge's statement of the law to the effect that s. 316 AIAOD establishes a legal suretyship is therefore wrong.¹⁴⁷

The court's finding that the legal relations established by section 316 cannot be explained by the law of solidary obligations, obligations *in solidum*, or suretyship leaves the statute in a legal vacuum. It is difficult to believe that this result was intended by the legislature when it adopted articles 1525 and 2335 of the *Code*, especially in view of the preliminary provision, which states that "the Code is the foundation of all other laws."¹⁴⁸ My argument is that it is appropriate and helpful in cases such as this to apply the rules of solidarity or the rules of suretyship, either directly or by analogy, in order to complete the relevant statutory provisions.

In *D.I.M.S. Construction*, either the contractor or the employer was expected to pay the debt: the commission could require payment from one or the other. It would therefore not be appropriate to apply by analogy the law of suretyship, even though only one party, the contractor, was ultimately liable for the full amount of the debt. The court appeared to recog-

¹⁴⁴ See *supra* note 138.

¹⁴⁵ R.S.Q. c. A-3.001.

¹⁴⁶ See *D.I.M.S. Construction*, *supra* note 140 at para. 2.

¹⁴⁷ *Ibid.* at para. 21 [references omitted].

¹⁴⁸ See *Preliminary Provision*, C.C.Q.

nize that the employer is treated by the statute as a debtor, not a surety, when it held rather ambiguously that “the obligation is imposed directly on the warrantor.”¹⁴⁹ The obligation created by the statute must be characterized as an obligation with multiple debtors. Where such an obligation is created by law, it is presumed joint,¹⁵⁰ but *the presumption can be rebutted through the usual techniques of statutory interpretation*. Here, since only one debtor is ultimately liable for the full amount of the debt, characterizing the obligation as joint would defeat the purpose of the statute: the commission could obtain nothing from the employer who would escape all liability by invoking the benefit of division. The obligation created by section 316 is therefore solidary.

One area in which an analogy is sometimes drawn with the law of suretyship—correctly this time—is the liability of partners for partnership debts.¹⁵¹ The *Code* states that “[i]n respect of third persons, the partners are jointly liable for the obligations contracted by the partnership but they are solidarily liable if the obligations have been contracted for the service or operation of an enterprise of the partnership.”¹⁵² One’s initial impression might be that the *Code* envisages partners’ liability as an obligation with multiple debtors, which is either joint or solidary depending upon the nature of the debt. In a legal system that did not treat partnerships as having any existence distinct from its members, there would be no “obligation contracted by the partnership,” but only an obligation contracted in common by the partners. With such a conception of partnership, it would be correct to view the obligation contracted on behalf of the partnership as a joint or solidary obligation of all its partners.

However, the law of Quebec has long moved beyond this conception, even though it has not recognized the partnership as a full legal person. The partnership, under Quebec law, is undoubtedly an entity separate from its members, with the ability to sue and be sued¹⁵³ and the capacity to contract in its own name.¹⁵⁴ When the *Code* describes “the obligations contracted by the partnership,”¹⁵⁵ this must be taken literally to mean that the partnership is a contracting party and a debtor in its own right.

¹⁴⁹ *D.I.M.S. Construction*, *supra* note 140 at para. 21.

¹⁵⁰ See art. 1525 C.C.Q.

¹⁵¹ See Michael Wilhelmsen, “The Nature of the Quebec Partnership: Moral Person, Organized Indivision or Autonomous Patrimony?” (1992) 37 McGill L.J. 995 at 1014-18. For another example, see art. 1078 C.C.Q., which concerns the responsibility of co-owners for debts of the syndicate of co-owners.

¹⁵² Art. 2221 C.C.Q.

¹⁵³ See art. 2225 C.C.Q.

¹⁵⁴ See art. 2219 C.C.Q.

¹⁵⁵ Art. 2221 C.C.Q.

This provision affects the position of the partners in respect of the partnership's obligations because it cannot be considered that an obligation of the partnership has as its debtors both the partnership *and* its partners, either jointly or solidarily. Indeed, how could one determine the respective shares of the partnership and its partners in the common debt? The solution cannot be that the partnership is the only debtor with an interest in the debt, since that would have the effect of releasing partners when the obligation is characterized as joint, whereas article 2221 states that partners are responsible for the debt in such a case.

The better solution is therefore to consider partners as quasi-sureties of the partnership. In other words, partners are not debtors: they are merely responsible for partnership debts if the debts are not paid by the partnership. In the presence of several sureties, it is common to refer to their responsibility as being either "joint" or "solidary", with a slightly different meaning being attached to those terms in the context of suretyship.¹⁵⁶ It is entirely plausible that article 2221 contains an implicit reference to suretyship, and not to joint or solidary obligations.

Indeed, the relations between the partnership, its creditors, and its partners closely resemble those between a debtor, a creditor, and a surety. The partners are not parties to the partnership's obligations, and they are not expected to pay them under normal circumstances. A creditor of the partnership could not invoke compensation with an amount owed to him by an individual partner. Moreover, the partner pursued by a creditor of the partnership could avail himself of all the partnership's defences, with the exception of bankruptcy.¹⁵⁷ A partner should also be allowed to benefit from article 2359 in order to force the partnership to pay its debts.

Still, a difficulty arises with respect to this interpretation, stemming from the second paragraph of article 2221:

Before instituting proceedings for payment against a partner, the creditors [of the partnership] shall first discuss the property of the partnership; if proceedings are instituted, the property of the partner is not applied to the payment of creditors of the partnership until after his own creditors are paid.

This rule conflicts with the benefit of discussion as it applies in the context of suretyship. Indeed, a surety's creditors may not demand that a surety's property be first applied to the payment of their claims, before it is applied to the payment of the principal debtor's obligation. The reinforced benefit of discussion provided at article 2221 exists notably for the protection of partners' personal creditors; it thus detracts from the normal

¹⁵⁶ See art. 2349ff. C.C.Q.

¹⁵⁷ See art. 2353 C.C.Q.

rules of suretyship.¹⁵⁸ Still, that does not mean that in other respects the analogy with suretyship is inadmissible or irrelevant.¹⁵⁹ The partners' liability is best understood as responsibility for the partnership's debts. As we have seen, it is appropriate and helpful to refer by analogy to the law of suretyship in order to complete the rules governing the partners' responsibility under the law of partnership.¹⁶⁰ This is so even though article 2221 will prevail over articles 2347 and 2348 as concerns the benefit of discussion.

A more explicit reference to the law of suretyship can be found at article 1537, which states that where a solidary obligation is contracted in the exclusive interest of one co-debtor, the other co-debtors are considered, in his regard, as his surety. This rule applies only to the relations between co-debtors; its effects do not extend to the creditor. Thus it does not operate in such a way as to convert the solidary obligation into a relationship of suretyship. However, it illustrates the relevance of applying by analogy the rules of suretyship to other complex relations, in this case to the relations among co-debtors of a solidary obligation.¹⁶¹

*D. Imperfect Delegation*¹⁶²

Traditionally, imperfect delegation was interpreted as the formation of a new and distinct obligation modelled on the original obligation that it was the parties' intention to delegate. According to the traditional conception, the new obligation is entered into by the new debtor (i.e., delegate) and accepted by the creditor (i.e., delegatee). Its content or object is identical to that of the original obligation owed by the original debtor (i.e., delegator) to the creditor. An imperfect delegation therefore implies the coexistence of two distinct obligations, the original and the new. Payment of one obligation extinguishes the other, since they both relate to the same

¹⁵⁸ See *Duval-Hesler c. Lalande* (1996), AZ-97031007, J.E. 97-8 (C.Q.) (AZ); *Roy c. Boivin Carrier*, 2006 QCCS 2663.

¹⁵⁹ See *Banque Nationale du Canada c. Québec (P.G.)* (1994), AZ-95021136, J.E. 95-372 (C.S.) (AZ) (a suretyship agreement provided for a reinforced benefit of discussion, which did not disqualify it as a suretyship agreement).

¹⁶⁰ See Pineau, Burman & Gaudet, *supra* note 38 at para. 395.

¹⁶¹ See *Dawson c. King*, [1982] C.P. 97.

¹⁶² This section begins with a summary of the argument presented in my previous article (Cumyn, *supra* note 1). The reader should refer to that article for a more detailed discussion and for additional references. See also Benoît Moore, "De la délégation certaine à la délégation incertaine : *error communis facit jus et ... legem*" (2004) 38 R.J.T. 475; Jobin, *Les obligations*, *supra* note 38 at para. 1011ff.; Lluellas & Moore, *supra* note 41 at para. 3121ff.; Vincent Karim, *Les obligations*, vol. 2, 3d ed. (Montreal: Wilson & Lafleur, 2009) at 1093-96; Maurice Tancelin, *Des obligations en droit mixte du Québec*, 7th ed. (Montreal: Wilson & Lafleur, 2009) at para. 1318.1.

object. If the creditor discharges the original debtor, thus extinguishing the original obligation, the delegation becomes “perfect” and is equivalent to a novation of the debt.¹⁶³ In its traditional conception, imperfect delegation is correctly understood to give rise to an obligation *in solidum*. Both the original and new debtors are independently liable to perform the same prestation, by virtue of two distinct obligations.

The novel structure and new rules implemented in the *Code* now lend credence to a different conception of delegation.¹⁶⁴ Delegation can be interpreted henceforth in Quebec as an assignment of the original debt, rather than the creation of a new debt copied on the original one, as previously imagined. Indeed, there is no valid objection in principle to allowing the assignment of a debt under Quebec law, just as it is possible to assign a claim.¹⁶⁵ Where a debt is assigned, the creditor need not be party to the assignment. However, the original debtor remains responsible in case of non-payment by the new debtor, unless the original debtor is specially discharged by the creditor. In other words, the creditor need not take part in an imperfect assignment of the debt, but he must consent to a perfect assignment, since for the latter to take effect, the original debtor must be discharged by the creditor.¹⁶⁶

There are several benefits flowing from the new conception of delegation as an assignment of the debt. For the sake of brevity, I will state only the three most important reasons why this conception should be preferred. First, an imperfect delegation can now be completed without the creditor’s consent. This of course benefits debtors, for whom it becomes much simpler to reorganize their business or family affairs in the context of a separation, a divorce, or the sale of a business or immovable. Debtors need no longer beg or bargain for the creditor’s consent before such reorganization can take place.¹⁶⁷ While creditors may stand to lose in that respect, they also gain in another. Indeed, debtors frequently do not request the creditor’s permission before agreeing among themselves to a delegation. The delegation usually takes place in the context of a contractual re-

¹⁶³ See art. 1173 C.C.L.C.

¹⁶⁴ See art. 1667ff. C.C.Q.

¹⁶⁵ See art. 1555 C.C.Q.

¹⁶⁶ See art. 1668 C.C.Q.

¹⁶⁷ For an illustration of such a situation, see *Groupe C.S.L. c. Québec (Sous-ministre du Revenu)*, [2002] R.D.F.Q. 52 (C.A.). A group of related corporations wished to transfer a debt from one member of the group to another. The debt was a loan by the Royal Bank of Canada whose terms were favourable to the group since there had been a subsequent rise in interest rates. The group decided not to run the risk of transferring the debt because the bank had declared its opposition to the transfer. It was thought best not to risk losing the benefit of the loan (*ibid.* at para. 15).

lation between the original and new debtors to which the creditor is not a party. Yet it may well be in the interest of the creditor to claim the benefit of the imperfect delegation, since he acquires a new debtor in addition to the original one. Under the traditional conception, the delegation takes effect only when the creditor accepts it. Where the creditor has not formally accepted the delegation, there is uncertainty as to its very existence. The delegation will fail, under the traditional conception, if the creditor dies or becomes bankrupt before accepting it,¹⁶⁸ or if the debtors revoke the delegation before such acceptance has taken place.¹⁶⁹

A second advantage of the new conception of delegation is that the incidents of the original obligation are preserved, even in cases where the original debtor is discharged. This is because the new debtor is bound by the original obligation itself, not by a new obligation modelled on the original. Thus the new debtor may set up against the creditor the same defences as the original debtor might have set up, with the exception of compensation.¹⁷⁰ More importantly, hypothecs attached to the original obligation are preserved, even if the original debtor is discharged. This represents a significant advantage for the creditor, since it sometimes happens that the original debtor in a delegation is discharged unintentionally.¹⁷¹ In such cases, if the traditional conception of delegation is followed, the creditor stands to lose not only his personal recourse against the original debtor, but also any security attached to the original debt. Under the new conception, hypothecs are preserved whether or not the original debtor is discharged, just as they are in an assignment of claim.

A third advantage of the new conception is that it provides a better fit with the parties' purpose in carrying out the delegation, and with the legal regime implemented by the *Code*. In practice, delegation is nearly always used to transfer a debt. The new conception therefore provides a better account of delegation as viewed by the parties. It is less likely to bring about undesired legal consequences such as those previously described. Modifications introduced in the *Code* have moved delegation away from the traditional conception and brought it closer to a true assignment of the debt. For example, the *Code* no longer states that a perfect delegation is equivalent to a novation of the debt, whereas this was clearly the case

¹⁶⁸ See art. 1392 C.C.Q.

¹⁶⁹ See art. 1390 C.C.Q.

¹⁷⁰ See art. 1670 C.C.Q.

¹⁷¹ See e.g. *Salvatore L. Briqueteur inc. c. Banque nationale du Canada*, [2002] R.J.Q. 1895 (C.A.) [*Salvatore*].

by virtue of article 1173 in the *Civil Code of Lower Canada*. The *Code* has even introduced different rules for delegation and novation.¹⁷²

In light of the new conception just exposed, I will now consider the relations between the parties to an imperfect delegation. The original debtor transfers his obligation to the new debtor, but continues to be responsible in case of non-payment.¹⁷³ The creditor need not take part in the delegation itself, but upon receiving notice of it, must pursue relations with the new debtor in respect of the assigned obligation. Payments are now made by the new debtor, not the original debtor. Modifications of the obligation (e.g., renewal of a loan agreement) are carried out by the creditor and new debtor, while the original debtor need not be present. Such relations are therefore analogous to those arising out of a contract of suretyship.

Indeed, the rules on suretyship represent a useful complement to those on imperfect delegation. The extent to which it will be appropriate to refer to them will need to be progressively worked out in light of the relevant practical and policy considerations. At first sight, it seems appropriate that the original debtor should be able to invoke the benefit of discussion and the benefit of subrogation. He might also have recourse to article 2359 of the *Code* in order to obtain the earliest possible payment of the obligation by the new debtor.¹⁷⁴ It is less certain whether the original debtor should be able to put an end to his responsibility after three years, in accordance with article 2362, but the possibility certainly deserves to be entertained.¹⁷⁵ As for the duty to inform, the courts have already transposed it from suretyship to imperfect delegation.¹⁷⁶

One last point is worthy of note. If the new conception of imperfect delegation is correct, then the co-debtors in a solidary obligation have the ability to convert their relationship to one of quasi-suretyship without the creditor's consent. One co-debtor need only delegate his share in the obligation to the other co-debtor. This solution has long been recognized in the common law: joint and several co-debtors may change their relation to one of suretyship by giving notice to the creditor.¹⁷⁷ This approach has

¹⁷² Compare arts. 1670 and 1663 C.C.Q.

¹⁷³ See art. 1668 C.C.Q.

¹⁷⁴ *Contra Lacasse c. Poulin*, [1953] B.R. 125 at 129 (C.A.).

¹⁷⁵ Note that this rule would apply only if the debt was for an indeterminate amount or if there was delegation of a future debt.

¹⁷⁶ See e.g. *Salvatore*, *supra* note 171 at 1902-1903; *Caisse populaire Desjardins Domaine St-Sulpice c. 2425-0771 Québec* (1997), AZ-98021170, J.E. 98-392 (C.S.) (AZ); *Banque nationale du Canada c. Portelance*, [1997] R.R.A. 1119 (summary), J.E. 97-1713 (C.S.); *Banque Nationale du Canada c. Hogue, succession* (1999), AZ-99026093 (C.S.) (AZ).

¹⁷⁷ See *Allison v. McDonald* (1894), 23 S.C.R. 635. See also Williams, *supra* note 42:

proven valuable in contexts where co-debtors decide to go their separate ways and wish to reorganize their relations such that one co-debtor is no longer a party to the debt. Naturally, it is not possible for the latter to be discharged without the creditor's consent, but at least his role can be reduced to that of surety. He need no longer take part in any agreements regarding the obligation, and he may benefit from the protections provided by the law of suretyship.

Conclusion

In the final analysis, complex relations in which several persons are responsible for the same debt break down into three broad categories. The first category is the obligation with multiple debtors: several persons are bound together by the same obligation to a creditor. Obligations with multiple debtors are either joint, solidary, or indivisible, as determined in accordance with articles 1519 and 1525 of the *Code*. The second category contains relations in which a person is responsible for the debt of another, though not as a co-debtor. Suretyship, imperfect delegation, and the liability of partners for partnership debts are members of this group. To the extent that it is appropriate, the legal regime of suretyship may be extended by analogy to other legal relations within this category. The third category involves situations in which several distinct obligations are joined together by their object, such that fulfillment of one obligation discharges them all. These have usually been named obligations *in solidum*, and they have largely been assimilated into solidary obligations.

Solidarity and suretyship have grown closer through the ages, but the difference that continues to set them apart is that a surety, contrary to a co-debtor, is not a party to the secured obligation. The laws of solidarity and suretyship both seek a balance between the reasonable interests of all parties involved. Accordingly, there exist many rules and mechanisms common to both solidarity and suretyship. The rules that differ relate to

Where co-promisors agree between themselves that one shall only be liable as surety for the others, the arrangement operates not only between them but also as against the creditor the moment he receives notice of it. Special modes of discharge under the law of suretyship will then come into operation (*ibid.* at 29-30).

Moreover,

[t]he foregoing rules as to suretyship do not apply to ordinary joint or joint and several liability. Notwithstanding the right of contribution, which makes each joint debtor a quasi-surety for the others to the extent of his right of contribution, he is not accorded the special position of a surety in respect of such rules as that concerning the giving of time (*ibid.* at 151).

See also O'Donnovan & Phillips, *supra* note 59 at paras. 1-30.

the idea that a surety, contrary to a co-debtor, is not a party to the principal obligation. That is why the surety may, under certain circumstances, bring his responsibility to an end, why he has certain means of pressuring the debtor who is expected to pay the debt, and why he has a right to be informed by the creditor.

The law has long hesitated to recognize that a debtor may transfer a debt to another without the creditor's consent, whereas the possibility of assigning a claim was admitted much earlier. There are no good reasons to oppose assignment of a debt. There exist safeguards that protect the creditor's legitimate interests, the most important of which is the rule stating that the original debtor is not discharged, but remains responsible in case of non-performance.¹⁷⁸ In the same manner, the *Code* provides that assignment of a claim may not be "injurious to the rights of the debtor or [render] his obligation more onerous."¹⁷⁹ Even so, situations occasionally arise where an assignment reveals itself to be detrimental to the party who has no other choice but to act in accordance with it, such as in the case of a debtor in an assignment of claim or a creditor in a delegation. Still, on the whole, assignment and delegation are exceedingly useful operations, and the law has been relatively successful in facilitating such operations while providing sufficient protection to all parties involved.

Legal evolution is often achieved by taking a fresh look at venerable institutions whose interpretation over time has become thwarted, constricted, or stale. Presumptions established to protect debtors and sureties have prevented jurists from borrowing freely from the rules and remedies of solidarity and suretyship, even in cases where to do so is perfectly legitimate. I hope to have shown that solidarity and suretyship represent valuable models to understand other complex relations and that they may be applied directly or extended by analogy where the law is otherwise incomplete. Over the course of the last century, contractual and legal obligations have become progressively more complex and diversified. Legislatures have extended the scope of obligations beyond the original reach of contract or civil responsibility, with a view to protecting consumers, workers, or victims. Meanwhile, legal practitioners have invented new payment mechanisms, new ways of transferring obligations, and new means of securing them.¹⁸⁰ Yet statutory and contractual schemes are frequently

¹⁷⁸ See art. 1668 C.C.Q.

¹⁷⁹ Art. 1637 C.C.Q.

¹⁸⁰ Maurice Tancelin rightly underlines some of the policy implications of facilitating the transfer of obligations: "*L'avenir dira si cette 'mouvance nouvelle' en matière de 'diversification des formules de financement' n'est pas une des bases de la gigantesque escroquerie du papier commercial adossé à des créances douteuses, qui a déclenché la crise de 2008*" (*supra* note 162 at para. 1318.1 [reference omitted]). Note that the movements he

incomplete. The civil law must engage with such innovations if it is to continue to provide a model and a guide.

describes illustrate the assignment of claims, not delegation. The fact remains that the civil law has not held back such innovations. Yet ignoring their very existence does not provide the parties with the legal protection they require.