The Supreme Court of Canada and The Common Law of Contract

by Philip Slayton*

I

Introduction

On December 10, 1949, assent was given to "An Act to amend the Supreme Court Act." [1] This Act abolished appeals from Canada to the Judicial Committee of the Privy Council, making the Supreme Court of Canada the final court of appeal for Canada.[2] The Supreme Court became judicial master in the Canadian house.

Abolition of appeals was considered a mark of the maturity of the Canadian state. Many hoped that it would lead to development of a law more able to respond to Canadian conditions. The *Ottawa Journal* commented in 1938 that "in recent years in particular Privy Council decisions have shown hardly an inkling of things in Canada in consequence of modern and Empire change." [3] Canadian development was characterized by one commentator as "arrested by the judicial barrier to progressive change erected by the Privy Council, and raised even higher as time moves on and new conditions arise." [4] Professor MacGuigan has described the Privy Council as sitting out its days in "judicial seclusion an ocean removed from the colony-state, with no knowledge of the geographic, eco-

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[1] 13 Geo. 6, c. 37. 1949, 2nd session, Vol. 1.

[2] Section 7 of the Act read in part: "Notwithstanding anything in section three of this Act, an appeal from or in respect of a judgment pronounced in (*a*) a judicial proceeding that was commenced prior to the coming into force of this Act... lies or may be brought as if that section had not been enacted." The last Canadian appeal to the Privy Council was therefore some years after the 1949 Act.

[3] *Ottawa Journal,* April 11, 1938, p. 4. Quoted by McConnell, *The Judicial Review of Prime Minister Bennet's 'New Deal'*, 6 Osgoode Hall L.J. 39, at 80 (1968).

[4] Tuck, *Canada and the Judicial Committee of the Privy Council,* 4 U. Toronto L.J. 33, at 71 (1941-2).

nomic, social and political conditions beyond what it might gather from the London newspapers." [5]

The post-war Canadian, under the influence of new Canadian nationalism, was irked by appeals to the Privy Council, which he considered to be the "badge of colonialism." [6] Stuart Garson, Minister of Justice, when introducing the legislation ending appeals, said:

> By far the most powerful argument, therefore, for the passing of this bill as a step towards complete self-government is that Canada in almost every other respect... has attained a complete and honourable nationhood. The question is whether it is consistent with that nationhood that we should continue an arrangement with regard to the hearing of our law cases which was begun in colonial times and still preserves its colonial characteristics... [7]

Criticism in this vein had been levelled at appeals over several decades. John Ewart commented in 1928 that "it is difficult to understand what right anybody, outside of Canada, has to discuss with us the finality of the decisions of our own courts." [8] The *Toronto Daily Star* said on April 21, 1938, that "the Judicial Committee of the Privy Council was established as a colonial court and Canada is not a colony but a self-governing dominion." [9] Professor Frank Scott remarked in 1947 that "because of the appeal a prime element of Canadian sovereignty is impaired." [10]

It was expected and hoped, then, that abolition of appeals to the Privy Council would remove the last mark of colonialism from Canada, and allow development of a law particularly suited to Canada by a Court with particular knowledge of peculiar Canadian conditions. Remarkably, since the abolition of appeals little has been written about the work of the Supreme Court, particularly in the private law area; there has been no extensive and rigorous analysis of the Court's work which would allow commentators to form opinions as to whether pre-abolition hopes and expectations have to any extent been realized. It is the purpose of this article

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[5] MacGuigan, *The Privy Council and the Supreme Court: A Jurisprudential Analysis*, 4 Alta. L. Rev. 419, at 419 (1966).

[6] For a history of the abolition movement, see MacKinnon, *The Establishment of the Supreme Court of Canada*, 27 Can. Historical Rev. 258 (1946), and Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, ch. 1 (1969).

[7] Canada, House of Commons Debates, September 20, 1949, p. 74.

[8] Ewart, *Canada's Political Status*, 9 Can. Historical Rev. 194, at 204 (1928).

[9] *Toronto Daily Star*, April 21, 1938, p. 6. Quoted by McConnell, *supra*, note 3.

[10] Scott, *Abolition of Appeals to the Privy Council: A Symposium*, 25 Can. B. Rev. 557, at 566 (1947).

to attempt to make such an analysis of the way in which the Supreme Court of Canada has, since the abolition of appeals to the Privy Council,[11] interpreted and applied the common law of contract.[12] What is presented here is a survey of the more important aspects of the Court's work in the field of contract, since 1949, in the hope that the survey will allow those interested in the Supreme Court to form some views on its development.

The kind of analysis to which this study subjects decisions of the Supreme Court is what might be termed, for want of a better phrase, "traditional substantive analysis." It is the written judgments rendered by members of the Supreme Court that are emphasized and analysed. Curiously, the bulk of what recent study of the Supreme Court there has been, is in the form of "scalogram analysis",[13] a methodology which presents a dramatic contrast to the traditional methodology adopted in this article. Scalogram analysis is an expression of the approach pioneered by, among others, Jerome Frank, who believed that judicial judgments are worked out backwards from conclusions formulated on the basis of, amongst other things, idiosyncratic biases.[14] This school of thought holds that the formal reasons for judicial judgment are, at best, only part of the "real" reasons for judgment; the "real" reasons include a judge's personality, his social and political beliefs, whether or not he has indigestion, his attitude towards redheads

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[11] As already pointed out (*supra*, n. 2), for some time following assent to "An Act to amend the Supreme Court Act", 13 Geo. 6, c. 37, cases before the Supreme Court, depending on when judicial proceedings were commenced, may have been subject to appeal to the Privy Council. This article will nonetheless treat all cases appearing before the Supreme Court after December 10, 1949, on an equal footing, on the grounds that the significant fact is recognition by the Act of Canadian judicial independence.

[12] One of the few comments on how the Court has dealt with contract is that of Dean Horace Read: "Study of most of the reported opinions revealed that while some of them show much skill in the techniques of applying precedents by analogy, almost all are routine deductions from English authorities or their unmodified derivatives." Read, *The Judicial Process in Common Law Canada*, 37 Can. Bar Rev. 265, at 267 (1959).

[13] See, for example, Peck, *The Supreme Court of Canada, 1958-1956: A Search for Policy Through Scalogram Analysis*, 45 Can. Bar Rev. 666 (1967); Peck, *A Scalogram Analysis of the Supreme Court of Canada, 1958-1967*, in Comparative Judicial Behaviour 293 (Ed. Schubert and Danelski); Fouts, *Policy-Making in the Supreme Court of Canada 1950-60*, in Comparative Judicial Behaviour 257; Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, (1969).

[14] J. Frank, Law and the Modern Mind 114 (1930).

if the appellant has red hair, and so on. If judges really do reach judicial decisions for these kinds of reasons, then clearly close study of formal written reasons for judgment is largely irrelevant. The most rational thing is probably to characterize the issue raised by the case and then determine which way the judge has "voted" on that issue.

Scalogram analysis represents a formalized and precise method of approaching cases in this way. Considerable claims have been made for its importance.[15] But apart from deficiencies of internal logic, the method suffers from serious conceptual flaws. It may well be true to say of a judge that his decisions are to some extent based on non-judicial considerations, but it is not true to say that judicial considerations are substantially disregarded in giving judgment; such a claim ignores the realities of the system. Furthermore, whatever it is that stimulates the judicial response, it is the rules and principles of law that define the acceptable limits of that response. It may be true to say that written reasons for judgment are not the whole story, but one cannot conclude that study of written reasons is futile. Those reasons indicate the boundaries within which judicial discretion operate. They illustrate one aspect of the workings of the judicial mind. And they are all we have, in the last resort; we must make of them what we can.[16]

II

Formation

Horace Read has written that in *Dawson* v. *Helicopter Exploration Co. Ltd.*[17] Mr. Justice Rand "by way of reasoned dictum, led the way in advancing the common law of contracts beyond previous express English and Canadian formulation . . ." [18] Springer, an agent of Helicopter Exploration, had written to Dawson offering to give him a ten percent share in claims staked if Dawson would show Helicopter Exploration mineral deposits which he had discovered at the head of the Leduc River in British Columbia. Helicopter was to finance the staking of new claims. Dawson agreed to this arrangement. Subsequently Helicopter wrote to Dawson

[15] See, for example, Baade, *Foreword*, 28 Law and Contemp. Prob. 1, (1963).

[16] For a description of scalogram analysis as applied to the Supreme Court of Canada, and an elaboration of the criticisms made above, see Slayton, *A Critical Comment on Scalogram Analysis of Supreme Court of Canada Cases*, 21 U. Toronto L.J. 393, (1971).

[17] [1955] S.C.R. 868.

[18] *Supra*, n. 12, at 281.

saying that it had been advised that technical difficulties in the way of extracting deposits from the Leduc River area made the proposal unattractive. Dawson did not reply. Later Helicopter located the deposits by itself and made arrangements with a new company to enter into development of the claims. Dawson brought an action against Helicopter Exploration for breach of contract. Helicopter contended that its offer called for an acceptance not by promise but by the performance of an act, namely, the precise location of the claims by Dawson for the respondent. Since that act was never performed, no contract was ever concluded.

The Court, in a four-to-one decision (Kerwin C. J. dissenting), found in favour of the appellant.

Mr. Justice Rand delivered the judgment of himself and Mr. Justice Fauteux. Rand J. was not prepared to find that the offer of the respondent was a unilateral offer. Purely on the facts, this was not the case; in a unilateral offer the offeror remains passive, and in Springer's proposal it was necessarily implied that Springer would participate, since Dawson was to proceed to the Leduc River with Springer or persons acting for him and by means of the respondent's helicopter. Dawson's simple promise was therefore sufficient to form the contract.

Rand J. then argued that where possible offers should be treated as calling for bilateral rather than unilateral action so that transactions will have business efficacy:

> ...an offer in the unilateral sense can be revoked up to the last moment before complete performance. At such a consequence many courts have balked; and it is in part that fact that has led to a promissory construction where that can be reasonably given. What is effectuated is the real intention of both parties to close a business bargain on the strength of which they may, thereafter, plan their courses.[19]

Rand J. quoted with approval *Williston on Contracts*, 1936 edition, Volume One, pp. 76-7, which urges the treating of offers as bilateral rather than unilateral so that both parties can be protected from a period prior to the beginning of performance on either side. He went on to endorse the following passage from Cardozo J. in *Wood* v. *Lady Duff Gordon*: [20]

> The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. A promise may be lacking and yet the whole writing may be "instinct with an obligation imperfectly expressed."

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[19] *Ibid.*, p. 875.
[20] 222 N.Y. 88, at 90 (1917).

On these grounds, on the grounds that Helicopter's offer was not unilateral, and on the grounds that the offer on the facts expressed an "instinct with an obligation",[21] Mr. Justice Rand was prepared to find for the appellant.

Estey and Cartwright JJ. agreed with Rand and Fauteux JJ. as to result, but preferred to assume that the respondent's offer was bilateral, and decide the case on the basis of whether or not the offer had been absolutely and unequivocally accepted[22] and whether the contract had been subsequently repudiated or abandoned. Chief Justice Kerwin dissented on the grounds that Dawson and Helicopter Exploration had never progressed beyond the stage of negotiations.

The judgment of Mr. Justice Rand is an important contribution to solution of the problem posed by unilateral contracts. An offer is not to be considered unilateral unless the offeror remains passive. It is not to be considered unilateral if a promissory construction can reasonably be given. It should not be considered unilateral if the real intention of the parties is to close a business bargain on the strength of which they may both plan their courses. Most significant of all, Rand J.'s endorsement of the passage in Cardozo J.'s judgment in *Wood* v. *Lady Duff Gordon* indicates a willingness to look beyond precise formal requirements in an attempt to gather the real sense of the agreement. It indicates a willingness to abandon application of precise rules in favour of a greater judicial discretion and creativity in the interpretation of contractual arrangements.

In *Calvan Consolidated Oil & Gas* v. *Manning*[23] a letter setting out an agreement was to be reduced to a formal agreement, the terms of which were to be settled by arbitration if the parties failed to agree on them. Judson J. (giving judgment for the Court), after disposing of a claim that the agreement was void for uncertainty, held that the parties were bound immediately on the execution of the informal agreement. He relied on a *dictum* of Parker J. in the English case of *Hatzfeldt-Wildenburg* v. *Alexander*,[24] and said that on construction the parties intended to hold themselves bound until execution of the formal agreement. The provi-

[21] The phrase "instinct with an obligation" was first employed by Scott J., in *McCall* v. *Wright*, 133 App. Div. (N.Y.) 62 (1909).

[22] For an enunciation by the Supreme Court of the well-established proposition that acceptance must be absolute and unequivocal, see the judgment of Estey J., *Harvey* v. *Perry* [1953] 1 S.C.R. 233, and Judson J., in *Calvan Consolidated Oil and Gas* v. *Manning* [1959] S.C.R. 253.

[23] [1959] S.C.R. 253.

[24] [1912] 1 Ch. 284, at 288-9.

sion for a formal agreement was merely an expression of the desire of the parties as to the manner in which the transaction already agreed to would go through. Some considerable weight appeared to be placed by Judson J. on the absence in the informal agreement of a traditional qualifying phrase such as "subject to contract." But it is difficult to see the significance of such omission, and to see how on construction it can be said the parties considered themselves bound from the time of the informal agreement, when the arbitration provision in that informal agreement was couched in the following terms:

> It is agreed that the terms of the formal agreement are to be subject to our mutual agreement, and if we are unable to agree, the terms of such agreement are to be settled for us by arbitration...

To balance against this provision, as Judson J. noted at page 256, was the fact that both parties to the informal agreement performed some of their obligations under that agreement, despite the absence of the formal document. But in what substantive way does the arbitration clause differ in effect from, for example, the phrase "subject to the terms of a formal lease," which the Supreme Court has agreed prevents a binding contract arising unless a formal agreement is executed? [25]

In any event, the judgment of Judson J. for the Court in *Calvan Consolidated Oil & Gas* v. *Manning* suggests the kind of preoccupation with words and formulae which Rand J. impliedly criticised in *Helicopter Exploration* v. *Dawson.* At the very least, Mr. Justice Judson neglected an opportunity to develop the more creative position suggested by Rand J.

In *Saint John Tug Boat Co. Ltd.* v. *Irving Refinery Ltd.*[26] the respondent made verbal arrangements with the appellant for the rental of a tug for one month. Those arrangements were expressly extended twice, each time for a two-week period. No further formal arrangements or extensions were agreed upon, but the appellant continued to make his tug available to the respondent. Later the respondent denied all liability for charges accruing after expiry

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[25] Kellock J., in *Bonnie* v. *Aero Tool Works Ltd.* [1952] 1 S.C.R. 495, at 502, citing *Spottiswoode* v. *Doreen* [1942] 2 All E.R. 65. In *Cotter* v. *General Petroleums Limited* [1951] S.C.R. 154, at 172 Cartwright approved the following passage from *Pollock on Contracts,* 13th Edition, (1950) p. 35: "...if parties to an agreement leave essential terms in it undetermined and therefore to be settled by subsequent contract, their agreement is not an enforceable contract."

[26] [1964] S.C.R. 614.

of the last formal extension. Ritchie J., giving the judgment of the Court, found in favour of the appellant. He considered that the appellant, in keeping the tug available for the respondent after the express arrangements had expired, was making a new offer for the same services at the same rate. The question then became whether the respondent's course of conduct during the months in question constituted a continuing acceptance of these offers. The test, said Ritchie J., was objective; in support of this proposition he cited *Anson on Contracts*, 21st edition, p. 28, and *Williston on Contracts*, 3rd edition, volume 1, paragraph 91A, but appeared to rely most heavily on the famous *dictum* of Lord Blackburn in *Smith* v. *Hughes*:

> If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[27]

Ritchie J. concluded that an agreement was to be implied from the respondent's acquiescence in the tug's services being supplied for its benefit during the period for which the claim was being made.

Regrettably, Ritchie J. did not examine important passages from the judgment of Locke J. in *Barrick* v. *Clark*.[28] In that case, the Supreme Court was called upon to decide whether or not an offer by post had been accepted within a reasonable time. Upon considering the terms of the offer and the circumstances surrounding it, the Court held that a reasonable time had elapsed before purported acceptance. Locke J. considered evidence to the effect that the offeror was not really in as much of a hurry as his offer indicated, and commented as follows:

> With great respect, I think this evidence does not affect the question to be determined. An intention not expressed or communicated to the other party is immaterial in deciding the question as to whether there was an agreement. The law appears to me to be accurately summarized in Leake (8th Ed.) p. 2, where it is said that the law judges the intention of a person by outward expressions only and judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them unless there is a duty to speak, in which event a party may become bound by his silence. ... the question should, in my opinion, be determined by considering only the communications which passed between the parties.[29]

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[27] (1871), L.R. 6 Q.B. 597, at 607.
[28] [1951] S.C.R. 177.
[29] *Ibid.*, p. 188.

To the extent that Locke J. in this passage is accepting the proposition that formation of a contract must be judged objectively, his *dicta* can be said to support Ritchie J.'s interpretation of the facts in *Saint John Tug.* But to the extent that Locke J. considers express communication of intent between parties crucial, this passage from *Barrick* v. *Clark* is a serious obstacle to Ritchie J.'s decision, and constitutes a severe restriction on the whole notion of acceptance by conduct. Faced with this difficulty raised by his own Court, Ritchie J. weakened his judgment in *Saint John Tug* by simple reliance on Lord Blackburn's *dictum* in *Smith* v. *Hughes.*

Ritchie J. in *Saint John Tug* was faced with a difficult problem concerning formation of a contract. It would have been appropriate, although it was not necessary, for Ritchie J. to employ Rand J.'s "instinct with an obligation" concept and develop it in a way that would make it suitable as a method of solving acceptance by conduct situations. The effect of the "instinct with an obligation" concept, properly developed, would be to allow evaluation of the whole sense and nature of the negotiations and possible agreement, without undue restriction by highly technical rules and requirements. When the function of the Court is properly to interpret and apply the private law of the parties, such a wide mandate is appropriate. Without questioning the wisdom and fairness of the specific decision of Ritchie J. in *Saint John Tug,* it can be said that Ritchie J. ignored an opportunity to develop a new and far-seeing principle already canvassed by the Supreme Court.

In those few cases which the Supreme Court since 1949 has decided on offer and acceptance grounds, the Court has as a whole apparently chosen to act on conventional principles long accepted by English and to some extent American law. It can be said that the Court has not decided these cases badly; generally application of the conventional law has led to a reasonable result.[30] But the Court has ignored the opportunity to indulge in creative jurisprudence; it has ignored an opportunity to create a distinct new principle, in favour of simple application of concepts developed elsewhere. And it has done this without canvassing the relative policy merits of the competing principles.

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[30] See for another example of such a result *Gordon* v. *Conners* [1953] 2 S.C.R. 127. A less convincing case is *Lethbridge Collieries Ltd.* v. *The King* [1951] S.C.R. 138, in which the Court differentiated between an offer and a "certain policy" which the Emergency Coal Production Board indicated by letter to collieries that it proposed to follow.

III

Construction

In *Canadian Indemnity* v. *Andrews & George*[31] Kerwin J., giving judgment for himself and Estey J., quoted Holmes, *The Common Law*, p. 302: "As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary." To this sentence, Kerwin J. added the following passage from *Chitty on Contracts*, 20th edition, p. 3:

> It therefore appears that... the kind of obligation involved in a contract is that which the parties themselves *intend* shall be created. It arises from their volition and is not imposed on them *ab extra* by the law. A and B are not obliged to enter into any contract unless they wish to do so; if they do so, they create their own obligation, the one to the other; they intend that their bargain shall, if necessary, be enforced by the law.[32]

The law of contract has traditionally proceeded on the basis that the Court has as its function to understand the arrangements reached between private parties and to enforce those arrangements, provided only that the contract is not in some way illegal or contrary to public policy. But as the range and nature of possible contracts has expanded as society becomes more complex, the Courts have made inroads into this basic principle, although in most cases, paying lip-service to it. To begin with, the increasingly accepted notion that intention must be judged objectively, rather than subjectively, allows courts if they wish to impose on all contracts the community or some other standard of what is 'fair" and "reasonable." Using this device, and sometimes simply explicitly ignoring what appears to have been the true intention of the parties, the courts, while maintaining that "the heads of public policy are closed," have often acted to impose general standards on private agreements. This fundamental and continuing development in the law of contract has been clearly recognized by most commentators. Atiyah, for example, has analysed how the Courts, when differentiating between terms of the contract and mere representations, do not really do what they claim to be doing:

> ...it is reasonably clear that the 'intention of the parties' does not really mean what it says. In the first place, it is highly unlikely that the parties had any intention at all on the matter, for such an intention would virtually require an appreciation of the legal distinction between a term of the contract and a mere representation. In the second place

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[31] [1953] 1 S.C.R. 19.
[32] *Ibid.*, p. 23.

> it is almost certain that the parties will claim that they had different intentions, for if they did not, the case probably would not be in Court at all. Thus we rarely find a Court making any real attempt to examine the actual intention of the particular parties in order to solve this particular type of question. ...We are then likely to find the Court explaining the purely objective reasons for which it thinks that the party making the statement accepted responsibility for it, e.g. that he was a dealer in the goods in question, or that he, as owner of the land being sold, had better opportunities for discovering the truth of his statement.
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> ...In point of fact, it is the nature of the result which appears in many cases to determine the answer to the question.[33]

The Court, then, may well interpret the contract to arrive at a result which appeals to it; and often what will appeal to the Court will appeal to it for policy reasons. "Objective" interpretation of a contract may simply be a means of applying public standards to private law.

This fundamental development, symptomatic of a tempered judicial activism,[34] has yet to be consistently reflected in the decisions of the Supreme Court of Canada. The Supreme Court, compared to other final appellate courts, has demonstrated a general reluctance to interfere with what appears to be the actual agreement reached between two parties. Some indication of its general approach is given by the case of *Canadian Atlas Diesel Engines* v. *McLeod Engines*.[35] Both the appellant and the respondent held agencies in British Columbia for the sale of Chrysler marine engines. Chrysler appeared to want only one agency in the Vancouver/Victoria area, and the respondent, a much newer agency than the appellant, decided it would be wise to anticipate a possible move by Chrysler and surrender its agency to the appellant on the best terms available. The agreement for that surrender included a provision whereby the appellant agreed to supply the respondent with enough engines to allow the respondent to fill "orders" which it had on hand at the time of surrender. The respondent submitted a list to the appellant of what it considered to be such orders;

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[33] Atiyah, Introduction to the Law of Contract 103, (1961).

[34] American Courts, taking a highly liberal view of the role of public policy in the law of contract, tend to be explicit in their application of actual or desired community standards; consider, for example, the judgment of Frances J., in *Henningsen* v. *Bloomfield Motors*, 32 N.J. 358, 161 A. 2d 69 (1960). An English Court might decide the same way in a Henningsen situation, but would likely justify its decision, following *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, on the basis of unrebutted presumptions of intention.

[35] [1952] 2 S.C.R. 122.

the list was compiled from letters from fishing companies estimating the engines they would need for the coming season. After supplying some engines, the appellants refused to supply any more, and argued that the letters estimating engine requirements were not "orders" within the meaning of the word.

The Court gave judgment for the appellant. Mr. Justice Estey considered that the letters in question were of an ambiguous nature; the Court was therefore justified in examining the intent and meaning of the word "orders" as used by the parties in this contract. The rule to be applied, said Estey J., is that stated by Blackburn J. in *Fowkes* v. *The Manchester and London Life Assurance and Loan Association*: [36]

> ...The language used by one party is to be construed in the sense in which it would be reasonably understood by the other.

If, said Mr. Justice Estey, the respondent intended the estimated requirements made in the letters to be accepted as orders within the meaning of the contract, the respondent should have exhibited one of the letters or made such explanations of their contents as would have enabled the appellant to understand the word "order" in the sense which he desired it to be understood.[37] Mr. Justice Locke agreed as to the result with Estey J. Locke J. did not consider there to be any ambiguity in the language used in the contract, and considered accordingly that the word "orders" should be given its commonly accepted meaning, which in Locke J.'s. view, was the meaning to be found in the New Oxford Dictionary. The letters in question were, said Locke J., not "orders" but were simply estimates of requirements. Kerwin J. simply agreed with Estey and Locke JJ., without indicating which of the two approaches he preferred.

The dissenting judgment of Rand and Cartwright JJ. was delivered by Mr. Justice Rand. Rand J. was of the opinion that the word "orders" as used embraced the commercial commitments contained in the controversial letters. He gave a far-ranging definition of the word "order":

> Strictly speaking, an order, in law, is a proposal in the nature of an offer which invites, without more, some form of acceptance intended to lead to an obligation; that acceptance, according to the nature of the order, may be by promise or by some act as, say, the delivery of goods to a carrier. The letters of essentiality here do not go to that length; they do not of themselves alone contemplate an acceptance;

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[36] (1863), 3 B. & S. 917, at 929.

[37] Estey J. did not refer to the supporting dictum of Locke J., in *Barrick* v. *Clark* [1951] S.C.R. 177, at 188.

> but they are *bona fide* estimates of an approaching season's requirements by a customer to a seller which look to subsequent directions for shipment of the goods mentioned. They imply an assurance that such directions will be given, and exhibit that assurance as a representation to the department of government concerned.[38] They did not, from that moment, in a legal sense, bind the companies, but neither would they have had they been orders in the strict sense; before acceptance, an order can be revoked and an outstanding recovable order would admittedly satisfy the language used.[39]

Rand J. went on, relying on *Hillas & Co. Limited* v. *Arcos Limited*,[40] to hold that the rule that the ordinary meaning of language is to be taken as intended may be modified by showing the perspective in which the matters were actually viewed, and what matters of fact were actually in the minds of the parties.[41] The contract, said Rand J., must be construed as a whole, and an undue emphasis upon a word or phrase may easily distort that balanced understanding which can be seen to have been the crystallized consensus.

Rand J.'s judgment recalls again the passage from *Wood* v. *Lady Duff Gordon*[42] which he quoted in *Dawson* v. *Helicopter Exploration Co. Ltd.*:[43] "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Kerwin, Estey and Locke JJ. were con-

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[38] The letters were originally written to satisfy the Federal Government that there was a commercial need for the engines in question so that the required import permission could be obtained.

[39] [1952] 2 S.C.R., at 129-130.

[40] (1932), 147 L.T. 503. See the *dictum* of Lord Wright, at 514, and that of Lord Tomlin, at 511, both cited by Rand J.

[41] In *Canadian Indemnity Co.* v. *Andrews & George Co. Ltd.* [1953] 1 S.C.R. 19, at 24, Rand J., said "... "meaning" itself has rather shadowy boundaries, and even ordinary language must, for a true understanding of what the parties meant by it, be construed in the context and the circumstances out of which it has arisen. When the words are in the form of legal expressions which have no fixed or precise definition, those circumstances become so much more necessary to enable us to appreciate the mental perspectives of the parties when they bargained." The Court held in *Canadian Indemnity* that liability under s. 21 of the Sale of Goods Act R.S.B.C. 1948, c. 294, was contractual liability rather than liability at law, since the warranty provided by s. 21 was deemed to be an element of the intention of the parties, and could by agreement be excluded. It is interesting to note that in this case the Court, while insisting that it was up to contracting parties to create their own law, found that s. 21 was impliedly a term of the contract although the litigation suggests the parties were not agreed that this section was a term. The Court in this case appears to have taken an unusual objective view of the contract.

[42] 222 N.Y. 88, at 90 (1917).

[43] [1955] S.C.R. 868, at 875.

cerned only to define the word "orders." Locke J. relied on the dictionary definition; Estey J. was, it seems, prepared to admit of another definition if the word could so be reasonably understood. Even Rand J. was essentially concerned with the meaning of "orders," but he was prepared to take a far-ranging view of what was involved in defining any word. It is only Rand J. who gives any indication of being concerned with objectivity in the sense of a desired result or application of a general standard. It could, of course, be said of the majority judgment that it was objective in the sense that it attempted to define a word generally rather than with a view to the specific understanding of the contractual parties. But this kind of objectivity is indeed a poverty-stricken objectivity. Its result is to apply neither the intention of the parties nor a community standard of what is fair and reasonable.

Rand J., in asking for balanced understanding rather than undue emphasis upon a word or phrase, has not been alone in the Supreme Court of Canada. In *Cotter* v. *General Petroleums Ltd.*[44] Cartwright J. endorsed the following rule laid down in *Mill* v. *Hill*[45]: "The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it."[46] In *Barrick* v. *Clark*[47] Estey J., in discussing whether or not an offer by letter had been accepted within a reasonable time, stated:

> What will constitute a reasonable time depends upon the nature and character of the subject matter and the normal or usual course of business in negotiations leading to a sale thereof, as well as the circumstances of the offer including the conduct of the parties in the course of negotiations.

A remarkable result was achieved in the case of *Mason* v. *Freedman.*[48] In that case, the appellant accepted an offer from the respondent for the purchase of the fee simple of his farm. The contract contained a clause providing for the right of the vendor to declare the contract null and void if requisitions which he is unable or unwilling to remove are made within a stated time. At the time of closing, the appellant asserted that he was unable to secure a bar of dower from his wife, tendered a deed without such

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[44] [1951] S.C.R. 154, at 171.

[45] (1852), 3 H.L. Cas. 828, at 847.

[46] In *Cotter* v. *General Petroleums* the Court was faced with deciding whether or not, under the rule in *Forbes* v. *Git* [1922] 1 A.C. 256, at 259, a repugnancy existed between two clauses in an option agreement.

[47] [1951] S.C.R. 177, at 184.

[48] [1958] S.C.R. 483.

a bar and claimed payment in accordance with the terms of the contract. The respondent refused to close on these terms, rejected a tender of the return of his deposit, and brought an action for specific performance. Judson J., giving the majority judgment, said that a proviso of the kind facing the Court "does not enable a person to repudiate a contract for a cause which he himself has brought about."[49] "A vendor who seeks to take advantage of the clause," said Judson J., "must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner."[50] In this case, decided Judson J., the vendor had made no genuine attempt to obtain a bar of dower: "there was complete and deliberate failure... to do what an ordinarily prudent man having regard to his contractual obligations would have done."[51] Accordingly, the appellant was unable to rely on the clause in the contract.[52]

In *Mason* v. *Freedman* the Supreme Court disregarded the obvious and mechanical application of a specific clause in a contract, looked beyond the clause to the actions and motives of the parties, and denied success to the appellant on the grounds that he did not act as "an ordinary prudent man having regard to his contractual obligations would have done." Here is an explicit application of a general standard, instead of an attempt to apply private law devised by the parties themselves.

The recent trend of the Supreme Court has regrettably been away from this type of objective approach to contractual interpretation and enforcement. In *Clark's-Gamble of Canada Limited* v. *Grant Park Plaza Limited et al*,[53] the appellant sought a permanent

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[49] *Ibid.*, p. 486. In *Bonnie* v. *Aero Tool Works Ltd.* [1952] 1 S.C.R. 495, at 506, Kellock J., said of the contract in question: "I think it was not in the contemplation of the parties that, where a binding contract of purchase and sale had been effected by the appellant, he would not be entitled to be remunerated if the respondent, by its own deliberate act, prevented such contract being carried out." From these *dicta* some new general principle or an extension of the principle of breach may emerge to the effect that if a contractual party prevents fulfillment of the contract, he becomes unable to sue on that contract, regardless of its terms, and is severely restricted in the remedies available to him. Possibilities of development of the law of contract in this direction are worthy of examination.

[50] *Ibid.*, p. 487.

[51] *Ibid.*, p. 488.

[52] The order of the Court for specific performance gave the respondent the option of requiring the appellant to convey all the interest he had without the bar of dower but with an appropriate provision for the payment into court of a sum of money out of the purchase-price as security against the claim for dower.

[53] [1967] S.C.R. 614.

injunction restraining the respondent from giving a lease in a shopping centre to a "Woolco Store", a type of store which would be in direct competition with the appellant's own operation. The appellant's primary contention was that in its agreement with the respondent, certains plans were approved by the parties, and those plans made no provision for a Woolco Store. The appellant also argued that the proposal to the respondent contemplated a building scheme and implied a negative covenant of the respondent not to depart from that scheme. Spence J., giving the judgment of the Court, gave judgment for the respondent. In interpreting the agreement, Spence J. relied on the following passage from the judgment of Sedgewick J. in *Toronto Railway Company* v. *City of Toronto*:[54]

> It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may have been supposed to have been intended, but what has been said.

The judgment of Spence J. in *Clark's-Gamble Case,* although it may well have achieved a reasonable result on the facts of that particular case, is regrettable in that it indicates a current general policy of the Court which does not encourage either a realistic attempt to determine the actual subjective intention of the contracting parties, or an attempt by objective interpretation to apply general standards. Spence J., and presumably the Court generally, is not prepared to go much, if at all, beyond the actual written word. The attitude of Kerwin, Estey and Locke JJ. in *Canadian Atlas Diesel Engines* v. *McLeod Engines* seems established as the general attitude of the Court. Precise words are still, it seems, in the Supreme Court of Canada, the sovereign talisman.

IV

Promissory Estoppel

The first case to reach the Supreme Court of Canada since 1949 in which, on the facts, the doctrine of promissory estoppel[55] could

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[54] (1906), 37 S.C.R. 430, at p. 435.

[55] Promissory estoppel must, of course, be carefully distinguished from ordinary estoppel. For a consideration by the Supreme Court of ordinary estoppel, see Spence J., *Clark's-Gamble of Canada Limited* v. *Grant Park Plaza Ltd. et al.,* [1967] S.C.R. 614, at 626-7, and *Canadian Acceptance Corporation Ltd.* v. *Fisher* [1958] S.C.R. 546, at 555-557 (per Cartwright J.).

have applied, appears to have been *Foot* v. *Rawlings*.[56] An action was brought for the balance owing on six promissory notes, made by the respondent payable to the appellant. The parties had executed an agreement as to five of the notes, whereby it was agreed that the respondent would pay $300 a month at 5%, instead of $400 at 8%. The payments were to be made on or before the 16th of each month. A series of post-dated cheques was inadvertently dated on the 18th; these cheques were accepted by the appellant. Several were cashed, but then an action was brought. The Court found for the appellant. Cartwright J., giving the unanimous judgment, found first that there had been no default under the agreement; the respondent had cashed three cheques dated the 18th, and by his conduct therefore had not elected to treat the lateness as entitling him to rescind. Cartwright then considered whether there was any consideration to support the agreement: citing *Sibree* v. *Tripp*,[57] he found as follows:

> I have reached the conclusion that the giving of the several series of post-dated cheques constituted good consideration for the agreement by the respondent to forbear from taking action on the promissory notes so long as the appellant continued to deliver the cheques and the same were paid by the bank on presentation.[58]

The notion that tender of a negotiable instrument constituted consideration for the discharge of the original debt was developed by the English courts as a way of avoiding the rule in *Pinnel's Case*[59] which holds that "payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole." Under that rule, a new agreement with new consideration is required before the original debt can be discharged by payment of a smaller sum. *Sibree* v. *Tripp*, followed by *Goddard* v. *O'Brien*,[60] held that the giving of a negotiable instrument constitutes such new consideration. These cases have been subject to considerable criticism. Cheshire and Fifoot have commented that "in contemporary society the distinction between payment in cash and payment by cheque — provided, indeed, that the cheque is honoured — scarcely accords with business practice." [61] Only two years after the Supreme Court of Canada decided *Foot* v. *Rawlings*, the English Court of Appeal

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[56] [1963] S.C.R. 197.

[57] (1846), 15 M. & W. 23. *Sibree* v. *Tripp* was generally considered authority for the proposition that the acceptance of a negotiable instrument may be in law a satisfaction of a debt of a greater amount.

[58] [1963] S.C.R. 197, at 202.

[59] (1602), 5 Co. Rep. 117a.

[60] (1882), 9 Q.B.D. 37.

[61] Cheshire and Fifoot, The Law of Contract 81 (7th ed. 1969).

in *D. & C. Builders Ltd.* v. *Rees*[62] rejected the distinction between cash and a cheque. Lord Denning said that "no sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque."[63]

The rule in *Pinnel's Case* has further been circumvented in England by development of the doctrine known as promissory estoppel. This doctrine was established by the 1947 case of *Central London Property Trust, Ltd.* v. *High Trees House Ltd.*[64] and was further defined in *Combe* v. *Combe.*[65] Denning L. J. in *Combe* v. *Combe* stated the principle in these terms:

> The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him: but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.[66]

The question becomes: Why did the Supreme Court of Canada in *Foot* v. *Rawlings* apply a distinction rejected two years later by the English Court of Appeal as lacking sense, while at the same time not discussing or employing an already established doctrine which would have allowed the Court to reach the result it apparently favoured?

The 1964 case of *Conwest Exploration Co. Ltd.* v. *Letain*[67] was the first post-abolition of appeals case in which the Supreme Court explicitly considered the doctrine of promissory estoppel. Under an option agreement, the obligations of the optionee, the appellant company Conwest, were to cause to be incorporated before October 1, 1958, a company to hold certain mining claims owned by the optionor, Letain, and to allot and issue to Letain not less than fifty thousand shares of this company. Letain executed a transfer of the optional claims to Conwest to be held subject to the terms of this agreement. On September 18, 1958, Conwest filed an application for incorporation of the company, and was notified that letters patent were being prepared and would bear the date Sep-

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[62] [1965] 3 All E.R. 837.
[63] *Ibid.*, p. 840.
[64] [1947] 1 K.B. 130.
[65] [1951] 2 K.B. 215.
[66] *Ibid.*, p. 220.
[67] [1964] S.C.R. 20.

tember 25. Conwest then decided to invite Letain to have his name appear in the proposed company; on September 26, Letain agreed to this proposal. The Director of Companies wrote to Letain to inquire about the nature of his interest in the company, and on October 7, Letain stated that he would have a substantial interest. Two days later, Letain sent a telegram to the Director withdrawing consent to the use of his name. The letters patent were nonetheless sealed and issued on October 20, bearing the date September 25. Letain sought return of the claims held under option on the ground that Conwest had not performed the conditions precedent to the exercise of the option; Letain maintained that he was entitled to have a company whose letters patent were actually sealed and issued on or before October 1.

The Court allowed the appeal by Conwest and restored the order of the trial judge for specific performance of the option agreement. The Court considered whether Letain, by his intervention in the incorporation of the company before October 1, 1958, provided Conwest with an equitable defence against a claim for re-transfer of the claims. Judson J., giving judgment for himself and Chief Justice Taschereau, held that Letain, by signing the consent to the use of his name and the declaration of substantial interest on October 7, and retaining $18,000 paid for the shares in the proposed company, represented to Conwest that he was satisfied with what was being done as performance of the contract. Furthermore, said Judson J., Letain knew that Conwest would act and was acting upon his representation, and but for this representation, Conwest could have given Letain the kind of performance to which he says he is entitled. Judson J. continued:

> I think that this brings the case within the principle which appears to have originated in the judgment of Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. 439. There was an unambiguous representation of intention made by Letain which was intended to be acted upon and was acted upon by Conwest, with the result that Conwest's position in relation to Letain was prejudiced if Letain's interpretation of what constituted performance under this contract is correct.[68]

This type of equitable defence, said Judson J., was recognized by Duff C. J. in *Pierce* v. *Empey*[69] and "it does not seem to me that the recent interest in England in this subject-matter, beginning with *Central London Property Trust Limited* v. *High Trees House*

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[68] *Ibid.*, pp. 27-28.

[69] [1939] S.C.R. 247.

Ltd. [1947] K.B. 130, has done anything more than to restate the principle." [70]

Martland J., dissenting, was of the opinion that the defence of equitable estoppel was not open to the appellant. Conwest contends, said Martland J., that it was induced by the respondent's conduct to believe that he had agreed to extend the time for acceptance. In taking this point, Conwest was not seeking to raise equitable estoppel as a defence to the strict enforcement by the respondent of his contractual rights; the respondent did not need to take any steps to terminate the option agreement, for it terminated automatically upon expiration of the option period. Said Mr. Justice Martland:

> What Conwest really seeks to do is to use equitable estoppel as a means of establishing that there was an extension of the option period. But such an extension would involve the making of a new contract and for such a contract there was no consideration.
>
> The doctrine has never been extended this far and its application in similar circumstances was denied by the Court of Appeal in England in *Combe* v. *Combe* [1951] 2 K.B. 215. While it is true that in that case the party seeking to apply the principle was the plaintiff in the action, in my opinion its application is not dependent upon which party sues the other. The basic question is as to whether, in the circumstances of the particular case, it is being used as a defence to the strict enforcement of contractual rights, or as a means of proving the existence of a contract made without consideration. It has no application to the latter type of case and consequently, in my view, should not be applied here.[71]

Ritchie J. also dissented. On the equitable estoppel point, he agreed in substance with Martland J. Said Ritchie J.:

> It is suggested... that the respondent's "declaration of substantial interest" which was not given until October 7 is to be treated as an acceptance by Letain of the fact that the company had not then been incorporated and an acquiescence in the delay, but even if this were so it could not serve to reinstate the lapsed option as the law is well settled that once it has expired an option cannot be revived without a new agreement for valuable consideration (see *Dibbins* v. *Dibbins* [1896] 2 Ch. 348, per Chitty J. at 351 and 352).[72]

Cartwright J. agreed with the judgment of Judson J. and in a short judgment of his own referred specifically to one aspect of the use of equitable estoppel raised by Mr. Justice Martland:

> In my view ...Letain is the plaintiff in substance as well as in form. He is not simply resisting an attempt to enforce the option; he is

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[70] *Supra*, n. 67, at p. 28. For an argument that *High Trees* constitutes a significant misunderstanding of *Hughes* v. *Metropolitan Ry.*, see Gordon, *Creditors' Promises to Forgo Rights*, 1963 Camb. L.J. 222.

[71] *Ibid.*, p. 31.

[72] *Ibid.*, p. 36.

> seeking to compel the conveyance to himself... of the eight claims which he caused to be transferred to Conwest...[73]

In the view of Cartwright J. the defence of equitable estoppel was open to Conwest.

It is clearly irrelevant that there was no consideration for an agreement to extend the option period. The doctrine of promissory estoppel was devised precisely to allow the use of an agreement without consideration as a defence to an action to enforce the superseded agreement. The doctrine can only be used as a defence, because only then is it not necessary to prove a contract and thus the existence of consideration. Although Letain was the plaintiff in *Conwest,* and from the point of view of form Conwest was using promissory estoppel as a defence, it was the view of Martland J. and apparently Ritchie J. (explicitly rejected by Cartwright J.) that in substance Conwest was using the doctrine to prove the existence of a new contract and not by way of defence to an action by Letain to enforce strict contractual rights. It is submitted that a better view — and impliedly this was the view of the majority — is that the key conceptual limitation on the doctrine is that as to form it can only be used as a defence — "as a shield and not as a sword"; it is not and should not be mandatory that it be used as a defence to an action to enforce strict contractual rights. Accordingly, that Letain was not enforcing strict contractual rights as such should not have affected the ability of Conwest to use promissory estoppel as a defence. That the majority of the Supreme Court in *Conwest* allowed use of the defence appears, then, to constitute a significant development of the doctrine of promissory estoppel in keeping with the spirit in which it was devised.

In any event, it should be clearly noted that the view of Martland and Ritchie JJ. that Conwest, by using promissory estoppel, was attempting illegitimately to prove the existence of a consideration-less contract is a highly doubtful view. Whenever the defence is employed, by its very nature it constitutes a reference to a new agreement without consideration. It was specifically devised to allow such a reference to constitute a good defence. If in the view of a Court, such a reference cannot be allowed, then that Court must reject the whole doctrine of promissory estoppel.

The doctrine of promissory estoppel was again considered by the Supreme Court in *John Burrows Ltd.* v. *Subsurface Surveys Ltd. and G. Murdoch Whitcomb.*[74] Under an agreement involving

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[73] *Ibid.,* p. 29.
[74] [1968] S.C.R. 607.

the sale of the appellant company to the respondent Whitcomb, the respondent company Subsurface Surveys (set up by Whitcomb) promised to pay the appellant $42,000 in nine years and ten months, together with interest on the first day of each month until payment. In default of payment of any interest payment for ten days or more, the whole amount payable under the note was to become immediately due. Eleven payments were accepted more than ten days after they were due. The twelfth payment being thirty-six days overdue, the appellant demanded the whole sum owing.

The Court found unanimously for the appellant. Ritchie J., giving the judgment, after finding that the instrument in question was a promissory note, addressed himself to the question of whether or not the defence of equitable estoppel applied in the circumstances of the case. Said Ritchie J.:

> It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.[75]

Ritchie J. concluded that "the behaviour of Mr. Burrows is much more consistent with his having granted friendly indulgences to an old associate while retaining his right to insist on the letter of the obligation . . ." [76]

Interesting questions are raised by the judgment of Ritchie J. in *Burrows* v. *Subsurface Surveys*. It is generally supposed that for promissory estoppel to be applicable, the party using the defence must have believed that strict rights under the contract would not be enforced and must have been led to so suppose by a course of negotiations. No one would likely dispute that this supposition must be a reasonable supposition; a mere eccentric belief would not satisfy the precondition for the doctrine's use. Ritchie J., in the passage above, appears further to define what is required before the defendant's supposition is sufficient to allow use of the de-

[75] *Ibid.*, p. 615.
[76] *Ibid.*, p. 617.

fence. There must be evidence that the plaintiff intended that the legal relations created by the contract would be altered as a result of the negotiations. In other words, the Court will only consider a supposition that strict rights will not be enforced as reasonable if it results from negotiations in which the other party intends the original legal relations to be altered. This limitation on the doctrine's use is unobjectionable if the promisor's intentions are judged objectively, according to the standard of the reasonable man. But if Ritchie J. means that the use of the defence depends on an actual subjective intention being shown to exist, we are faced with an unreasonable further definition of promissory estoppel, for this means that no matter how reasonable the defendant's supposition, it cannot be relied upon if the plaintiff unreasonably did not have the required intention. It is assumed that Ritchie J. intended the first interpretation, although this article's discussion of the Court's general attitude towards "intention" [77] raises some doubts concerning this assumption.

An additional element of further definition and limitation of the doctrine of promissory estoppel is the distinction drawn by Ritchie J. between the intention to alter legal relations and the mere granting of an indulgence. It is clearly a sound distinction, for as Ritchie J. points out, failing such a distinction contracting parties would have always to insist on their exact rights being enforced. However, some more precise indication of the nature of the distinction would have been helpful.

In summary, putting aside the curious case of *Foot* v. *Rawlings*, when it comes to promissory estoppel the Supreme Court of Canada in the few cases presented for its attention has applied the general law developed in England, although it has applied that law in a somewhat confused fashion.

V

Exemption Clauses

The problem of standard form contracts is increasingly recognized as a key problem in the modern law of contract. A law developed in an age which believed in laissez-faire and in which most contracts were concluded between parties of equal bargaining strength, must adjust to a time when the ordinary man deals with huge monopolies, and organs of the government seek increasingly

[77] *Supra*, pp. 483-491.

to regulate all relationships. In England this adjustment has recently been reflected in a long chain of difficult cases. Some thought that the judgment of the House of Lords in *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*[78] settled this troublesome area. But the judgment of the Court of Appeal, and particularly Lord Denning, in *Harbutt's Plasticine Ltd.* v. *Wayne Tank and Pump Co. Ltd.*[79] has again thrown the law as it relates to exemption clauses into confusion. In the United States, the problem of standard form contracts has been approached by courageous application of precepts of public policy. Beginning with the landmark case of *Henningsen* v. *Bloomfield Motors*,[80] American courts have shown an awareness of the problem and a desire to struggle with it in a fundamental way.

Curiously, only a handful of cases involving standard form contracts or exemption clauses has been considered by the Supreme Court of Canada since abolition of appeals to the Privy Council, and those few were considered before much of the interest and many of the developments in other countries. In *The King* v. *Canada Steamship Lines et al.*[81] a Montreal shed, leased by the appellant to the respondent Canada Steamship Lines, in which were stored goods belonging to the respondent and third parties, caught fire while the appellant's employees, acting within the scope of their duties, were negligently performing repairs in compliance with the appellant's obligation under the lease to maintain the premises. Clause 7 of the lease provided that "the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature ... to the said shed ... or materials ... goods ... placed, made or being ... in the said shed."

The Court, with each of the seven judges sitting on the case rendering a separate judgment, found for the appellant, with Locke J. dissenting in part. Chief Justice Rinfret first found, and all the other judges agreed with him, that the employees of the Crown did not commit "faute lourde." In any event, said the Chief Justice, on the authorities and true interpretation of Clause 7, he could not come to the conclusion that gross negligence or "faute lourde" should render the Clause inoperative. For this conclusion, Rinfret C. J. relied on the Supreme Court cases of *The Glengoil Steamship*

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[78] [1967] 1 A.C. 361.

[79] [1970] 1 All E.R. 225.

[80] 32 N.J. 358, 161 A. 2d 69 (1960).

[81] [1950] S.C.R. 532. The judgment of the Supreme Court was reversed by the Privy Council — *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192.

Company v. *Pilkington* [82] and *Vipond* v. *Furness, Withy and Company* [83] and on the Quebec case of *Canadian National Railway Company* v. *La Cité de Montréal.*[84] These cases, said Rinfret C. J., settled that a clause of this character is neither illegal or void. Clause 7, concluded the Chief Justice, is general and all-embracing and not susceptible of two meanings; it is applicable to the negligence of the appellant, and would be applicable even if that negligence constituted "faute lourde."

Mr. Justice Rand discussed what he described as the rule striking negligence from exceptions of liability. Examining "the rational consideration upon which the rule is based," Rand J. said that "since the matter is primarily in contract, the exception should appear as the presumed intention of the parties." [85] A test to ascertain presumed intention is whether the words of exemption can be given a reasonable application short of negligence, as was suggested by Atkin L. J. in *Rutter* v. *Palmer.*[86] Rand J. applied that test in the following way:

> In the lease before us, the Crown has undertaken only one obligation, to maintain the building, and the only sources of liability are, failure to maintain and negligent performance. It is said that the former is within section 7 and the latter not. But what, in reasonableness, is the difference between a culpable refusal to carry out an obligation, which involves either an intentional or negligent disregard of it, and the performance in good faith accompanied by less than reasonable care?... it is irrelevant that there might be liability which did not involve culpability, although I should add that I do not see how there could be here.[87]

Mr. Justice Kellock, referring to *Alderslade* v. *Hendon Laundry* [88] said:

> It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case...
>
> It is therefore argued for the respondent in the case at bar that the provisions of para. 7 do not extend to exonerate the Crown from its liability under the provisions of section 19(c) of the *Exchequer*

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[82] (1897), 28 S.C.R. 146.
[83] (1916), 54 S.C.R. 521.
[84] (1927), Q.R. 43 K.B. 409.
[85] [1950] S.C.R., at 546.
[86] [1922] 2 K.B. 87, at 94, referred to by Rand J., *ibid.*, p. 547.
[87] *Ibid.*, p. 547.
[88] [1945] 1 All E.R. 244. See the dicta of Lord Greene M.R., at 245.

Court Act[89] for the reason that negligence is not expressly mentioned and need not of necessity be implied as, under the provisions of the lease itself, circumstances could have arisen entailing liability upon the Crown apart altogether from negligence.[90]

The question, upon the analysis of Kellock J., becomes whether Clause 7 operates only to exempt for contractual liability for damage through failure to fulfill the obligation to maintain the shed. At this point, Kellock J. considered Clause 17 of the lease, which protected the Crown in respect of claims of third parties. Such claims could be based only on negligence, there existing by definition no contractual nexus between the third parties and the Crown. Clearly Clause 17, at any rate, extends to claims for damages by reason of negligent acts of Crown servants. The presence of Clause 17 affects the proper interpretation to be given to Clause 7, and on balance Kellock J. considered that Clause 7 answered the claim of Canada Steamship Lines.

Mr. Justice Estey, on the matter of the effect of Clause 7, attempted squarely to base his judgment on the intention of the parties:

> ...it must be assumed that clause 7 was drafted with reference to detriment, damage or injury to the premises, property or freight. In the preparation thereof the parties would have in mind at least the more likely sources or causes of liability on the part of the lessor. It would therefore be liability for damages arising out of the exercise of the privilege of access or duty to maintain that would be uppermost in their minds. In respect to the former any liability arising therefrom would almost invariably be founded on negligent conduct... It must be assumed, therefore, that the parties in drafting that clause would fully appreciate that the most probable source of liability upon the lessor would be negligent conduct.[91]

Mr. Justice Locke dissented in part. After an important review of cases dealing with exemption clauses, Locke J. concluded:

> Under the provisions of section 19(c) of the *Exchequer Court Act* the Crown might be held liable for damage to property resulting from the negligence of its servants in the discharge of their duties, a liability quite distinct and not in any way dependent on the contractual obligation to maintain the shed during the currency of the lease. As stated by Pollock,[92] the fact that the work was done pursuant to the lessor's obligations under the contract is merely irrelevant... Under the contract to maintain the shed... the Crown might be held liable in damages if, by way of illustration, the foundation of the shed gave way, due to

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[89] R.S.C. 1952, c. 98.
[90] *Supra*, n. 81, at p. 551.
[91] *Ibid.*, p. 556.
[92] Pollock on Torts 427 (14th ed.), referred to by Locke J., at 558.

> lack of repair... Such liability would be in contract and not in tort... The liability of the Crown, as in the case of the common carrier was not confined to that for the negligence of its servants; there was here, as with the carrier, a double liability and, in my opinion, the liability in negligence not having been expressly or by necessary implication excluded remains.[93]

Mr. Justice Cartwright, after considering the line of cases culminating with *Alderslade* v. *Hendon Laundry*[94] said:

> I see no good ground for holding, and I find nothing in the numerous authorities cited to us that appears to me to decide, that general words of exemption wide enough in their ordinary sense to cover every sort of liability should be held not to cover liability arising from negligence merely because some other equally blameworthy source of liability can be imagined.[95]

Mr. Justice Fauteux found the literal meaning of Clause 7 unhelpful. For help, he looked to Clause 17:

> This clause refers to claims and demands of third parties against the lessor for damages. There being no contractual relations between the former and the latter, such claims and demands for damages must, of necessity, be for damages *ex delicto*. Thus clause 17 affords manifest evidence that the minds of the parties were directed to other obligations than those flowing simply from the contract, that the legal duty not to do damage to others was considered and dealt with and this precisely in terms all embracing and thus consistently with the generality of the terms of clause 7...[96]

The judgment in *The King* v. *Canada Steamship Lines* was reversed by the Privy Council.[97] Speaking for the Court, Lord Morton of Henryton found that the Crown had failed in Clause 7 expressly to limit its liability for negligence and that therefore, following *Alderslade* v. *Hendon Laundry*, the clause was to be construed as relating only to certain obligations imposed on lessors by the Quebec Civil Code. The Privy Council further found that the effect of Clause 17 was unclear and it did not therefore exclude liability for negligence, since such an exclusion must be imposed by clear words. In any event, Lord Morton found that the *Alderslade* principle applied to Clause 17 since that clause could apply to heads of damage other than negligence.

The judgment of the Supreme Court of Canada has a number of curious features. In the first place, it is regrettable that each of the six judges in the majority felt it necessary to render an individual

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[93] *Ibid.*, pp. 563-4.
[94] [1945] 1 K.B. 189.
[95] *Ibid.*, p. 569.
[96] *Ibid.*, p. 576.
[97] *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192.

judgment. Such duplication is not only time-consuming, but also makes it that much more difficult to determine the exact *ratio decidendi* of the case. Secondly, the judgments in this case present a remarkable mixture of the principles of common and civil law. In theory the law applicable to this contract made and performed in Quebec is Quebec Civil Law; in fact, examination of the judgments shows extensive discussion of common law principles and of such English cases as *Rutter* v. *Palmer* and *Alderslade* v. *Hendon Laundry*. Consideration of these cases appears to have proceeded on the basis that the common law and the civil law as far as the matters under consideration went were the same. It is a trifle ironic that in a civil law matter the Supreme Court of Canada applied common law principles, only to have its decision reversed by the Privy Council sitting in England.

In general terms, the Supreme Court's judgment in *The King* v. *Canada Steamship Lines* is conservative and traditional, giving no indication of the doubt and controversy which surrounded and was increasingly to surround clauses exempting from liability. The various tools being developed at that time to avoid application of such clauses were studiously ignored. It was definitively stated that "faute lourde" did not render an exemption clause inoperative; meanwhile, English courts were on the brink of developing the notion that a party guilty of a "fundamental breach" could not rely on an exemption clause. The principle, articulated in *Alderslade* v. *Hendon Laundry*, that when negligence and another level of of liability co-exist the exemption clause will not be applied to liability for negligence, was unapplied by all but Mr. Justice Locke. Cartwright J. inexplicably appeared to offer the *Alderslade* case as authority for the exact opposite of what is generally considered to stand for.[98] Throughout, the Supreme Court referred in artificial terms to the "intention" of the parties, with no thought or reference explicit or implicit to judicial policy or community standards. It is not to be regretted that the Court's decision was reversed by the Privy Council.

In *Salmon River Logging Co. Ltd.* v. *Burt Bros.*[99] the Supreme Court, sitting five and with two dissents, substantially backtracked from the position it adopted in the *Canada Steamship Case*. The respondent in *Salmon River* contracted to haul logs produced by the appellant logging company. Clause 3 in the haulage contract exempted the appellant from liability for damage to the respondent's

[98] *Ibid.*, p. 569.
[99] [1953] 2 S.C.R. 117.

trucks in these terms: "The trucks and the personnel operating such trucks shall... be at the risk of and the responsibility of the truckers..." A truck was damaged when a tree fell on it due to the appellant's negligence.

Mr. Justice Rand interpreted Clause 3 as emphasizing that the trucking firm was acting as an independent contractor and laying down that no risk was to be placed on the logging company attributable to any relationship arising from the contract. As a consequence, said Rand J., on the principle followed by the Privy Council in *Canada Steamship Company* v. *The Crown,* "as the clause can be satisfied reasonably by reference to an area not touching the negligence of the party claiming the benefit of it, its language is not to be read as extending to that negligence..." [100] Mr. Justice Cartwright delivered the judgment of himself and Estey J. He found that the reciprocal obligations with which the contract dealt had to do with the loading of the logs on the respondent's trucks, the hauling of them to the appellant's log dump, and the dumping of them there; the contract was silent as to how the logs were to be brought to the places at which they were loaded, which was the stage at which the appellant's negligence occurred. Accordingly, said Cartwright J., the appellant's negligence was not within the four corners of the contract and the exempting clause does not apply.

Kellock and Locke JJ. dissented. Mr. Justice Kellock giving the judgment for both judges, and subjecting the language of the contract to rigorous analysis, held that effect could be given to all the language of Clause 3 only by construing it as applying to negligence as well.

The *Salmon River Case* appears to represent a reconsideration by the Supreme Court of the stance it adopted in *Canada Steamship.* The majority utilized the *Alderslade* v. *Hendon Laundry* principle previously shied away from, with Rand J. explicitly relying on the Privy Council's reversal of the Court's own previous decision. Cartwright J. employed the "four corners" concept rather than the *Alderslade* principle, but the general tone of his judgment was far less rigid than that of his earlier decision. In general, the Supreme Court in *Salmon River Logging* v. *Burt Bros.* paid less attention to rigorous textual analysis of the contract and, impliedly, more to general considerations of fairness than it did in *The King* v. *Canada Steamship Lines.* The reasonable bystander and layman,

[100] *Ibid.,* p. 119.

and perhaps even the lawyer, would be more likely to approve of the former decision than the latter.

This trend, initiated in the *Salmon River* case, was apparently continued in *Indemnity Insurance Company of North America* v. *Excel Cleaning Service.*[101] The appellant had agreed to indemnify the respondent in respect of all sums the respondent should be obligated to pay because of injury to property caused by accident in the course of the respondent's work. An exclusion in the insurance policy provided that the policy did not apply "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured." The respondent operated an "on location" cleaning service and, due to a defective cleaning machine, damaged a wall-to-wall rug it was cleaning in the owner's home. The rug's owner obtained judgment, and the respondent sought to recover under its policy. The appellant contended that it was relieved of liability under the exclusion clause.

The Court, in a three-to-two decision, found for the respondent. The various judgments concentrated on what constitutes "care, custody or control." Said Rand J.: "Clearly custody was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control, in a proprietary sense, was intended." [102] Mr. Justice Estey, after referring extensively to American cases, observed that if on the facts of this case the respondent had "care, custody or control" of the carpet, then in so far as the great majority of its cleaning jobs were concerned, the respondent would have no insurance coverage, notwithstanding the comprehensive language used in the policy. Said Estey J.: "Such a construction would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit." [103] Mr. Justice Estey found that it was difficult to construe the precise meaning of the words used in the policy, and that they should therefore be construed in a manner favourable to the insured.

No matter how eminently reasonable the decision of the majority in *Excel Cleaning* seems, Kerwin and Cartwright JJ. dissented from it. Kerwin J. found that the rug "was in the respondent's safekeeping in the sense that the respondent was not to damage it and, to that extent at least, it had "authority" over the rug. With the consent of the owner the respondent had taken such

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[101] [1954] S.C.R. 169.
[102] *Ibid.*, p. 175.
[103] *Ibid.*, pp. 177-78.

possession of it as was possible." [104] Cartwright J. said that "it seems to me that interpreting the words in their plain, ordinary and popular sense the respondent, at the time the damage was done, had both the care and control of the rug..." [105]

The majority decision in *Excel Cleaning* is marked by a regard for what is is reasonable, rather than by devoted consideration of the exact words used in the agreement. The purpose of the insurance policy should not be frustrated: doubtful words should be construed in favour of the insured: the words "custody" and "control" should be interpreted in a non-technical sense. Regrettably, this reasonable approach and result was abandoned in what appears to be the most recent case directly on exemption clauses decided by the Supreme Court — *Union Steamships Ltd.* v. *Barnes.*[106] The respondent boarded the appellant's ship in the early morning. There was no ticket office on shore, and he bought a ticket for his family on board. The ticket bore a notice on its face, in red print, to the effect that it was issued subject to the conditions printed on the back; on the back was a condition relieving the appellant from liability for any injury howsoever caused. The respondent knew that there was writing on the ticket, but had not looked at it. He was seriously injured as a result of the steward's negligence.

The Court found that the exemption clause operated to exclude the appellant's liability. Mr. Justice Locke gave the majority judgment for himself, Fauteux and Nolan JJ. Said Locke J.:

> In my opinion, the issue in the present matter is determined by the finding of fact that the endorsement on the face of the ticket printed in red ink and referring to the conditions endorsed on its reverse side constituted a reasonable attempt to bring to the passenger's attention the terms of the contract and I consider that his acceptance of the ticket without protest and embarking upon the voyage precludes him from reprobating its terms, relying upon the fact that he did not read it.[107]

Mr. Justice Locke went so far as to doubt the following dictum of Mellish L.J. in *Parker* v. *The South Eastern Railway Company*: [108] "if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions..." [109] Locke J., for the majority of the Court, was clearly not concerned

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[104] *Ibid.*, p. 173.

[105] *Ibid.*, p. 181.

[106] [1956] S.C.R. 842.

[107] *Ibid.*, p. 856.

[108] (1877), 2 C.P.D. 416.

[109] *Ibid.*, p. 423.

with *real* assent, but sought only to satisfy himself that the required forms had been complied with.

Rand and Cartwright JJ. dissented. Mr. Justice Rand said that it was absurd to say that reasonable notice of the exemption clause had been given:

> Everything was hurried; his getting aboard, the vessel getting under weigh (sic), the purchase of the tickets with the steward at his elbow, the settling of the family in the stateroom and the hastening for the baggage. One has only to imagine the incongruity of stopping to examine a ticket in such surroundings to ascertain its terms.[110]

In the view of Rand J. failure to give prominence to the exemption clause "could amount to a virtual deception of passengers."[111] In any event, the appellant did not give sufficient notice of the condition to the respondent. In a separate judgment, Cartwright J. agreed with Rand's dissent.

Union Steamships Ltd. v. *Barnes* is the least happy of those cases on the common law of contract decided by the Supreme Court of Canada since abolition of appeals to the Privy Council. The Court made no reference to the policy question of whether a common carrier should be able to contract out of negligence, the kind of question many think a final appellate court should be prepared to consider. More important, the Court demonstrated an overriding concern for the satisfaction by contracting parties of certain formal and somewhat technical requirements, to the exclusion of examination of *real* consent, and to the exclusion of any application of general standards. Apparently Locke J., for the majority, was concerned only that there be writing on the ticket, whether or not Barnes saw or knew that there was such writing. The circumstances in this case demonstrate total absence of genuine agreement, but the Court ignored subjective reality, not in order to apply objective community standards, but to demand adherence to legalistic forms.

A point referred to only by Rand J. should be emphasized. The ticket with the conditions was obtained after the ship had been boarded by Barnes and had got under way; at that point, the contract was already being performed. Can conditions be incorporated in a contract after performance has commenced? *Chapelton* v. *Barry U.D.C.*[112] suggests not. Rand J. met this point by assuming "that the passenger, knowing he must buy a ticket, agreed in

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110 [1956] S.C.R., at 845.

111 *Idem.*

112 [1940] 1 K.B. 532.

advance that it should govern the carriage from the beginning." [113] But clearly any such agreement is theoretical. The fact that on this analysis Barnes could only have discovered the terms of the contract when he was in a position that absolutely required performance (unless he and his family were prepared to swim for shore) illustrates the absence of real agreement.[114]

Union Steamships Limited v. *Barnes* is an unhappy case. Perhaps the Supreme Court as well felt it to be an unhappy case. The decision was three to two, and then only after a rehearing.

It seems, remarkably, that the Supreme Court has not directly faced the problem of exemption clauses since 1956. The 1958 case of *Mason* v. *Freedman,*[115] discussed already in this article, is conceptually applicable to the problem, but has not been applied, perhaps simply through lack of opportunity. It will be recalled that in *Mason* v. *Freedman,* Judson J. said that an attempt to take advantage of a contractual provision must be exercised reasonably and in good faith. This general precept enunciating general standards outlined by Judson J. could well have been and could still be developed to restrict the applicability of exemption clauses, perhaps as a modified version of the American doctrine of unconscionability. Mr. Justice Judson went on to say that clauses allowing repudiation of a contract do not allow a person to repudiate a contract for a cause which he himself has brought about. This dictum could be interpreted as a specialized application or extension of some form of doctrine of fundamental breach.

It is to be presumed that at least one reason why for so many years the Supreme Court of Canada has not considered the problems posed by exemption clauses and standard form contracts is that litigants have considered the law sufficiently well established in England as to make it foolhardy to appeal to the highest Court in Canada. And yet in England, particularly since the recent case of *Harbutt's Plasticine,* the matter is surrounded by considerable confusion and doubt. The Supreme Court will likely soon have to address itself to these questions. Hopefully the Court will feel itself able to break away from the judgments described here.

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[113] *Ibid.,* p. 846.

[114] Could Union Steamships have demanded that Barnes leave the ship (although under way) if Barnes, upon discovering the conditions, rejected them?

[115] *Supra,* n. 48.

VI

Non Est Factum

In *Prudential Trust Co. Ltd.* v. *Cugnet*[116] one Hunter, acting as an agent of Amigo Petroleums, persuaded Edmond Cugnet to sign what was represented as a mere grant of an option of mineral rights, but was in fact an assignment and transfer of a share in those rights. Amigo assigned these rights to Prudential, which acted as a trustee, first for Amigo, and then for Canuck Freehold Royalties, which later acquired the beneficial interest in Amigo's petroleum rights. Prudential and Canuck brought an action to establish what they considered to be their rights, and the defendant pleaded *non est factum.*

Mr. Justice Nolan delivered the majority judgment for himself, Taschereau and Fauteux JJ. Nolan J. began by giving an important review of *non est factum* authorities. The two key cases are *Howatson* v. *Webb,*[117] stressed by the appellants, and *Carlisle and Cumberland Banking Company* v. *Bragg,*[118] relied upon by the defendants. In *Howatson,* Warrington J. said:

> The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents... Under these circumstances I cannot say that the deed is absolutely void.[119]

On this basis, the appellants argued that while the respondent was careless as to what he signed, he knew the nature of the document and was bound by his signature. In *Carlisle* v. *Cumberland Banking,* Buckley L. J. said:

> The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains... If, on the other hand, he is materially misled as to the contents, of the document, then his mind does not go with his pen. In that case it is not his deed.[120]

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[116] [1956] S.C.R. 914. See a comment by Otto Lang in 35 Can. Bar Rev. 566 (1957). The principle in *Cugnet's Case* was referred to in *Prudential Trust* v. *Olson* [1960] S.C.R. 227, and in *Pepper* v. *Prudential Trust,* [1965] S.C.R. 417.

[117] [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

[118] [1911] 1 K.B. 489.

[119] [1907] 1 Ch., at 549.

[120] [1911] 1 K.B., at 495.

Relying on this case, the respondent argued that his mind did not go with his pen.

Mr. Justice Nolan, after considering these and other cases, concluded:

> In my view while the respondent Edmond Cugnet knew that he was dealing with his petroleum and natural gas rights, the representation made to him was as to the nature and character of the document and not merely as to its contents...
>
> Applying the principle contained in *Carlisle and Cumberland Banking Company* v. *Bragg, supra,* as I do, I have come to the conclusion that the mind of the respondent Edmond Cugnet did not go with his hand and that the plea of *non est factum* has been established.[121]

Mr. Justice Locke, in a separate judgment, considered the issue of estoppel by negligence. The appellants argued that the respondent's negligence enabled Hunter and his principals to sell what appeared to be an interest in mineral rights to a purchaser for value acting in good faith; that negligence should prevent the respondents from pleading *non est factum.* Locke J. rejected this argument, adopting the distinction suggested by *Bragg's Case,* that negligence in signing a document only gives rise to estoppel when that document is a negotiable instrument. Said Locke J.:

> To say that a person may be estopped by careless conduct such as that in the present case, when the instrument is not negotiable, is to assert the existence of some duty on the part of the person owing to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it is valid in the hands of the holder. I do not consider that the authorities support the view that there is any such general duty, the breach of which imposes a liability in negligence.[122]

Mr. Justice Cartwright dissented. He characterised the problem facing the Court in this way: "The question raised for decision in this appeal is which of two innocent parties is to suffer for the fraud of a third." [123] Cugnet, said Cartwright J., was guilty of such negligence, that he must bear the loss, and to the extent that *Bragg's Case* does not allow this conclusion, it should not be followed.

The judgment of the majority in *Cugnet's Case* shows, once more, how the Supreme Court has been captivated by fine technical distinctions at the expense of considerations of policy which in a good system give rise to and support such distinctions. Mr. Justice Nolan, rather than taking the fundamental approach of

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[121] [1956] S.C.R., at 925.
[122] *Ibid.,* p. 929.
[123] *Idem.*

Cartwright J. who in his dissent characterised the issue as being which of two innocent parties should suffer for the fraud of a third, dealt with the case on the doubtful basis of distinguishing between mistake as to the nature and character of the document, and mistake as to its contents, a distinction often criticized.[124] The key problem in *non est factum* has increasingly been recognized as the relationship between the plea and the negligence of the defendant. It is curious that this matter was not touched on by Nolan J. Mr. Justice Locke dealt with the question, but regrettably endorsed the distinction between a document which is a negotiable instrument and one which is not. The only rational policy basis for such a distinction is that innocent parties cannot suffer in the case of non-negotiable instruments; otherwise the general duty giving rise to the liability estopping use of *non est factum* would be wide enough to apply to all instruments. That innocent parties *can* suffer in the case of non-negotiable instruments is amply shown by *Cugnet's Case* itself.

Cugnet's Case established in Canada the unfortunate distinction between class and contents, and implicitly denied application in the *non est factum* context of the principle of estoppel by negligence. A curious consequence of not allowing estoppel by negligence is that the class/contents distinction becomes more desirable. If someone signs a document aware of its nature, but negligently fails to inform himself of its contents, he cannot plead, according to present law in Canada, *non est factum.* If the plea *was* available when the mistake was as to contents, availability of estoppel by negligence would be desirable in order to restrict the plea and protect third parties. While the principle is not available, the class/content distinction performs a useful function in limiting the scope of *non est factum.* It should be recognized that if in Canada that distinction is to be abolished, then estoppel by negligence must be recognized, or *non est factum* will run rampant.

In *Prudential Trust* v. *Forseth,*[125] the distinction between the contents of a document and its nature was reaffirmed.[126] The facts were essentially the same as those in *Cugnet's Case.* Prudential was bare trustee of rights acquired under the relevant documents on behalf originally of Amigo Petroleums Limited; at the time of the action the rights were held by Canadian Williston Minerals Limited. The respondent had assigned an undivided one-half interest in oil

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[124] See for example, Lang, *supra,* n. 116.

[125] [1960] S.C.R. 210.

[126] The distinction was again applied in *Dorsch* v. *Freeholders Oil* [1965] S.C.R. 670.

rights. He sued to have the assignment set aside, alleging that the defendants' agent represented that the documents were only an option to lease.

Mr. Justice Martland, giving the unanimous judgment of the Court, emphasised that in this case, unlike in *Cugnet's Case,* the document in question was read aloud by one of the respondents, in the presence of the respondent and the appellant's agent. Said Martland J.:

> Counsel were unable to refer us to any case in which a plea of *non est factum* had been upheld where a literate person executed a document after having read it through, or after having heard its contents completely read. The fact that some of the terms may be difficult to comprehend, a matter which weighed heavily in the Court of Appeal, does not serve to establish such a plea. This goes only to the issue of a misconception as to the contents of the document and not as to its nature and character. A literate person who signs a document after reading it through, or hearing it fully read, must, I think, be presumed to know the nature of the document which he is signing.[127]

Accordingly, Martland J. rejected the plea of *non est factum.*

There is a certain lack of realism in the approach of Mr. Justice Martland. How does a document take on a certain nature and character, if not by its contents? If the contents of a document cannot be understood, how is it that nonetheless the nature of the overall document is comprehended? Is it realistic and reasonable to set up a presumption that if a literate person signs a document after reading it, he knows what he has done? The real rule emerging from Martland J.'s *dicta* is that if a person signs a document, he is bound by it, *whether or not he understands it.* It would have been helpful if the real *ratio decidendi* of *Forseth's Case* had been explicit and had been justified.

Cugnet's Case and *Forseth's Case* taken together lead to a curious result. Denial in *Cugnet's Case* of the principle of estoppel by negligence means that the doctrine of *non est factum* can be used by someone who negligently signs a document without reading it; *Forseth's Case* denies use of the defence to someone who carefully reads the document before signing, but does not understand fully what he signs. The advantage is thereby given to the person who does not even bother to read the instrument and a considerable price is paid for the peccadillo of signing what is not fully comprehended.

To summarize, the present Canadian law regarding *non est factum,* as laid down by the Supreme Court of Canada to 1965,

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[127] *Ibid.,* pp. 219-220.

is as follows: (1) The distinction made in *Bragg's Case* between the class and contents of a document is accepted; (2) estoppel by negligence, if it applies at all, is applicable only to negotiable instruments (*Bragg's Case*); (3) the policy problem of which of two innocent parties is to suffer for the fraud of a third is overshadowed by the technical distinctions referred to in (1) and (2) above. Essentially, what the Supreme Court of Canada has done is endorse and apply the English case of *Carlisle and Cumberland Banking* v. *Bragg.*

Ironically, the House of Lords in *Saunders* v. *Anglia Building Society,*[128] has recently overruled *Bragg's Case.*[129] Lord Reid said in that case "... I do not think that the modern division between the character and the contents of a document is at all satisfactory." [130] Lord Reid continued:

> There must I think be a radical difference between what he signed and what he thought he was signing — or one could use the words 'fundamental' or 'serious' or 'very substantial'. But what amounts to a radical difference will depend on all the circumstances.[131]

On the question of estoppel by negligence, the House of Lords thought that "estoppel" was not the correct term but that the principle existed. Said Lord Hodson:

> A person may be precluded by his own negligence, carelessness or inadvertence from averring his mistake. The word 'estoppel' has often been used in this context but... this is not a true estoppel but an illustration of the principle that no man may take advantage of his own wrong.[132]

Whatever it is called, negligence may in England, it seems, prevent use of the *non est factum* plea.

The Supreme Court of Canada chose to follow English decisions just at the time when the English courts decided to depart from them. The English courts now take a wider, less technical approach; the Supreme Court, in this area as in others, has turned its back on that approach.

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[128] [1970] 3 All E.R. 961, affirming *Gallie* v. *Lee* [1969] 1 All E.R. 1062.

[129] It is to be remembered that shortly after the Supreme Court, in *Foot* v. *Rawlings,* decided that the giving of a negotiable instrument constituted new consideration, the English Court of Appeal, in *D. & C. Builders Ltd.* v. *Rees,* rejected the distinction between cash and a cheque.

[130] *Supra,* n. 128, at 964.

[131] *Idem.*

[132] *Ibid.,* p. 966.

VII

Damages

The Supreme Court has not given the problem of remoteness of damage detailed consideration in recent years. In *Brown and Root Ltd.* v. *Chimo Shipping Ltd.*[133] it was stipulated in a verbal contract of carriage that no single piece of cargo tendered for carriage by the respondent's ship would exceed thirty tons. The appellant tendered cargo in excess of that weight, and the respondent's captain, bragging about the capacity of his derrick, accepted it. The ship's derrick was damaged, and the respondent brought an action for breach of contract. Mr. Justice Ritchie, giving the judgment of the Court, said that assuming the appellant was guilty of breach of contract, that breach would not make the appellant liable for the damage to the ship's derrick since that damage was occasioned by the fault of the master. Said Ritchie J.: "It has never been seriously questioned since the case of *Hadley* v. *Baxendale* that damages for breach of contract are limited to the ordinary consequences which would follow in the usual course of things from such breach or for the consequences of the breach which might reasonably be supposed to have been in contemplation of both parties at the time they made the contract." [134] It could, of course, be suggested that derrick breakdown is a normal consequence of lifting fifty tons on a thirty-ton derrick,[135] and that the parties in any event had such results in mind; why, after all, was the restriction put in the contract in the first place? Ritchie J. apparently thought otherwise although he offers no elucidation or explanation of his view. In any event, the result in this case is eminently reasonable, and involves creative application of the *Hadley* v. *Baxendale* principle. Clearly when an agent of one contracting party urges an agent of the other to go into breach,[136]

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[133] [1967] S.C.R. 642.

[134] [1967] S.C.R., at 648. The law applicable in *Chimo Shipping* was the Civil Code, the incident having taken place in Quebec. After stating the effect of *Hadley* v. *Baxendale*, Ritchie J., at 648, simply said "Article 1074 of the *Civil Code* is to the same effect." It will be remembered that in *The King* v. *Canada Steamship Lines* it was similarly assumed that the common law and civil law were at one on the relevant point.

[135] Ritchie J., considered the breach to be *tendering* excessively heavy cargo. The natural result of such breach, says Ritchie, would have been the master's refusal to hoist the cargo.

[136] Neither apparently knew of the weight restriction in the contract. A complicating factor was that the master of the ship theoretically had no authority to alter the terms of the contract of carriage.

some principle should stop the victim of the breach from suing on it. Whether that principle should be the remoteness of damage principle is perhaps questionable — but the result is this case was the right result.

A specialized application of one branch of the *Hadley* v. *Baxendale* rule was made in *Wingold Construction Co. Ltd.* v. *Kramp.*[137] In that case, the appellant suffered loss after accepting inferior qualify sand fill from the respondent; the appellant asked for consequential damages over and above the difference in value between the goods contracted for and those delivered. Judson J. for the unanimous Court held that the appellant's consequential loss was not one directly and naturally resulting from the breach of warranty, but one resulting from the use made by the appellant of the goods, with full knowledge of their quality.

The Supreme Court, then, has routinely accepted the *Hadley* v. *Baxendale* rule as the rule governing remoteness of damage. In England, the precise application of *Hadley* v. *Baxendale* has been in doubt since *Victoria Laundry (Windsor) Ltd.* v. *Newbold Industries*[138] moved towards a general principle of reasonable foreseeability. The House of Lords, in *Koufos* v. *Czarnikow*,[139] laid down that "the correct criterion of liability is not whether the loss is reasonably foreseeable by the the parties, but whether it should have been within their reasonable contemplation at the time of the contract, having regard to their knowledge at that time."[140] In England, then, the traditional interpretation of *Hadley* v. *Baxendale* is subject to on-going evaluation, and presumably at some point the Supreme Court of Canada will participate in this process.

The Court has had the opportunity of taking a closer look at the question of measure of damages. In *Cotter* v. *General Petroleums Ltd.*,[141] optionees covenanted to exercise a petroleum and natural gas option, and it was provided that if they failed to do so, as they did, the optionor would be entitled to remedies for breach of contract. Kerwin J. gave the judgment for himself and Chief Justice Rinfret. On the question of measure of damages, Kerwin said that

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[137] [1960] S.C.R. 556. The Supreme Court dismissed an appeal from the Ontario Court of Appeal which had reversed a judgment of Spence J., who later became a judge of the Supreme Court.

[138] [1949] 2 K.B. 528.

[139] [1969] 1 A.C. 350.

[140] Cheshire and Fifoot, The Law of Contract 549 (7th ed. 1969).

[141] [1951] S.C.R. 154.

"the proper measure is not the cost of performance to the respondents but the value of performance to the appellant," and a bit later, that the measure "is the sum necessary to place the appellant in the same position as he would have been in if the covenant had been performed . . ." [142] Presumably Kerwin J. is here equating the "value of performance" with the difference in value between the appellant's position without the covenant performed and the appellant's position with the covenant performed. It is doubtful whether in fact these two things should be equated. For "consequential reasons" the appellant's position following performance may improve in money terms far beyond the actual cost of performance. By making the measure of damages "the sum necessary to place the appellant in the same position as he would have been if the covenant had been performed," measure and remoteness are confused, and liability for a certain kind of consequential loss may be imposed. It is doubtful if Kerwin J. had this in mind when he talked about the "value of performance." Cartwright J. stated [143] that the underlying principle was that expressed by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp Co.*[144] : ". . . In giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." Doubts that here Cartwright J. might be subject to the same confusion as Kerwin J. are allayed by what follows in Cartwright's judgment. Since almost no part of the consideration which under the contract would have passed to the respondent had passed, Cartwright J. did not think that the cost of drilling was the proper measure of damages. The proper measure, said Cartwright, "is the difference between the value to him [the appellant] of the consideration for which the respondents agreed to drill the well and the value to him of the consideration which, acting reasonably, he should find it necessary to give to have the well drilled by others." [145] Cartwright J. makes clear by this statement that measure is the more restricted "value of performance" and excludes remoteness elements such as consequential loss.

In *Sunshine Exploration* v. *Dolly Varden Mines* [146], Sunshine Exploration was given an exclusive right to develop mining properties

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[142] [1951] S.C.R., at 160. On the question of remoteness, Kerwin J., applied the rule in *Hadley* v. *Baxendale.*

[143] *Ibid.*, p. 174.

[144] [1911] A.C. 301, at 307.

[145] [1951] S.C.R., at 175.

[146] [1970] S.C.R. 2.

owned by Dolly Varden; in exchange, Sunshine covenanted to perform developmental work. Sunshine was in breach of its covenant. The sole issue before the Supreme Court was the measure of damages. Sunshine Exploration contended that the decision in *Cotter* v. *General Petroleums Ltd.* should be applied, and that nominal damages only should be awarded. But Mr. Justice Martland, giving the judgment of the Court, distinguished *Cotter's Case* on the grounds that there consideration for the drilling had not passed, whereas in the present case it had.[147] Martland J. rejected the argument that Dolly Varden was only entitled to receive by way of damages the difference between the value of the premises if the work had been performed, and their value with the work unperformed. Said Martland J.:

> ...when Sunshine, by entering the agreement, acknowledged that, in the light of its future potential benefits under the agreement, its own suggested program of work was worth the cost of performing it, and when Dolly Varden was prepared to give, and did give, valuable consideration for its performance, I consider that it was entirely proper for the learned trial judge to assess the damage resulting from the breach as being equivalent to the cost of doing the work. In so doing he was seeking to fulfil the underlying principle stated by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp Co.*, and cited by Cartwright J. in the *Cotter* case in the passage already quoted:
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> "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been if the contract had been performed."[148]

The key distinction between *Cotter's Case* and the *Sunshine Exploration Case* is clearly that in the former no consideration passed to the respondent, whereas in the latter consideration had passed to the appellant. Nominal damages to someone who has provided no consideration may be justified, but doubts can be raised about the justification of awarding merely nominal damages to someone who *has* provided consideration. If performance has been paid for but not provided, the *measure* must be what has been paid plus the differential between what has been paid and what must be paid elsewhere to obtain similar performance. (Application of remoteness principles may, of course, enlarge the scope of recovery). If performance has neither been paid for nor performed, the *measure* is the differential only.

The argument, put forward by the appellant in *Sunshine Exploration*, that the measure was the difference between the value

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[147] For the precise and rather complicated nature of the consideration, see [1970] S.C.R., at 15.

[148] *Ibid.*, p. 22-3.

of the premises if the work had been performed, and their value with the work unperformed, demonstrates a clear confusion between measure and remoteness, as we showed in the discussion of Kerwin J.'s judgment in *Cotter's Case.*

The judgments of the Supreme Court on measure of damages show an application, if a slightly confused application, of the *Wetheim* v. *Chicoutimi Pulp Co.* principle.[149] When it comes to remoteness of damages, the Court shows a history of application of *Hadley* v. *Baxedale,* with no consideration of the *Victoria Laundry* case, and with apparently as yet no opportunity to examine the applicability to Canada of *Koufos* v. *Czarnikow.*[150]

VIII

Conclusion [151]

What conclusions can be drawn from this survey of the more important cases on the common law of contract decided by the Supreme Court of Canada? Generally, it can be said that the major

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[149] Two other cases in which the Supreme Court considered particular aspects of the measure of damages were *The Ford Motor Co. of Canada Ltd.* v. *Steve Haley* [1967] S.C.R. 437, and *Miller* v. *Advanced Farming* [1969] S.C.R. 845. In *Ford Motor,* there was complete failure of a warranty that trucks bought by the respondent would be satisfactory for hauling gravel; the Court held that the onus was on the appellant to establish that the trucks had any remaining value, and was not on the respondent to prove his damages as being the difference between the purchase price and the actual worth of the trucks. In *Miller* v. *Advanced Farming,* there had been substantial but not complete performance by the respondent; the Court, applying *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, held that the correct measure of the appellant's damages was the cost of making good the defects and omissions in the work the respondent contracted to do.

[150] In connection with damages, the case of *Dimensional Investments* v. *The Queen* [1968] S.C.R. 93, should be noted. In that case the Court looked at the matter of penalty clauses, considering *Stockloser* v. *Johnson* [1954] 1 Q.B. 476, *Dunlop Pneumatic Tyre* v. *New Garage* [1915] A.C. 79, and *Bridge* v. *Campbell Discount Co. Ltd.,* [1962] A.C. 600. Ritchie J's., remarks on these cases (in giving the judgment of the Court) were *obiter,* since the matter was governed by s. 48 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, which provides that a clause in a contract with the Crown in which a penalty is stipulated on account of non-performance of any condition shall be construed as importing an assessment of damages by mutual consent.

[151] Space limitations prevent discussion of remedies other than damages. Readers are referred to the following cases: *Deglman* v. *The Guaranty Trust et al.,* [1954] S.C.R. 725, *Peter Kiewit Sons' Co.* v. *Eakins Construction Ltd.* [1960] S.C.R. 361, and *Alkok* v. *Grymek* [1968] S.C.R. 452 (on *quantum*

theme is absence of a theme. No picture emerges of a dynamic court, with a well-defined philosophy, revealing and developing its philosophy through the cases. The Court's reaction to the cases has been an *ad hoc* reaction, a reaction of particular judges to particular facts. The concern appears almost always to have been the particular situation before the Court rather than some notion of evolving community standards or needs.

Limits are, of course, imposed on the reaction of particular judges to particular facts; the "law" imposes boundaries on the possibles responses of judges to cases.[152] What law have judges of the Supreme Court chosen to restrict their activities? Have they chosen to take on the least possible restraints, or have they voluntarily circumscribed their actions, using well-established conservative law as a fence enclosing a small piece of judicial ground?

Analysis shows that the Supreme Court has not strayed far from the law of England. The cases used to support judgments are, with few exceptions, English cases, or Canadian cases that were themselves based on English cases. Seldom is reference made to a United States judgment[153], and there is no reference to cases from other common law jurisdictions. Ironically, in following English cases, the Court has on occasion been seriously out of step with English courts themselves.[154] Nowhere has there been radical and explicit departure from what has been decided in other jurisdictions on the grounds that those decisions are inapplicable in Canada because of particular features of Canadian life. It cannot be said that since the abolition of appeals to the Privy Council, the Supreme Court has fully escaped from judicial dependence and has used particular

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meruit); *Gray* v. *Cameron, Ainsworth and Armstrong* [1950] S.C.R. 401, *Kloepfer Wholesale Hardware* v. *Roy* [1952] 2 S.C.R. 465, and *McKenzie* v. *Hiscock and Dowie* [1967] S.C.R. 781 (on specific performance); *Shortt* v. *MacLennan* [1959] S.C.R. 3, *Field* v. *Zien* [1963] S.C.R. 632, and *Pepper* v. *Prudential Trust* [1965] S.C.R. 417 (on rescission). Readers are also referred to the following cases on discharge: *Canadian Acceptance Corporation Ltd.* v. *Fisher* [1958] S.C.R. 546 (per Rand J., dissenting); *McBride and Hogaboam* v. *Johnson* [1962] S.C.R. 202, and *Chapman* v. *Ginter* [1968] S.C.R. 560 (repudiation); *Canada Egg Products* v. *Canadian Doughnut Company* [1955] S.C.R. 398 (anticipatory repudiation); *Fairbanks Soap* v. *Sheppard* [1953] 1 S.C.R. 314 (abandonment).

152 See Slayton, *supra*, n. 16, at 399.

153 The most important reference to a United States case is Rand J.'s, reference to *Wood* v. *Lady Duff Gordon* in *Dawson* v. *Helicopter Exploration, supra*, note 20.

154 See discussion of *Foot* v. *Rawlings, The King* v. *Canada Steamship Lines*, and *Prudential Trust* v. *Cugnet, infra.*

knowledge of peculiar Canadian conditions to develop a law which, although based on the great English common law tradition, is particularly suited to Canadian conditions.

It is suggested that the explanation for the timidity of the Court is its apparent fear of doing anything which could be characterised as "judicial law-making." At the time of abolition of appeals to the Privy Council, as now, there was no great body of Canadian contract law; the common law that regulated contracts was then and still is law developed in English courts. To break away from that law, to develop it in light of the Canadian experience, required and requires policy courage, the courage to depart from what has been laid down earlier and elsewhere. New principles must be justified on grounds of policy. This the Supreme Court of Canada has been loath to do. There has been a reluctance to use new principles of construction to allow application of public standards to private law [155]; there has been reliance on an English case of 1602 [156] when English courts have moved away from the principle represented by that case; there has been no recognition of the application in the United States of the unconscionability doctrine to the problem of exemption clauses; *non est factum* principles that the House of Lords has recently abandoned [157] still appear to be the law in Canada; strict application of *Hadley* v. *Baxendale* is still the order of the day, although English courts have been moving towards a loose interpretation of that case since the 1949 decision in the *Victoria Laundry* case. Fear of justifying new approaches on policy grounds means not only that an indigenous law cannot be developed, but also that the Supreme Court of Canada appears always one step behind English courts.

The Supreme Court of Canada must, as befits the final court of appeal of an independent state, be prepared to lay down new principles or modify old ones when Canadian conditions appear to require it. The Supreme Court should be always on the alert for discrepancies between law established elsewhere and local needs. When that is the case, criticisms of the Court levelled before the abolition of appeals to the Privy Council will at last be met.

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[155] E.g., *Clark's-Gamble of Canada Ltd.* v. *Grant Park Plaza Ltd., supra,* note 53.

[156] See *Foot* v. *Rawlings, supra,* note 56.

[157] In *Saunders* v. *Anglia Building Society* [1970] 3 All E.R. 961.