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### Judicial Law Reform in the Law of Contract

Joost Blom

*Allard School of Law at the University of British Columbia*, [blom@allard.ubc.ca](mailto:blom@allard.ubc.ca)

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# JUDICIAL LAW REFORM IN THE LAW OF CONTRACT

JOOST BLOM Q.C.†\*

## I. INTRODUCTION

Of all the areas of law still dominated by common law principles, the law of contract has probably changed the least in the last quarter century or so. This is not for lack of trying on the part of law professors and law reformers. Legal academics have variously asserted that contract as a distinct branch of the law is dead,<sup>1</sup> or at least in need of lifesaving radical surgery. The English Law Commission, together with the Scottish, tried for years to codify the law of contract and gave up.<sup>2</sup> The Law Reform Commission of Ontario has just produced a long shopping list of reforms, many of which echo changes that academics have been urging for years.<sup>3</sup> Yet the law of contract in 1988, not only in its main features but also in many of its details, would have seemed quite familiar to someone like Sir Frederick Pollock, who wrote the first treatise on the law of contract in 1876.<sup>4</sup> The same could not be said, by any stretch of the imagination, of torts and restitution.

For all its stability the law of contract has seen a good deal of reform, most of it judge-made, in the last quarter century or so. In

† Professor, of the Faculty of Law, University of British Columbia.

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<sup>1</sup> G. Gilmore, *The Death of Contract* (1974).

<sup>2</sup> *Anson's Law of Contract*, 26th ed. by A. G. Guest (1984) at 16-7.

<sup>3</sup> Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) (Chair: J. R. Breithaupt). [cited hereafter as *OLRC Contracts Report*].

<sup>4</sup> F. Pollock, *Principles of Contract at Law and in Equity* (1876).

this paper I will try to sketch at least some of the main features of this judicial law reform in the law of contracts, to suggest the areas where this reform has been a success and where it has been less so, and, at the end, to ask what this overall picture tells us about the process of judicial law reform in the common law.

Successful judicial law reform has, I would submit, two aspects. It must be *internally* successful in the sense that the new law integrates well, conceptually, with the old. It must also be *externally* successful, by which I mean that the new law should not have major adverse effects on the use of contracts as a device for ordering private rights. These adverse effects can be looked at either at the "micro" level (they make it more difficult for the parties to make a contract that does what they want it to do) or at the "macro" level (they inhibit the role that private ordering can play in the efficient operation of economic processes).

This view of what is successful is obviously loaded with assumptions. It does assume that freedom of contract is in general, though with necessary exceptions, a good thing. It also assumes that one should try to maintain the conceptual integrity of the law of contract. It is often argued that it is exactly the unwillingness to break out of traditional modes of thinking about contract that has been the biggest obstacle to needed reform. Insisting on conceptual integrity, on this view, just perpetuates the hold of the dead past. Still, I would argue that real and lasting change in the common law is possible only if the law continues to make sense to us as a whole, each part of which stands in a rationally justifiable relation to every other part. This does not exclude radical, fundamental change, but it does mean that such change can happen only from the centre outwards, by recasting the ideas at the core of the law. This has visibly happened to the law of negligence in the last sixty years or so. One of the many fascinating comparisons between contract and tort is to ask whether any equivalent revolution at the centre is happening, or can happen, in contract.

This paper will touch on a number of areas of contract in the order in which they would come up in a conventional first year contracts course. For the sake of colour, but certainly not scientific precision, I have assigned each of them a letter, A, B, C or N, based on the degree of success that judicial law reform has had in that area. If the reform is successful, albeit sometimes modest in scope, I gave it an A. The letter B suggests that the reform has succeeded on the whole but has been accompanied by problems; and C suggests that the reform has not been successful. An N suggests that there has been no significant reform where it is often urged that there should be.

## II. AREAS OF REAL OR POTENTIAL JUDICIAL LAW REFORM

### A. THE CONCEPT OF AGREEMENT

The common law has been and is wedded to the idea that a contract is by definition a bargain expressed in, or at least reducible to, a fixed set of terms. These terms are thought of as verbal formulae that once agreed to become themselves the source from which the parties' rights and obligations are deduced. It is not what the parties actually intended, either individually or in common, that is the contract; it is what the parties agreed to, meaning the terms on which they agreed, seen as quite detached from their actual intentions. From this fundamental concept flow most of the important features of the common law of contract — the making of a contract is almost always analyzed by finding an offer and an acceptance; the meaning of a contract is fixed at its inception, barring a new agreement; the parties' rights under a contract are unaffected by all but the most drastic changes in circumstances, because the terms survive; an incomplete or insufficiently clear set of terms cannot be a contract. Still, the law of contract formation has by no means been static.

#### (i) Offer and Acceptance (N)

The very concept of offer and acceptance implies a particular way of viewing the nature of a contract. It is something that comes into existence neither over time nor by hindsight, but by words or conduct that clearly signal the making of an agreement at a specific point in time. This is what Lord Wilberforce aptly called "a rather technical and schematic doctrine of contract", though he admitted that the facts did not always fit neatly into the scheme.<sup>5</sup> For a short while Lord Denning tried to insinuate a more flexible doctrine of contract formation based on whether the dealings between the parties, looked at as a whole, were sufficient evidence of an agreement for a court safely to hold the parties bound.<sup>6</sup> But the House of Lords stressed the merits of certainty and precision in the classical view of offer and acceptance and firmly repudiated the heresy.<sup>7</sup> Even a contract pro-

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<sup>5</sup> *New Zealand Shipping Co. v. A. M. Satterthwaite & Co.* [1975] A.C. 154 at 167 (P.C.).

<sup>6</sup> *Gibson v. Manchester City Council* [1978] 1 W.L.R. 520, [1978] 2 All E.R. 583 (C.A.).

<sup>7</sup> *Gibson v. Manchester City Council* [1979] 1 W.L.R. 294, [1979] 1 All E.R. 972.

duced by a "battle of forms", an exchange of mutually contradictory sets of standard terms, is generally still analyzed as the classic tennis game of offer, counter-offer and so on, to acceptance.<sup>8</sup>

Some scholars, most notably in Canada Professors John Swan and Barry Reiter,<sup>9</sup> have argued that the courts should break free from the tyranny of seeing a contract as a set of terms fixed once and for all from the time the contract was entered into. This model, it is argued, prevents the courts from asking directly what, under the circumstances as they exist from time to time, each party is reasonably entitled to expect from the other. This is an inquiry for which a much more open-textured approach is needed, taking into account the history of the relations between the parties both before and after the contract is made, not concentrating all attention on the offer and acceptance. I think the central concept of what an agreement is has not changed very much, but the paralyzing hold that this concept has had on many aspects of the law of contract is slowly but surely being loosened.

## (ii) Uncertainty of Terms and Agreements to Agree (A)

One of the areas where the law has been made noticeably more flexible is the problem of incompleteness, where either the parties spelled out the terms of their agreement vaguely or ambiguously, or they intended to leave all or some vital parts of the contract for further negotiation. The British Columbia Court of Appeal offers a good illustration of this shift. One need only compare *First City Investments Ltd. v. Fraser Arms Hotel Ltd.*,<sup>10</sup> which held that the parties had made a valid contract although they left it to be filled in by

<sup>8</sup> *Butler Machine Tool Co. v. Ex-Cell-O Corp.* [1979] 1 W.L.R. 401, [1979] 1 All E.R. 965 (C.A.). Cf. *Tywood Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* (1979) 100 D.L.R. (3d) 374 (Ont. H.C.). See also: M. G. Shanker, "Battle of the Forms: A Comparison and Critique of Canadian, American and Historical Common Law Perspectives" (1979-80) 4 Can. Bus. L.J. 263; D. Vaver, "Battle of the Forms: A Comment on Professor Shanker's Views", *ibid.* at 277.

<sup>9</sup> See, e.g.: B. Reiter & J. Swan, "Contracts and the Protection of Reasonable Expectations", and B. J. Reiter, "Contracts, Torts, Relations and Reliance" in B. J. Reiter & J. Swan, *Studies in Contract Law* (1980), 1 and 239 resp.; J. Swan, "Whither Contracts: A Retrospective and Prospective Overview" in Law Society of Upper Canada Special Lectures 1984, *Law in Transition: Contracts* (1984), 125; J. Swan, "Contract Law: An Overview of the New Era" in *Contract Law: A New Era* (1987), Tab I, at 1.

<sup>10</sup> (1979) 104 D.L.R. (3d) 617 (B.C.C.A.). See also: *Canada Square Corp. v. Versafood Services Ltd.* (1981) 130 D.L.R. (3d) 205 (Ont. C.A.); *Alta-West Group Investments Ltd. v. Femco Financial Corp.* (1984) 34 Alta. L.R. (2d) 5 (Q.B.).

“such other covenants as the solicitors for the lender may reasonably require”, with *Arnold Nemetz Engineering Ltd. v. Tobien*,<sup>11</sup> decided only eight years earlier, where the omissions held to be fatal included the failure to state expressly that a rate of interest specified in the contract was interest per annum. The most striking recent example of this increased flexibility is *Wiebe v. Bobsien*,<sup>12</sup> in which the vendor argued that a contract for the sale of land was void because it was made subject to a condition precedent that was too uncertain. The condition was a subject to clause relating to the sale of the purchaser’s old house, without anything being specified as to the terms on which he would sell. The majority of the Court (Seaton and Carrothers JJ.A.) said that the law implied an obligation on the purchaser to act in good faith and use all reasonable efforts to sell his old house, and that these obligations were sufficiently certain to make the condition precedent legally operative. Lambert J.A., dissenting, thought that the clause could not be given enough meaning, because in a dispute about whether the condition precedent could have been satisfied the Court would have to decide the price the purchaser should accept for his old house, something he thought the Court could not reasonably do. The majority were prepared to hang their conclusion on general standards like “reasonable efforts” and “good faith” for the sake of enabling parties, who are usually not lawyers, to use conditions like this without the risk that it might cause their agreement to unravel.

It is still the received view that an agreement to negotiate is devoid of legal content. This is based on the idea that if negotiations break down or never take place, the law cannot substitute a judge’s or arbitrator’s view of what the parties ought to have agreed to for the parties’ own agreement. Even this orthodoxy has received a glancing blow in another recent British Columbia Court of Appeal decision, *Fraser v. Van Nus*.<sup>13</sup> The purchaser agreed to buy a large house on condition that the vendor make very extensive and elaborately described alterations to it. The agreement provided that if the parties could not agree on the architect’s plans by a certain date the contract would “cease and determine”. The Court held that this did not leave the purchaser free to walk away from the negotiations on the architect’s plans, as he did. Only a genuine failure to agree would cause

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<sup>11</sup> [1971] 4 W.W.R. 373 (B.C.C.A.).

<sup>12</sup> (1985) 20 D.L.R. (4th) 475 (B.C.C.A.), leave to appeal refused, [1985] 2 S.C.R. v.

<sup>13</sup> (1985) 22 D.L.R. (4th) 459.

the contract to determine. Since the purchaser had broken off negotiations for reasons irrelevant to the merits of the architect's plans he was in breach of contract.<sup>14</sup> This is a small but significant step in the direction of imposing legal sanctions for breach of an agreement to negotiate.<sup>15</sup>

Another development, tangential to this point but possibly far-reaching, is the Ontario Court of Appeal's decision that negotiating for a contract may place the parties under obligations to each other although, without bad faith on either party's side, the negotiations prove abortive. The parties, held the Court, may nevertheless assume fiduciary obligations to each other in respect of any confidential information they exchange in the course of negotiations.<sup>16</sup> The Court did, however, rest its conclusion specifically on evidence that in the mining industry those who were seriously negotiating towards a joint venture were regarded as under an obligation not to do anything detrimental to the other party.<sup>17</sup> It is hard to say whether (if it stands) the case will be limited to a narrow range of situations, or whether it will open the way to apply standards of commercial morality (a phrase invoked by Lambert J.A. in another context<sup>18</sup>) to parties negotiating in other commercial or non-commercial contexts.

### (iii) Identification and Interpretation of Terms: The Parol Evidence Rule (N or A)

The cases on uncertainty and agreements to agree show the courts' greater willingness to flesh out the bare verbal bones of the parties' agreement, by implying additional obligations that in the courts' view are needed to make the contract work as the parties intended it to, or ought to have intended it to. A related problem is how far the law should go in using the parties' informal expressions of intention

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<sup>14</sup> The Court awarded damages for the full loss of the purchaser's bargain, which assumed that the parties would have reached agreement if the purchaser had negotiated in good faith.

<sup>15</sup> The Court distinguished the cases on agreements to agree by construing the contract as, rather, an agreement intended to be binding from the outset subject to a condition subsequent that if the parties after a bona fide attempt were unable to agree, the contract would be determined (*supra*, note 13 at 466). If such a condition subsequent has legal effect, it is hard to see why the same effect cannot be given to a condition precedent that the parties make a bona fide attempt to agree.

<sup>16</sup> *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1987) 23 O.A.C. 263, leave to appeal granted, [1987] 2 S.C.R. viii.

<sup>17</sup> *Ibid.* at 301-5.

<sup>18</sup> See *infra*, note 57 and accompanying text.

to determine what the obligations under the contract are. The most litigated aspect of this problem is the parol evidence rule. The Supreme Court of Canada has twice in recent years reiterated the rule in its dogmatic form: if the parties' agreement is in writing, no evidence of promises made during negotiation or at the time of execution is admissible to vary or contradict the written terms.<sup>19</sup>

As academics never tire of pointing out, this rule is not properly seen as a rule of evidence at all, but a rule of construction; and as a rule of construction it cannot be an absolute rule of exclusion. The British Columbia Court of Appeal, through Lambert J.A., has now said emphatically, twice, that the Supreme Court's version of the parol evidence rule, when read in the context of the cases' facts, is no more than a conclusion of how the contracts in those cases ought to have been construed.<sup>20</sup> The rule does not prevent a court in different factual circumstances from finding that the parties intended the oral promises to override inconsistent written terms, particularly where the written terms are not individually negotiated and drafted but are boiler-plate clauses in standard forms. The Court of Appeal accordingly deprived a seller of buckwheat seed of the protection of a clause that said it would "not in any way be responsible for the crop". The seller had made oral representations in discussions with the buyers that the crop would choke any weeds, whereas the reverse happened.<sup>21</sup> Similarly, a bank was held bound by its promises, made in correspondence with the guarantors, that it would monitor the debtor company's financial position in various ways. The guarantors were released from liability by the bank's breach of its undertaking, despite the printed guarantee form's exclusion of all representations other than those on the form.

This reform, assuming the Court of Appeal's view prevails as it ought to, is an internal success because it relegates the parol evidence rule to its proper place in the law, as an expression of a common sense rule of construction. It may be said to cause external problems if it makes for greater uncertainty as to whether written terms will stand up; but the parol evidence rule was subject to so many exceptions even in its old quasi-rigid formulation that it probably never offered all that much security in the first place.

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<sup>19</sup> *Hawrish v. Bank of Montreal* [1969] S.C.R. 515; *Bauer v. Bank of Montreal* [1980] 2 S.C.R. 102.

<sup>20</sup> *Gallen v. Allstate Grain Co.* (1984) 9 D.L.R. (4th) 496 (B.C.G.A.); *Toronto Dominion Bank v. Griffiths* (1987) 18 B.C.L.R. (2d) 117 (C.A.).

<sup>21</sup> *Gallen, ibid.*

## B. CONSIDERATION (N)

Few topics in contracts generate as much academic heat as the doctrine of consideration. It is regularly denounced as irrational, arbitrary and anachronistic. Yet in the courts it stubbornly lives on, with only a few signs here and there that judges take it less seriously now than they did a century ago.

Actually the supposed centrality of the doctrine of consideration in the law of contract is deceptive. In the vast majority of cases consideration is never an issue. It raises its head, ugly or otherwise, in only a few limited areas, each of which has distinct policy problems that the doctrine of consideration, albeit haphazardly, does answer to some extent. In practical terms the doctrine operates as a rule that invalidates five rather narrow categories of promises.

First, it says that promises to make a gift are not binding. There is no strong sentiment in any quarter to change this rule.<sup>22</sup> Secondly, the doctrine of consideration dictates the invalidity of a promise to pay for a benefit already received. This "past consideration" rule is already subject to a judge-made exception that if the benefit was rendered at the promisor's request, a subsequent promise to pay for the benefit will be binding. The Ontario Law Reform Commission recommends legislative reform so that a promise based on past consideration will be enforceable to the extent necessary to prevent the promisor from being unjustly enriched, which effectively means if the benefit was conferred other than as a gift or gratuitous service.<sup>23</sup> It is not clear to me that the proposed statutory rule would significantly alter the position already reached at common law or that the past consideration rule causes any real difficulty. The Commission cites only one case where the rule barred the enforcement of a promise that it thinks probably should have been enforced: *Eastwood v. Kenyon* in 1840.<sup>24</sup>

The third and fourth situations in which the doctrine of consideration strikes down promises are those of the variation of a contract. A promise to pay or do more in exchange for getting something one is already legally entitled to get from the other party is not binding. Conversely, a promise to accept less from the other party than one is legally entitled to get is also not binding. Here doctrine does fly in the face of common sense. Lawyers may think of contracts as an

<sup>22</sup> *OLRC Contracts Report* at 8.

<sup>23</sup> *Ibid.* at 18-20.

<sup>24</sup> (1840) 113 E.R. 482. The modern extent of the rule is given in *Pao On v. Lau Yiu Long* [1980] A.C. 614, [1979] 3 All E.R. 65 (P.C.).

array of terms that, once fixed, cannot be changed except by a new, independently valid contract, but ordinary rational people do not. A contract is a blueprint for achieving a particular result, and when the parties agree to change the blueprint because they think the result will then be more satisfactory, it would not occur to them to ask whether the change benefits only one side (in which case the law says the change is not binding), or involves at least some benefit on both sides (in which case it is binding). Lord Blackburn pointed out the unreality of this distinction more than a hundred years ago.<sup>25</sup> He thought that in fact an agreement to vary a contract was always supported by consideration, because whoever was agreeing to pay more or accept less got, at the very least, the benefit that the other side was more likely to stick to the new arrangement than to the old. Nevertheless the law has clung to the almost metaphysical notion that a promise to do what you are already bound by contract<sup>26</sup> to do, is not consideration.

Recent cases in Canadian courts on promises to pay or do more in exchange for what the other party was already bound to do have produced nothing but a repetition of orthodox principle and a rejection of the claim based on the promise.<sup>27</sup> The result still has the slight attraction that it may be thought to deter one party from pressing the other to "up the ante" or otherwise risk a breach of contract. This deterrent effect is extremely doubtful, since the rule can be circumvented so easily (by making the promise under seal or for nominal consideration), and the sanction comes only in the relatively rare case where the "victim" fails to pay up and the "extorting" party takes him to court. If extortion is a problem, surely a doctrine of unconscionable pressure would do a better job than consideration. The consideration rule inhibits sensible adjustments to contracts as conditions change. It occasionally lets a judge deal with a promise he or she thinks the promisor should not have made, like the waiver of liability signed by the plaintiff in *Delaney v. Cascade River Holidays Ltd.*<sup>28</sup>

Often it is possible to enforce the promise in the converse situation, where one party agrees to accept less from the other. In some circum-

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<sup>25</sup> *Foakes v. Beer* (1884) 9 App. Cas. 605 at 622.

<sup>26</sup> That is, a contract with the promisee; a promise to perform an existing contractual obligation to a third party is good consideration.

<sup>27</sup> *Gilbert Steel Ltd. v. University Const. Ltd.* (1976) 67 D.L.R. (3d) 606 (Ont. C.A.); *Abraham v. Wingate Properties Ltd.* [1986] 1 W.W.R. 568, reconsidered on other points, [1986] 2 W.W.R. 568 (Man. C.A.).

<sup>28</sup> (1983) 44 B.C.L.R. 24 at 33-5 *per* Nemetz C.J.B.C. (dissenting).

stances the provision in the *Law and Equity Act* about part performance of an obligation<sup>29</sup> makes the promise binding. In many other cases the equitable doctrine of promissory estoppel applies; the promisor is precluded from insisting on his or her full contractual rights where it would be unconscionable to do so. The doctrine of consideration nevertheless demands that the promise be used only as a shield — only to provide a defence to the other party when the first party makes a claim (or sets up a defence)<sup>30</sup> based on the original contract terms. The promise cannot be used by the other party as a new cause of action in itself, as a promise as fully binding as if it had been supported by consideration.<sup>31</sup> Judges, particularly in Canada, see little merit in this distinction now, and have almost reached the point of breaking it down completely.<sup>32</sup> A Saskatchewan judge recently said that the distinction was gone.<sup>33</sup> We are moving inexorably closer to the famous s. 90 of the Second Restatement on Contracts,<sup>34</sup> the American concept of promissory estoppel affording a cause of action based on reliance. This of course applies much more widely than just in the area of modifying contracts. Section 90 was recently cited in a decision of the Federal Court, in which officials on behalf of the federal Crown had persuaded a native Indian to move off his reserve, where he had become unpopular because he operated an extensive tree farm business. The Court enforced the Crown's promise, given in very general terms, to see that he was compensated.<sup>35</sup>

The Ontario Law Reform Commission's proposals in this area are twofold: first, that any agreement in good faith modifying a contract should not require consideration to be binding;<sup>36</sup> and, second, that

<sup>29</sup> R.S.B.C. 1979, c. 224, s. 40.

<sup>30</sup> *Robertson v. Minister of Pensions* [1949] 1 K.B. 227 (K.B.D.); *Charles Rickards Ltd. v. Oppenheim* [1950] 1 K.B. 616 (C.A.); cf. *Conwest Exploration Co. v. Letain* [1964] S.C.R. 20.

<sup>31</sup> *Combe v. Combe* [1951] 2 K.B. 215 (C.A.); *Gilbert Steel Ltd. v. University Const. Ltd.*, *supra*, note 27.

<sup>32</sup> *Re Tudale Explorations Ltd. and Bruce* (1978) 88 D.L.R. (3d) 584 (Ont. Div. Ct.); *Petridis v. Shabinsky* (1982) 132 D.L.R. (3d) 430 (Ont. H.C.). See also: *Rusonik v. Canada Trust Co.* (1986) 39 R.P.R. 263 (Ont. H.C.); *Watson v. Canada Permanent Trust Co.* (1972) 27 D.L.R. (3d) 735 (B.C.S.C.), *rev'd* on other grounds (1974) 66 D.L.R. (3d) 85 (C.A.).

<sup>33</sup> *Royal Bank of Canada v. Forster* (1986) 47 Sask. R. 209 at 212-3 (Q.B.) *per* McLellan J.

<sup>34</sup> American Law Institute, *Restatement of Law, Second: Contracts*, s. 90.

<sup>35</sup> *Mentuck v. The Queen* [1986] 3 F.C. 249 (T.D.). The decision was based on a unilateral contract, but promissory estoppel and s. 90 were brought in to buttress the importance of the plaintiff's reliance on the Crown's promise.

<sup>36</sup> *OLRC Contracts Report* at 13-8.

the American concept of promissory estoppel, the enforcement of promises based on reliance, be adopted in Ontario.<sup>37</sup>

The fifth type of situation where the doctrine of consideration strikes down a promise is the gratuitous option, a promise to keep an offer open for a certain time without the offeree's supplying anything in return for that promise. An option is a powerful right, because it gives the person who has it the unfettered choice to do nothing or to claim the benefit of the contract in full, whereas the person who gives the option is committed for its duration. There is some merit in requiring a degree of deliberateness on the part of the promisor as a condition for enforcing an option, and the presence of consideration (though it may be nominal<sup>38</sup>) performed that role, though not particularly well. The Ontario Law Reform Commission would change the rule about firm offers only for offers made in the course of a business, on the theory that business people at least are likely to know what they are doing when they make a promise to keep the offer open.<sup>39</sup>

### C. WAIVERS OF CONDITIONS PRECEDENT (C)

This is my only C. It is really an example of unintended judicial law reform. The Supreme Court of Canada, announcing the rule in *Turney v. Zhilka*,<sup>40</sup> seemed to think that it was established law. If a contract is made subject to a "true" condition precedent, whose fulfilment depends on the will of a third party, and that condition precedent is not fulfilled, the Supreme Court's rule is that even if the condition was inserted for the exclusive benefit of one party, that party has no right to waive the nonfulfilment of the condition and enforce the contract. In fact no other common law jurisdiction takes this view, and the British Columbia Law Reform Commission pointed out<sup>41</sup> that it is based on a confusion between a condition precedent to the existence of any contract at all (where it is true to say that neither party has any rights before the condition is fulfilled) and a condition precedent to the performance of the obligations under a contract (where the parties are under obligations to each other before the condition precedent is fulfilled, if only to wait until

<sup>37</sup> *Ibid.* at 25-32.

<sup>38</sup> As in *Mountford v. Scott* [1975] Ch. 258 (C.A.).

<sup>39</sup> *OLRC Contracts Report* at 20-5.

<sup>40</sup> [1959] S.C.R. 578.

<sup>41</sup> Law Reform Commission of B.C., *Report on Waiver of Conditions Precedent in Contracts* (1977) (Chair: L. Getz), esp. at 10-1.

the condition is either fulfilled or not and to do nothing to interfere with its fulfilment). In *Barnett v. Harrison*,<sup>42</sup> the Supreme Court adhered to its position. Despite counsel's frontal assault on the rule, the Court thought that letting one party waive the nonfulfilment of a true condition precedent was like having one's cake and eating it too. If the condition is fulfilled one gets the benefit of the contract; if it isn't, one can still get the contract or can get out scot-free. The British Columbia Law Reform Commission found this reasoning unpersuasive, as indeed it is, and recommended the enactment of what became s. 49 of the *Law and Equity Act*.<sup>43</sup> This abolishes the "true condition precedent" rule and treats waiver of a condition precedent like waiver of any other provision that is exclusively for one's own benefit.

Here, I suggest that judicial law reform was unsuccessful because the legal concepts were allowed to drift loose from their moorings. The Supreme Court was impressed by the "different" nature of a condition precedent, and deduced that the right to waive such a condition must therefore be different from the right to waive other provisions of a contract.<sup>44</sup> Conditions precedent, for this particular purpose, are in fact not materially different from other provisions of the contract, as the British Columbia legislature has now said.

#### D. MISREPRESENTATION (A/B)

This, and the doctrine of privity, are two areas where the tort of negligence has been used to overcome the felt shortcomings of traditional contract doctrine. The result here was the more successful of the two. According to classical contract law, if a person is induced to enter into a disadvantageous contract by misrepresentations of fact by the other party, and it is no longer possible to rescind the contract, the injured party has a remedy in damages only if the representation was fraudulent, or if the representation could be regarded as a term of the bargain or at least a contract collateral to the main bargain.<sup>45</sup> If it is not a contractual promise and not fraudulent, there is no remedy once the right to rescission is gone. However, once *Hedley Byrne & Co. v. Heller & Partners Ltd.*<sup>46</sup> established that a negligent mis-

<sup>42</sup> [1976] 2 S.C.R. 531.

<sup>43</sup> R.S.B.C. 1979, c. 224.

<sup>44</sup> *Barnett v. Harrison*, *supra*, note 42 at 558 *per* Dickson J.

<sup>45</sup> *Derry v. Peek* (1889) 14 App. Cas. 337 (H.L.); *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30 (H.L.).

<sup>46</sup> [1964] A.C. 465 (H.L.).

statement causing financial loss could give a cause of action in tort to the person who reasonably relied on it, it was only a matter of time before this right of action was fully integrated with the law of contract.

The integration was accomplished in England with *Esso Petroleum Co. v. Mardon*<sup>47</sup> in 1976. Canadian courts quickly accepted that a negligent misrepresentation *inducing* a contract gave a right to damages, although it was not until last year that *Hedley Byrne* was declared by the Supreme Court of Canada to be fully applicable to negligent information or advice given *in the course of* a contractual relationship.<sup>48</sup>

The right of action in negligence established in *Hedley Byrne* has generally dovetailed well with the law of contract because the criteria for the duty of care in tort, summarized as the need for a "special relationship" between advisor or informant and the plaintiff, are harmonious with and to some extent inspired by the law of contract.<sup>49</sup> Now and then the internal dynamic of the law of negligence, which focuses on the defendant's fault and therefore sees the plaintiff as a victim, has pushed recovery beyond what these criteria would seem to justify if they are applied with an eye to the contractual setting of the case. A good example, I think, is the Supreme Court of Canada's decision in *V. K. Mason Construction Ltd. v. Bank of Nova Scotia*.<sup>50</sup> This held at one and the same time that a letter of comfort to a contractor from the bank that was providing financing to the developer was *not* reasonably to be construed as a promise that the contractor would be paid, but *was* an assurance that the financing was adequate to cover the full project. It was reasonable for the contractor to rely on this assurance, and the contractor could therefore sue the bank in tort when it did not get paid because the developer did not have enough funds. I would suggest that a reasonable contractor, seeing that the bank's letter was not a guarantee of payment, would have either taken steps to get further assurances or gone ahead fully realizing that it was taking a risk. In the latter case, recovery in tort is unjustified.

In this kind of case the function of tort recovery is so close to that of recovery on a contractual promise that to let the result depend on the form of the action is something that requires strong justification.

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<sup>47</sup> [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.).

<sup>48</sup> *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147, overruling implicitly on this point *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* [1972] S.C.R. 769.

<sup>49</sup> See especially Lord Devlin in *Hedley Byrne*, *supra*, note 46 at 526-9.

<sup>50</sup> [1985] 1 S.C.R. 271, (1985) 16 D.L.R. (4th) 598.

That justification was not present in the *Mason* case, which I would suggest is another example of a legal concept, that of a duty of care in giving information or advice, being carried by its own momentum into cases where, seen in a broader context, it does not belong.

### E. UNCONSCIONABILITY (A)

Canadian courts have been leaders in developing the theory that an unfair contract procured through the use of a stronger bargaining position should not be allowed to stand. Davey C.J.B.C. first stated this equitable doctrine in its modern form<sup>51</sup> in 1965.<sup>52</sup> His decision was one of those relied on by Lord Denning when he too adopted a theory of inequality of bargaining power in *Lloyds Bank Ltd. v. Bundy*<sup>53</sup> ten years later. In England the House of Lords has recently doubted the correctness of Lord Denning's view and suggested that judges have no business putting new restrictions on freedom of contract in the name of redressing inequality of bargaining position; that, the Law Lords thought, should be left to Parliament.<sup>54</sup>

In Canada, however, judges have felt no such inhibitions.<sup>55</sup> In *Harry v. Kreutziger*<sup>56</sup> the British Columbia Court of Appeal re-affirmed the doctrine of the unconscionable use of bargaining power. Lambert J.A., in a separate judgment, sought to put the doctrine on a more general basis than a quasi-mechanical weighing up of the degree of inequality between the parties, and the extent to which the terms of the contract were unfair. He suggested the true question was "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".<sup>57</sup> The doctrine has spread well beyond the type of case in

<sup>51</sup> The older doctrine was restricted to a few stereotyped cases, such as catching bargains with expectant heirs.

<sup>52</sup> *Morrison v. Coast Finance Ltd.* (1965) 55 D.L.R. (2d) 710 (B.C.C.A.).

<sup>53</sup> [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.).

<sup>54</sup> *National Westminster Bank v. Morgan* [1985] A.C. 686 at 708, [1985] 1 All E.R. 821 at 830.

<sup>55</sup> A factor may be that legislatures in Canada have generally done less to deal with abuse of contractual bargaining power, for example in standard form contracts, than in England. Lord Scarman in *National Westminster Bank v. Morgan*, *ibid.*, gave Parliament's legislative activity as a primary reason why judges should exercise restraint.

<sup>56</sup> (1978) 95 D.L.R. (3d) 231. See also *Buchanan v. Canadian Imperial Bank of Commerce* (1980) 125 D.L.R. (3d) 394 (B.C.C.A.). Cf. *Lott v. Angelucci* (1982) 36 B.C.L.R. 273 (B.C.C.A.); *Bomek v. Bomek* (1983) 146 D.L.R. (3d) 139 (Man. C.A.).

<sup>57</sup> *Ibid.* at 241.

which a person disadvantaged by age, infirmity or lack of education is exploited by someone else. The Ontario Court of Appeal, for example, recently held that a bank was under a duty to ensure that a woman, from whom they proposed taking a mortgage to secure her son's debt to the bank, had independent legal advice.<sup>58</sup> The duty was expressly not based on any fiduciary relationship between her and the bank;<sup>59</sup> she did not look to the bank for advice on the merits of the transaction. The duty was said to arise from the nature of what the bank was asking her to do and what the bank stood to gain from it, as well as her age (seventy-one), low education and poor English. The decision may therefore have quite broad implications for the way in which banks conduct these transactions.

The concept of unconscionability has two components, which are often called procedural unconscionability (the way the plaintiff is induced to enter into the contract is unfair) and substantive unconscionability (the bargain is in itself unfair because the plaintiff gets a bad deal). Beyond a few hints in obiter dicta<sup>60</sup> the courts have not yet held that a contract, or a provision in a contract, can be held invalid or set aside simply because its terms work unduly harshly on one party. The traditional view is that so long as the playing field is not tilted too much (*i.e.* there is no procedural unconscionability, incapacity or duress) everybody should be free to drive as hard a bargain as he or she can. But the means by which the bargain is brought about are scrutinized much more strictly than they used to be. Canadian courts have held, for example, that a clause in an employment contract providing for termination on short notice is unconscionable if it was part of a contract that the employee was asked to sign on a "take it or leave it" basis.<sup>61</sup>

<sup>58</sup> *Bertolo v. Bank of Montreal* (1986) 33 D.L.R. (4th) 610.

<sup>59</sup> I have not dealt with the judiciary's increasing enthusiasm for the fiduciary relationship as a means of expanding a party's obligations beyond those that the contractual relationship might otherwise include. This is linked to contract law but goes well beyond it in many respects. Its primary function is not to give relief from the contract but to give damages for losses arising elsewhere, as from a transaction the advisee enters into with a third party. Sometimes the fiduciary duty is invoked to amplify the obligations under a contract for professional services; see for example *Kuruyo Trading Ltd. v. Acme Garment Co. (1975) Ltd.* [1988] 3 W.W.R. 644 (Man. Q.B.).

<sup>60</sup> Most notably in *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* [1986] 1 S.C.R. 57 at 67 *per* Le Dain J.

<sup>61</sup> *Dolden v. Clarke Simpkins Ltd.* (1983) 3 C.C.E.L. 153 (B.C.S.C.); *Clark v. Optyl (Canada) Ltd.* (1985) 61 N.B.R. (2d) 377, 158 A.P.R. 377 (C.A.). Cf. *Wallace v. Toronto Dominion Bank* (1983) 145 D.L.R. (3d) 431 (Ont. C.A.).

I have suggested that this aspect of judicial law reform in contracts is a success because it does no violence to the structure of the law. The notion of agreement, by definition, must involve scope for examining the nature of the parties' consent to the terms. It is also a reform couched in terms of justice between the parties based on their individual circumstances, so it does not open up a very broad range of contracts to uncertainty and litigation.

The same might not be true of the Ontario Law Reform Commission's suggestion that the terms of every contract should, by legislation, be made subject to judicial review on the ground of unconscionability. The review is to take into account all the circumstances of the case including as a minimum twelve listed factors which cover both procedural and substantive aspects of the contract.<sup>62</sup> In addition the Commission would imply into every contract an obligation to perform it in good faith notwithstanding any terms that might limit that obligation.<sup>63</sup> "Good faith" is left undefined for this purpose.

I wonder about the advisability of giving judges the discretion to declare a contract not binding, or a party to be in breach of contract, on the basis of an abstract and many-sided principle like "unconscionability" or "good faith", detached from any particular factual context. The merit of developing such concepts by judicial decision, case by case, is that the principle is usually (though not always) reasonably well trimmed to the need for it. The courts have been adept at weighing the need to do justice in the particular case before them with the need to keep the law clear and certain enough to be predictable. Parties who make a contract ought to be reasonably sure that it will hold up to do the work they want and will not be invalidated by an unpredictable exercise of a judicial discretion. Parties want to be able to perform their contract against the background of a reasonably clear idea of what their legal position would be if they or the other side departed from the contract's terms.

The Commission's argument is that judges have been developing the "doctrines" of unconscionability and good faith but are inhibited by traditional concepts from doing it as openly and as extensively as they should. I am inclined to agree with the first part of this argument<sup>64</sup> but not the second, which I think underrates both the forth-

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<sup>62</sup> *OLRC Contracts Report* at 128-32.

<sup>63</sup> *Ibid.* at 165-76.

<sup>64</sup> I would quibble with the assertion that the cases show an evolving "doctrine" of unconscionability; I think they show several doctrines, applied to different problems.

rightness and the ingenuity of the judiciary. It may be worth noting that the Commission does not provide one concrete case of unconscionability or bad faith where judges have been or may be unable to do justice with the instruments the common law already puts into their hands.<sup>65</sup>

## F. EXEMPTION CLAUSES (B)

This area used to loom large in first year contract courses, but now that the judge-made (which in this context meant Lord Denning-made) device of fundamental breach,<sup>66</sup> designed specifically to attack exemption clauses, has been firmly relegated by the House of Lords to the dustbin of history,<sup>67</sup> the ordinary process of construing a contract should apply (said the Law Lords) to exemption clauses as to any other clauses of the contract. Exemption clauses had no special status that would allow a judge to disregard them if, on their true construction, they applied to limit or exclude the rights that the injured party would have had without the clause. Of course "true construction" here means construction *contra proferentem* if the clause was inserted by one party for that party's advantage, as it almost always would be.

In *Beaufort Realities (1964) Inc. v. Chomedey Aluminum Co.*<sup>68</sup> the Supreme Court of Canada accepted the letter of the House of Lords' decision but not fully the spirit. In a completely non-consumer situation — a mechanics' lien claim by an unpaid subcontractor on a large building project — the Court held that a clause in the subcontract by which the subcontractor waived its lien rights should be construed not to apply to a situation where the general contractor committed a fundamental breach of contract by failing to pay the subcontractor. The decision was based on Wilson J.'s emphasis, in her judgment in the Ontario Court of Appeal, on whether it was "fair and reasonable" that the waiver should survive the "disinte-

<sup>65</sup> See the critique by D. Vaver, "Unconscionability: Panacea, Analgesic or Loose Can(n)on?" (1988) 14 Can. Bus. L.J. 40.

<sup>66</sup> Actually Lord Denning fashioned a series of devices under that rubric, the two most influential of which were the "breach of a fundamental obligation" idea in *Karsales (Harrow) Ltd. v. Wallis* [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 (C.A.), and the "destruction of the contract" rationale in *Harbutt's Plasticene Ltd. v. Wayne Tank & Pump Co.* [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.).

<sup>67</sup> *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, [1980] 1 All E.R. 556.

<sup>68</sup> [1980] 2 S.C.R. 718.

gration of its contractual setting",<sup>69</sup> and her conclusion that it was not fair and reasonable because the subcontractor, when it agreed to the waiver, "had no reason to anticipate that as the work progressed it would ever be out of pocket in any substantial amount".<sup>70</sup>

There is still more than a hint in the *Beaufort* case of the "rule of law" approach to exemption clauses — that they must be policed by the courts, and even if clearly drafted cannot be permitted to operate beyond a certain extent. The trouble all along has been that the dividing line between the permissible use and the overreaching use of exemption clauses is so hard to define. It seems to be a combination of the degree to which the clause was the subject of bargaining, the relative bargaining strengths of the parties, the severity of the clause, and the extent to which giving the clause effect would make the bargain from the plaintiff's point of view a lopsidedly disadvantageous one.

The Ontario Law Reform Commission's recommendation that judges be given by statute the power to declare any clause in any contract void for unconscionability, or otherwise give relief from its consequences, has already been noted. It was obviously directed to a great extent towards the problem of exemption clauses. The non-exclusive list of a dozen factors that the courts are to consider in making their evaluations is largely based on the English *Unfair Contract Terms Act 1977*,<sup>71</sup> and, as already mentioned, embraces both procedural and substantive aspects of the agreement. I repeat my reservation about enacting a sweeping dispensing power that is subject to no limits as to the kind of contract on which it may be exercised (unlike the English *Act*, which applies only to liability for things done in the course of a business<sup>72</sup>) and is almost unreviewable because it is to be exercised on no clearly articulated principle.<sup>73</sup>

The judicial law reform in this area, even accepting the House of

<sup>69</sup> *Chomedey Aluminum Co. v. Belcourt Construction (Ottawa) Ltd.* (1979) 97 D.L.R. (3d) 170 at 178.

<sup>70</sup> *Ibid.* at 180.

<sup>71</sup> (U.K.) 1977, c. 50, Sch. 2.

<sup>72</sup> *Ibid.*, s. 1(3); see also the excepted contracts in Sch. 1.

<sup>73</sup> See *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] 2 A.C. 803 at 815-6, where Lord Bridge said that a decision on whether an exemption clause met the "fair and reasonable" test in the *Unfair Contract Terms Act 1977* should be interfered with on appeal only in exceptional circumstances, because it involved the balancing of such a variety of considerations that the trial judge's view had to be treated with the utmost respect. This has been described as a kind of "ad hoc dispute settlement in the trial courts" that "will horrify commercial contractors": J. N. Adams & R. Brownsword, "The Unfair Contract Terms Act: A Decade of Discretion" (1988) 104 L.Q.R. 94 at 118.

Lords' counter-reform, has been very significant. The judiciary's ability to achieve fairness through the way it approaches the construction of exemption clauses has repeatedly been demonstrated. A good example, albeit a dissenting view on the facts of the case, is Nemetz C.J.B.C.'s judgment in *Delaney v. Cascade River Holidays Ltd.*<sup>74</sup> The question was whether a "Standard Liability Release" signed by a passenger at the start of a white water rafting trip was binding so as to prevent recovery from the rafting operator by the passenger's estate after the passenger was drowned because, according to the trial judge, the operator had been negligent in providing lifejackets of inadequate buoyancy.<sup>75</sup> Nemetz C.J.B.C. focused on the way in which the ordinary person would read the document, given the way it was actually presented to the passenger — not weighing its words like a lawyer, but bringing to it the assumption that anything so "standard" was unlikely to be as drastic as, literally read, the release was.

Such a willingness to construe agreements in their whole factual context, based on how somebody in the plaintiff's position would read them — here casually, with no eye for verbal nuance, with a set of everyday attitudes and assumptions — is a technique powerful enough to deal with most exemption clauses. Even if the technique is taken so far as to disregard the words of the contract (or some of them) entirely,<sup>76</sup> I would submit that it can be squared with principle. The objective meaning of a contract is not necessarily the sum of the objective meanings of its parts. Some express clauses may be inconsistent with other express clauses and have to be disregarded. There is no reason why a court cannot say that an express clause is inconsistent with the overriding impression given by the terms as a whole, read as they would be by someone in the plaintiff's position.

Admittedly there are obvious dangers in straying too far from the wording, but requiring the conclusion to be justified in terms of the agreement's construction gives the law a surer direction, I would argue, than just making the judge incantate an open-sesame word like "unconscionable" and list a series of factors that he or she considered. I suspect that there are really very few cases where such a broad approach to construction cannot do justice. The exception is where the ordinary person tends not to think of the contract in

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<sup>74</sup> *Supra*, note 28.

<sup>75</sup> The majority of the Court of Appeal held that the negligence had not been shown to have caused or contributed to the passenger's death.

<sup>76</sup> As, in effect, was done in *Tilden Rent-a-Car Co. v. Glendenning* (1978) 83 D.L.R. (3d) 400 (Ont. C.A.).

terms of "terms" at all, but as a generic transaction like buying groceries or getting into a taxi. Consumer sales of goods are often of this kind. If the ordinary consumer would think of the written terms as peripheral to the contract, assuming he or she thinks of them at all, the idea of "construing" the agreement as the ordinary consumer would "read" it becomes unreal. Here the common law of contract reaches its limit. When we reach this point, legislative regulation of the parties' rights, as is already done to some extent in consumer sales of goods by the British Columbia *Sale of Goods Act*,<sup>77</sup> seems to be the only practical alternative.

### G. MISTAKE (B)

The most significant recent judicial law reform in the law of mistake<sup>78</sup> is the outcome of the Supreme Court of Canada's decision in *Ron Engineering & Construction (Eastern) Ltd. v. The Queen*.<sup>79</sup> The direct effect of that case was actually to reverse a tentative reform initiated by the Ontario Court of Appeal.<sup>80</sup> This was to the effect that a mistake not as to what the terms of an offer are, but affecting the offeror's reasons for proposing a fundamental term like the price, will prevent the other party from accepting the offer if that party knows about the offeror's mistaken "motive". The effect of *Ron Engineering*, and the Supreme Court's reaffirmation of *Ron* in *City of Calgary v. Northern Construction Co.*<sup>81</sup> is that a mistake in calculating the contract price, even if it is known to the offeree by the time the offer is accepted, is no ground for relief if the offer is submitted as part of a competitive tendering process the terms of which bind the offeror to keep the offer open,<sup>82</sup> and there is nothing about the offer when it is submitted to indicate the mistake.<sup>83</sup>

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<sup>77</sup> R.S.B.C. 1979, c. 370, s. 20.

<sup>78</sup> The doctrine of equitable mistake in *Solle v. Butcher* [1950] 1 K.B. 671 (C.A.), would fall into the general time frame for this survey but has been omitted for reasons of space.

<sup>79</sup> [1981] 1 S.C.R. 111.

<sup>80</sup> *Belle River Community Arena Inc. v. W. J. C. Kaufmann Co.* (1978) 20 O.R. (2d) 447, 87 D.L.R. (3d) 761.

<sup>81</sup> [1987] 2 S.C.R. 757, aff'g [1986] 2 W.W.R. 426 (Alta. C.A.).

<sup>82</sup> These terms may be express, as when they are part of the invitation to tenderers, or implied, as when they form part of the custom in the industry: see *Gloge Heating & Plumbing Ltd. v. Northern Construction Co.* (1986) 27 D.L.R. (4th) 264 (Alta. C.A.).

<sup>83</sup> It is possible that a court might give relief if the result of holding the offeror to his offer would be unconscionable: see Kerans J.A. in *City of Calgary v. Northern Construction Co.*, *supra*, note 81 at 441-3 (Alta. C.A.).

*Ron Engineering* nevertheless deserves to be called a reforming case because it decided, contrary to established doctrine,<sup>84</sup> that the mere submission of a tender creates a contractual relationship between the tenderer and the offeree. This was characterized in the case itself as a unilateral contract, but it is clearly bilateral. The tenderer typically promises not to withdraw a bid, to enter into a formal construction contract if called upon to do so, and to forfeit a deposit or be subject to legal liability if he or she defaults on these obligations. What the offeree provides as consideration for these obligations was left rather shadowy in *Ron* itself<sup>85</sup> but can only be some reciprocal promise, since it is certainly not any act of performance. The true consideration, although no court has put it this bluntly, is at least that the offeree promises to consider the bid as part of an orderly and fair competitive tendering process. Cases since *Ron* have elaborated on the obligations of the offeree, usually the owner of the construction project. The owner must deal equally with the bidders, so that he or she cannot negotiate changes in the specifications with one of them without giving the others a chance to compete on equal terms.<sup>86</sup> The owner cannot award the contract on a different basis from that indicated to bidders beforehand.<sup>87</sup>

In this side-effect, if not in its direct effect, I suggest that *Ron Engineering* has improved the law by giving a juristic basis for what was usually assumed in practice: that the rules of a competitive bidding process were binding on both parties so that the interests of each were protected. The reason I would sum up this reform as a B rather than an A is that the conceptual basis for this approach has not been clearly articulated, with the result that a good deal of litigation has been, and probably still is, needed to clarify the legal situation.

The Ontario Law Reform Commission's thinking on mistake is in keeping with its general tendency in this *Report* to rely on judicial discretion. If the mistake was or ought to have been known to the defendant, the court should have a discretion to grant the mistaken plaintiff such relief as may be just, depending on a variety of cir-

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<sup>84</sup> The only earlier authority pointing in this direction was *Warlow v. Harrison* (1859) 120 E.R. 925 (Exch. Ch.), whose effect has been limited to undertakings to hold an auction without reserve.

<sup>85</sup> Estey J. referred to an obligation, subject to some qualifications, to accept the lowest bid: *supra*, note 79 at 123.

<sup>86</sup> *Ben Bruinsma & Sons Ltd. v. City of Chatham* (1984) 29 B.L.R. 148, 11 Const. L.R. 37 (Ont. H.C.); *Best Cleaners & Contractors Ltd. v. The Queen* [1985] 2 F.C. 293 (C.A.).

<sup>87</sup> *Canamerican Auto Lease & Rental Ltd. v. Canada* [1987] 3 F.C. 144, (1987) 37 D.L.R. (4th) 591 (C.A.).

circumstances including the plaintiff's conduct, the defendant's reliance on the contract and the plaintiff's fault.<sup>88</sup> My own view at the moment is that such a solution may depend too much on the knowledge of the facts that hindsight always gives a court. An owner who is told shortly after bids are opened that the lowest tenderer has made a mistake is in no position to judge whether this is true, let alone to guess how a court vested with a wide equitable discretion would deal with the claim. The Commission's argument might be that this very uncertainty would concentrate the parties' minds on making a fair settlement. It might, conversely, encourage the owner, at least, to harden his or her position so as to discourage bidders from making such claims in the future. This is an area where empirical research into industry practice might be very useful.

#### H. PRIVACY OF CONTRACT (N)

Despite unceasing efforts to prove that the doctrine of privity is historical nonsense<sup>89</sup> it survives almost intact, as the Supreme Court of Canada once more decided not long ago.<sup>90</sup> The only real dent the judges have made in the doctrine relates to clauses in shipping contracts by which the shipper agrees to an exemption or limitation of liability not only for the benefit of the carrier, who is the other party to the contract, but also for the benefit of others, like stevedores, who are part of the performance of the contract but not parties to it. These clauses have been held capable of being relied upon by the stevedores, on the theory that the carrier agreed to the exemption or limitation clause as the stevedores' agent.<sup>91</sup> The Supreme Court of Canada recently expressed its approval of this (rather strained) analysis because it works "by placing the relationship of the parties into the traditional mold of the law of contract".<sup>92</sup>

The doctrine of privity is so firmly entrenched for two reasons. One is that, like the doctrine of consideration, it is based on a prin-

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<sup>88</sup> *OLRC Contracts Report* at 259-66. This discretion is excluded where the contract expressly or impliedly puts the risk of the mistake on the plaintiff, a proviso of a somewhat circular nature.

<sup>89</sup> For the most recent example see R. Flannigan, "Privity — The End of an Era (Error)" (1987) 103 L.Q.R. 564.

<sup>90</sup> *Greenwood Shopping Plaza Ltd. v. Beattie* [1980] 2 S.C.R. 228, (1980) 111 D.L.R. (3d) 257.

<sup>91</sup> *New Zealand Shipping Co. v. A. M. Satterthwaite & Co.*, *supra*, note 5, followed in *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.* [1986] 1 S.C.R. 752, (1986) 28 D.L.R. (4th) 641.

<sup>92</sup> *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, *ibid.* at 787 (S.C.R.), 666 (D.L.R.) *per* McIntyre J.

principle with an almost mathematical absoluteness about it. Where the conceptual framework of the law is clearest it is hardest to change by incremental means. The other is that, unlike questions that arise only in a narrow range of contracts (like unconscionability or even exemption clauses) or in relatively atypical situations (mistake), privity is a doctrine whose ramifications cover a huge area, and any change is correspondingly difficult to assess as to its practical effects. The Ontario Law Reform Commission rather breezily recommends that a single statutory section be enacted declaring the doctrine abolished.<sup>93</sup> This may be the right way to go, but I would feel more confident about it if the Commission had given at least some discussion of the implications of such a change for different areas of the law, particularly commercial law.<sup>94</sup>

The major judicial attempt to remedy the doctrine of privity of contract has come in the law of torts. Cases like *Junior Books Ltd. v. Veitchi Co.*,<sup>95</sup> *B.D.C. Ltd. v. Hofstrand Farms Ltd.*,<sup>96</sup> *Ross v. Caunters*,<sup>97</sup> and many cases on negligent misstatement are all attempts by third parties to recover damages for the defendant's failure to perform a contract with someone else. *Junior Books* adumbrated an approach to duty of care in negligence that went a fairly long way towards cancelling out privity of contract, at least in the context of negligent manufacture. It was precisely because of the totally disruptive effect that such a right of action in tort would have on well settled contractual arrangements, that the English courts have now all but cut back *Junior Books* to its facts.<sup>98</sup>

## I. DAMAGES IN LIEU OF RESCISSION (A)

As a final area, one may note a narrow but particularly successful piece of judicial law reform by the British Columbia Court of Appeal.

<sup>93</sup> *OLRC Contracts Report* at 49-71, esp. at 71.

<sup>94</sup> For example, is a building subcontract a contract "for the benefit of" the owner so that the latter can sue the subcontractor directly in contract?

<sup>95</sup> [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

<sup>96</sup> [1986] 1 S.C.R. 228.

<sup>97</sup> [1980] Ch. 297, [1979] 3 All E.R. 580 (Ch. D.).

<sup>98</sup> The best examples in contractual settings are: *Leigh & Silavan Ltd. v. Aliakmon Shipping Co.* [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.); *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] 2 W.L.R. 761 (C.A.); *Muirhead v. Industrial Tank Specialities Ltd.* [1986] Q.B. 507, [1985] 3 All E.R. 705 (C.A.), leave to appeal refused, [1986] 1 W.L.R. 1380 (H.L.); *Candlewood Navigation Corp. v. Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1, [1985] 2 All E.R. 935 (P.C.). Cf. *Canadian Pacific Hotels Ltd. v. Bank of Montreal* [1987] 1 S.C.R. 711.

*Dusik v. Newton*<sup>99</sup> was a case where the Court held the contract to be the product of the unconscionable use of superior bargaining strength. Quite clearly, on the authorities, the only remedy for such a case is rescission of the contract, which in the circumstances of that case could not be granted because the *status quo ante* could not be restored. Unconscionability is not a breach of contract and not a tort, so damages cannot be given on those grounds. *Lord Cairns' Act*<sup>100</sup> empowers the courts to give damages in lieu of ordering specific performance or an injunction, but not in lieu of rescission. The Court of Appeal simply declared that such a technical distinction was now obsolete. The courts had inherent power to grant damages in lieu of rescission analogously to specific performance or an injunction, especially in the face of constructive or equitable fraud.<sup>101</sup> This kind of naked judicial legislation, simply reversing clear law, is probably feasible only in an area like remedies. No standards of conduct are changed, no new relationships are created; it is only the consequences of an established wrong that are altered. But the alteration is nevertheless fundamental. It turns an action to set aside a contract into an action for damages for a wrong; unconscionability becomes a kind of equitable tort.<sup>102</sup>

### III. CONCLUSION

General conclusions about judicial law reform, in a picture as varied and complicated as the common law of contracts, are hard to pin down. I have indicated my views on particular aspects of this picture as I discussed them. When one looks at them together, I think that two broad points do emerge.

One is that up to now there has been no revolution at the centre of the law of contracts, and it is unlikely that there will be. The core idea of an agreement, a set of terms from which the parties' obligations and rights must be deduced, is still vital.<sup>103</sup> It is true that the way the common law treats the agreement has undergone a marked

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<sup>99</sup> (1985) 62 B.C.L.R. 1.

<sup>100</sup> *The Chancery Amendment Act, 1858* (U.K.), 1858, 21 & 22 Vict., c. 27, received in B.C. as part of English law, 19 November 1858.

<sup>101</sup> *Supra*, note 99 at 47.

<sup>102</sup> Like breach of fiduciary duty, the ground on which *Newton*, the majority shareholder, was held liable.

<sup>103</sup> Compare the definition Pollock gave in 1876 (*supra*, note 4 at 2), which he took from Savigny: "When two or more persons concur in expressing a common intention so that rights or duties of those persons are thereby determined, this is an agreement."

evolution. Rather than a form of private legislation that commands judicial deference, contract is tending to be regarded more and more as a form of private conduct that needs to be monitored and controlled. In deciding whether to enforce the contract, the courts are now much readier to look at how the agreement came about, how its terms are balanced between the parties, and how the parties' legitimate expectations must be seen against the background of their particular experience and circumstances. The remedial side of the judicial role is growing in relation to the enforcement side.

Still, this is at most only half a revolution. Generally it has not displaced in judicial minds the need to enforce contracts if they are to be a viable instrument of commercial and social planning. The law of contract retains its unique double perspective, which combines a retrospective assessment — the fairness of the outcome in the particular case — with a prospective concern for how the individual decision will affect the way that future contracts are made and carried out. Contract law always must, and usually does, bear in mind the calculated risks that parties took when they made their agreement and performed it, not — as tort can often do — concentrate on clearing up the aftermath. The law of contract is basically about telling people they have to lie in beds they made for themselves. This is on the whole a less inspiring exercise than what tort usually does — to shift or distribute a victim's losses and deter antisocial conduct; but the law cannot do without both.

The other point, little more than common sense, is the absolutely crucial role of the concepts in which we frame the law. Academics, including I think those whose ideas are reflected in the Ontario Law Reform Commission's *Report*, are sometimes too aware of how traditional legal concepts can often be our masters rather than our servants. Doctrines like consideration and privity have stood in the way of desirable advances in the law because they are strong ideas that resist any modification. On the other hand, the malleability of concepts like the objective meaning of a contract and the unconscionable use of superior bargaining power have made reform possible and to some extent pointed its direction.

I think that perhaps academics, more than judges or lawyers let their impatience with the constrictions of principle, of conceptual thinking, lead them too far in the other direction, of underestimating how important an adequate conceptual framework is to the law. Some of the Ontario Law Reform Commission's proposals are based on the premise that judges should be able to proceed directly from considerations of policy to the ultimate decision without the mediation

of articulated general principles. The Commission's proposal on unconscionability is a good example. Judges must make sure they canvass a variety of quite disparate factual elements, including as a minimum the twelve factors on the list, and after that can do whatever they think is right. It would be very difficult for judges to give themselves such an untrammelled jurisdiction. They would have to explain how the facts in the case before them raised a particular problem, and they would have to frame a rule, albeit in general terms, direct at that problem. It is very difficult—although now and then it is possible—for a judge to say simply, “these are the facts; the law is that I can do whatever I think right under these circumstances that the plaintiff (or defendant) should win.”

The constant struggle to translate what we want to do into concepts, into rules, is indispensable to the common law. It is something that legislation can give up on; the legislature, unlike the judges themselves, can just say, “you judges can do whatever you think is right in the circumstances.” Sometimes that is the only practical way to proceed. But if too many problems are addressed in this way, we run the risk of turning judicial decisions into little more than instinctual responses labelled with the name of a discretion.

It is the interplay between judicial instinct and formulated principle, each working on the other, that gives vitality and coherence not just to the common law, but to all law. That is why judicial law reform in contract, for all its failings and shortcomings, can show us many strengths as well.