CONTRACTS

*Ronald C. C. Cuming**

I. INTRODUCTION

The following survey of Canadian contract law [1] focuses on legislation passed and interesting or important decisions reported during the period June 1, 1969 to December 31, 1970. If it can be said that any one aspect of contract law stands out as having created the most difficulty for the courts during the period surveyed, that aspect is the regulation of the rights of parties to standard form sales and lease contracts which contain exclusion or exemption clauses. On the one hand, courts continue to pretend that contracting is a private matter and that public policy does not enter into the determination of the respective rights of parties to such contracts. [2] On the other hand, they do recognize the obvious injustice which would result if all of the terms of these contracts were to be given their apparent meaning and scope. [3] Consequently, they are forced into adopting specious concepts and dubious approaches to contract interpretation in their quest for justice. One unfortunate by-product of this process is the loss of any reasonable degree of predictability, particularly in transactions at the non-consumer level. What is lacking in this area of consumer-level contracting is a clear legislative definition of public policy. Notwithstanding the much heralded flurry of legislative activity in the consumer protection field during the last decade, basic non-excludable warranties as to quality of goods and services are a necessary part of consumer sales contracts in only two jurisdictions. [4]

II. FORMATION, EXISTENCE AND ENFORCEABILITY

A. *Offer or Invitation to Treat—The Fishmarket Approach*

Until recently, every Canadian contracts law teacher, when discussing contract formation in his classes, was forced to use the unsatisfactory English decisions in *Fisher v. Bell* [5] and *Pharmaceutical Society of Great Britain v.*

---

*B.A., 1962; LL.B., 1963, University of Saskatchewan; LL.M., 1967, Columbia University. Associate Professor of Law, College of Law, University of Saskatchewan.

[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.*, Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, at 406, [1966] 2 All E.R. 61, at 76, (Lord Reid).

[3] *Id.*

[4] *See* Manitoba: The Consumer Protection Act, MAN. REV. STAT. c. C200, § 58 (1970) (applicable to all consumer sales and hire-purchase contracts); The Farm Implement Act, MAN. REV. STAT. c. F40, (1970) Schedule (applicable to the retail sale of farm machinery); Saskatchewan: The Conditional Sales Act, SASK. REV. STAT. c. 393, § 25 (1965) (applicable to all conditional sales contracts); The Agricultural Implements Act, Sask. Stat. 1968 c. 1, Schedule (applicable to the retail sale of farm machinery).

[5] [1961] 1 Q.B. 394, [1960] 3 All E.R. 731.

Boots Cash Chemists (Southern) Ltd. [6] as background for examination of the difference between offer and invitation to treat. However, since the British Columbia Supreme Court decision in *Regina v. Bermuda Holdings Ltd.* [7] they have an unsatisfactory Canadian decision which can be used for this purpose. The case involved a prosecution of the defendant, Bermuda Holdings Ltd., for violation of Regulation 8.01 of the British Columbia Motor-vehicle Act [8] which made it a summary conviction offence to "keep for sale, sell or offer for sale, any new or used motor vehicle unless the motor vehicle is equipped as required by these regulations." The issue which was before Mr. Justice Wooton, on appeal by way of stated case, was whether certain vehicles were being offered for sale by the defendant in violation of the regulations. The lower court found that the defendant was guilty in that it had for sale at the front of its business premises vehicles which were not equipped in accordance with the requirements set out in the regulations. In addition, an officer of the company, in reply to a question by the investigating police officers, said that the vehicles were for sale. The proper conclusion was obvious to Mr. Justice Wooton.

> On the facts the motor vehicles were simply outside the premises of the appellant and, whether they had price tags or not upon them, of which there was no mention in the statement of the case, the principle involved is the same....
>
> What is apparent to the casual observer of the words "offer for sale" has not the general meaning those words appear to have. There must be something more than mere exhibition, for if that is all there is, the exposure is only an invitation to treat. There is no definition in the Act regarding offer for sale or anything of that kind. What was done here was not an offering for sale, but the goods, *viz.*, the motor vehicles, were exposed for sale and the exposure was merely an invitation to treat as laid down in the foregoing authorities. I must answer the question raised in the stated case in the following manner (with the observation that the usual question is put so that the answer may be 'yes' or 'no'). However, the answer to the question raised is that the presence of the automobiles around the front of the appellant's premises, amplified by the statement of one of the officers of the appellant company that such cars were for sale, did not constitute a valid offer for sale at law. At best there was merely an invitation to treat. [9]

If it were not for the fact that the judge used contract law principles to deal with an issue arising in a quasi-criminal proceeding, the decision could be ignored in any examination of Canadian contract law. [10] However, since such principles were used, there is the obvious danger that the decision will be treated as judicial authority on the present state of Canadian contract law. As such, it may have the effect of inducing postponement of a much needed,

---

[6] [1952] 2 Q.B. 795, [1953] 1 All E.R. 482 (C.A. 1952).

[7] 70 W.W.R. (n.s.) 754, 9 D.L.R. 3d 595 (B.C. Sup. Ct. 1969).

[8] B.C. REV. STAT. c. 253 (1960).

[9] *Supra* note 7, at 598-99.

[10] Although one may well conclude that since the intention of the legislature in enacting the statute was obviously to provide measures to deal with death and injury in motor vehicles, a social problem which has reached crisis proportions in North America, a more positive approach to the legislation is warranted.

thorough, re-examination by lawyers and courts of the law of offer and acceptance in the light of contemporary Canadian marketing practices, particularly at the retail level. [11] In view of the absence of any degree of bargaining in the vast majority of retail sales transactions, it is difficult to understand why courts perpetuate the presumption that a public offering of goods or services is not an offer in law. [12]

B. *Illegal Consideration—Victorian (Sexual) Morality is Still Alive and Well in Prince Edward Island*

The decision of Mr. Justice Trainor of the Prince Edward Island Supreme Court in *Farrar v. MacPhee* [13] at all costs must be kept out of the hands of that rapidly growing segment of society which holds the belief that, in large part, the Canadian legal system is entirely out of touch with the changes which have occurred in Canadian attitudes and institutions in the last two or three decades. One of the primary issues before the court in this case was whether or not the female plaintiff was entitled to payment as a creditor of the estate of the late Louis Beaton, a man with whom she had lived for twenty-two years during which she bore seven of his children, and with whom she had shared the work involved in operating four business enterprises owned by him. The court apparently accepted the principle that an implied contract permitting recovery on the basis of *quantum meruit* could be found on the facts. [14] However, it concluded that a court could not enforce such a contract in view of the fact that the circumstances could not have disclosed "a clearer case of the establishment of an illegal or immoral relationship between a man and a woman." [15] In coming to this conclusion the court had to struggle with and finally distinguish the facts or reject the majority decision of the Saskatchewan Court of Appeal in *Kutsenko v. Wasilenko*, [16] a case similar on its facts to the one before the court. When giving the majority judgment in the *Kutsenko* case, Mr. Justice Gordon, after reviewing evidence which disclosed that the female respondent went to live with the appellant noted: "Those of us who remember conditions in this Province at the time will reserve judgment on her actions." [17] He then concluded: "The defendant denies the alleged agreement *in toto* and the plaintiff swears that the fact that she had been the common-law wife of the defendant, and that she intended to continue in that role, had nothing whatever to do with the alleged agreement. With every deference I agree with the conclusion reached by the learned trial Judge on this issue." [18] In the *Farrar* case, the work performed by the plaintiff for Beaton in connection with the operation of his various businesses had very little connection with the illicit cohabita-

[11] See G. TREITEL, THE LAW OF CONTRACTS 11-12 (3d ed. 1970).

[12] On the issue of contract formation, *see also Re* Pattenick & Adams Furniture Ltd., [1970] 2 Ont. 539, 11 D.L.R.3d 416 (High Ct.), Italian Village Restaurant Ltd. v. Van Ostrand, 9 D.L.R.3d 512 (Alta. Sup. Ct. 1970).

[13] 13 D.L.R.3d 204 (P.E.I. Sup. Ct. 1970).

[14] *See, e.g., Re* Jacques, 66 D.L.R.2d 447 (N.S. County Ct. 1968).

[15] *Supra* note 13, at 210.

[16] 19 D.L.R.2d 665 (Sask. 1959).

[17] *Id.* at 666.

[18] *Id.* at 667.

tion arrangement. The approach taken by the court would be somewhat more justifiable if the plaintiff's claims were for household services rendered by the plaintiff.

C. *Illegal Contracts—"In maiore delicto . . ."*

In *Davidson & Co. v. McLeery* [19] Mr. Justice Gregory of the British Columbia Supreme Court concluded: "I believe that I can both follow the authorities binding on me and do justice. If I cannot do both then at least I will try to do justice." [20] His Lordship was induced to take this highly unorthodox position in a situation where the plaintiff, a firm of stockbrokers, was suing the defendant, a client of the plaintiff, for recovery of the balance owing on a trading account in respect of the sale and purchase of securities over a period of time. The defendant defended the action on the basis that the plaintiff's employee, Head, with whom the defendant had dealt, was not a registered salesman as required by the provisions of the British Columbia Securities Act, 1967, thus making the contract illegal; and that the defendant fell within the class of persons which the act was designed to protect. However, it was established that the defendant was aware of the fact that Head was unlicensed. In addition, he and Head had a working arrangement under which the defendant traded under four different names, thereby obtaining much more credit from the plaintiff than the defendant would otherwise obtain. The court was faced with a dilemma. The plaintiff had violated the statute designed to protect the defendant, but the defendant had defrauded the plaintiff and was now seeking to use the defence of illegality to avoid having to repay the credit which he obtained as a result of his fraud. Without citing authority, the court concluded that while an action by the plaintiff for brokerage commission would be unsuccessful, the action for recovery of money fraudulently obtained could be successful. Mr. Justice Gregory is correct in his conclusion that judgment in favour of the plaintiff amounted to justice. However, from the point of view of established authority, it is difficult to see how the illegal acts of the defendant, who is in the class of persons intended to receive the protection of the statute, can have the effect of validating a contract prohibited by the statute, when a party to an illegal contract can plead his own illegality in defence to a claim by an innocent plaintiff. [21] The judgment represents a new approach which accepts the possibility that if the parties are not *in pari delicto* in the sense that the statute breaker's actions are less objectionable than the person for whose protection the statute was passed, the statutory illegality will be ignored.

On appeal to the British Columbia Court of Appeal the lower court judgment was upheld. [22] The court concluded that under the circumstances, non-compliance with the British Columbia Securities Act did not invalidate the contracts between the plaintiff and the defendant. Since Head, the em-

[19] 69 W.W.R. (n.s.) 111, 6 D.L.R.3d 331 (B.C. Sup. Ct. 1969).

[20] *Id.* at 337.

[21] *See, e.g.*, Chai Saw Yin v. Liew Kwee Sam, [1962] A.C. 304, [1962] 2 W.L.R. 765. As to the effect of statutory illegality generally, *see* Sidmay Ltd. v. Wehettam Investments Ltd., [1967] 1 Ont. 508, at 534-38, 61 D.L.R.2d 358, at 384-388 (Laskin, J.A.).

[22] 75 W.W.R. (n.s.) 278, 14 D.L.R.3d 756 (B.C. 1970).

ployee, was not a party to the contract but was merely acting as employee for the plaintiff, the contract was not tainted with illegality. The court concluded that merely because Head was statutorily prohibited from acting as a salesman, the contract which he made on behalf of his principal is not rendered illegal or unenforceable. [23]

D. *Capacity*

The Legislatures of British Columbia, Saskatchewan and Manitoba enacted statutes in 1970 reducing the age of contractual capacity from 21 years. [24] In addition, the British Columbia Legislature removed one of the most humiliating features of this area of the law. Under the British Columbia act, a person who has not attained the age of majority may be described as a "minor" instead of as an "infant." [25] However, apart from this major breakthrough, no attempt was made by any of the three Legislatures to enact much needed, general legislative reform of the law applicable to infants' contracts.

E. *Mistake—The Old Guessing Game*

The English Court of Appeal was offered but refused to take the opportunity in *Magee v. Pennine Insurance Co. Ltd.* [26] to eliminate some of the chaos presently existing in the law dealing with common mistake in contract formation. In 1961, the plaintiff signed a proposal form for automobile insurance to be provided by the defendant. The form was actually filled in by the seller from whom a new car was being purchased by the plaintiff. The information contained on the form was incorrect in several respects. In particular, it was represented that the plaintiff held a valid driving licence when in fact he did not have a licence; and that he owned the car when in fact he had purchased it for his eighteen year-old son. However, the trial court found that the plaintiff had not been fraudulent. The defendant issued a policy to the plaintiff on the strength of the misrepresented facts in the proposal. The policy was renewed each year for four years without any further communication between the plaintiff and the defendant concerning the drivers and ownership of the vehicle involved. In April, 1965, the plaintiff claimed under the policy for the sum of 600 pounds as a result of an accident which demolished the automobile. The plaintiff's son was driving the vehicle when the accident occurred. The defendant's written offer to pay 385 pounds in full settlement of the claim was orally accepted by the plaintiff. However, before payment was made the defendant learned of the misrepre-

[23] Other cases reported during the survey period involving illegality are: Green v. Stanton, 69 W.W.R. (n.s.) 415, 6 D.L.R.3d 680 (B.C. 1969) (restraint of trade); Betz Laboratories Ltd. v. Klyn, 70 W.W.R. (n.s.) 304 (B.C. Sup. Ct. 1969) (restraint of trade); Orville Kerr Ltd. v. DeWitt, [1970] 1 Ont. 378, 8 D.L.R.3d 436 (High Ct. 1969) (restraint of trade); Perry v. Anderson, 12 D.L.R.3d 414 (B.C. Sup. Ct. 1970) (Lord's Day Act, CAN. REV. STAT. c. 171 (1952)).

[24] British Columbia: The Age of Majority Act, B.C. Stat. 1970 c. 2 (nineteen years); Manitoba: The Age of Majority Act, Man. Stat. 1970 c. 91 (eighteen years); Saskatchewan: The Coming of Age Act, Sask. Stat. 1970 c. 8 (nineteen years).

[25] The Age of Majority Act, B.C. Stat. 1970 c. 2, § 6.

[26] [1969] 2 Q.B. 507, [1969] 2 All E.R. 891 (C.A.).

sentation and refused to pay the 385 pounds. The issue before the court was as to the enforceability of the settlement agreement.

By a majority of two to one, the Court of Appeal reversed the trial court judgment in favour of the plaintiff, concluding that the settlement agreement was based on a common mistake, namely, that the insurance policy was in force at the time of the agreement. The court concluded that because of the misrepresentation the defendant could have avoided the policy. Although counsel for the plaintiff contended that on its facts the case was very similar to *Bell v. Lever Brothers,* [27] Lord Denning chose to ignore the *Bell* case: "I do not propose today to go through the speeches in that case. They have given enough trouble to commentators already." [28] The Master of the Rolls had no difficulty in determining what the established law [29] in the matter is: "I would say simply this: A common mistake, even on a most fundamental matter, does not make a contract void at law; but it makes it voidable in equity." [30] He concluded that at the time of the contracting the plaintiff and defendant were both under a common mistake which was fundamental to the whole agreement. Under the circumstances it would be inequitable to deny the defendant's application to have the agreement set aside.

Lord Justice Fenton Atkinson refused to take sides on the issue as to whether a fundamental mistake in a contract renders it void at common law. He adopted a passage from *Chitty on Contracts,* [31] which purports to be a distillation of the various judgments in *Bell v. Lever Brothers,* accepting the proposition that a contract based on an untrue fundamental assumption is avoided. His Lordship then noted that under the circumstances "it is the right and equitable result of this case that the insurance company should be entitled to avoid that agreement on the ground of mutual mistake in a fundamental and vital matter." [32] Lord Justice Winn found it impossible to find any difference between the case and *Bell v. Lever Brothers* with respect to the kind of misapprehension involved. What occurred was a misapprehension as to the value of rights which the plaintiff had under the contract, not a misrepresentation as to the subject matter of the contract. [33]

F. *Equitable Estoppel—Not Corrupted by "Loose Southron Ways"*

In *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.* [34] the Supreme Court of Canada declared its intention not to permit the adop-

---

[27] [1932] A.C. 161, [1931] All E.R. Rep. 1 (1931).

[28] *Supra* note 26, at 514, [1969] 2 All E.R. at 893.

[29] *See* Solle v. Butcher, [1950] 1 K.B. 671, [1949] 2 All E.R. 1107 (C.A. 1949); Leaf v. Int'l Galleries, [1950] 1 All E.R. 693 (C.A.); Frederick E. Rose London Ltd. v. William H. Pim Jnr. & Co., [1953] 2 Q.B. 450, [1953] 2 All E.R. 739 (C.A.). *Contra,* Diamond v. B.C. Thoroughbred Breeders' Soc'y, 52 W.W.R. (n.s.) 385, 52 D.L.R.2d 146 (B.C. Sup. Ct. 1965); Regina v. Ontario Flue-Cured Tobacco Growers' Marketing Bd., [1965] 2 Ont. 411, 51 D.L.R.2d 7.

[30] *Supra* note 26, at 514, [1969] 2 All E.R. at 893.

[31] 1 CHITTY ON CONTRACTS 102 (A. Guest, 23 ed. 1968).

[32] *Supra* note 26, at 896.

[33] Other cases reported during the survey period involving mistake are: Marwood v. Charter Credit Corp., 12 D.L.R.3d 765 (N.S. Sup. Ct. 1970); Hooper v. Bellevue Holdings Ltd., 73 W.W.R. (n.s.) 401 (B.C. Sup. Ct. 1970).

[34] 12 D.L.R.3d 247 (Sup. Ct. 1970).

tion in Canada of the kind of estoppel contemplated by section 90 of the American Law Institute's, *Restatement of the Law of Contracts.*[35] The plaintiff, a lessee under a petroleum and natural gas lease granted by Hambly, was required by the lease in order to avoid automatic termination of it, either to market gas discovered on the leased property in paying quantities or to pay a royalty of 100 dollars per well per year. Gas in paying quantities was discovered, but since there was no immediate market, the gas was not produced. Instead, the plaintiff sent a payment of 100 dollars in lieu of production to the royalty trustee, for distribution among the various interest holders. However, as a matter of law, the lease had terminated due to lack of timely compliance with its terms. Counsel for the plaintiff contended that Hambly was estopped from taking the position that the lease had terminated since his actions after the termination of the lease amounted to a representation to the plaintiff, which the plaintiff had acted upon, that the lease had not terminated. The court rejected the argument as legally unsound. Actions falling short of fraudulent "acquiescence" as defined in *Willmot v. Barber,*[36] could not give rise to equitable estoppel if they occurred after the termination of the lease. Estoppel assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other that the former will not enforce his strict legal rights under it. To decide that it can be based on actions occurring after the termination of the contract would be to conclude that estoppel can be the foundation of a new cause of action.

It is somewhat disappointing that the Supreme Court apparently did not even consider the advisability, from a purely practical standpoint, of developing estoppel beyond its present scope under English law.[37] For example, in situations where the date of termination of the contractual relation between parties is a matter of doubt, doubt which can be settled only by a final court of appeal or by a new agreement between the parties, estoppel should be operative when one party clearly indicates that he has no intention of insisting on his strict legal rights, including his right to rely on a subsequent finding of law that the contract has terminated, and the other party relies on this position. In terms of the justice of the situation, and that is what equitable estoppel is supposed to be all about, it makes little difference if the representations came before or after the legal termination of the contractual relationship between the parties.[38]

---

[35] Section 90: 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.

[36] 15 Ch. D. 96, at 105, 43 L.T.R. (n.s.) 95, at 98 (1880) (Fry, J.).

[37] The decision of the court in this regard is not binding on subsequent courts since the court found that there was not sufficient evidence of representations by Hambly upon which equitable estoppel could be based.

[38] Other cases reported during the survey period involving equitable estoppel are: Canadian Petrofina Ltd. v. Motormart Ltd., 7 D.L.R.3d 330 (P.E.I. Sup. Ct. 1969); Frankel Structural Steel Ltd. v. Goden Holdings Ltd., [1969] 2 Ont. 221, 5 D.L.R.3d 15.

G. *Consumer Protection—Unsolicited Credit Cards and Goods*

The practice of sending unrequested credit cards as a method of attracting potential customers for banks, department stores, oil companies and auto leasing companies and the practice of sending unsolicited goods such as magazines as a method of inducing sales have quickly come to a halt in British Columbia as a result of 1970 amendments to the British Columbia *Consumer Protection Act.* [39] The legislation excludes the possibility of a court implying acceptance of the terms [40] on which a credit card or goods are sent by providing that the recipient has no legal liability to the sender of any unsolicited credit card or goods and that no legal action will lie in the event of loss, misuse, damage or misappropriation unless and until the recipient expressly acknowledges to the sender in writing his intention to accept the unsolicited card or goods.

III. The Terms and Contents of Contracts

A. *Exclusion Clauses—"The Average Man" Interpretation Rule*

One of the most frequently encountered legal problems arising out of the sale of large ticket consumer goods at the retail level is the determination of the terms included in the purchase contracts. Often, the seller makes statements to the buyer about the goods or about some aspect of the proposed sale which are relied upon by the purchaser in making the decision to purchase. However, more often than not the written contract which the purchaser eventually signs contains the standard merger or exclusion clause under which the buyer acknowledges that the seller has made no representations and has given no warranties except as contained in the contract, and that the contract contains the whole agreement between the parties. If given full scope, the clause invokes the parol evidence rule, and prevents the recognition of a collateral agreement or actionable misrepresentation. [41] However, the courts are displaying an increasingly hostile attitude towards such clauses, particularly when the legitimate expectations of consumer purchasers must be ignored if operative effect is to be given to them.

In *Francis v. Trans-Canada Trailer Sales Ltd.* [42] the Saskatchewan Court of Appeal employed a technique which is likely to be very popular with courts sympathetic to the consumer buyer's position. The plaintiff, during the course of negotiation for the purchase of a house trailer from the defendant was told by the defendant's salesman, Myles, that the trailer had been used for three months, but that it carried the same warranty as a new trailer. The trial court found that the plaintiff entered into the purchase agreement in reliance on this representation. The plaintiff signed a standard form conditional sales contract which made no mention of the warranty but which contained the following clause: "The Purchaser acknowledges that this

[39] B.C. Stat. 1970 c. 8, § 1 adding § 14A to B.C. Stat. 1967 c. 14.

[40] *See, e.g.,* Weatherby v. Banham, 5 Car. & P. 228, 172 E.R. 950 (1832).

[41] However, it is very unlikely that such a clause would be effective in cases of fraudulent misrepresentation. *See* Pearson & Sons Ltd. v. Dublin Corp., [1907] A.C. 351, [1904-07] All E.R. Rep. 255 (1907).

[42] 69 W.W.R. (n.s.) 748, 6 D.L.R.3d 705 (Sask. 1969).

agreement constitutes the entire contract and that there are no representations, warranties, or conditions, expressed or implied, statutory or otherwise, other than as contained herein." [43] After taking possession the plaintiff discovered that the trailer was unroadworthy. He then commenced an action against the defendant for breach of warranty and was successful at the trial level. On the appeal, the Saskatchewan Court of Appeal concluded that the evidence disclosed a collateral agreement embodying the undertaking of Myles. However, the court was still faced with a major obstacle to the plaintiff's success: how can the court recognize the enforceability of a collateral agreement where the parties had agreed in the subsequent written contract that no such agreement came into existence? And further, even if the existence of that collateral agreement is recognized, how can it be enforced in view of its apparent inconsistency with the subsequent written contract? [44] The court circumvented these problems through the use of a somewhat novel interpretation technique of the *contra proferentem* variety. The exclusion clause was found inapplicable, and therefore, it did not stand in the way of the recognition of an enforceable collateral agreement. In reaching this conclusion, the court adopted the approach to such clauses used by Mr. Justice Lamont in *Eisler v. Canadian Fairbanks Co.* [45]

> Where a man enters into a written agreement which plainly sets out that he cannot rely on any representation made outside of the writing itself, he must be held to have precluded himself from relying upon any verbal representation; but to deprive a man of the legal rights which such representation would give him, the language of the written agreement must be sufficiently clear that the average man entering into such contracts would know, if he gave it reasonable consideration, that he was debarring himself from relying upon the representation. The words used must not be reasonably capable of another meaning consistent with the retention of his legal rights. [46]

The "average man" approach of interpretation of exclusion clauses avoids the necessity of a frontal attack on contractual clauses designed to relieve the seller from legal responsibility for sales talk.

B. *Exclusion Clauses—The Parol Evidence Rule in Reverse*

The decision of Judge Kindred of the Saskatchewan District Court in *Canadian Acceptance Corp. v. Mid-Town Motors Ltd.* [47] may be an example of things to come if the most recent variety of "Denningism" enunciated in *Mendelssohn v. Normand, Ltd.*, [48] is allowed to spread unchecked. In the *Mid-Town Motors* case, the defendant, Mid-Town Motors, entered into an equipment lease with the plaintiff. The lease was part of an equipment financing arrangement under which the plaintiff purchased the equipment from the supplier and leased it to the defendant. Prior to the purchase of the equipment by the plaintiff, the supplier's salesman, Hedderly, met with

---

[43] *Id.* at 751, 6 D.L.R.3d 705, at 708.

[44] *See* Hawrish v. Bank of Montreal, 66 W.W.R. (n.s.) 673 2 D.L.R.3d 600 (Sup. Ct. 1969).

[45] 3 W.W.R. 753, 8 D.L.R.390 (Sask. Sup. Ct. 1912).

[46] *Id.* at 757-758.

[47] 72 W.W.R. (n.s.) 365 (Sask. Dist. Ct. 1970).

[48] [1969] 2 All E.R. 1215, [1969] 3 W.L.R. 139 (C.A.).

the defendant's officers and, as part of the sales pitch, promised that an advertising and promotional programme involving the design and publication of newspaper advertisements and the distribution of advertising material to householders and service stations in the area, would go along with the equipment, and that this programme would begin as soon as the lease was entered into and the equipment was delivered. The court found that on the strength of this verbal promise the defendants decided to lease the equipment. The verbal undertaking as to the promotional programme was not written into the lease; in fact the lease expressly negatived all oral agreements. Apart from the preparation of some advertising materials, the promotional programme was never undertaken by the supplier; and, consequently, the defendant repudiated the lease and refused to make the rental payments after the first three months of the term. The action before the court was for the remaining instalments under the lease. The plaintiff based its case on Hedderly's lack of authority to bind it to any undertakings apart from those contained in the lease. It also sought to invoke the parol evidence rule so as to preclude the court from treating the oral promises of Hedderly as part of the lease. The court found that Hedderly was an agent of the plaintiff with authority to bind it. In rejecting the second defence, Judge Kindred held that since the verbal promise with respect to the promotional programme induced the defendant to enter into the lease, such promise took "priority over any printed condition in the contract." [49] He further held that breach of the oral promises by the plaintiff's agent excused the defendant from the obligations to pay further rentals. The court could not adopt the approach used in the *Francis* case [50] since the exclusion clause was found to be well worded, straight forward and its meaning clear. The court relied solely on the judgment of Lord Denning in the *Mendelssohn case* [51] in which the Master of the Rolls concluded in part:

> There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see *Couchman* v. *Hill* [1947] K.B. 554; *Curtis* v. *Chemical Cleaning and Dyeing Company* [1951] 1 K.B. 805; and *Harling* v. *Eddy* [1951] 2 K.B. 739; nor is he allowed to go back on his promise by reliance on a written clause, see *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129, 145 per Harman, J. The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. [52]

The unqualified conclusion that promises or representations of fact which induce a party to contract take priority over any printed condition in the contract is surely to receive a much less enthusiastic acceptance by Canadian courts which feel bound to follow the Supreme Court decision in

---

[49] *Supra* note 47, at 370.

[50] *Supra* note 43.

[51] *Supra* note 48.

[52] *Id.* at 1218, [1969] 3 W.L.R. at 144.

Hawrish v. Bank of Montreal, [53] or which see some social value in the parol evidence rule. [54]

C. *Fundamentalism: More Cases—No Less Confusion*

If the House of Lords sought through its decision in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale,*[55] to kill in its infancy the concept of fundamentalism as formulated by Lord Denning in *Karsales (Harrow), Ltd. v. Wallis,* [56] recent decisions in Canadian courts provide evidence that their Lordships failed miserably. In *Western Tractor Ltd. v. Dyck* [57] the Saskatchewan Court of Appeal, while giving lip service to the "interpretation" theory of fundamentalism, enunciated in the *Suisse Atlantique* case, adopted essentially a pre-1966 approach.

As part of a transaction under which the defendant purchased from the plaintiff a HD7G Allis-Chalmers tractor, the defendant signed an "order for industrial equipment" which was "accepted" by the plaintiff. The form contained the usual exclusion clauses under which the defendant "agreed that this order . . . constitutes the entire agreement relating to the sale of said goods"; and that "[t]he new goods herein ordered are sold under warranty printed hereunder and under no other warranty or condition, express or implied, all conditions and warranties implied by law being hereby expressly negatived." The express warranty contained in the order form was the valueless promise of replacement of parts which, in the manufacturer's opinion, are defective, and which are returned F.O.B., transportation prepaid, to the manufacturer's factory within six months of delivery of the tractor to the buyer and before the parts have been used fifteen hundred hours. Further, *ex abundanti cautela,* another exclusion of warranties and agent's authority clause was included. The "service and warranty policy" sent to the defendant shortly after the tractor was delivered contained yet another general warranties exclusion clause along with the assertion that "thousands of profit-making hours have been built into this equipment." The lower court found that the negotiations which led up to the sale were such that the plaintiff knew that the defendant wanted a tractor for clearing brush, and that it was being relied upon by the defendant to provide a tractor suitable for this purpose. However, since the tractor delivered was designed to load gravel, it was entirely inadequate for clearing brush, notwithstanding the fact that it was returned to the plaintiff for repairs approximately seventeen times. Mr. Justice Brownridge, in giving the judgment of the court, accepted the lower court's finding that the contract was one for the sale of a tractor suitable for clearing brush. He was able to explain away the "express warranty" part of the written contract on the basis that it was not inconsistent with the implied warranty of suitability for a particular purpose and that it was intended to apply to repair a tractor which was generally suitable for the

[53] *Supra* note 44. *See generally,* Wedderburn, *Collateral Contract,* [1959] CAMB. L.J. 58.

[54] *See, e.g.,* Mechanical Pin Resetter Co. v. Canadian Acme Screw & Gear Ltd., [1969] 2 Ont. 61, 4 D.L.R.3d 359.

[55] [1967] 1 A.C. 361, [1966] 2 All E.R. 61 (1966).

[56] [1956] 2 All E.R. 866, [1956] 1 W.L.R. 936 (C.A.).

[57] 70 W.W.R. (n.s.) 215, 7 D.L.R.3d 535 (Sask. 1969).

buyer's purposes. The court, however, made no attempt to deal with the two other exclusion clauses, thereby refusing to recognize the possibility that these clauses could have any legal effect whatsoever in delimiting the contents of the contract or the scope of the seller's obligations under it. Indeed, Mr. Justice Brownridge, concluded that "the plaintiff was in breach of a fundamental term of the contract and, therefore, could not rely on the excluding clauses to prevent the defendant from recovering damages for such breach." [58]

In *Lightburn v. Belmont Sales Ltd.* [59] Mr. Justice Ruttan of the British Columbia Supreme Court, when dealing with a replacement of defective parts warranty accepted by a buyer under a sales contract as being in lieu of all other conditions and warranties, express or implied, made some effort to explain that his conclusion that the clause was ineffective was consistent with the approach set out in the *Suisse Atlantique case.* [60] After finding that the seller of an automobile had committed a fundamental breach in delivering to the buyer a completely unreliable car under a contract requiring the delivery of a new Cortina automobile, he concluded that the exclusion clause was never intended by the parties to cover the type of breach which occurred. A general exclusion clause must be very clear to affect the seller's obligation to deliver goods in accordance with the contract description. On its facts, the *Lightburn* case differs from the *Western Tractor* case in one important respect. The contract expressly called for a new automobile. The court was not forced to go outside the written contract in order to find the basic obligation (description of goods) which was not fulfilled by the seller. In this respect, the facts of the *Lightburn* case are much more in line with the Supreme Court decision in *Schofield v. Emerson Brantingham Implement Co.* [61] than were the facts in *Western Tractor* case. However, oddly enough, the Saskatchewan Court of Appeal relied heavily on the *Schofield* case without attempting to deal with that part of the written contract signed by Dyck which in clear terms purported to excluded the implied condition of suitability for a particular purpose — a condition which was not specified in the written portion of the contract. [62]

In *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.* [63] Lord Denning, with the complicity of Widgery and Cross, L.JJ., skilfully exploited the confusion produced by the House of Lords decision in *Suisse Atlantique* [64] and re-established fundamentalism as a substantive law concept. The plaintiff engaged the defendant to design and install a system for moving stearine, an inflammable substance, from one place to another inside the plaintiff's factory. The defendant used plastic instead of steel pipe for this purpose, and, as a result, the stearine escaped from the system and caught on fire. The plaintiff's plant was entirely destroyed. The action against

[58] *Id.* at 224, 7 D.L.R.3d at 544.

[59] 69 W.W.R. (n.s.) 734, 6 D.L.R.3d 692 (B.C. Sup. Ct. 1969).

[60] *Supra* note 55.

[61] 57 Sup. Ct. 203, 43 D.L.R. 509 (1918).

[62] On fundamental obligation, *see also* Peters v. Irving Oil Co., 1 N.S.2d 861 (Sup. Ct. 1970).

[63] [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A. 1969).

[64] *Supra* note 55.

the defendant was brought by the plaintiff's insurer, using the plaintiff's name. The contract between the plaintiff and the defendant contained, *inter alia*, an exclusion clause under which the defendant agreed to indemnify the plaintiff for "direct damage and injury to your property . . . caused by negligence of ourself or our servants, but not otherwise, to the extent of repairing the damage to the property . . . provided always that our total liability for loss, damage or injury shall not exceed the total value of the contract." The total value of the contract was 2,330 pounds but the damage to the factory was 146,581 pounds. The Court of Appeal agreed with the trial court in its finding that the defendant was negligent, and that the negligence caused the damage. The court (Lord Denning M.R. *dubitante*) held that the limitation of liability clause on its true construction applied to the event which occurred. It also found that the consequences of the defendant's acts were such that the contract was frustrated and, therefore, the contract was fundamentally breached by the defendant. [65] The significance of this conclusion in the ordinary case, according to the court, is that the innocent party can elect either to accept the breach and treat the contract at an end or he can refuse to accept it and keep the contract in being. [66] If the innocent party chooses the former course of action, he can sue for breach and the guilty party cannot rely on an exclusion or limitation clause since the contract including such clause has ceased to exist. [67] The court held that since the breach in this case was such as to make election by the innocent party impossible, the contract was automatically at an end and therefore, the limitation of liability clause was not available to assist the defendant.

Until the House of Lords, or maybe even the Supreme Court of Canada, takes the opportunity in circumstances more appropriate than those obtaining in the *Suisse Atlantique* case to determine the relevance (if any) of the doctrine or doctrines of fundamentalism to the law of contract, parties to contracts will not be able to make their own bargains even where it is apparent, as it was in *Harbutt's* case that an exclusion or exemption clause was part of a contract arrived at between two parties of equal bargaining power. [68]

---

[65] For a criticism of the fusion of the law dealing with frustration and the law dealing with breach, see Weir, Comment, 28 CAMB. L.J. 189 (1970).

[66] *See* Farnworth Finance Facilities Ltd. v. Attryde, [1970] 2 All E.R. 774, [1970] 1 W.L.R. 1053 (C.A.).

[67] In coming to this conclusion the Court relied on statements of Lords Reid and Upjohn in *Suisse Atlantique*, [1967] 1 A.C. 361, at 398, 425, [1966] 2 All E.R. 61, at 71, 88 (1966).

[68] *See* Coote, *The Effect of Discharge by Breach on Exception Clauses*, 28 CAMB. L.J. 221 (1970).