CONTRACTS

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I. INTRODUCTION

The following survey of Canadian contract law [1] is focused on decisions reported and legislation passed during the period from January 1, 1968 to June 1, 1969. The survey period has not produced anything which could be considered as a dramatic or a fundamental change of direction in the development of any area of contract law. With a few notable exceptions, Canadian courts continued to display a colonial mentality, and, consequently, little attempt was made to define or develop a body of contract law which would reflect current Canadian economic, social and political conditions. This fact is particularly dismaying when one realizes that, apart from some patchwork legislation passed during this period dealing with consumer credit and sales contracts, [2] Canadian legislators have shown little inclination to assume the task of reforming the many obsolete aspects of the law of contract. [3]

II. FORMATION, EXISTENCE AND ENFORCEABILITY

A. *Lack of Agreement—The Infamous Bank Guarantee Form*

The use of standard form guarantee agreements by banks frequently gives rise to situations where the guarantor is called upon to perform a contractual obligation the existence or extent of which he is unaware. [4] A good example of the type of problem arising out of the use of standard form agreements is the case of *Bank of Nova Scotia v. MacDonald.* [5] In order

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[1] The survey is confined to decisions of courts in common-law jurisdictions and decisions of the Supreme Court in cases on appeal from these courts.

[2] *See, e.g.*, The Consumer Protection Act, Man. Stat. 1969 c. 4 (Bill 12); The Newfoundland Consumer Protection Act, 1969, Nfld. Stat. 1969 No. 36 (Bill 23); Direct Sellers Act, N.S. Stat. 1969 c. 5.

[3] Apparently, Canadians have a much higher opinion of English common law than do the English. See Diamond, *Codification of the Law of Contract*, 31 MODERN L. REV. 361 (1968).

[4] *See also* Hawrish v. Bank of Montreal, [1969] Sup. Ct. 515, 2 D.L.R.3d 600, discussed *infra*; Royal Bank of Canada v. Hale, 30 D.L.R.2d 138 (B.C. Sup. Ct. 1961); Royal Bank of Canada v. Kiska, 63 D.L.R.2d 582 (Ont. 1967).

[5] 69 D.L.R.2d 504 (N.S. County Ct. 1968). Other cases decided during the survey period involving the issue of agreement are: Hyrsky v. Smith, [1969] 2 Ont. 360 (High Ct.); Irving Oil Co. v. Belledune Housing & Enterprises Ltd., 1 N.B.2d 48 (Q.B. 1968); Westerlund v. Ayer, 68 W.W.R. (n.s.) 689 (B.C. 1969); Sturgeons Ltd. v. Municipality of Metropolitan Toronto, 70 D.L.R.2d 20 (Ont. Sup. Ct. 1968); Frank H. Davis of Georgia Inc. v. Raymonier Canada (B.C.) Ltd., 65 W.W.R. (n.s.) 251 (B.C. Sup. Ct. 1968); Karpa v. O'Shea, 3 D.L.R.3d 572 (Alta. 1969).

to get a 500-dollar loan from the plaintiff's Halifax branch, Mrs. Beaton, an infant, was required to obtain a guarantor. She suggested to the manager that her parents, the defendants, who lived in New Glasgow would be willing to guarantee her loan. Since Mrs. Beaton's husband was at the time indebted to the plaintiff in the amount of 1,283 dollars, the plaintiff's manager demanded that a further condition of the loan would be the consolidation of her husband's debt with the 500-dollar loan. However, in explaining the transaction to her parents, Mrs. Beaton inadvertently left them with the impression that they were guaranteeing only the loan to her. The defendants were called into the plaintiff's New Glasgow branch and asked to sign two documents: an application to guarantee under which the defendants applied "to be accepted" as guarantors of a loan for 1,783 dollars to John Beaton and Kathleen Beaton, and a form of promissory note which was blank at the time of signing but which was later filled in by the bank's employees for the amount of 1,783 dollars. The court accepted the evidence of the defendants that they were unaware of the contents of the application to guarantee when they signed it. In an action on the promissory note, the court dismissed the plaintiff's claim on the ground that there was no *consensus ad idem* between the parties as to the terms of the alleged contract of guarantee. Further, the defendants had done nothing to lead the bank to believe they had guaranteed the full amount of the debt. The judge held that the signing of a document prepared by a bank official and containing information which was not given by the MacDonalds and which was not specifically pointed out to them was not sufficient to prevent them from raising the defence that the writing did not embody the terms of the alleged contract as they conceived them.

B. *Capacity—Mechanical Jurisprudence and a Defective Car*

The inadequacy of the common law as it applies to infants' contracts was exemplified in *Coull v. Kolbuc.*[6] The plaintiff, an infant, purchased a used car from the defendant, depositing fifty dollars and taking possession. Two weeks later, the plaintiff sought to avoid the contract and obtain the return of his deposit. The plaintiff testified that the car had shown signs of mechanical weakness within two days of delivery and, after having it checked by experts, he discovered that it needed a new engine. The Alberta District Court concluded that the car could not be classified as a necessary, and, accordingly, the contract was voidable. However, notwithstanding the fact that the plaintiff returned the car, the court refused the plaintiff's claim for the return of the deposit since the plaintiff had derived some advantage from the contract: clear title to the car, the right to drive it, and to deal with it or to dispose of it as he saw fit. Unfortunately, the court unquestioningly followed the English common-law rule that an infant cannot avoid retroactively a voidable contract and obtain the return of consideration he had transferred under it unless the contract is totally executory on the other

[6] 68 W.W.R. (n.s.) 76 (Alta. Dist. Ct. 1969).

side.[7] If the judicial reluctance to allow the recovery of money paid by an infant under a contract is based upon fear of prejudice to the other party, attention should be directed to the possibility of restitution rather than merely the presence or absence of some consideration passing to the infant. If, as in this case, the other party can be placed in his pre-contract position, surely the underlying principle of protection of infants from improvident contractual arrangements demands that a court assume jurisdiction to award the return of consideration transferred by the infant under the contract.[8]

C. *Equitable Fraud*

During the survey period, the valid formation and existence of enforceable contracts was questioned in three cases in the light of the principles of equitable fraud. In *Knupp v. Bell*,[9] the Saskatchewan Court of Appeal set aside a contract for the sale of land on the ground that its enforcement either specifically or through a judgment in damages would produce an unconscionable result. The defendant seller was an eighty-five-year-old woman frequently disoriented as to time, somewhat senile and without any business experience or knowledge as to the value of farm land. In addition, it was established that she was easily led by her family, by friends and by persons in whom she had confidence. The plaintiff buyer was sixty years of age and, by his own testimony at trial, indicated that he was aware of the value of land in the district. He was a long-time neighbour and friend of the defendant and her late husband. According to evidence given by the plaintiff, he saw the defendant sometime in September, 1963, at which time he repeated an earlier expressed desire to purchase the land. The matter was discussed later that month, but no price was set. On October 2, the plaintiff asked the defendant to name a price and he suggested thirty-five, forty or fifty dollars per acre. In reply, the defendant said that she would not accept any more than thirty-five dollars per acre from him. The parties immediately had the necessary documents prepared by a real estate agent known to both of them, although there was no evidence that the defendant received advice from the agent or anyone else prior to entering into the agreement. The court accepted the trial court finding that the price of thirty-five dollars per acre was considerably less than a neighbour might be expected to pay in the circumstances. Evidence given at the trial established that another neighbour would have been willing to pay sixty-five dollars per acre for the land. The lower court decision to set aside the agreement was affirmed by the Saskatchewan Court of Appeal notwithstanding the evidence of the defendant that at the time of

[7] Steinberg v. Scala (Leeds), Ltd., [1923] 2 Ch. 452 (C.A.); Chaplin v. Leslie Frewin (Publishers) Ltd., [1966] 1 Ch. 71 (C.A.). Apparently there is some question as to whether or not this rule applies to the transfer of property other than money. See CHESHIRE AND FIFOOT, THE LAW OF CONTRACT 376-77 (7th ed. 1969).

[8] There is some judicial support for this position. *See* Sturgeon v. Starr, 17 West. L.R. 402 (Man. Q.B. 1911); La Fayette v. W.W. Distributors & Co., 51 W.W.R. (n.s.) 685 (Sask. Dist. Ct. 1965). *See also* REPORT OF THE COMMITTEE ON AGE OF MAJORITY (Malony Report), July 1967, CMND. 3342, at 83.

[9] 67 D.L.R.2d 256 (Sask. 1968).

the sale she intended to sell the land to the plaintiff, that there was no misrepresentation by the plaintiff as to the value of the land, and that it was only as a result of pressure by her children that she decided not to perform the contract. The court exercised its equitable jurisdiction in order to set aside the agreement on the ground that the dominant party had taken an unconscionable advantage of the weaker party to the contract. Citing with approval the judgment of Mr. Justice Davies of the British Columbia Court of Appeal in *Morrison v. Coast Finance Ltd.*,[10] the court recognized the distinction between jurisdiction to set aside an agreement on the ground of unconscionability and jurisdiction to set aside an agreement on the ground of undue influence.

The same equitable principles were applied in *Marshall v. Canada Permanent Trust Co.*[11] by Mr. Justice Kirby of the Alberta Supreme Court, Trial Division. In this case, the plaintiff purchaser, who had considerable business experience and who was well acquainted with the value of the land, was refused an order for specific performance of an agreement under which he purchased land for a price approximately one-half of its market value from the defendant, a sixty-eight year-old man who, prior to the sale, had suffered a stroke which impaired his ability to think, rationalize and speak. As in *Knupp v. Bell*, there was no evidence of a fiduciary relationship between the parties on which to base a finding of undue influence in the formation of the contract. However, unlike the decision in *Knupp v. Bell*, the court found that the plaintiff was unaware of the defendant's incapacity to appreciate fully the transaction and to protect himself. Without citing any authority, Mr. Justice Kirby concluded that knowledge on the part of the dominant party of the weakness of the other party is not an element of this category of equitable fraud. This point is not as free from doubt as the judge seems to have thought.[12]

The third case in which equitable fraud was the ground upon which a contract was set aside is *Mundinger v. Mundinger*.[13] The plaintiff, wife of the defendant, sought to have a separation agreement and a conveyance of land set aside on the ground that she had been induced to execute the documents involved through the husband's fraud, threats, duress and undue influence. The evidence accepted by the court established that shortly before the contract in question was executed, the wife had spent one month in hospital recovering from a nervous breakdown induced by the defendant's maltreatment of her and his adulterous relation with another woman. The defendant had demanded a separation agreement while the plaintiff was in hospital, and he presented her with a form of separation agreement for her acceptance as soon as she returned home. The plaintiff did not sign the agreement immediately but, contrary to the expressed wishes of the

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[10] 55 D.L.R.2d 710, at 713 (B.C. 1965).

[11] 69 D.L.R.2d 260 (Alta. Sup. Ct. 1968).

[12] *See, e.g.*, Wilson v. The King, [1938] Sup. Ct. 317, [1938] 3 D.L.R. 433; L. SHERIDAN, FRAUD IN EQUITY 75-78 (1956).

[13] 3 D.L.R.3d 338 (Ont. 1968).

defendant, consulted a solicitor who advised her against signing it and who made a counterproposal to the defendant on her behalf. When the defendant learned of the proposed terms, he flew into a violent rage, addressed the plaintiff in "an abominable and threatening manner" and again advised her against seeking further assistance from the solicitor. Shortly thereafter, while the plaintiff was under the influence of brandy (given to her by the defendant), tranquilizers and sedatives, she signed a separation agreement identical to the one initially proposed by the defendant with the exception that the compensation to her for her surrender of her property rights was doubled. The court found that the compensation was grossly disproportionate to the value of the property surrendered by the plaintiff under the agreement. Expert medical evidence accepted by the court established that at the time of signing the agreement the plaintiff was not in a mental condition to exercise proper judgment affecting her property rights.

The court ordered the agreement and conveyance set aside on the grounds that the defendant was in a position of dominance and control over the plaintiff, and that he had taken full advantage by exercising undue influence upon her to enter into the improvident transaction. It is clear that the court based its jurisdiction to set aside the transaction on the well-established power of a court of equity to set aside transactions of undue influence.[14] However, it is difficult to find in the facts of the case evidence of any special relationship between the plaintiff and the defendant out of which the fiduciary obligation basic to the concept of undue influence could arise.[15] The facts, however, do support a finding of unconscionability arising out of the advantage taken by the husband of his wife when she was weak and ill.[16] Accordingly, the case falls in line with *Knupp v. Bell* and *Marshall v. Canada Permanent Trust Co.* rather than those cases based on the undue influence category of equitable fraud.

D. *The Statute of Frauds—Like Death and Taxes*

The period under examination produced the usual number of unsatisfactory Statute of Frauds decisions. The Supreme Court case of *Brownscombe v. Public Trustee*[17] arose out of a contractual arrangement commonly encountered in the prairie provinces. The plaintiff as a young man came to work for Vercamert on his farm in Alberta in 1932. For thirteen years, he worked as an employee for very little wages and, for an additional thirteen years, he farmed the land on a fifty per cent crop share basis. The trial court found that on a number of occasions when the plaintiff thought of leaving

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[14] The court followed Vanzant v. Coates, 40 Ont. L.R. 556, 39 D.L.R. 485 (1917).

[15] It is established that there is no presumption of undue influence in a husband and wife relationship. See L. SHERIDAN, *supra* note 12, at 96.

[16] Indeed, the court cites with approval Crawford, Comment, 44 CAN. B. REV. 142 (1966), a case comment and discussion of the elements of the concept of unconscionability.

[17] [1969] Sup. Ct. 658, 68 W.W.R. (n.s.) 483. *See also* Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd., 3 D.L.R.3d 630 (Alta. 1969).

Vercamert's employ, he was persuaded to remain by Vercamert's promise and assurance that on his death the farm would pass to the plaintiff. Evidence of this arrangement was corroborated by four witnesses, all of whom testified that they had heard Vercamert say that upon his death the plaintiff would get the farm. During the period when the plaintiff farmed the land on a crop share basis, he built a house on the land at his own expense. Vercamert died intestate, and the plaintiff brought action against the Public Trustee of Alberta seeking an order for specific performance of the oral agreement. The Public Trustee raised as a defence to the action the Statute of Frauds since the contract involved a sale of an interest in land within the meaning of section 4 of the Statute. The Supreme Court reversed the decision of the Alberta Supreme Court, Appellate Division, and restored the trial court's decision which held that there were sufficient acts of part performance of the agreement to circumvent the Statute of Frauds. In particular, the construction of the house on the farm land in question amounted to such acts. [18] Mr. Justice Hall pointed out that the house was built at the request of Vercamert and on this basis he must have concluded it was part of the agreement.

While the Supreme Court decision is based on an interpretation of fact and for this reason the case is of no great significance, it is a further example of the ridiculous results produced by the Statute of Frauds. At no time were any of the courts hearing the case in doubt as to the existence of an agreement between the plaintiff and Vercamert. Accordingly, it was not a case where the Statute had the desired effect of allowing the court to avoid the problem of determining the existence of a contract. It was a case where the Statute produced the undesirable result of forcing the court to rely on the obviously difficult doctrine of part performance in order to be able to enforce an agreement the existence of which was without doubt established by reliable and admissible evidence.

E. *Illegality—Restraint of Trade*

The legality of restraint of trade covenants in employment contracts was an issue in two appellate level decisions in 1968. In *E. P. Chester Ltd. v. Mastorkis*, [19] the Nova Scotia Supreme Court, Appeal Division, ruled on the validity of a covenant in an employment contract between a wholesale supplier of a line of goods sold to drugstores in the Atlantic provinces and

[18] While there is no published report of the trial judge's decision, large portions of it are reproduced in the judgment of Mr. Justice McDermid of the Alberta Supreme Court, Appellate Division, 64 W.W.R. (n.s.) 559 (1968). The trial judge concluded that building the house constituted acts which "were necessarily related to the interest in the land which he [the plaintiff] now claims, besides being necessarily related to the contract under which he claims it." *Id.* at 563. On the other hand, Mr. Justice McDermid concluded: "The respondent was in possession of the farm under a lease and as a tenant. I do not see how in the circumstances the building of the house could have been considered to have been done under the terms of a contract that the respondent was to work for the deceased and be left the farm." *Id.* at 565.

[19] 70 D.L.R.2d 133 (N.S. 1968).

its salesman in that region. The covenant provided that the defendant salesman, after leaving the employment of the plaintiff, would not "for a period of two years . . . directly or indirectly own, manage, operate, join, control, be employed or participate in the management, operation or control of or be connected in any manner with any business carried on in the Atlantic provinces in competition with that presently carried on by Chester . . . ." [20] The agreement further provided that the plaintiff was entitled to terminate the employment contract with the defendant "[i]f the employee either directly or indirectly sells and distributes in competition to Chester any merchandise or wares which as of the date of this Contract are being sold and distributed by Chester in the Atlantic Provinces and without limiting the generality of the foregoing shall include baby products, nylon hosiery, rubber gloves, swim caps, plastic cosmetic bags and stationery." [21] The defendant resigned after nearly three successful years as salesman for the plaintiff and established a company in competition with the plaintiff.

The court was able to give effect to the clauses, notwithstanding their very wide scope, by accepting the evidence of the plaintiff as establishing that the parties intended the clauses to have a much narrower scope than they appeared by their terms to have. Obviously, the court did not cite authority to justify this approach. In addition, the court adopted the lower court decision to sever "the province of Newfoundland" from the words "the Atlantic Provinces" and in doing so purported to follow the directions of Lord Justice Younger in *Attwood v. Lamont* [22] as to when severance is permissible.

By way of contrast, the Manitoba Court of Appeal decision in *T. S. Taylor Machinery Co. v. Biggar* [23] is much more in line with the judicially established approach to restraint of trade covenants in employment contracts. The covenant which was attacked as illegal provided that upon termination of his employment with the plaintiff, the defendant, a sales manager and director of the plaintiff company, would not within five years

> a) work in any capacity whatsoever in any province in Canada where the company is transacting business for either
> i) any of the company's principals, or
> ii) any other person, firm or company that the company has had during the term written negotiations to act as agents for;
> b) within Alberta, Saskatchewan, Manitoba and Ontario.
> i) sell, handle or deal in any of the lines,
> ii) carry on or be concerned or interested in carrying on any business similar to the business carried on by the company during the term;
> . . . . [24]

Adopting the conventional approach to such clauses, Mr. Justice Dickson determined whether or not the plaintiff had a legitimate interest to protect. After concluding that the plaintiff did, he then proceeded to determine whether

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[20] *Id.* at 135.
[21] *Id.*
[22] [1920] 3 K.B. 571, [1920] All E.R. 55 (C.A.).
[23] 2 D.L.R.3d 281 (Man. 1968).
[24] *Id.* at 282.

or not the restrictive covenant was wider than was necessary to protect that interest. The court found that the clause was much wider than necessary, ruling that it was unreasonable and therefore unenforceable. On the issue of severance, the court, while avoiding any direct rejection of the approach taken in *Chester*, held that the conditions under which severance will be permitted in an employer-employee agreement are strictly limited. The severed parts must be independent of one another; the excess to be severed must not be part of the main purport of the clause. Severance was not possible in the case because it would involve the court in rewriting the covenant and this is something which it cannot do.

It is difficult to see how these cases can stand together. In view of the abundance of established authority on the point as well as the important public policy considerations involved, the vast majority of Canadian courts are likely to treat *Chester* as an isolated and unacceptable relaxation of the traditionally hostile judicial attitude toward such clauses. [25]

F. *Privity of Contract—A Case of Confused Remedies*

The major redefinition of the rights of parties to a contract conferring benefits on third parties set out by the House of Lords in *Beswick v. Beswick* [26] was adopted as the basis for relief given to the plaintiff in the Ontario High Court decision of *Sears v. Tanenbaum*. [27] The case involved an action for breach of a contract which provided for the payment of sales commissions to Sydney Sears Real Estate Ltd., a company wholly owned by the plaintiff. The contract before the court was the basic document in a residential land development scheme undertaken by Sears, Tanenbaum and three others. The agreement provided for the incorporation of a development company and the payment of this company to Sydney Sears Real Estate Ltd. of a commission of fifty dollars on each lot sold in the development. However, Sydney Sears Real Estate Ltd. was only a third party beneficiary of the agreement. The development company, Downsview Meadows Ltd., was formed, and, after some initial delays, the development project went ahead and was a financial success. A large number of lots in the development were sold, but no payments on account of the commissions were ever made to Sydney Sears Real Estate Ltd. Mr. Justice Stark concluded that the action essentially resolved itself into a claim made by Sydney Sears in his personal capacity against Tanenbaum in his personal capacity since Tanenbaum had predominate control over the entire scheme. The court ruled that Tanenbaum was in breach of the commission clause in the agreement. However, counsel for Tanenbaum argued that since Sydney Sears had brought the action in his personal capacity, he was not entitled to succeed because he had

[25] For other restraint of trade cases handed down during the survey period, *see* Reliance Cordage Co. v. Hetterly, 5 D.L.R.3d 297 (Sask. Q.B. 1969); Taylor v. McQuilkin, 2 D.L.R.3d 463 (Man. Q.B. 1968); K.M.A. Caterers Ltd. v. Howie, 1 D.L.R.3d 558 (Ont 1968) (consideration supporting covenant was in issue).

[26] [1968] A.C. 58, [1967] 2 All E.R. 1197 (1967).

[27] [1968] 2 Ont. 582, 70 D.L.R.2d 126 (High Ct.).

not suffered any loss himself. Quoting with approval the statement of Lord Hodson in *Beswick* that "[i]t is not part of the law that in order to sue on a contract one must establish that it is in one's interest to do so," [28] the court concluded that Sears had a right to insist on the contract being carried out. However, since Tanenbaum no longer controlled Downsview Meadows Ltd., it was impossible to order specific performance of the agreement, and it was necessary for the court to give a remedy in damages to Sears. Mr. Justice Stark concluded: "Therefore, as in the *Beswick* case this is a proper situation for the alternative relief by way of damages in the sum of $24,200 [the amount payable to Sydney Sears Real Estate Ltd. under the contract]. These damages should be payable by the defendant Max Tanenbaum to the plaintiff Sydney Sears in trust for Sydney Sears Real Estate Ltd." [29]

This decision departs in two respects from the position taken in the House of Lords in *Beswick*. In the first place, the House ordered specific performance of the agreement before them because damages would not be adequate. [30] Mr. Justice Stark seems to have concluded that since specific performance was not available, he was entitled under the *Beswick* approach to give judgment in damages in an amount equal to what would have been recovered if specific performance could have been ordered. [31] In the second place, Mr. Justice Stark seems to have interpreted *Beswick* as establishing the proposition that the contractor who seeks enforcement of the contract is acting on behalf of a third party and, accordingly, is entitled to a measure of damages equivalent to the loss suffered by the third party, and that these damages must be held in trust for the third party. This would be the proper approach only if the contractor was trustee for the third party. The House of Lords in *Beswick* leaves no doubt that unless there is a trust relationship, the defaulting party must pay damages to the other party in his own right and in an amount equal to his losses, not those of the third party. [32] The amount awarded the plaintiff may have been proper if his actual damages were equal to the amount payable to Sydney Sears Real Estate Ltd. as a result of the fact that he was the sole owner of the company. However, it is unlikely that the court considered the point important since it ordered the amount to be held in trust for the company.

G. *Equitable Estoppel*

The now well-established principle of equitable estoppel [33] was applied in *Weyburn Securities Co. v. Sohio Petroleum Co.*, [34] a Saskatchewan Court

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[28] [1968] A.C. at 82, [1967] 2 All E.R. at 1208.

[29] [1968] 2 Ont. at 589, 70 D.L.R.2d at 133.

[30] [1968] A.C. at 77-78 (Lord Reid); *id.* at 81 (Lord Hodson); *id.* at 88-90 (Lord Pearce); *id.* at 101-02 (Lord Upjohn); [1967] 2 All E.R. at 1205 (Lord Reid); *id.* at 1207 (Lord Hodson); *id.* at 1212-14 (Lord Pearce); *id.* at 1221 (Lord Upjohn).

[31] See Kidner, Comment, 33 SASK. L. REV. 293 (1968).

[32] [1968] A.C. at 73 (Lord Reid); *id.* at 88 (Lord Pearce); [1967] 2 All E.R. at 1202 (Lord Reid); *id.* at 1212 (Lord Pearce).

[33] *See* Conwest Exploration Co. v. Letain, [1964] Sup. Ct. 20, 41 D.L.R.2d 198.

[34] 66 W.W.R. (n.s.) 155 (Sask. Q.B. 1968).

of Queen's Bench decision, in order to extend the contractual provisions of an expired petroleum and natural gas lease. In an action by the plaintiff for a declaration that the lease had terminated and an order against the defendant for possession and accounting, Mr. Justice MacPherson held that the plaintiff, by its demands that the defendant perform in accordance with the provisions of the lease, represented to the defendant that it considered the lease to be in force. He found that the defendant had relied on these representations and had acted to its detriment by rendering the demanded performance just as though the lease had not expired. In reply to argument that the plaintiff in making the demands was acting under a mistaken assumption that the lease was still in force, Mr. Justice MacPherson concluded on the authorities of *Pickard v. Sears*[35] and *Freeman v. Cooke*[36] that "for estoppel to apply on the facts at hand, it is not necessary for the defendants to prove that the plaintiff knew the lease to have terminated for failure to produce before the end of the 10 year term."[37] Although the point was raised by counsel for the plaintiff, there was no finding of fact as to the motivation behind the defendant's actions. Mr. Justice MacPherson found that the defendant would not have acted had it not been for the demands of the plaintiff. However, he neglected to extend the inquiry further in order to determine whether the defendant acted because it thought that the plaintiff was promising through its demands to extend the lease or because it thought that the plaintiff had a contractual right to the performance it demanded. If the defendant acted throughout on the mistaken assumption that the lease was still in effect, it is very unlikely that it relied on representations as to the plaintiff's intentions with respect to the expired lease since it would have no reason to do so thinking it was contractually bound to act.[38]

Even if it is accepted that the defendant acted in reliance on the plaintiff's representation that it intended to treat contract rights under the expired lease as continuing to exist, the decision amounts to a departure from established authority on the nature of equitable estoppel in Canada and is an expansion of the scope of the concept, bringing it closer to the kind of estoppel contemplated by section 90 of the American Law Institute's *Restatement of Contracts*.[39] The plaintiff's representation came at a time when the contractual relationship between the parties had ceased. Accordingly, these representations could not have misled the defendant into believing that

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[35] 6 Ad. & E. 469, 112 Eng. Rep. 179 (K.B. 1837).

[36] 2 Ex. 654, 154 Eng. Rep. 652 (1848).

[37] *Supra* note 34, at 162.

[38] The decision was reversed on this issue in an appeal to the Saskatchewan Court of Appeal. *See* 69 W.W.R. (n.s.) 680 (1969).

[39] RESTATEMENT OF CONTRACTS § 90 (1932):

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

See also the dubious cases of Reitmeir v. Exner, 68 W.W.R. (n.s.) 16 (Sask. Q.B. 1969) and La Caisse Populaire Notre Dame Ltee. v. Moyen, 59 W.W.R. (n.s.) 129 (Sask. Q.B. 1967).

the plaintiff would not insist on strict performance of the contract between them since no contract existed. Viewed in this light, the estoppel arose out of representations other than those referrable to existing primary or secondary contractual rights. The estoppel resulted in a new contract which was not supported by consideration. There is authority for the application of estoppel to prevent one party from going back on his promise not to treat the other party as being in breach even though at the time of the promise the promisor is entitled to repudiate the contract.[40] However, in these cases, the representations were interpreted as promises not to exercise the rights arising from the breach, rights which would be recognized only when claimed. In addition, there is authority for applying estoppel in a case where the representations are made before the automatic termination of the contract.[41] However, in *Weyburn Securities*, the lease terminated automatically without any affirmative steps on the part of either party and before the representations of the plaintiff were made. Accordingly, these representations could be seen only as a promise to create a new contract on terms identical to those contained in the expired lease.

During the past year, the Supreme Court of Canada had a second opportunity to deal with the doctrine of equitable estoppel in *John Burrows Ltd. v. Subsurface Surveys Ltd.*[42] In this case, the defendant pleaded estoppel as a defence to an action arising out of a sales contract in which it agreed to pay to the plaintiff 42,000 dollars with six per cent interest by instalments over a period of nine years and ten months. The agreement contained a clause under which the obligation would be accelerated if there was default in any of the payments. In fact, eleven payments were accepted more than ten days after they were due and no complaint was made by the plaintiff. However, when the twelfth payment was thirty-six days overdue, the plaintiff elected to exercise the power of acceleration and demanded payment of the entire balance owing under the agreement. Mr. Justice Ritchie, in giving judgment for the Court, reversed the majority decision of the New Brunswick Court of Appeal by rejecting the defence based on estoppel. The Court attempted to distinguish "mere indulgences" from proper cases for the application of the doctrine of estoppel by placing a great deal of emphasis on the intention of the representor to alter legal relations created by the contract. However, the Court indicated that the test is not one of subjective intention on the part of the representor but rather the reasonable inferences to be drawn from his conduct. A comparison of the finding in *Conwest Exploration Co. v. Letain*[43] and that in *John Burrows* leaves one with the conclusion that there is a very small degree of predictability as to what amounts to a sufficient representation to give rise to equitable estoppel.

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[40] *See* Conwest Exploration Co. v. Letain, *supra* note 33; Hartley v. Hymans, [1920] 3 K.B. 475; Panoutsos v. Raymond Hadley Corp., [1917] 2 K.B. 473 (C.A.).

[41] *See* Bruner v. Moore, [1904] 1 Ch. 305 (1903).

[42] [1968] Sup. Ct. 607, 68 D.L.R.2d 354.

[43] *Supra* note 33.

III. The Terms and Content of Contracts

A. *Collateral Contracts—The Credulous Lawyer*

If there is any doubt in Canada as to whether or not a collateral contract can co-exist with a primary written contract [44] which is inconsistent with it, this doubt was removed in the Supreme Court decision in *Hawrish v. Bank of Montreal.* [45] The defendant, Hawrish, a senior solicitor in Saskatoon, executed a guarantee to the plaintiff covering loans to a small dairy company of which he was a shareholder. Although the guarantee applied to existing and future indebtedness of the company to the bank in the amount of 6,000 dollars, the defendant gave uncontradicted evidence that before he signed it he was given oral assurance of an assistant manager of the plaintiff's branch bank that he would be released from the guarantee when the bank obtained a joint guarantee from the directors of the company. He admitted that he did not bother to read the guarantee agreement at the time he signed it. An additional guarantee for 10,000 dollars was obtained from the directors of the company, but when the company defaulted an action was brought against the defendant on his guarantee. By way of defence, the defendant sought to establish a collateral contract arising out of the oral representations made by the assistant manager. The Supreme Court rejected the argument holding that a collateral contract based on representations made prior to the guarantee contract could not be recognized, since the terms of the collateral contract would conflict with the guarantee which clearly covered present and future debts and liabilities of the company and which cited the guarantor's acknowledgement that no representations had been made to him on behalf of the bank; that the liability of the guarantor is embraced in the agreement; that the guarantee has nothing to do with any other guarantee; and that the guarantor intended the guarantee to be binding whether any other guarantee or security was given to the bank or not. The Court refused to employ the judicial ingenuity which has been used in other cases to protect naive and credulous persons like the defendant. [46] In addition, the Supreme Court ignored a well-established line of authority recognized by the trial judge which has refused to enforce provisions of written contracts, the contents or existence of which has been misrepresented by a plaintiff with the result that a defendant has misunderstood his rights and obligations under the contract. [47]

It is interesting to speculate whether or not the Court would have taken a similarly harsh attitude toward these defences if the defendant had been someone without expert knowledge of guarantee contracts or someone with little education who would be more inclined to rely on representations of a

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[44] *See* Wedderburn, *Collateral Contracts*, [1959] Camb. L.J. 58, at 81-84.

[45] [1969] Sup Ct. 515, 2 D.L.R.3d 600.

[46] *See, e.g.*, Webster v. Higgin, [1948] 2 All E.R. 127 (C.A.); Francis v. Trans-Canada Trailer Sales Ltd., 69 W.W.R. (n.s.) 748 (Sask. 1969).

[47] *See* Royal Bank of Canada v. Hale, 30 D.L.R.2d 138 (B.C. Sup. Ct. 1961); Curtis v. Chemical Cleaning & Dyeing Co., [1951] 1 All E.R. 631 (C.A.). See Waddams, Comment, 47 Can. B. Rev. 505 (1969).

person in a position like that of the plaintiff's branch manager. If this factor is ignored and the decision on these points is taken at face value, two important avenues of relief against the rigors and injustices which frequently result from a strict application of the parol evidence rule will be substantially narrowed, thus making it imperative that the legislature take the necessary steps to protect those who are inclined to believe what they are told by retail sellers and credit grantors (including bank employees), and those who sign the standard form contract assuming it does not contain additional or excluding provisions. [48]

B. *Fundamentalism*

Likely the most significant factor in the development of contract law in England and Canada in recent years is the popularity of the concept of fundamentalism as a device for nullifying the effect of exclusion clauses in contracts. Notwithstanding the protracted discussion of the concept by the House of Lords in *Suisse Atlantique Société d'Armement S.A. v. N.V. Rotterdamsche Kolen Centrale*, [49] it remains substantially undefined. Although fundamentalism was a basis of the judgment of Mr. Justice Wilson of the Ontario High Court in *R. G. McLean Ltd. v. Canadian Vickers Ltd.*, [50] the the case does little to clarify the many doubtful aspects of the concept. [51] The conditional sales contract on which the plaintiff's action for breach of warranty was based involved the sale of a sophisticated printing press by the defendant to the plaintiff for the price of 72,650 dollars. Mr. Justice Wilson found that the machine which was delivered by the seller "did not come up to specifications. It (has) never operated as anticipated by both the vendor and the purchaser on any proper commercial basis for the production of very high quality lithographic offset prints . . . . " [52] The contract contained a standard "warranty" clause under which the seller agreed to replace and repair defective materials and workmanship in the machine within a twelve-month period from the date of delivery if the buyer paid the costs of transportation of the defective parts to the seller's plant and back. The contract further provided that this warranty "is in substitution for and excludes all express conditions, warranties or liabilities of any kind relating to the goods sold whether as to fitness or otherwise and whether arising under the Sale of Goods Act, 1893, or other statute or in tort or by implication of law or otherwise. In no event shall we be liable for any direct or indirect loss or damage (whether special, consequential or otherwise) or any other claims except as provided for in these conditions." [53] Purporting to apply the

[48] *See also* Canadian Imperial Bank of Commerce v. Wilcox, 68 W.W.R. (n.s.) 710 (Sask. Q.B. 1969).

[49] [1967] 1 A.C. 361.

[50] 5 D.L.R.3d 100 (Ont. High Ct. 1969).

[51] In any event, the proper law of the contract was, by the choice of the parties, English, and technically, the decision does not purport to be an application of Ontario contract law.

[52] *Supra* note 50, at 104.

[53] *Id.* at 107.

"law as . . . laid down in *Suisse Atlantique*," [54] Mr. Justice Wilson held that the exclusion clause did not protect the defendant from a breach "so serious a nature in this case that for commercial purposes there was a breach of condition which the plaintiff has treated as a breach of warranty." [55] The court apparently did not consider it relevant to inquire into the circumstances leading up to the formation of the contract. Indeed, it is difficult to find in the facts any basis for concluding that the plaintiff was in any worse position than the defendant in determining the extent to which the exclusion clause purported to affect its rights to complain about defective performance by the seller. The plaintiff surely was able to retain competent counsel to advise it as to the effect of the contract. While fundamentalism is not based on any concept of fairness in contractual dealings, [56] it is based on the presumed intentions of the parties at the time of making of the contract as to the kind and quality of performance intended under the contract. In view of the ruling of the court, it is difficult to determine how parties who want to contract on the basis that the seller's liability for defective performance is limited to replacing defective workmanship and materials can word their contracts. Further, the court drew no distinction between that part of the exclusion clause purporting to affect primary contractual obligations (that is, the supply of a workable printing press), which was very much like the usual type of exclusion clause courts have been reluctant to recognize as operative, and that part of the clause purporting to limit substitutional contract rights. The latter part of the clause is clear and unequivocal. Since the plaintiff elected not to repudiate the contract, it is difficult to distinguish this aspect of the case from the corresponding aspect of *Suisse Atlantique* with respect to which Lord Reid made the following comment:

> It is impossible to hold that these words [limitation of liability clause] are not wide enough to apply to the circumstances of the present case, whether or not there was a fundamental breach. So the only question is whether there is any reason for limiting their scope. The authorities are against the appellants, but, even putting them aside, I can find no such reason. The appellants chose to agree to what they now say was an inadequate sum for demurrage, but that does not appear to me to affect the construction of this clause. Even if one assumes that the $1,000 per day was inadequate and was known to both parties to be inadequate when the contract was made, I do not think that it can be said that giving to the clause its natural meaning could lead to an absurdity or could defeat the main object of the contract or could for any other reason justify cutting down its scope. If there was a fundamental breach the appellants elected that the contract should continue and they did so in the knowledge that this clause would continue. [57]

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[54] *Id.* at 108.
[55] *Id.* at 111.
[56] *See* the *Suisse Atlantique* case, *supra* note 49, at 406-07 (Lord Reid).
[57] *Id.* at 407.

IV. Remedies for Breach of Contract

A. *Damages for Default Under a Chattel Lease*

Two decisions handed down during the survey period which deal with the issue of damages recoverable by a lessor of goods upon termination of the lease for default by the lessee have placed difficulties in the path of the rapidly expanding chattel leasing business in Canada. In *Canadian Acceptance Corp. v. Regent Park Butcher Shop Ltd.* [58] and *Pacific Leasing Corp. v. Fire Valley Land & Cattle Co.*, [59] the Manitoba Court of Appeal and Mr. Justice Seaton of the British Columbia Supreme Court, respectively, held that the measure of damages recoverable by the lessor, when the lease was terminated at his election as a result of the lessee's default, was the amount of arrears owing up to the date of termination plus incidental expenses of repossession. The basis of this conclusion is that the lessor is entitled to recover for default of the lessee, and the only default that is possible is that occurring prior to the termination of the lease by the lessor. [60] Both decisions recognize that a different rule may apply if the termination was as a result of expressed or implied repudiation of the contract by the lessee. [61] Necessarily incidental to the conclusion in these cases is the finding that the acceleration clauses usually found in chattel leases amount to a penalty and are not a genuine pre-estimate of damages suffered by the lessor. [62] These decisions may have the result of forcing the chattel leasing industry to bring periodic rental payments in line with the depreciation rate of the chattel leased rather than calculating them on the basis that they amount to repayment of the equivalent of the purchase price of the chattel.

B. *Repudiation—Mitigation of Damages*

The troublesome decision of the House of Lords in *White & Carter (Councils), Ltd. v. McGregor*, [63] which established the rule that when one party to a contract has wrongfully repudiated the contract, the innocent party is entitled to continue performing his obligations under the contract and in so doing incur expenses which are recoverable in a damage action, [64]

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[58] 3 D.L.R.3d 304 (Man. 1969).

[59] 68 W.W.R. (n.s.) 411 (B.C. Sup. Ct. 1969).

[60] The same rule applies to a lease of land and premises. *See* Highway Properties Ltd. v. Kelly, Douglas & Co., 66 W.W.R. (n.s.) 705 (B.C. 1968).

[61] *See* Associated Distrib. Ltd. v. Hall, [1938] 2 K.B. 83 (C.A.); Bridge v. Campbell Discount Co., [1962] A.C. 600, [1962] 1 All E.R. 385.

[62] *See* Bridge v. Campbell Discount Co., [1962] A.C. 600, [1962] 1 All E.R. 385. For a criticism of the English authorities on this point, see Ziegel, *The Minimum Payment Clause Muddle*, [1964] Camb. L.J. 108. *See also* Charterhouse Leasing Corp. v. Sanmac Holdings Ltd., 57 W.W.R. (n.s.) 615 (Alta. Sup. Ct. 1966).

[63] [1962] A.C. 413, [1961] 3 All E.R. 1178 (1961).

[64] The principle does not apply to employment contracts. *See* Denmark Prods. Ltd. v. Boscobel Prods. Ltd., [1968] 3 All E.R. 513 (C.A.). It does, however, apply to a lease of land and premises. *See* Highway Properties Ltd. v. Kelly, Douglas & Co., 66 W.W.R. (n.s.) 705 (B.C. 1968).

was considered by the Ontario Court of Appeal in *Finelli v. Dee.*[65] In this case, the plaintiff contracted to pave the defendant's home driveway. The contract did not fix a particular time for commencement of the work. Shortly thereafter, the defendant called the plaintiff and sought to cancel the contract. While argument was presented by counsel on the issue as to whether or not there had been a valid recision of the contract, Mr. Justice Laskin held that it was unnecessary for him to rule on this issue. While the defendant was away from home, the plaintiff entered upon his property and completed the paving. The primary issue upon which the court directed its attention centered on the applicability of the principles set out in *White & Carter.* In a curiously worded oral judgment, Mr. Justice Laskin held that the plaintiffs were not entitled to judgment for the contract amount since they were required to give to the defendant notice of their intention to commence the work, and this they had not done. Further, in order for the plaintiff to perform under the contract, it was necessary for them to obtain the co-operation of the defendant in the form of permission to come on to his land. The court held that where this is necessary, the *White & Carter* principle does not apply.[66] During the course of his decision, Mr. Justice Laskin stated that he was "attracted by the reasons of the two dissenting members of the Court"[67] in the *White & Carter* case who held that the obligation to mitigate damages required that a party to a contract who has been notified of the other party's unjustified repudiation of his contractual obligations is not entitled to continue performance and thereby inflate his loss and aggravate the damages.[68]

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[65] [1968] 1 Ont. 676, 67 D.L.R.2d 393.

[66] *See* White & Carter (Councils), Ltd. v. McGregor, *supra* note 63, at 429-30, [1961] 3 All E.R. at 1182 (Lord Reid).

[67] [1968] 1 Ont. at 678, 67 D.L.R.2d at 395.

[68] *Compare* American Law Institute, RESTATEMENT OF CONTRACTS § 338, Comment (c) (1932):

> After an anticipatory breach is known to the injured party, just as in the case of other kinds of breach, the damages that will be awarded are limited by the rule as to avoidable harm (see § 336). He is not permitted, merely because the breach is anticipatory, to enhance his damages by unreasonably continuing his own performance or unreasonably omitting action that would prevent harm.

See also Goodhart, *Measure of Damages When a Contract is Repudiated,* 78 L.Q.R. 262 (1962); Nienaber, *The Effect of Anticipatory Repudiation: Principle and Policy,* [1962] CAMB. L.J. 213.