Recent Cases

NEGLIGENCE — MOTOR VEHICLES — FAILURE TO USE AVAILABLE SEAT BELTS AS CONTRIBUTORY NEGLIGENCE. *Yuan* v. *Farstad*, (1967), 66 D.L.R. (2d) 295, 62 W.W.R. 645; *MacDonald* v. *Kaiser*, (1968), 68 D.L.R. (2d) 104.

The advent of the seat-belt as a regular accessory in automobiles and the considerable publicity regarding safety generated by Ralph Nader in the United States and former M.P. Hewart Grafftey in Canada has, perhaps not unexpectedly, led to a significant amount of jurisprudence in connection with the non-use of this safety feature by plaintiffs seeking damages for personal injuries and death.

In *Yuan* v. *Farstad*, Munroe, J.,[1] found that "the collision was caused solely by reason of the negligence of the defendant driver . . ."[2] but this was not an end of the matter. Based on the evidence of a retired police captain and a physician (both, incidentally, were Americans), Munroe, J., found that "lap seat belts are effective in reducing fatalities and minimizing injuries resulting from automobile accidents."[3] Accordingly, Munroe, J., determined that

> the deceased, even if he had been wearing a seat belt, may and probably would have suffered injury to his chest and internal organs, correctible by surgery, but he would probably not have been ejected from the car and would probably not have suffered fatal injuries.[4]

On this basis he concluded that

> where a motorist fails to use an available seat belt and where it is shown that the injuries sustained by him would probably have been avoided or of less severity had he been wearing a seat belt, then the provisions of s. 2 of the *Contributory Negligence Act*[5] are applicable.[6]

The judge's general conclusion was that a person must reasonably anticipate that he might be involved in a collision if driving in a city and that a reasonable and prudent driver of a car in a city should make use of available seat belts. More specifically, the judge only apportioned 25% of the fault which related to the damages upon

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[1] Of the British Columbia Supreme Court.
[2] At p. 300.
[3] At p. 301.
[4] *Ibid.*
[5] R.S.B.C. 1960, c. 74.
[6] At p. 302.

the plaintiff and 75% upon the defendant driver who had been held 100% responsible for the accident itself.

Mr. Justice Dubinsky,[7] who delivered the opinion in *MacDonnell* v. *Kaiser*, strongly disapproved of the opinion of Mr. Justice Munroe. Convinced that "the effectiveness of seat belts is still in the realm of speculation and controversy" and influenced favorably by the view of J. Murray Kleist that no doctor can say exactly which damages would be suffered if the victim were to wear a seat belt against the situation where he would not,[8] he refused to hold that a motorist who drives carefully and lawfully

> has not discharged his duty as a reasonable man, simply because he has not fastened to his person the seat belt.[9]

The argument of Dubinsky, J., is sorely reminiscent of the argument advanced by some civilians that "moral" damages should not be awarded because of the difficulty of assessing them in terms of dollars and cents. The argument is unconvincing — difficulties of assessment or apportionment should not be permitted to deny the availability of the right or the defence itself. The stronger argument against the "non-use of seat belts as contributory negligence" position is surely that there is neither a statutory nor a common law duty to use seat belts since, as can be readily proved, most motorists do not in fact wear available belts or harnesses;[10] however, at least one American court has concluded that

> there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.[11]

It will be interesting to see whether the Quebec courts determine that a *bon père de famille* wears his seat belt or not. There is clearly room for such a defence in a jurisdiction where contributory negligence is a natural phenomenon, requiring no statutory basis for its existence. The argument that the fault goes to the damages and not to the delict itself is immaterial.

R.I.C.

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[7] Of The Nova Scotia Supreme Court.

[8] *Seat Belt Defense — An Exercise in Sophistry*, (1967), 18 Hastings L.J. 613.

[9] At p. 108.

[10] See the article by John P. Blackburn, *Seat Belts and Contributory Negligence*, (1967), 12 So. Dak. L.R. 130, particularly at pp. 140-141.

[11] *Bentzler* v. *Brown*, (1967), 34 Wis. (2d) 362, 149 N.W. 2d 626. See also *Mortensen* v. *Southern Pacific Co.*, (1966), 53 Cal. Rptr. 851; *Kavanagh* v. *Butorac*, (1966), 221 N.E. 2d 824 (Ind. App.); and *Brown* v. *Kendrick*, (1966), 192 So. 2d 49 (Fla. App.).

PUBLIC INTERNATIONAL LAW: SOVEREIGN IMMUNITY: DISTINCTION BETWEEN PUBLIC AND PRIVATE ACTS; *Allan Construction Ltd.* v. *Le Gouvernement du Vénézuela,* [1968] R.P. 145; *Venne* v. *Le Gouvernement de la République Démocratique du Congo,* [1968] R.P. 6.*

One of the more interesting by-products of Expo '67 was the opportunity it gave to the Quebec Superior Court to decide on two separate occasions a controversial question of public international law which has never been properly answered by Canadian courts: to what degree should foreign states be allowed to claim immunity with respect to their commercial activity?

The view that sovereign immunity is absolute finds its origin in the nineteenth century economic policy of *laissez-faire* which established a clear differentiation between private enterprise and the state's sphere of activity. As governmental functions gradually expanded into the economic realm and "socialist" governments established state trading companies, however, many countries adopted instead a theory of qualified immunity which distinguished between private acts of state (*jure gestionis*) and public or political acts (*jure imperii*),[1] only the later received the benefit of immunity. Proponents of this more modern view felt that immunities should depend on function rather than status; as well, additional remedies were opened up in the national courts for those plaintiffs with claims against a sovereign state. Acceptance of this view was far from unanimous, however. It was not until 1952, for example, that the United States government in the Tate letter[2] took the position that immunity should be restricted to *jure imperii,* and the question is still not regarded as settled by the American courts.[3] In Great Britain, moreover, the theory that absolute immunity extends to commercial operations is still the almost unchallenged jurisprudence

* On appeal, the decision of the Superior Court was confirmed by the Court of Queen's Bench, Montreal, No. 10601, October 18, 1968.

[1] As early as 1903 the Belgian *Cour de Cassation* adopted this view in *S.A. de chemins de fer Liègeois-Luxembourgeois* v. *Etat Neerlandais* [1903] Pasicrisie belge I. 294. For a recent survey see Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade,* (1958), 7 Int. Comp. L.Q. 452.

[2] 26 Dep't. of State Bull. (1952), p. 984.

[3] K.R. Simmonds, *The Limits of Sovereign Jurisdictional Immunity: the Petrol Shipping Corporation and Victory Transport Cases,* (1965), 11 McGill L.J. 291. See also R.A. Falk, *The Role of Domestic Courts in the International Legal Order,* (Syracuse, N.Y., 1964), pp. 139 *et seq.*; Sigmund Timberg, "Sovereign Immunity, State Trading, Socialism and Self-Deception" in *Essays on International Jurisdiction,* (Ohio, 1961), pp. 40 *et seq.*

of the courts.[4] Finally, in two recent decisions of Canadian federal courts,[5] the question was raised but was left undecided.

After a lengthy review of the leading doctrinal authorities, both of the Quebec Superior Court judges in the cases under discussion unequivocally adopted the theory of restricted sovereign immunity. In the *Vénézuela* case, Mr. Justice Reid further diminished the scope of the immuity by classifying it as a derogation from the normal exercise of a court's jurisdiction and hence only to be applied in very clear circumstances;[6] he thus had little difficulty in holding that, by entering into a contract for the construction of a pavilion where restaurant and other concessions were to be exploited, the Venezuelan government was engaging in acts of a private nature.

> Accepter le principe que tout gouvernement étranger puisse venir au Canada pour y faire affaires et encaisser des centaines de milliers de dollars des Canadiens ou des visiteurs temporaires sous la protection de l'immunité de la souverainété des pays étrangers devant les Cours de justice canadienne serait certainement aller au-delà du respect politique et diplomatique qui actuellement devrait faire la seule base de l'application d'une théorie d'immunité pour les pays étrangers devant nos tribunaux, eu égard aux activités directement commerciales de différents pays dans les activités mondiales.[7]

Similarly, in the *Congo* case, Leduc, J., described the contract between a local architect and the Congolese sovereign as a purely private act,[8] the rationale being that, by appointing an accredited *chargé d'affaires* with specific instructions to have someone design a pavilion, the sovereign freely and implicitly accepted the exercise of its rights and obligations in the local jurisdiction.

The distinction between the public and private acts of a sovereign accepted by the Quebec courts is undoubtedly an artificial one; "public" acts have come to include only those which used to be done in the *laissez-faire* era, while all others are classified as "private". Yet, in the absence of the abolition of sovereign immunity as a general

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[4] Simmonds, *loc. cit.*, pp. 291-292; E.J. Cohn, *Waiver of Immunity*, (1958), 34 B.Y.B.I.L. 260; *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379, [1957] 3 All E.R. 441.

[5] *Flota Maritima Browning de Cuba S.A.* v. *The Steamship Canadian Conqueror* and *The Republic of Cuba*, [1962] S.C.R. 598, 34 D.L.R. (2d) 628; *Chateau-Gai Wines Limited* v. *Le Gouvernement de la République Française*, (1967), 61 D.L.R. (2d) 709 (Exch.).

[6] At p. 175.

[7] [1968] R.P. 145, at p. 177.

[8] At p. 8.

rule of international law,[9] the restricted sovereignty view at least has the merit of making litigation between individuals and foreign states a little less one-sided; the equity can perhaps be better appreciated in a delictual situation where the plaintiff has had no advance warning that he may eventually be claiming from an immune sovereign. It is of course well to remember that even if the plaintiff has been accorded the right to sue the foreign sovereign, this is a far cry from being permitted to execute the judgment on the property of the sovereign.[10]

D.H.T.

LABOUR RELATIONS — CERTIFICATION PROCEEDINGS — WHETHER EMPLOYER ENTITLED TO HEARING — *Komo Construction Inc.* v. *Commission des Relations de Travail du Québec,* [1968] S.C.R. 172.

Among the large and increasing number of labour law decisions rendered in Quebec courts during the past few years have been several which dealt with the character of the hearing an employer must be afforded in certification proceedings. With the decision of the Supreme Court in *Komo Construction Inc.* v. *Commission des Relations de Travail du Québec,*[1] it would appear to be settled that in such circumstances a full-scale hearing need not be held in order to comply with the rules of natural justice and particularly the principle of *audi alteram partem.* As long as an employer has been given the opportunity to put forward his position to the Board there can be no complaint by him for the reason that his argument was not oral and that he was not physically present for all certification proceedings.

In *Komo Construction* the employer had sought a writ of prohibition against the Labour Relations Board, complaining that in the certification proceedings before that body the association of employees

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[9] Advocated by Judge Lauterpacht for one: *The Problem of Jurisdictional Immunities of Foreign States,* (1951), 28 B.Y.B.I.L. 220.

[10] See, for example the United States experience outlined in Timburg, *loc. cit.,* pp. 53 *et seq.*

[1] [1968] S.C.R. 172.

had failed to produce with its petition the documents required by the *Labour Code*[2] and that, as it (the employer) had been granted no opportunity to be heard, the principle *audi alteram partem* had been violated. The Superior Court ordered the issuance of a writ of prohibition but the Court of Queen's Bench, Appeal Side, annulled the writ for the reason that the decision on certification was one within the sole jurisdiction of the Board.

A unanimous Supreme Court dismissed the appeal from the Court of Queen's Bench. Mr. Justice Pigeon, who wrote the notes for the entire Bench, held, first, that as long as the Board is within the area of its jurisdiction its decision on a matter of law was final, no matter how erroneous that decision might have been. Relying on the decisions of the Supreme Court in the *White Lunch*[3] and *Galloway Lumber*[4] cases, His Lordship stated:

> A moins de voir dans chacune des prescriptions législatives à l'adresse de la Commission des relations de travail une restriction à sa juridiction, on ne saurait prétendre qu'elle a outrepassé sa compétence en décidant qu'une disposition législative a été observée. Une pareille interprétation irait à l'encontre d'un principe fondamental du *Code du travail* qui est de confier *exclusivement* à la Commission le soin de statuer sur les demandes d'accréditation ce qui implique que c'est à elle qu'il appartient de juger dans chaque cas si l'on s'est conformé aux prescriptions du *Code du travail* à cet égard.[5]

With respect to the *audi alteram partem* issue His Lordship held that this principle does not mean that a hearing need always be granted, but that the only requirement is to give a party "l'occasion de faire valoir ses moyens." In this case the Board had not proceeded improperly in deciding that, on the point of law raised by the employer, it did not require to hear any more from the latter before rendering its decision. Mr. Justice Pigeon relied here on the judgment of the Supreme Court in *Forest Industrial Relations Ltd.* v. *International Union of Operating Engineers, Local 882*,[6] a case different from *Komo Construction* on the facts as in *Forest Industrial* there

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[2] R.S.Q. 1964, c. 141, as amended by 13-14 Eliz. II, S.Q. 1965, c. 50 and the *Civil Service Act*, 13-14 Eliz. II, S.Q. 1965, c. 14.

[3] *Bakery and Confectionery Workers* v. *White Lunch Limited*, [1966] S.C.R. 282, 55 W.W.R. 129, 56 D.L.R. (2d) 193.

[4] *Galloway Lumber Co. Ltd.* v. *The Labour Relations Board of British Columbia*, [1965] S.C.R. 222, 51 W.W.R. 90, 48 D.L.R. (2d) 587.

[5] At pp. 174-175. On this proposition that when the Board is within its jurisdiction it is alone competent to act, *Komo Construction* was most recently cited with approval in *Fraternité Unie des Charpentiers et Menuisiers d'Amérique, Local 2394* v. *Commission des Relations de Travail du Québec*, C.S.M. 755,927 (unreported), September 5, 1968. (Mr. Justice W.A. Johnson.)

[6] [1962] S.C.R. 80, 37 W.W.R. 43, 31 D.L.R. (2d) 319.

had been a physical hearing in which the employer had participated, but which nevertheless held that "it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop."[7]

The *audi alteram partem* debate on certification proceedings was recently reviewed by Associate Chief Justice Alan B. Gold of the Quebec Provincial Court.[8] Judge Gold allowed that where the Board exercised purely administrative functions there need be no hearing and, conversely, when the function exercised is judicial a hearing must be held but referred to two opposing schools of thought on the matter of certification proceedings. The first school argues that certification is a purely administrative matter and that as there is no litigation involving the employer and the Board or the employer and the association, in an adversary sense, no hearing need be held. The other school takes the view that certification proceedings involve judicial or at least quasi-judicial functions on the part of the Board and that the employer, who is affected by its decision, is an interested party and must be heard.

Those who argue in favour of the requirement of a full-scale hearing find support in the Court of Queen's Bench decision in *Beacon Plastic Ltd.* v. *C.R.O.*,[9] particularly in the notes of Mr. Justice Choquette, who based his view on the proposition that the employer is actually a party to the certification proceedings.[10] This view was opposite to that expressed by Montpetit, J., in the Superior Court decision in *Beacon Plastic.*[11] Mr. Justice Montpetit, in deciding that a hearing need not be held in such circumstances, stated that no provision of Quebec positive labour law required a hearing on certification proceedings[12] and also warned that in considering

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7 *Ibid.*, at p. 83 (Judson, J.).

8 See *Regards sur l'Evolution Jurisprudentielle et la C.R.T.*, [1967] R.D.T. 222.

9 [1964] R.D.T. 25.

10 *Ibid.*, at p. 33. See also *Houghco Products Ltd.* v. *C.R.T.*, [1965] R.D.T. 252, [1965] B.R. 561; *Quebec Labour Relations Board* v. *J. Pascal Hardware Company Ltd.*, [1965] B.R. 791 and B. Starck, *Aspects Juridiques du Syndicalisme Québecois: L'Accréditation*, (1966), 44 Can. Bar Rev. 173 at pp. 203 *et seq.*

11 [1964] R.D.T. 14 at pp. 22-23.

12 See *Donatelli Shoes Limited* v. *Labour Relations Board*, [1964] C.S. 193 at pp. 200 and 201 (Brossard, J.) approving the judgment of Montpetit, J., in *Beacon Plastic.* In *Donatelli Shoes*, Brossard, J., at page 202, goes further than Mr. Justice Montpetit and suggests that the law not only does not require a hearing but actually absolves the Board from holding one. Compare *Star Glass Limited* v. *Labour Relations Board*, [1963] R.D.T. 372 at pp. 375-376 (Puddicombe, J.).

whether, notwithstanding this, a hearing was necessary, one should not give "une portée déraisonnable" to the maxim *audi alteram partem.*[13]

Proponents of the school which maintains that on certification proceedings a hearing need not be held formulate their position by employing, in addition to the view expressed by Montpetit, J., in *Beacon Plastic,* arguments based on the nature of the Board's functions and the status of the employer on certification proceedings, and the criterion of sufficient knowledge which includes the question as to whether any prejudice might or did result from the failure to hold a hearing.

In *L'Union International des Journaliers (617)* v. *La Laiterie Dallaire Limitée,*[14] Judge Gold stated the case from the viewpoint of the nature of the functions performed by the Board and the role of the employer in certification proceedings when he stated *obiter:*

> In proceedings on a demand for certification, we sit as an administrative tribunal exercising at most quasi-judicial functions and the hearing, which we conduct in this connection, if we choose to call one, and we are not obliged to do so, is our hearing and no one else's. Furthermore, in certification proceedings, we may or may not call the employer to our hearing but, if we do so, it is only to assist us in conducting our inquiry. He is not there as a party *en cause* against whom a decision will be rendered. While it is true that the employer will be affected by the issue of the certificate if one is issued, the fact remains that, at the time of our hearing and prior to the issue of the certificate, he has no relationship with the Union, the issue before the Board being solely whether or not the Union in its demand has complied with all legal requirements for certification and this is an issue solely between the Board and the applicant. On certification proceedings, there is no *lis* between the Union and the employer in the sense of the civil law. To allow an employer, of right, to contest an application, considering himself a party *en litige,* is contrary to the intent and purposes of the act would have the effect of nullifying the value and effect of the certification proceeding.[15]

The argument based on "sufficient knowledge" and the matter of prejudice is built on the premise that the dictates of justice are

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[13] See also *Doric Textile Mills Limited* v. *Commission de Relations Ouvrières de Québec,* [1964] R.D.T. 377 at p. 381 (Ouimet, J.). Compare *Broadway Paving Co. Ltd.* v. *Syndicat de la Construction de Montréal,* [1967] R.D.T. 506 at p. 508.

[14] [1964] R.D.T. 449.

[15] *Ibid.,* at p. 470. See also *United Steelworkers of America* v. *Continental Can Company of Canada,* [1964] R.D.T. 65 at pp. 85 *et seq.* (*obiter*) and *Commission des Relations de Travail de Québec* v. *Civic Parking Centre Ltd.,* [1965] B.R. 657 at p. 662, per Casey, J.

satisfied if a party has had his position made known to the Board which, although it convened no hearing of the various parties, was sufficiently aware of their attitudes and views. In *Commission des Relations de Travail du Québec* v. *Civic Parking Centre Ltd.*[16] Mr. Justice Casey expressed such an opinion:

> *Audi alteram partem* does not necessarily entitle the person claiming its benefits to a physical appearance with all that that implies. In some instance the rule will be satisfied the moment the Board has knowledge of the protesting party's point of view.
>
> Here the employer stated its objections very clearly in writing and the contrary not having been alleged it must be assumed that the Board honestly and fairly investigated the charges and then, as the result of its investigation, held them unfounded. On the whole I am satisfied that the facts alleged by the employer disclose adequate compliance with the rule.

In the light of *Komo Construction,* therefore, it would appear that this certification issue has been settled and the first school, in favour of a restrictive view of *audi alteram partem,* has been vindicated. The precise reason for the Supreme Court view combines some of the elements set forth above but is expressed by Mr. Justice Pigeon in the following manner:

> Il ne faut pas oublier que la Commission exerce sa juridiction dans une matière où généralement tout retard est susceptible de causer un préjudice grave et irrémédiable. Tout en maintenant le principe que les règles fondamentales de justice doivent être respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure.[17]

R.L.

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[16] [1965] B.R. 657 at p. 662. See also *MacDonald Drum Manufacturing Corp.* v. *Commission des Relations de Travail de Québec,* [1967] R.D.T. 94 at pp. 98-99 (Johnson, J.); *Canadian Ingersoll Rand Company Limited* v. *C.R.T.,* [1966] R.D.T. 513 at p. 526 (Dorion, C.J.) and *Donatelli Shoes Limited* v. *Labour Relations Board,* [1964] C.S. 193 at pp. 202-203.

[17] At p. 176.

CRIMINAL LAW — INDECENT ASSAULT — ACCUSED FALSELY REPRESENTING HIMSELF AS A DOCTOR — COMPLAINANTS CONSENTING TO INTIMATE TREATMENT — WHETHER CONSENT OBTAINED BY FRAUD AS TO THE NATURE AND QUALITY OF THE ACT Cr. Code, ss. 141, 230, 562, *R.* v. *Maurantonio,* (1968), 65 D.L.R. 2d) 674.

Problems of consent in sexual cases often have a tendency toward the abstract and metaphysical, lending themselves to a number of equally logical although not totally satisfactory answers.

In the recent case of *R.* v. *Maurantonio,*[1] the Ontario Court of of Appeal once again wrestled with the issue of what exactly sec. 141(2) of the *Crimal Code* envisages when it speaks of consent "obtained by false and fraudulent representations as to the nature and quality of the act."

The accused had represented himself to the general public, including the complainants, as a licensed physicians duly qualified to practice medicine. His conduct toward the complainants was to intimately examine the "patients" and, in certain cases, administer "treatment". It appears that there was nothing lewd or sexual *per se* about the examinations and that a similar type would be given if they were carried out by a physician, in the light of the medical problems of the complainants. The Crown Attorney in fact admitted "that if the accused had been a qualified doctor, there was nothing in his conduct toward and his ministrations to the women in respect of whom he was charged and convicted to make him guilty of indecent assault."[2]

The issued stated in its simplest terms is whether fraud as to a collateral matter such as identity can taint the "act" sufficiently to become fraud as to its nature and quality, thereby vitiating the consent. In other words, wherein lies the distinction between the type of fraud which induces a consent that would not have otherwise been obtained but which is none the less a valid consent (fraud in the inducement), and the type of fraud which prevents any real consent from existing (fraud in the *factum*) ?[3]

On appeal, the court upheld the conviction (Laskin, J.A., dissenting). Mr. Justice Hartt stated:

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[1] (1968), 65 D.L.R. (2d) 674.

[2] *Ibid.*, at p. 675. It is worthy of note that indecent assault of a female by definition involves the necessity of circumstances of indecency. *Quaere:* if the accused "acted in an entirely professional manner" (p. 678), can this element be said to be present?

[3] See *Papadimitropoulos* v. *R.*, (1957), 98 C.L.R. 249.

> In my opinion, the words "nature and quality of the act" as used in s. 141(2) should not be so narrowly construed as to include only the physical action but rather must be interpreted to encompass those concomitant circumstances which give meaning to the particular physical activity in question... The false representation which led to consent was that what the appellant was about to do was to conduct a medical examination or administer treatment. Since the representation went to the nature and quality of the act to be performed the consent of each of the complainants, even if given in the full understanding of what physical acts the appellant was about to perform, was "obtained by false and fraudulent representations as to the nature and quality of the act."[4]

Mr. Justice Laskin was of an entirely contrary opinion:

> In this stato of the matter, it was incumbent on the Crown to prove deceit by the accused as to the "nature and quality" of the very acts charged against him; whether or not they constituted medical treatment in the abstract would merely be a refined way of challenging professional qualification, and to raise this in the context of s. 141(2) would, in my opinion, be begging the question to be decided.[5]

The decision would appear to be in conformity with inferences that might be drawn from *obiter* statement of the Supreme Court in *Bolduc* and *Bird* v. *The Queen.*[6] Nevertheless, the broad interpretation of "nature and quality of the act" to include its extrinsic as well as intrinsic character is a development which further blurs the distinction between it and fraud in the inducement.

H.S.

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[4] (1968), 65 D.L.R. (2d) 674 at p. 682.

[5] *Ibid.*, at p. 679.

[6] [1967] 3 C.C.C. 294, 2 C.R. (N.S.) 40, 63 D.L.R. (2d) 82. This decision is cited by Laskin, J., as authority for his findings, but not mentioned hy the majority.