COMMENTS
COMMENTAIRES

RANGE V. CORPORATION DE FINANCE BELVÉDÈRE—CONSUMER NOTES—STATUS OF SUBSEQUENT HOLDERS—NEED FOR LEGISLATIVE INTERVENTION.—Few problems in our burgeoning consumer credit economy have an older history, few are more urgently in need of a satisfactory solution than the problems associated with the taking and negotiation of consumer notes. It is more than forty years since the Supreme Court of Canada has had a significant opportunity to review this branch of the law,[1] and much water has flown under the bridge since then. In particular, consumer credit has grown from a modest trickle to a veritable flood which engulfs every aspect of our economy—to the tune of about ten billion dollars annually.[2] In the area of immediate legal concern, we have also witnessed the now seminal decision of Mr. Justice Kelly in *Federal Discount Corporation* v. *St. Pierre*[3] and the host of new cases which it has spawned.

There was therefore more than the usual stir of interest when the Quebec Court of Appeal's decision in *Corporation de Finance Belvédère* v. *Range*[4] was appealed to the Supreme Court of Canada. At last, commercial lawyers must have hoped, the highest court in the land would pronounce itself for or against the Kelly doctrine. We waited in vain. So, far from supplying the answer or even hinting at it, the court[5] appears to have succeeded in turning back the clock almost fifty years and in re-opening an issue that was supposed to have been laid to rest by its earlier decision in

[1] See *Killoran* v. *Monticello State Bank* (1921), 61 S.C.R. 528.

[2] At the end of June, 1969, the outstanding balance stood at $10,256m. Bank of Canada, Statistical Summary, January 1970, pp. 47-48.

[3] [1962] O.R. 310, 32 D.L.R. (2d) 86 (C.A.), extensively discussed by Ivan & Kristine Feltham in (1962), 40 Can. Bar Rev. 461.

[4] [1967] Que. Q.B. 932.

[5] The court's decision was rendered on 17th February, 1969, but was not reported in the Canada Law Reports until the following September. The English language translation of Pigeon J.'s judgment appeared in the Dominion Law Reports in its issue of September 25th, 1969. See respectively [1969] S.C.R. 492 and (1969), 5 D.L.R. (3d) 257. A summary of the translation appeared earlier in C.C.H. Canadian Sales and Credit Law Guide, Vol. I, para. 22-104. Surely we can do better than this? When I addressed the Law Refresher Course of the Alberta Law Society in May of last year none of those present had even heard of the Supreme Court's decision.

Killoran v. *Monticello State Bank.*[6]

When lien notes[7] were first introduced in Canada the draftsmen frequently copied the American device of introducing the agreement with a promise by the buyer to pay the purchase price by the agreed instalments. The promise itself satisfied the formal requirements of a promissory note in section 176 of the Bills of Exchange Act.[8] The difficulty arose because the promise was usually followed by the recital of the other terms of the agreement, thus inviting the inevitable argument that the promise to pay was not unconditional and the document containing it not a negotiable instrument.[9] Still, for reasons that are not altogether clear, the draftsmen were reluctant to abandon the concept of an integrated chattel paper which incorporated a negotiable promise and created at the same time a security interest in the goods sold in favour of the seller. Perhaps they still hoped to persuade the Canadian courts to attribute a negotiable quality to the whole lien note (obviously a very desirable step from the financial community's point of view), as happened in the United States of America.[10] Or they may have felt that a separate promissory note would introduce new kinds of complications—the note might, mistakenly or otherwise, end up in different hands from the lien agreement or the note might be subject to one set of rules and the agreement to another. We really do not know.

In any event, the draftsmen retained the single sheet concept but introduced two minor and, as it transpired, crucial modifications. They required the buyer to sign the promise to pay separately from the lien agreement and they also pointedly referred in the lien agreement to the fact that the buyer had given a promissory note for the balance of his indebtedness. To fasten the hatch still more securely they also inserted what is commonly referred to as a "cut-off" clause, that is, a clause in which the buyer agrees that any holder of the note is not to be affected by any equities between him and the promisee of the note.

The refurbished lien note came under intensive judicial scrutiny in *Killoran* v. *The Monticello State Bank*[11] and emerged successfully. I must pause a moment to examine the judgments in some depth because it is my submission that the Supreme Court

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[6] *Supra*, footnote 1.

[7] In this comment the terms lien note, conditional sale agreement, and instalment sale are used interchangeably.

[8] R.S.C., 1952, c. 15.

[9] The cases are collected in an annotation by Falconbridge in [1927] 1 D.L.R. 1 and summarized (though not altogether accurately) in his Banking and Bills of Exchange (7th ed., 1969), pp. 886-888. See also Read, Negotiability as it affects "Lien Notes" (1927), 5 Can. Bar Rev. 314.

[10] See now Uniform Commercial Code (hereinafter UCC), section 9-206(1), 2nd sent.

[11] *Supra*, footnote 1.

seriously misunderstood them in its later decision. Killoran purchased a stallion from one Dygert for $1,700.00. He paid $300.00 cash and gave Dygert two lien notes in the amount of $700.00 each. Each lien note contained a promise to pay, signed by Killoran, which was then followed by a recital of the terms of lien agreement. The agreement read in part as follows:[12]

> It is hereby agreed by and between (the parties) . . . that the goods and chattels (stallion) are received by the subscriber on the following terms and conditions; namely—that the price thereof, which is $1,700, and for which the subscriber shall give his promissory notes to the promisee, shall be payable as provided for in such notes which are as follows (here follow dates, amounts and dates of maturity of the two promissory notes sued upon, and the agreement continues):
>
> That these notes or any of them as well as renewals thereof may be discounted, pledged or hypothecated by the promisee and in every such case payment thereof is to be made to the holder of the notes . . . and no holder of said notes or any of them . . . shall be affected by the state of accounts between the subscriber [the defendant] and the promisee or by any equities existing between the subscriber and the promisee but shall be and shall be deemed to be a holder in due course and for value.

Dygert endorsed the notes to the respondents and also assigned the lien agreements to them.[13] Unfortunately the stallion died before he had been paid for. Killoran took the position that this terminated the agreement since the risk of loss was on the seller, and he relied on sections 9 and 22 of the Alberta Sale of Goods Ordinance.[14] He also denied that the first part of the lien note constituted a promissory note.

The Alberta trial judge, Walsh J., accepted these contentions.[15] The Alberta Appellate Division unanimously reversed[16] and its decision was upheld by an equally unanimous Supreme Court[17] which included Duff, Anglin, and Mignault JJ. The only points at issue on both appeals were the status of the promissory notes and the significance of the cut-off clause. Speaking for the Alberta Appellate Division, Ives J. wrote:[18]

> The only connection between these notes and the conditional sale

[12] Unfortunately the lien note is not reproduced in full in the judgment of the Alberta Appellate Division or in the Supreme Court judgments. The extract which follows appears in (1920), 16 Alta L.R. 341, at p. 342. There are some minor discrepancies between this version and the terms of the cut-off clause which are quoted at p. 532 (S.C.R.), *supra*, footnote 1.

[13] Idington J. asserts in his judgment, *ibid.*, at p. 529, that there was an intermediate party between Dygert and the bank but this is not supported by the recited facts in the judgment of the Appellate Division (at p. 342) or the judgment of Brodeur J. in the Supreme Court (at p. 533). Since the promise to pay always remained attached to the lien note nothing appears to turn on the discrepancy.

[14] C.O., 1915, c. 39.

[15] [1921] 3 W.W.R. 17.

[16] [1920] 3 W.W.R. 542, (1920-21), 16 Alta L.R. 341.

[17] *Supra*, footnote 1.

[18] *Supra*, footnote 16, at p. 342 (Alta L.R.).

agreement is that they are found on the same sheet of paper. But they are distinctly and separately signed and by the expressed intention of the parties intended to be separate from the agreement.

The members of the Supreme Court gave different reasons. Idington and Duff JJ. decided in favour of the bank on the ground that the promises to pay were severable from the rest of the lien documents and constituted promissory notes. Duff J. expressed his opinion with his usual gift for brevity and lucidity. "I have no difficulty", he wrote,[19] "in concurring with the view of the Appellate Division that the instruments sued upon are promissory notes. In each case there is, it is true, on the same piece of paper one of these instruments and a collateral agreement, but the collateral agreement is no part of the instrument sued upon. By its express terms, indeed, it is not to qualify the absolute obligation of the promissor or to affect the contractual rights of the parties in such a way as to impair the negotiability of the note". I do not read the second sentence in this passage as qualifying the first but merely as reinforcing it. It would be contrary to principle to allow the negotiable character of an instrument to be proved by reference to extrinsic evidence. The instrument must stand or fall on its own merits. There is, it needs to be emphasized, a fundamental difference between treating a writing as a promissory note because it satisfies the requirements of the Bills of Exchange Act and giving it a similar effect, although the writing does not satisfy the statutory requirements, because the parties have agreed that it shall be treated as if it did.

Anglin and Brodeur JJ. decided the issue on the basis of the cut-off clause without expressing an opinion on the other point.[20] Mr. Justice Mignault rested his decision on both grounds. His words referring to the first ground are worth recalling because they make the point perhaps even more clearly than does Duff J.'s judgment. "The promissory notes sued on, although printed on the same sheet of paper as the agreement for the sale of the stallion, are, I think, severable from this agreement, and constitute perfectly valid promissory notes which could be transferred, as was done here, by indorsement."[21] Thus, and it is important to stress the fact, there was a clear majority for both points of view, including of course the view that the promises to pay constituted promissory notes.[22]

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[19] *Supra*, footnote 1, at p. 531.

[20] However Anglin J. thought that there was much "in the terms of the documents" to support the view that the instruments sued upon were promissory notes. *Ibid.*, at p. 531.

[21] *Ibid.*, at p. 534.

[22] In his summary of the cases Falconbridge, annotation, *op. cit.*, footnote 9, p. 17, wrote: "Both in *Killoran* v. *Monticello State Bank*, and in *Lecomte* v. *O'Grady* there was manifested also a tendency on the part of some Judges to treat the promise to pay embodied in the usual form of a

The impact of *Killoran* was not lost on the legal community or on subsequent courts. It became in fact the finance companies' talisman in their legal skirmishes with consumers when consumers resisted payment. With few exceptions, the courts unhestitatingly followed *Killoran*, usually when action was brought on the promissory note.[23] Reliance on the cut-off clause appears to be less frequent. The pre-1962 exceptions[24] did not impugn the *Killoran* doctrine. Quite the contrary. Like *Federal Discount Corp.* v. *St. Pierre*[25] itself they tacitly accepted it, but held against the finance company on the ground that it was not a holder in due course on the facts of the particular case.[26] Without a promissory note to begin with, obviously there would have been no need to decide whether the plaintiff was a holder in due course. Legal draftsmen made *Killoran* still more acceptable by introducing some further refinements into the lien note or conditional sale agreement. The promise to pay was transposed from the head of the sheet to the bottom, and it was separated from the body of the agreement by a perforated edge.[27]

It was this type of document that was involved in *Range* v. *Corporation de Finance Belvédère*, to the facts of which we must now turn our attention.

Leonard C. Range was a knight in the best Gallic tradition. He wished to purchase a fur coat for his wife and on April 7th, 1960, he signed a conditional sale agreement for this purpose with Durand & Coutu Enrg., a firm of furriers in Sept-Isles, Quebec. The agreement form was supplied by United Loan Corporation, this apparently being a finance company with whom Durand

promissory note as being severable, in special circumstances, from the provision or provisions contained on the same piece of paper." As can be seen, Falconbridge was unduly cautious, at any rate so far as *Killoran* is concerned.

[23] *E.g., Bank of Nova Scotia* v. *Philpott*, [1930] 4 D.L.R. 148 (Sask. C.A.); *Colonial Finance Corp.* v. *Poirier* (1931), 37 R.L. 197 (Que.); *Union Acceptance Corpn. Ltd.* v. *Lucienne St. Amour* (1957), 8 D.L.R. (2d) 2 (Ont. C.A.); *Aetna Factors Corp.* v. *Breau* (1957), 10 D.L.R. (2d) 100 (N.B.); *Canyon Securities* v. *McConnell* (1959), 17 D.L.R. (2d) 730 (B.C.); *Rand Investments Ltd.* v. *Wallberg* (1961), 34 W.W.R. 412 (B.C.); *Prudential Finance Corp. Ltd.* v. *Kucheran* (1964), 45 D.L.R. (2d) 402 (Ont. C.A.).

[24] *Del Confectionary Ltd.* v. *Winnipeg Cabinet Factory*, [1941] 4 D.L.R. 795 (Man.); *Traders Finance Corp.* v. *Vanroboys*, [1955] O.R. 380.

[25] *Supra*, footnote 3.

[26] Significantly Tritschler C.J.Q.B., in his admirably articulate judgment in *Keelan* v. *Norray Distributing Ltd.* (1967), 62 D.L.R. (2d) 466 applying the *Federal Discount* doctrine, called *Killoran* the "*locus classicus*" of the law of consumer notes. *Ibid.*, at p. 477.

[27] Some agreements take the precaution of instructing the clerk to detach the promissory note from the agreement before the note is executed by the buyer, but one suspects that this direction is more honoured in the breach than observed. Such a direction appeared in the agreement in *Prudential Finance Corp. Ltd.* v. *Kucheran*, *supra*, footnote 23, but no importance was attached to it by Schroeder, J.A.

& Coutu regularly transacted business. Below the front page of the agreement and separated from it by a perforated edge there was the familiar promissory note for the balance of the purchase price, which was signed by the purchaser. The single sheet of paper was headed "Contrat de vente conditionnelle". Written across the left hand side of the promissory note there appeared the words "INSTRUMENT NÉGOCIABLE".[28] The body of the conditional sale agreement also recited the fact that "Un billet promissoire négociable a été donné par l'Acheteur au Vendeur comme preuve constatant ledit Total de Paiements Différés mais non pas en paiement d'icelui". The agreement apparently contained no cut-off clause. Until the present action was begun the promissory note remained attached to the sheet of paper.

On the 13th of April[29] Durand & Coutu endorsed the note and assigned the agreement to United Loan Corporation. This company in turn deposited the document, in conjunction with a large number of others, with the Imperial Bank of Canada as security for its indebtedness to the bank.

Concurrently with the execution of the conditional sale agreement, Range handed the furriers a series of postdated cheques to cover the monthly payments on his purchase. He met the first two

[28] The note read as follows:

No. *4020-6782*

$792.00 A *Sept-Isles* *7e Avril* 1960
(Endroit où le billet est réellement signé)

INSTRUMENT NEGOCIABLE

POUR VALEUR RECUE, je promets payer à l'ordre de

Durand & Coutu Enrg. la somme de

Sept cent quatre vingt douze ——————— DOLLARS

Au Bureau de United Loan Corporation dans la ville de *Montreal*

En versements mensuels de *$33.00* chacun, à la même date de chaque mois subséquent, commençant le *10 mai* 1960 et le dernier versement sera pour le solde qui restera impayé. Chaque versement non payé à l'échéance portera intérêt au taux de NEUF POUR CENT par année, à compter de la date d'échéance, et sur défaut de paiement de tout versement à la date d'échéance d'icelui, tous les versements restant dus deviendront immédiatement dus et payables sans avis.

(L'Acheteur signe ici à l'Encre) *L. C. Range*

Source. Appeal Book on appeal to the Supreme Court of Canada, Exhibit P-1, p. 41. The italicised words in the above copy appear in handwriting in the original document. The original note measures 8″ x 2¼″. For some unknown reason the copy in the Appeal Book does not reproduce the perforated edge.

[29] There is some confusion about the date. Pigeon J. gives this date but the judgments in the Quebec Court of Appeal refer to April 7th. Nothing turns on the difference.

payments but stopped payment on the rest because the fur coat had not been delivered. It never was. Durand & Coutu became bankrupt later in 1960 and a similar fate befell United Loan Corporation in 1961.

After United Loan Corporation's bankruptcy, by agreement with the trustee for certain note holders of the company, the bank sold the collateral still in its hands to the Corporation de Finance Belvédère for a sum much below the amount still owing to it. In this way Belvédère came into possession of Range's conditional sale agreement and the promissory note. It now sued on the note.

The trial judge, in an unreported judgment, denied the claim on the grounds apparently that United Loan Corporation had not been a holder in due course and that the bank and (obviously) Belvédère were in no better position. The evidence showed that shortly after receiving the note from Durand & Coutu, United Loan Corporation was advised by Madame Range that she had not received the fur coat. The Quebec Court of Queen's Bench, Appeal Side, reversed by a two to one majority and held that United Loan Corporation must be deemed to have been a holder in due course since it gave value and received the note before it became overdue.[30] In the court's opinion, notice of the non-delivery came too late since it only reached the company after it had already become a holder of the note. Casey J. dissented[31] on the ground that the relationship between Durand & Coutu and United Loan Corporation was too close to entitle the finance company to shelter behind the holder in due course doctrine. In short, he followed the *Federal Discount* thesis. It is important to note that the negotiable character of the promise to pay was not questioned in either court and indeed it does not appear to have been pleaded.[32]

The Supreme Court of Canada unanimously reversed the appeal court's decision in a judgment written for the court by Pigeon J.[33] The respondent, he held, had not shown that United Loan Corporation was a holder in due course. The conditional sale agreement, he reasoned, purported to show that the purchaser had received the goods; the vendors must have known this was not correct and it would have been fraudulent for them to discount the paper without disclosing the true position. Had they perpetrated such a fraud it would have shifted to United Loan Corporation the burden of proving its good faith.[34] If the vendors had

[30] *Supra*, footnote 4. [31] *Ibid.*, at pp. 935-936.

[32] See Appeal Book ("Dossier imprimé sur appel" in French) filed in the Supreme Court 26th January 1968, pp. 1-4. Para. 1 of the "Plaidoyer" (Statement of Defence) reads, "Il (sc. le defendeur) admet avoir signé le billet produit sous la cote P-1 et il admet que le billet fut cédé à United Loan Corporation et il nie en fait et en droit le surplus dudit paragraphe;".

[33] *Supra*, footnote 5. The other members of the court were Fauteux, Abbott, Martland and Hall JJ.

[34] Citing *Benjamin* v. *Weinberg*, [1956] S.C.R. 553 in support.

disclosed the non-delivery of the goods United Loan Corporation would have had actual knowledge of the defect in the promisee's title and therefore could not have become a holder in due course. Pigeon J. thought the evidence favoured the latter interpretation. His line of reasoning is not free of difficulty, but it need not detain us since he also held that the evidence established satisfactorily the holder in due course status of the bank. The court rejected the argument that a person who holds a note as security cannot be a holder in due course.[35] Having established the bank's title the plaintiff was home free since of course it did not matter that the note was overdue or that at the time it purchased the note from the bank Belvédère knew that the coat had not been delivered.[36]

So far, so good. Like a good thriller the surprise was in the ending. The judgment had proceeded this far on the assumption that the court was dealing with a true promissory note, but was this correct? Mr. Justice Pigeon thought not. In his opinion,[37] the sheet containing the conditional sale agreement and the promise to pay constituted but one document. The bank had received it as one and so had the plaintiffs. The note was only detached from the sheet for the purpose of bringing this action. The judge expressed no opinion as to what would have been the position if the note had been detached and negotiated separately from the conditional sale agreement.[38]

Even without the debilitating circumstance of forty years of contrary precedents—not to mention the *communis error* of many commercial lawyers—Mr. Justice Pigeon's conclusion would have been much debatable. Surely the draftsman of the document made it abundantly plain that the promise to pay constituted a separate obligation and was not conditional? What makes the judgment that much more difficult to follow is the manner in which Pigeon J. purported to distinguish *Killoran* v. *Monticello State Bank* from the facts in the present case. In his opinion, the Supreme Court's decision on the earlier occasion rested on the presence of the cut-off clause, a clause, as has already been noted, that did not appear

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[35] Citing *Bonenfant* v. *The Canadian Bank of Commerce*, [1930] S.C.R. 386.

[36] Bills of Exchange Act, *supra*, footnote 8, s. 57.

[37] *Supra*, footnote 5, at pp. 498-499.

[38] This reservation, with respect, proves the fatal flaw in the court's reasoning. If the note and the agreement were but one document it would have been highly improper for the seller to detach the note and to transfer it separately. But the note was clearly labelled "Instrument Négociable" and the perforated edge showed that it was detachable. Obviously therefore it would have been very difficult for the buyer to deny that the note was not what it appeared to be in the hands of an innocent third party. The short question then remains whether the buyer and seller intended the note not to be a note while it remained in the seller's hands and to change its character once it was transferred. The answer is surely self-evident.

in the present agreement. This part of the court's judgment only occupies half a page and Pigeon J. made no attempt to examine the individual judgments in *Killoran* or the subsequent jurisprudence. Presumably he thought the matter was too plain for argument. The reader is invited to form his own opinion as to whether the learned justice correctly interpreted *Killoran* and what his motives may have been in raising an issue that was not dealt with in the lower courts or seemingly pleaded. For my part I must continue on my journey in order to examine some of the practical consequences of *Belvédère.*

There is no reason to believe that Pigeon J. thought that by a few masterful strokes of the judicial pen he had disposed for all time of the consumer note problem. Had he accomplished this neat trick he would have won, if not the abiding gratitude of the financial community, at least the plaudits of those who are concerned about the consumer's vulnerability. But he himself disclaimed any such ambitious goal. As his judgment clearly intimates, the court's strictures were only directed at consumer notes that are printed on the same sheet of paper as the instalment agreement. Credit grantors therefore can easily avoid the pitfalls of *Belvédère* by carefully printing the note on a separate piece of paper—unless of course they prefer to keep all their eggs in one basket and to rely on the continuing validity of cut-off clauses.

In the light of this conclusion one may be forgiven for thinking that *Belvédère* has settled nothing. At most it will encourage some more shuffling of papers, some further indulgence in the fiction that the consumer will better appreciate the nature and consequences of a promissory note when it is presented to him on a separate piece of paper (in conjunction with others, equally confusing) than when it is attached to the instalment agreement. The decision has accomplished the remarkable feat of simultaneously antagonizing the business community and leaving the consumer as vulnerable as before.

Where then do we go from here? In my opinion, only sensible and very much overdue legislation can solve the imbroglio. Judicial innovation, as reflected in *Federal Discount* v. *St. Pierre*[39] has performed a very valuable service in drawing attention to the inequities of consumer notes and providing some relief, but it is only a palliative. It cannot solve the problem by itself.

This is so for several reasons. First, the *St. Pierre* doctrine only applies where there is a close relationship between the financer and the merchant. It will not therefore apply to arm's length transactions or, usually, to remote holders of the note as in *Belvédère's* case.[40] Secondly, not all the courts have been willing to

[39] *Supra,* footnote 3.

[40] See *e.g., Prudential Finance Corp. Ltd.* v. *Kucheran, supra,* footnote

follow Mr. Justice Kelly's initiative. The Quebec Court of Appeal has firmly cold-shouldered it on at least two occasions[41] and even the justice's own Court of Appeal has shown itself less than enthusiastic.[42] Thirdly, the very nature of the doctrine invites expensive litigation since few financers will admit to having an incestuous relationship with the seller whom they help to finance. It has indeed been objected that there is a general tendency to over-estimate the degree of control which a typical financer can exercise over his client's business or the amount of knowledge that he has of it.[43] In the fourth place, even if a consumer succeeds in denying the financer's claim to be a holder in due course he is still met with the ubiquitous disclaimer clauses in the original sale contract. In recent years there has been an encouraging trend by Canadian courts to adopt the English doctrine of fundamental terms,[44] but even allowing for this there is still plenty of bite left in the clauses.

Finally, and perhaps most important, *Federal Discount* really does not come to grips with the basic problem. The fundamental objection to consumer notes is not so much the impropriety of finance companies seeking to isolate themselves from buyer-seller disputes. There may be nothing particularly reprehensible about it. The vice resides in the fact that the average consumer knows nothing about negotiable instruments law and does not appreciate the legal consequences of signing a note.[45] It follows that the consumer needs protection against all types of consumer notes and not merely those which are invoked in intimate dealer-finance company relationships. Nothing presently in the wind suggests even remotely an expansion of the *Federal Discount* doctrine to meet this need. Some courts have resorted to the *non est factum*

23; *Traders Finance Corp. Ltd.* v. *Edmonton Airport Hotel Co. Ltd.* (1964), 49 W.W.R. 56 (Alta); *Levenhurst Investments Ltd.* v. *Oakfield Country Club Ltd.* (1968), 68 D.L.R. (2d) 79 (N.S.); *Trans-Canada Credit Corp.* v. *Zuluski* (1969), 5 D.L.R. (3d) 702 (Ont.).

[41] In the present case and in *Imperial Oil Ltd.* v. *Fortier*, [1968] Que. Q.B. 315. In each case there was a dissenting judgment. The Quebec lower courts have followed the *Federal Discount* doctrine on several, usually unreported, occasions. For a recent example, see *Imperial Oil Ltd.* v. *Pelletier*, Superior Court, District of Montreal, Case No. 736, 769, June 26th, 1968 (Puddicombe J.).

[42] In *Kucheran's* case, *supra*, footnote 23, at p. 405, Mr. Justice Schroeder said that *Federal Discount* was distinguishable "on its peculiar facts"—hardly an encouraging sign.

[43] See Kripke (1968), 68 Col. L. Rev. 445, at pp. 470-471.

[44] *E.g.*, *R. E. McLean Ltd.* v. *Canadian Vickers Ltd.* (1969), 5 D.L.R. (3d) 100 (Ont.); *Lightburn* v. *Belmont Sales Ltd.* (1969), 6 D.L.R. (3d) 692 (B.C.); *Western Tractor Ltd.* v. *Dyck* (1970), 7 D.L.R. (3d) 535 (Sask.).

[45] See Kripke, *op. cit.*, footnote 43, at p. 472, and *cf.* Ziegel (1968), 68 Col. L. Rev. 488, at pp. 497-498.

rule[46] or have found an unauthorized "issue" of the note,[47] but no one would suggest that these approaches are more than a modest supplement to the judicial arsenal of weapons against the holder in due course claimant.

Several possible types of legislative solutions suggest themselves. The first would be to prohibit the taking of any type of negotiable instrument in a consumer credit transaction. This would go too far since it would include cheques, including a cheque to cover a downpayment. No common law jurisdiction known to me has such a sweeping prohibition.[48] The second solution would be to restrict the prohibition to negotiable instruments other than cheques. This is the solution adopted in section 2.403 of the Uniform Consumer Credit Code.[49] A complete exemption of all cheques would be too wide since it would encourage credit grantors to take a series of post-dated cheques for the balance of the price. A third possibility would be to limit the prohibited category of negotiable instruments to consumer notes. This approach has been adopted in a number of American states.[50] Its practical effect appears to be the same as section 2.403 of the Uniform Consumer Credit Code and it suffers from the same weakness. It should be noted that the American provisions do not proscribe the use of a non-negotiable instrument, that is an instrument not payable to order or to bearer, and such instruments are subject to all the provisions of Article 3 of the Uniform Commercial Code save that there can be no holder in due course with respect to them.[51] Since the Canadian Bills of Exchange Act does not contain a provision similar to section 3-805 of the Uniform Commercial Code, this

[46] *E.g., Nordic Acceptance Ltd.* v. *Switzer* (1965), 50 D.L.R. (2d) 600 (Ont.).

[47] *E.g., Frontier Finance Ltd.* v. *Hynes & Niagara Sewing Machine Co.* (1957), 10 D.L.R. (2d) 206 (Ont.); *C.A.C.* v. *Paris* (1964), 45 D.L.R. (2d) 493 (Ont.); and *Nordic Acceptance Ltd.* v. *Switzer, ibid.*

[48] But see the First Final Draft of the National Consumer Act, s. 2.405 (National Consumer Law Center, Boston College Law School, January 1970). This privately sponsored legislative project arose as a result of the dissatisfaction felt with the Uniform Consumer Credit Code at a conference of consumer experts held in Washington on June 20th, 1969. S.18 of the Saskatchewan Limitation of Civil Rights Act, R.S.S., 1965, c. 103, has indirectly (and probably unintentionally) nearly brought about this result. See *Crescent Finance Corp.* v. *Oleson* (1958), 13 D.L.R. (2d) 557 (Sask. C.A.) and *Traders Finance Corp.* v. *Casselman*, [1960] S.C.R. 242. There is a conflict between the authorities as to the extent to which the prohibition in s. 18(1) applies to a negotiable instrument given by way of downpayment on a purchase. See *Traves* v. *Manchur* (1958), 26 W.W.R. 158 (Sask.) and *cf. Relland Motors Ltd.* v. *Foy* (1959), 20 D.L.R. (2d) 558 (Sask. C.A.).

[49] All references to the code are to the version promulgated at the annual meeting of the National Conference of Commissioners on Uniform State Laws, July 22nd—Aug. 1st, 1968.

[50] *E.g.*, California, Hawaii, New York, Oregon and Rhode Island.

[51] UCC 3-805. *Cf.* the comment to s. 2.405 of the Draft National Consumer Act, *supra*, footnote 48.

technique of permitting a credit grantor to retain at least some of the advantages of promissory notes while depriving them of their objectionable features may not be open in Canada.

However, the same goal can be attained in another way. Promissory notes would be permitted but they would require to be marked "Consumer Note" or with some similar legend, and any holder of such a note would take it subject to all of the consumer's defences and rights of set-off. This solution was recommended in the *Report* on Consumer Credit of the Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living,[52] and it has been adopted in a number of American states.[53] Apart from the advantages already described, it has the added attraction for Canadians in that there is a precedent for it in sections 14-16 of our Bills of Exchange Act.[54]

A number of collateral problems arise whichever of these solutions is adopted. To begin with, the legislation would have to resolve the position of a subsequent holder who receives a negotiable instrument or an instrument not marked with the prescribed legend not knowing that it arose out of a consumer transaction. The Uniform Consumer Credit Code would leave his status unimpaired whereas the Draft National Consumer Act would confer no special immunity on him.[55] The reasoning of the Code's draftsmen strikes me as slightly more persuasive, although the problem is unlikely to arise frequently in practice. A greater danger arises out of the very real possibility that sellers may seek to evade the new provisions by arranging a purchase money loan for the buyer with a friendly loan company or bank. Under existing principles the lender's rights would not be subject to the buyer's defences against the seller since the lender's claim is not derivative. A creative court might be willing to extend the *Federal Discount* doctrine to cover also this type of intimate relationship, but one cannot assume it as inevitable. So the problem should be anticipated and dealt with in the legislation.[56] Another question concerns the type

[52] P. 5, recommendation No. 6 (Ottawa, 1967).

[53] *E.g.*, Maryland, Michigan, Rhode Island, and Washington. Rhode Island prohibits the use of negotiable promissory notes *and* requires the notes to be marked "Non-negotiable Promissory Note": see G.L.R.I. as am., s. 6-27-6, CCH Consumer Credit Guide, Vol. 3, para. 6016.

[54] These provisions were originally adopted by Parliament in 1884 in order to prevent frauds in connexion with the sale of patents. For the particulars, see Falconbridge on Banking and Bills of Exchange (1st ed., 1907), pp. 359-361.

[55] Uniform Consumer Credit Code, s. 2.403, 2nd sent; Draft National Consumer Act, s. 2.405 and comment. A similar problem has arisen in Canada with respect to the assignees of agreements which are subject to the Unconscionable Transactions Relief Acts. See Ziegel (1969), 8 Alta L. Rev. 59, at pp. 67-69.

[56] The problem is by no means hypothetical. Alberta has already experienced it, albeit in a slightly different context. It was found that a

of consumer transaction to which the provisions should be directed. The Uniform Consumer Credit Code restricts them to credit sales or leases; the Draft National Consumer Act also applies them to lenders. In my opinion, logic and consistency supports the latter solution.

There remains the constitutional problem. The federal government has been repeatedly urged to adopt remedial legislation, and although a bill was promised in the last throne speech[57] it has not yet materialized. Could the provinces prohibit the taking of promissory notes, negotiable or otherwise? In the absence of conflicting federal legislation, a persuasive argument can be made in the affirmative on the ground that promissory notes constitute an integral part of consumer transactions and therefore are an aspect of property and civil rights.[58] It would be different if the provinces attempted to regulate the incidents of consumer notes once given. This is not to suggest that provincial initiatives in this area should be encouraged. Obviously it is desirable to have a uniform rule for the whole country. But the provinces' hands may be forced if the federal government continues to delay action much longer.

So much attention has been focused in the literature on the abuses of consumer notes that it is tempting to regard their elimination as the universal solvent of the related ills as well. The temptation must be resisted. As has been seen, a cut-off clause may be just as effective as a promissory note in isolating a finance

chartered bank which was financing instalment sales was attempting to avoid the requirements of the Credit and Loan Agreements Act, 1967, S.A., 1967, c. 11, as am., by inserting a clause in the agreement requiring the buyer to pay the balance of the price on demand. After the agreement had been assigned to the bank the bank would invite the buyer to come and sign a promissory note on a regular instalment basis. The province countered the stratagem by adding section 7a to the Act. See S.A., 1968, c. 15, s. 7. Similar problems have arisen in Germany where purchase money loans are frequently negotiated through the dealer. In such circumstances the German courts have applied a *Federal Discount* type doctrine. See Ziegel & Foster (eds), Aspects of Comparative Commercial Law (1969), pp. 175-176.

[57] H.C. Debates, Oct. 23rd, 1969, Vol. 114, p. 3.

[58] *Cf. A.G. Ontario* v. *Barfried Enterprises Ltd.*, [1963] S.C.R. 570. Some provinces have copied the Ontario expedient of requiring a seller who assigns a negotiable instrument to also supply the assignee with a copy of the sales agreement. Consumer Protection Act 1966, S.O., 1966, c. 23, as am., s. 27. What this is designed to accomplish is not clear. Knowledge that a note was given in conjunction with a sale agreement does not of course, without more, affect its negotiability or the rights of a holder. Conceivably the section may have intended to fasten knowledge on the holder of a defect in the seller's title arising from non-compliance with s. 16 of the Act. S.27(3) lends some support to this hypothesis. The opposite view appears to have been entertained in *Avco Limited* v. *James Bradley*, [1969] 1 O.R. 240, [1968] CCH Can. Sales & Credit Law Guide, Vol. I, para. 22-116 (1st Div. Ct., Dist. of Algoma, Ont., Oct. 9th, 1968), so far the only reported decision on s. 27. Note also that s. 27 does not prohibit the giving of a separate note or its detachment from the sale agreement where it is joined to it by a perforated edge.

company from the buyer's complaints. So these clauses must also be dealt with, as they now have been in many American states,[59] the Uniform Consumer Credit Code,[60] and the recently enacted Manitoba Consumer Protection Act.[61] Here at any rate the provinces possess a plenary jurisdiction and need not wait on Ottawa's pleasure.[62]

But the consumer is still not home free. When all else fails the financer, as assignee of the agreement, will fall back on the familiar disclaimer clauses excluding all warranties and conditions and all verbal representations. Incredibly, some of the recent consumer protection acts actually encourage the seller to include them.[63] Only Saskatchewan and Manitoba have so far outlawed disclaimer clauses in credit sales,[64] although scattered provisions applying to particular types of sales also exist in several of the other provinces.[65] Surely it is time we had a comprehensive consumer credit code? And surely also it is time that our law reform commissions woke up to the fact that disclaimer clauses and adhesion contracts are *the* most pressing problems in modern contract law?[66]

JACOB S. ZIEGEL*

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[59] *E.g.*, California, Illinois, Massachussetts, Michigan, and New York.

[60] Section 2.404. *Cf.* Draft National Consumer Act, s. 2.406.

[61] S.M., 1969 (2nd Sess.), c. 4, s. 67(1) & (2). The Act was proclaimed in force on Jan. 3rd, 1970. S. 67(1) substantially re-enacts s. 12 of the Consumers' Credit Act, S.M., 1965, c. 15.

[62] At a federal-provincial conference of Ministers responsible for consumer affairs held in Ottawa on April 10th-11th, 1969, the federal government intimated that it was willing to legislate with respect to consumer notes if the provinces undertook to take concurrent action with respect to cut-off and disclaimer clauses. The provincial Ministers felt unable to give any undertaking without consulting their governments and none was subsequently given. In its report on consumer credit of December 1st, 1969, the Canadian Consumer Council supported the need for concurrent action at the two levels of government but also strongly expressed the view that federal legislation should not be made contingent on reciprocal action at the provincial levels. According to my informants the federal government has now abandoned its earlier position and will proceed without awaiting provincial developments.

[63] Section 16 of the Ontario Consumer Protection Act, *supra*, footnote 58, requires every "executory contract" to be in writing and to contain "(f) any warranty or guarantee applying to the goods or services and, where there is no warranty or guarantee, a statement to this effect;". Needless to say, sellers readily avail themselves of the second alternative. Many of the other provincial consumer credit Acts contain a similar provision.

[64] See the Conditional Sales Act, R.S.S., 1965, c. 393, s. 25, and the Consumer Protection Act, *supra*, footnote 61, Part VI, s. 58. The Saskatchewan provisions were copied from the English Hire-Purchase Act 1938, 1 & 2 Geo. 6, c. 53, s. 8. See now Hire-Purchase Act 1965, Stat. 1965, c. 66, ss 17-20.

[65] The farm implement Acts of the Prairie provinces have long regulated the contents of agreements relating to the sale of farm machinery. See *e.g.*, Agricultural Implements Act, 1968, S.S., 1968, ss 16-19, and Sched., Forms A & B. A statutory form of contract for instalment sales not exceeding $800.00 is also prescribed in the Quebec Civil Code, Art. 1561e.

[66] The English Law Commission has had disclaimer clauses in sale

LANDLORD AND TENANT RELATIONS—RENT-WITHHOLDING IN ONTARIO: A CASE-STUDY AND SUGGESTIONS FOR LEGISLATION.—The use of rent strikes by aggrieved tenants is not a recent phenomenon. Charles Parnell M.P. was convicted in Ireland in 1881 of conspiring with others in the Irish National Land League to withhold rent from landlords "to the great damage of the said owners, and to the evil example of others in like case offending".[1] In contemporary Canada the multiple-unit urban apartment building has taken the place of the farm as the locus of tenant discontent, but the law has shielded the modern landlord from the rent withholding device as effectively as the absentee landlord in Ireland was protected from the likes of Parnell.

Frequent resort to protest activity by relatively powerless groups in North America, such as Negroes, the poor and tenants, has been an important recent challenge to law as an instrument of social control and peaceful conflict-resolution. The response of some American states has been to enact legislation to regulate the withholding of rents by tenants and to encourage the orderly resolution of the dispute with the help of mediation by government officials. This comment will present a case-study of a rent strike in a new apartment building in Toronto which, it is claimed, arose out of a situation typical of many elsewhere in urban Canada, where the unprecedented rate of urbanization has resulted in a seller's market for persons dealing in land.[2] Recent amendments to the Ontario Landlord and Tenant Act[3] will be considered insofar as they deal, or neglect to deal, with the problems raised. The legislative attempts to regulate the problem will be evaluated.

Rent-withholding: A Case-study

In a recent case involving a rent strike in a large apartment building in Toronto, Judge McDonagh said *obiter* that rent withholding in Ontario was unlawful. The learned judge said:

> . . . Until the Landlord and Tenant Act is amended then it is the law of this province and it is expected as Canadian citizens we will all obey

agreements under active consideration since 1966. See Law Com. No. 24, Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893 (London, H.M.S.O., 24th July, 1969). It is understood that the Quebec Civil Code Revision Office is also working on the subject. Current American thinking is reflected in several provisions in Article 2 of the UCC (most notably s. 2-302), ss 5.108 and 6.111 of the Uniform Consumer Credit Code and, most recently, Part 3, s. 3.302 of the Draft National Consumer Act, *supra*, footnote 48.

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[1] *R.* v. *Charles Parnell, M.P., and others* (1881), 14 Cox C.C. 508 (Q.B. Ir.).

[2] See L. Stone, Urban Development in Canada (1967); Report of the Task Force on Housing and Urban Development ("The Hellyer Report"), (1969).

[3] R.S.O., 1960, c. 206, as am. by S.O., 1968-69, c. 58.

that law regardless of how we like it. So long as it is on the statute books it is law and there is no authority that I know of that gives a group of tenants the right to do under the law what these tenants have done by the formation of their Association and the refusal to comply with the contracts which they signed. Once you are over 21 and you sign a contract you are bound by it. Once you are bound by the terms of your lease I say you have the right to go to the Court to seek damages. If the landlord has breached the lease you haven't any right to take the law into your own hands.[4]

This case brought to culmination ten months of struggle between the landlord and tenants. At all stages the tenants possessed superiority of numbers alone. The judgment quoted finally crushed the attempts of the tenants to force the landlord to accept as his responsibility the upkeep of certain basic facilities and services. The history of the dispute will be traced:[5]

33 Eastmount Avenue is an apartment building and townhouse complex that overlooks the Don Valley just north of Bloor Street in Toronto. It was opened for occupancy on May 1st, 1968. The building contains 210 units with rents ranging from $140.00 per month for a bachelor apartment, $160.00 for a one-bedroom, $260.00 for a townhouse to $360.00 for a penthouse.

When the tenants moved in they found that there were no working elevators. The furniture for upper apartments had as a result to be lifted on a construction hoist or carried upstairs. In addition there were no storage lockers, no laundry room, an unusable garage, no parking lot, no landscaping, no pool, no sauna, and completely unfinished corridors and lobby. In some individual apartments the door to the corridor had no lock, the doors within the apartment had not been hung and the floors and walls had not been completely finished. Throughout the summer, tenants continued to move into the building. Each of them was told the same story: the building would be completed within one month.

Four months later, little progress had been made. Two tenants circulated a petition saying that the tenants were not satisfied with the condition of the building and warning that if all common areas were not finished by November 1st they would withhold their November rent. During October work on the building continued slowly. The tenants' dissatisfaction was fanned when a fire in the penthouse did serious damage because the defective elevators prevented firemen from reaching the top floor.

On November 1st approximately thirty-three[6] tenants withheld their rent. The landlord responded with a letter demanding pay-

[4] *In the Matter of Vivene Developments Ltd.* v. *Jack K. Tsuji*, unreported. Transcript, County Court Reporters, Toronto, March, 1969.

[5] The research for this study was conducted through interviews with the tenants, the leaders of the tenants association and city officials, by Miss Ruth Ann Irving.

[6] About 140 of the 210 units were rented at this time.

ment. Conditions did not improve. Matters came to a head over the weekend of November 17th when the heat failed for one day and the garbage chute was blocked up as far as the twelfth floor. The tenants were unable to contact the lessor company or the building manager. On November 18th the leaders of the rent strike sent a telegram to the director of the lessor company (hereinafter the landlord) asking him to attend a meeting on November 19th. When the strike leaders returned home from work on Monday, November 18th they found the bailiff's locks on their doors. They immediately summoned their fellow tenants and explained the situation to them. An impromptu tenants' meeting developed in the lobby. The ringleaders were inundated with offers of food, clothing and lodging. The tenants were found to be in support of their leaders. The lockout provided an immediate cause around which to unite against the landlord.

The next day, November 19th, the tenants held a meeting with full press coverage. The meeting was attended by Toronto's Mayor Dennison, two controllers, an alderman, a member of the provincial Legislature, and a representative of the Canadian Union of Public Employees, all of whom publicly expressed support for the tenants. The tenants formed an association, elected an executive and levied a membership fee. The purpose of the association, as stated in its constitution, was to bargain collectively with the landlord.

On November 20th inspectors from the City Department of Buildings inspected the building and found numerous building code violations. The matter was further aired when the Toronto City Council met to request information from the Commissioner of Buildings as to the standards that ought to be required as a condition precedent to occupancy of new apartment buildings. Nine days later the Commissioner of Buildings reported[7] that requirements listed in the building standards by-law respecting safety and health were enforceable but should be considered separately from other questions which the Commissioner considered desirable in the interests of tenants but which could not be enforced by present civic by-laws.[8] Some of these "desirable" items included laundry facilities, elevators in operating condition, and sufficient locker space. He further was of the opinion that all work on the apartment should be completed prior to occupancy and that all equipment installed in the apartment should be in operating condition prior to occupancy. Despite this incipient interest in the situation by City Council, no further action on the matter was

[7] Report of Commissioner Wellwood, Department of Buildings, to the Board of Control, submitted November 29th, 1968.

[8] See City of Toronto Act, S.O., 1936, c. 84, as am.; City of Toronto By-Law, No. 73-1968.

taken by them and the recommendations of the Commissioner of Buildings have been ignored.

During the same week the tenants commenced an action seeking an injunction to prevent the landlord from locking out any more tenants. The two parties reached a settlement before the case was heard. The landlord agreed to negotiate with the Tenants' Association and to allow the excluded tenants to reoccupy their apartments. The tenants agreed to pay their rent.

This concluded the first stage of the dispute between the landlord and tenants. The landlord, induced by pressure from rent withholding, publicity, the threat of legal action, and the Department of Buildings had agreed to negotiate. After this, however, he became progressively less co-operative.

At the first meeting of the Landlord's and Tenants' Negotiating Committee the landlord turned down a demand by the tenants for rebates on their rents during the time that the building was incomplete. The landlord agreed verbally, however, to the following items: to recognize the Association as an official bargaining agent; to allow any tenants to break their leases if they wished; to join the Urban Development Institute[9] or adopt its code of ethics, and to give a definite date for completion of the building and grounds. At a second meeting one week later the landlord agreed to negotiate a new form of lease and to deal with complaints about the building and grounds by December 12th. On December 5th the tenants submitted a list of eighty complaints about individual apartments and asked for a completion date of December 20th.[10]

By January 1969, eight months after they had moved in, the tenants were still faced with unsatisfactory conditions. The pressure of the rent strike reinforced by political pressure had brought the landlord to the position where he seemed willing to accede to the tenants' demands. However, no action was taken on the tenants' list of complaints. Work on the building proceeded very slowly. The landlord missed two Negotiating Committee meetings in January. At the third he refused to hire a security guard to provide protection against an increasing number of thefts unless each unit's rent was increased by $30.00 per month. He also went back on his agreement to negotiate a new lease. The tenants considered methods of sustaining their pressure and of consolidating their initial success.

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[9] The Urban Development Institute is an association of apartment building owners.

[10] Typical complaints included water in the basement, handles lacking on kitchen cupboards, drafts from around balcony doors, drafts from around windows, radiator leaks, unfinished floors and toilets not flushing. General complaints included lack of hot water, insufficient heat, and cracks on the walls.

A second rent strike was called for February 1st. The Tenants' Association informed the landlord that they would withhold their rent until meaningful negotiation could take place on the issues of property management of the building, compensation for the hazards and inconveniences they had suffered while the building was unfinished, a new lease, the removal of clauses waiving their legal rights, interest on security deposits and procedures for its return, the right to sub-let, a covenant by the landlord to maintain the building in good repair, the requirement that the landlord be responsible for damage caused by his own negligence and a provision that the landlord ask permission before entering apartments.[11]

The Tenants' Association withheld their cheques as planned and sent a letter to the landlord telling him that they had collected the seventy-eight[12] cheques and were keeping them in a security box until he was willing to negotiate. A title search reveals that on February 1st the landlord took out a second mortgage of $375,000.00 on which the interest was $4,500 per month. He already had a first mortgage of $2,250,000.00 on which the interest was $15,929.55 per month. Being deprived of approximately $15,000.00 of his monthly rent roll must have been hurting his financial position.

The two sides had reached an impasse. Despite his economic loss, the landlord immediately signalled his intention to stand firm by sending three notices to the tenants informing them of their overdue rent. The tenants attempted to apply further pressure by picketing the Eastmount building as well as a newly opened apartment building elsewhere in Toronto which was owned by the same landlord. The notices advertising this building were withdrawn from the press, but the landlord maintained his position. City politicians sympathetic to the tenants attempted to break the deadlock through negotiations with the landlord. However, his interest in negotiating had flagged. Instead he instituted a suit against the executive of the Tenants' Association seeking an injunction to prevent them from counselling others to break their contracts, from organizing a so-called rent strike and from interfering between the plaintiff and his mortgagor.[13] He claimed $100,000.00 in damages. After an appearance had been entered on behalf of

[11] Many of these provisions are now mandatory under Part IV of the Landlord and Tenant Act, as amended, *supra*, footnote 3.

[12] Many of the other tenants who felt it was wrong to withhold their rent assisted the Tenants' Association by (1) being members, (2) making money donations, (3) doing organizing tasks. Others, although sympathetic to the strike, feared retaliatory evictions. Still others felt that the physical condition of the building had improved sufficiently or were not particularly interested in changes in the lease.

[13] The President of the Tenants' Association had informed the mortgage company of the rent strike.

the tenants the case was dropped.

Faced with little improvement in the condition of the building, the tenants did not relent. Approximately the same group withheld their March rent. This time the landlord initiated eviction proceedings[14] against twenty-six of the tenants. Again he was willing to stop short of eviction, indicating that he would drop the action if each tenant paid his rent and $30.00 in costs and if the executive of the Association moved out. The tenants agreed to pay their rent if the landlord would negotiate a new lease.

The landlord finally decided to press for the eviction of the tenants. At the end of a day's hearing during which Judge McDonagh made clear his view that the landlord's action would be upheld, the tenants eventually accepted a settlement to pay their rent within five days in return for the right to remain in the building. After almost a year's battle, the law provided the landlord with the necessary reinforcement to make his position virtually invulnerable.

Rent Withholding: The Law

The facts of the Eastmount case show a clear injustice wrought upon tenants by a landlord taking advantage of his economic power in a city where the supply of residential accommodation is scarce. It is equally clear, as the remarks of the court indicated, that the tenants could, at the time, claim little help from the law. The Canadian common law provides that in the absence of express agreement or where the premises were furnished, a landlord may keep his premises in whatever condition he desires.[15] There is no implied warranty that the premises are fit for any particular purpose or that the landlord will put them in repair at the commencement of or during the term.[16] Even in the case of furnished premises, although a condition is implied that the premises would be fit for habitation when let,[17] no such obligation to keep them in that condition is implied.[18] In addition, covenants in a lease are held to be independent, thus permitting a landlord to require rent even in the cases where he had breached a written agreement to repair.[19] The American doctrine of constructive eviction has not been adopted in Canada.[20] The administrative enforcement of

[14] Landlord and Tenant Act, *supra*, footnote 3, Part III.

[15] Except for Quebec. See J. Durnford, The Landlord's Obligation to Repair and the Recourse of the Tenant (1966), 44 Can. Bar Rev. 477.

[16] *Smith* v. *Galin*, [1956] O.W.N. 432.

[17] *Smith* v. *Marrable* (1843), 11 M. & W. 6.

[18] *Cross* v. *Piggott*, [1922] 2 W.W.R. 662 (Man. K.B.).

[19] *Johnston* v. *Givens*, [1941] 4 D.L.R. 634 (Ont. C.A.).

[20] See *Dyett* v. *Pendleton* (1826), 8 Co. 727 (N.Y.); A. Casner, 1 American Law of Property (ed. 1952), sec. 3.51. Some American courts have held certain kinds of conditions dangerous to life constituted a common law partial eviction. But, see *Gombo* v. *Martise* (1964), 41 Misc.

building, housing and health codes has helped to redress the balance toward the tenant, but these laws are aimed at poor or slum housing and they do not provide the tenant with his own right to initiate proceedings.[21]

Following most of the recommendations proposed by the recent report of the Ontario Law Reform Commission on Landlord and Tenant Law,[22] the Ontario Legislature passed an Act effective January 1970 to amend the Landlord and Tenant Act.[23] The Act radically alters the balance of obligations between landlord and tenant in "residential premises".[24] Two provisions would in particular aid tenants in a position similar to those in 33 Eastmount:

Section 95(1) places the obligation on the landlord both to provide and maintain rented premises in a good state of repair and fit for habitation during the tenancy and to comply with any legal safety, health and housing standards, notwithstanding any state of non-repair known to the tenant prior to the tenancy agreement.[25] Section 88 provides that "the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements". These sections may not be waived by agreement.[26]

What then would be the legal position of tenants in the situation of those in the apartment described? Do the amendments to the Ontario Landlord and Tenant Act help tenants who are today frequently subjected to conditions similar to those endured by the Eastmount tenants? An authoritative answer will have to await the interpretation by the courts and a more comprehensive analysis than is within the scope of this comment.[27]

The obligations under section 95 may be enforced under section 95(3) by summary application to a judge of the county or district in which the premises are situated and the judge may either (a) "terminate the tenancy subject to such relief against

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2d 475, 246 N.Y.S. 2d 750, rev'd, 44 Misc. 2d 239, 253 N.Y.S. 2d 459. See generally, R. Schoshinski, Remedies of the Indigent Tenant, Proposals for Change (1966), 54 Geo. L.J. 519.

[21] See *e.g.* City of Toronto Act, *supra*, footnote 8; City of Toronto By-Law No. 73-1968; Public Health Act, R.S.O., 1960, c. 321. For an account of these and other defects of housing codes see Note, Enforcement of Municipal Housing Codes (1965), 78 Harv. L. Rev. 801.

[22] Ontario Law Reform Commission, Report on Landlord and Tenant Law Applicable to Residential Tenancies (1968).

[23] *Supra*, footnote 3.

[24] *Ibid.*, s. 1.

[25] Under section 95(2): "The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him." *Ibid.*

[26] *Ibid.*, s. 81(1).

[27] For an initial analysis see D. Lamont, The Landlord and Tenant Act Part IV (1970).

forfeiture as the judge sees fit", (b) "authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off", or (c) "make such further or other order as the judge considers appropriate".

A tenant in premises that fail to reach a "good" state of repair may now seize the initiative and sue under this section either to terminate the lease or to have the court order the landlord to carry out the repairs. It is unclear what procedure should be followed if he wishes to make repairs himself. It would seem from section 95(3)(b) that he might (probably where urgent repair is necessary) conduct the repairs himself, then apply for the judge's authorization to recover the costs by suing the landlord or by setting off the cost of the repairs against rent. The discretionary section (95(3)(c)) allows the judge to make an appropriate further order. Lamont suggests that such an order could relate to the extent of the repairs, the time by which they should be made, and possibly a reduction in rent while out of repair and until required repairs are effected.[28]

No guidelines are provided, however, as to what might constitute a "good state of repair". In the Eastmount situation only defective heating would now be prohibited by the City of Toronto By-law.[29] Other defective items may or may not fall within the definition: for example, defective elevators, laundry rooms, lack of storage, incomplete garage, lack of a parking lot, landscaping, a pool, sauna and defective corridors and lobby. The cases defining "good tenantable repair" are vague, simply referring to repair which, "having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it".[30]

In view of the shortage of residential accommodation, the cost and nuisance involved in vacating premises (even those not in good repair), and in view of the likely difficulty to many tenants of initiating court action (with its expense, time and risk of failure), the withholding of rent while staying on the premises might seem the most effective way for a tenant—particularly for a group of tenants—to induce a landlord to repair. Before dealing with the merits of rent withholding, let us consider the actions open to the landlord in response to such action.

[28] Lamont, *op. cit., ibid.*, p. 26.

[29] City of Toronto By-law No. 73-1968, s. 23, providing for 70° Fahrenheit in all habitable rooms, bathrooms and toilet rooms at all times.

[30] *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42, at p. 45 (C.A.) per Lopes L.J. See also *Gordon* v. *Goodwin* (1910), 20 O.L.R. 327 (C.A.) where Riddell J. stated that "there is no need for the tenement to answer every whim of a financial tenant, but common sense should be applied in determining whether it does fulfil the required conditions".

Under section 17(1), in every demise an agreement is implied (unless otherwise agreed) that if payment of rent reserved, or any part thereof, remains unpaid for fifteen days after it ought to have been paid, the landlord is entitled to enter and repossess. The new section 106(1) states that the landlord may gain repossession only under the authority of a writ of possession.[31] Two remedies formerly open to the landlord are, under the new amendments, now denied him. First, section 85(1) takes away the landlord's right to distrain for default in payment of rent, whether a right of distress existed by statute, common law or contract. Second, section 94 prohibits the landlord (or tenant) from altering the locking system on any door giving entry to the rented premises, except by mutual consent.[32] This remedy, used by the landlord in the Eastmount dispute, will no longer be permitted.

Two remedies would thus now be available to a landlord against tenants withholding rent. First, he could sue for the arrears of rent. The tenant would then have to plead in defence the landlord's breach of a "material covenant" under section 88 perhaps counterclaiming for damages.[33] Again we shall have to await future interpretation to discover what covenants are considered "material". Would every covenant be capable of being material? Does this include covenants for quiet enjoyment? Assuming the failure to keep in a "good" state of repair, does this imply the breach of material covenant? In the past even the failure to provide heat under a written agreement has been held not to invalidate a contract through a total failure of consideration.[34] The material covenant will probably lie somewhere between the total failure of consideration—which will justify rescission—and the breach of a provision which involves only "minor adjustments" and which will not justify rescission.[35] It remains to be seen where the line will be drawn.

The landlord's second course of action might be to sue for a writ of possession under the old Part III or the new section 105 of the Act. These sections are similar, and it is difficult to see the need for both of them.[36] In both, the landlord applies to the court for an

[31] The writ of possession must be issued under the new section 105, where an application may be made for an order declaring a tenancy agreement terminated or under Part III where an application against an overholding tenant may be made under section 75. These will be considered below.

[32] The maximum penalty for contravention of s. 94 is $1,000.00. *Ibid.*, s. 107(1).

[33] See *Hart* v. *Rogers*, [1916] 1 K.B. 646, 85 L.J.K.B. 273.

[34] *Johnston* v. *Givens*, [1941] 4 D.L.R. 634. See also *Macartney* v. *Queen-Yonge Investments Ltd.*, [1961] O.R. 41, 25 D.L.R. (2d) 751.

[35] See Williston, Contracts (3rd ed., 1962), vol. 6, s. 829.

[36] Lamont makes the point that the advantage to the landlord of proceeding under section 105 is that he can combine with the application for an order terminating the tenancy, a claim for arrears of rent and com-

appointment for a hearing. Under Part III he applies by sworn affidavit whereas under section 105 he files an application stating the grounds under which the tenancy agreement is alleged to be terminated. Part III requires three days notice whereas section 105 requires fifteen days. Both proceedings allow equitable relief to be granted by the judge hearing the application. Under section 105(4) the judge may order a writ of possession "or such other relief as may be just in the circumstances". Under Part III the tenant must apply for relief to a judge of the Supreme Court under section 19 of the Act, which may be granted "on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court deems just".

It would seem that a tenant in arrears of rent would not have a valid defence to an action for eviction unless he could plead a breach of the landlord's material covenant under section 88 of the Act, and if the judge were then willing to allow equitable relief, such as permitting the tenant to remain on the premises and perhaps to set off all or part of his rent against repairs that the tenant may have carried out, or that he or the landlord may be ordered to carry out. In view of the fact that the tenant now has a legal remedy to compel repairs under section 95 of the Act, it is unlikely that the judge will exercise equitable relief in order to sanction the self helping tenant who remains on the premises but withholds his rent.

Finally, it is possible that the landlord might wish to proceed against the organizers of the rent strike, and to enjoin their conduct on the ground that it is a tortious conspiracy, or a tort of inducement to breach a contract or intimidation. For purposes of these torts a breach of contract may be as sufficient an unlawful act as would be ordinary criminal or otherwise tortious conduct. The most important authority for this principle is *Rookes* v. *Barnard*,[37] which also held that the tort was committed by the defendants notwithstanding the fact that the plaintiff employer was himself in breach of the same contract.[38] Because of section 88's establishment of dependent covenants it might be that tenants in Ontario will be justified in withholding their rent, thus avoiding liability for these torts. Again, however, it is dubious whether their breach of contract while remaining on the premises would be so justified. It is also possible that all of the participants in the rent strike might be guilty of criminal conspiracy. This depends upon whether their breach of contract will be considered an

pensation for the use and occupation of the premises. Under Part III a separate action is required for arrears of rent. *Op. cit.*, footnote 27, p. 21.

[37] [1964] A.C. 1129.

[38] See also *International Brotherhood of Teamsters* v. *Therien*, [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

"unlawful means" under section 408(2) of the Criminal Code.[39]

Rent Withholding Legislation: American Approaches

During the past five years, various American states have enacted legislation to regulate collective tenant action and its weapon of the rent strike.[40] Three examples will be briefly outlined, in order to show different techniques which might be useful for future application to the Canadian situation.

Article 7-A of the New York Real Property Actions and Proceedings Law,[41] enacted in 1965, constitutes the first of recent attempts to provide for regulated rent withholding. Its aim was to make rents available "for the purpose of remedying conditions dangerous to life, health and safety".[42] One-third of the tenants of a multiple dwelling may bring an action against their landlord if there exists over a five-day period "a lack of heat or of running water, or of light or of electricity or of adequate sewage disposal facilities" or if the building is infested by rodents or if some other condition dangerous to life, health and safety exists.[43]

The tenants' petition must specify the nature of the defects, the estimated cost of removing them,[44] and the rent due from each of the petitioning tenants.[45] The landlord may raise as a defence the fact that the condition complained of has been corrected, that he was refused entry to make repairs, or that the condition was caused by the tenant.[46] If the judgment is in favour of the tenants, the owner will have the opportunity to undertake repairs himself,[47] provided he demonstrates to the court that he is able to perform the work promptly, and is able to post security for such performance.[48] The court will make an order requiring the rents of all the tenants in the building to be deposited with the clerk of the court as they become due.[49] Should the owner remedy the

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[39] S.C., 1953-54, c. 51, as am. Charles Parnell's conduct was considered unlawful means, *supra*, footnote 1. *Cf. Wright, McDermott and Feeley* v. *The Queen*, [1964] 2 C.C.C. 201 (S.C.C.).

[40] Note, Tenant Rent Strikes (1967), 3 Col. J. of L. and Soc. Prob. 1-6; Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts, [1966] St. Johns L. Rev. 233; Stang, Tenant Initiated Repairs: New York's Article 7-A (1967), 2 Harv. Civil Rights Civil Liberties L. Rev. 201; Simmons, Passion and Prudence; Rent Withholding Under New York's Spiegel Law (1966), 15 Buffalo L. Rev. 572; Frances Fox Piven and Richard A. Cloward, Rent Strike, The New Republic, December 2nd, 1967; Lipsky, Rent Strikes: Poor Man's Weapon, Transaction, February 1969; Tenant Unions: Collective Bargaining and the Low Income Tenant, *op. cit., ibid.*

[41] N.Y. Real Prop. Actions Law, s. 769 (Supp. 1966).

[42] *Ibid.*

[43] *Ibid.*, s. 770.

[44] *Ibid.*, s. 772(1), (3).

[45] *Ibid.*, s. 773(4).

[46] *Ibid.*, s. 775.

[47] *Ibid.*, s. 777 (a) ("owner or any mortgagee or lienor of record or any other person having an interest in the property").

[48] *Ibid.*

[49] *Ibid.*, s. 771.

condition he may claim the money or a receiver may be appointed by the city to use the rent money to make repairs, paying over any surplus to the owner.[50]

This legislation rests the initiative with the tenants. An organizer is in fact needed to inform the tenants of their rights, to allay their fears of eviction, to persuade one-third of them to sign the petition and to shepherd them through the legal process. Experience in New York has shown that the leaders of tenants' organizations become fully involved in the administrative tasks required of them, at the expense of their organizational and negotiating responsibilities. A lawyer is required to carry out the rather complicated notice provisions, to handle the court case and to block adjournments. The city may be required to appoint a receiver. Apparently, however, few people want this difficult task and few are capable of overseeing the complicated construction work. Often the rent rolls produce only enough money to provide heat and exterminate rats. The receiver will rarely have sufficient funds to carry out any structural repairs.[51]

The New York Multiple Dwelling Law, section 302-a, also enacted in 1965, provides a procedure which is easier for the tenant to handle. In a suit for non-payment of rent a tenant has a defence if he can show that the landlord has had notice of a "rent impairing" code violation for six months and that the repair has not yet been carried out.[52] Lists of "rent impairing" violations are promulgated by the New York City Department of Buildings after hearings.[53] Where the Department has notified a landlord of a violation existing on his premises, and if the violation has existed for a period of six months[54] the tenant may withhold his rent. If then sued for rent, the tenant must deposit with the clerk of the court in which the action is proceeding the rent sought to be recovered. Such deposit of rent shall vitiate the right of the owner to terminate the lease for non-payment of rent.[55] Should the tenant succeed in his defence, he keeps his money. There is no provision that it shall be used for repairs.

The use of this procedure as a shield is an advantage to tenants who would have difficulty initiating action against their landlords. Any one tenant can take this action. The disadvantage

[50] *Ibid.*, s. 776.

[51] See Note, Tenant Rent Strikes, *op. cit.*, footnote 40; Lipsky, *op. cit.*, footnote 40; Piven and Cloward, *op. cit.*, footnote 40.

[52] N.Y. Multiple Dwelling Law (Supp. 1965).

[53] These range from defective faucets and inadequate lighting to structural defects and vermin. See *Matter of 10 W. 28th St. Corp.* v. *Moerdler* (1966), 62 Misc. 2d 109 (Sup. Ct.).

[54] N.Y. Multiple Dwelling Law, *supra*, footnote 52, s. 3a.

[55] *Ibid.*, s. 3c. The landlord's defences under s. 3b are similar to those under article 7-A of the New York Real Property Action Law, *supra*, footnote 41.

is that no provision is made to use the funds withheld for repairs, and the use of the rent withholding defence is contingent upon prior certification of the premises by the New York City Department of Buildings.[56]

The Pennsylvania rent withholding statute, passed two years later, utilizes a third approach.[57] It provides that whenever the Department of Licences and Inspections or the Department of Public Safety or any Public Health Department certifies a dwelling as unfit for human habitation, the duty of any tenant to pay rent shall be suspended until the dwelling is certified as fit for human habitation. The inspector uses a special point scale worked out for rent withholding evaluation.[58] If the points add up to twenty the house is declared unfit and the tenant notified of that fact. The tenant obtains a rent withholding card at the Department office and pays his rent into an escrow account fund. If within six months after this time the house is certified as fit, the landlord may receive all the monies in the account. If at the end of the six months the dwelling is still certified as unfit, the money in escrow is paid to the tenant except that the funds may be used "for the purpose of making such dwelling fit for human habitation and for payment of utility services".

The statute establishes a simple procedure which the tenant can handle by himself, after a municipal department has certified the premises. The effect on the landlord is then immediate, since he will be deprived of his rent money, yet the statute allows the landlord a six-month period to make repairs before he loses his right to the rent money completely. Where necessary the city or the tenant could use the rent money to make repairs.

Conclusions

The new amendments to the Ontario Landlord and Tenant Act go a long way towards redressing the balance of obligations formerly heavily weighted in favour of the landlord. Other provinces still adhering to the old pattern would do well to observe the development of the Act as it is interpreted. Nevertheless, it would seem that a tenant not able or willing to initiate proceedings to compel the landlord to repair, under section 95 of the Act, or to terminate the tenancy agreement because of a breach of the landlord's obligation, would have little option but to continue to in-

[56] See Lipsky, *op. cit.*, footnote 40; Piven and Cloward, *op. cit.*, footnote 40; Note, Tenant Rent Strikes, *op. cit.*, footnote 40.

[57] Pa. Stat. Ann., tit. 35, ss 1700-01 (Supp. 1967), as amended Act of June 11th, 1968 (Act. 89), 1968 Pa. Leg. Serv. 152 (1968).

[58] For example, a defective roof is worth 5-10 points, a door which is not weathertight 1-2, insufficient refuse containers 1-5, inadequate water heating facilities 5-10, windows not openable 1-5, wiring defective 5-10. See Note, Rent Withholding in Pennsylvania (1968), 30 U. of Pitts. L. Rev. 149.

habit the premises and to pay rent, at the risk of facing eviction. Even if the tenant were prepared to sue for repairs, it is not at all sure whether many of the defects facing Eastmount tenants could be considered items not constituting a "good" state of repair.

It is defects such as these, however, that are most offensive to individuals caught in a seller's market for land that exists in most urban areas. As a result, groups of tenants are increasingly taking collective action, utilizing techniques that bring raw political and economic power into play.

Some American states have regulated the rent strike, thus forbidding self-help by tenants and controlling and encouraging the peaceful resolution of landlord and tenant disputes. These models for regulation have been tried and tested. As with labour unions and management, the regulation of tenants' unions would prove beneficial both to tenants and landlords. The proprietal analogy for "industrial peace" would certainly seem enhanced by the prospect.

It has been noted that few norms are more deeply embedded in our culture, as verbal abstractions, than those which are frequently cited as justifying judicial or administrative intervention: that the weak should be protected from the strong and that conflict should be settled peacefully.[59] The situation facing tenants similar to those in the Eastmount apartments calls for intervention for just those reasons.

JEFFREY JOWELL*

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JUVENILE DELINQUENCY—TRANSFER OF JUVENILE CASES TO ADULT COURTS—FACTORS TO BE CONSIDERED UNDER THE JUVENILE DELINQUENTS ACT.—Reported cases may not provide very accurate criminal statistics but recently there seems to have been an increased number of cases[1] of juvenile delinquency which have been transferred (or were sought to be transferred) to the adult

[59] Murray Edelman, The Symbolic Uses of Politics (1964).

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[1] *E.g., Regina* v. *Simpson*, [1964] 2 C.C.C. 316 (North Bay Juv. Ct); *Re Regina* v. *Arbuckle*, [1967] 3 C.C.C. 380, (1967), 59 W.W.R. 605 (B.C.C.A.); *Regina* v. *Shoemaker*, [1966] 3 C.C.C. 79 (B.C.S.C.); *Rex* v. *H*, [1931] 2 W.W.R. 917 (Sask. K.B.); *Regina* v. *P.M.W.* (1955), 16 W.W.R. 650 (B.C. Juv. Ct); *Re L.Y. No. 1* (1944), 82 C.C.C. 105 (Man. C.A.); *Re Rex* v. *D.P.P.* (1948), 92 C.C.C. 282 (Man. Q.B.); *Regina* v. *Sawchuk* (1967), 1 C.R.N.S. 139 (Man. Q.B.); *Regina* v. *Miller* (1961), 132 C.C.C. 349 (Sask. Q.B.); *Regina* v. *M.*, [1964] 2 C.C.C. 135 (Man. Q.B.); *Regina* v. *Liefso* (1965), 46 C.R. 103 (Ont. S.C.); *Regina* v. *Cline*, [1964] 2 C.C.C. 38 (B.C.S.C.); *Regina* v. *Pagee (No. 1)* (1963), 41 W.W.R. 159 (Man. Q.B.); *Regina* v. *Trodd*, [1966] 3 C.C.C. 367 (B.C. S.C.).

court. The incidence of waiver cases varies from province to province and from juvenile court to juvenile court. One of the busiest juvenile courts in Canada, the court of Metropolitan Toronto, has not waived a juvenile case in the last twenty years. On the other hand, during one week in July, 1969, the British Columbia Supreme Court has considered two waiver cases.[2] These two cases provide an interesting contrast in the legal approach to the juvenile delinquent. Another waiver case from British Columbia has just been reported,[3] and provides the most balanced view of all three.

The question of waiver is considered important because we subscribe to the philosophy that a juvenile (under sixteen, seventeen, or eighteen years, depending on the provincial jurisdiction) who does some anti-social act is different from an adult criminal and should be treated accordingly. This is well expressed in section 38 of the Juvenile Delinquents Act[4] where it is laid down that a child should "be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance". This is to be achieved by therapeutic rather than punitive measures. Since its inception, the juvenile court has employed enlightened methods, such as probation, which have eventually received wider use and acceptance in the adult courts and institutions. The juvenile court has been a laboratory for ideas in handling problems of social deviance. This court for children has been strongly influenced by behaviourist and determinist ideas which denied the notions of blameworthiness and free will found in the ordinary criminal law and which are based on the classical school of criminology as practised by such strict adherents to the Judeo-Christian ethic as James Fitzjames Stephen. The founders of the juvenile court, who were dedicated to social work, had high hopes for their creation. For many reasons, including their exaggerated hopes, the juvenile court did not put an end to juvenile delinquency and, consequently, adult crime did not disappear. Perhaps the increased incidence of waiver cases can be attributed to a disillusionment among juvenile court judges who have not "reformed" delinquent children by friendly counselling, stern warnings, probation or enforced detention in training schools. These judges may also have been influenced by the popular cries of "Law and Order", "Crime on the Streets" and the adult resentment of today's freedom-loving, uninhibited, undisciplined, hedonistic, alienated and troubled Youth. This spate of contradictory adjectives may not describe a juvenile delinquent but they are no more arbitrary and inexact than the definition found in the Juve-

[2] *Regina* v. *Beeman* (1969), 69 W.W.R. 624 (B.C.S.C.) aff'd (1970), 71 W.W.R. 543 (B.C.C.A.); *Regina* v. *Proctor* (1969), 69 W.W.R. 754 (B.C. S.C.).

[3] *Regina* v. *R.* (1969), 70 W.W.R. 292 (B.C.S.C.).

[4] S.C., 1929, c. 46, now R.S.C., 1952, c. 160.

nile Deliquents Act. Section 2(h) of that legislation defines a "juvenile delinquent" as:

> . . . any child who violates any provision of the *Criminal Code* or any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute;[5] . . .

A delinquent is defined as less than eighteen years in some provinces (such as British Columbia) and as young as sixteen years in others (such as Ontario). The delinquent act can vary from murder, and other serious Criminal Code offences, to minor infractions of city by-laws. Fortunately, there are limitations on the cases of juvenile delinquency which can be waived to the adult courts. The child must have allegedly committed an indictable Code offence and must be "apparently or actually over the age of fourteen years".[6] The only guidance given to the juvenile court judge in making his decision to give up jurisdiction to an ordinary criminal court is that "the good of the child and the interest of the Community demand it".[7] Most of the cases have involved serious charges such as murder, arson and rape. Waiver has been upheld on appeal in about half the cases (but, of course, only a very small percentage of juvenile cases are waived in the first instance). The reasons given in these decisions show little understanding of the juvenile delinquent or of the philosophy of the juvenile court. The courts have discussed the juvenile court's inadequacy as a tribunal to try serious crimes, the lack of procedural protections in that court, the need to give a child a fair trial, the public's "right to know", the inadequacy of treatment available to the juvenile court and the community's need to see justice done in a public trial. Very few cases have made a close examination of the problem; ironically, these rare cases are ones in which waiver has been refused or quashed.

Regina v. *Beeman* is primarily concerned with procedure. Originally, an allegation had been made in the family and children's court of Vancouver that Beeman "did commit a delinquency in that he . . . unlawfully did attempt to commit an act of gross indecency with another male person". Pursuant to section 9 of the *Juvenile Delinquents Act*, the case was transferred to the ordinary courts. Beeman elected to be tried by a judge without a jury and, after a preliminary hearing, was committed for trial. Subsequently, the Crown preferred an indictment charging Beeman with counselling another to commit the offence of gross indecency, rather than attempted gross indecency. The British Columbia Supreme

[5] *Ibid.*
[6] *Ibid.*, s. 9.
[7] *Ibid.*

Court, per Macdonald J. decided that "valid proceedings had been initiated against the accused in the ordinary courts"[8] and that section 478(2) of the Canadian Criminal Code[9] could be used by the Crown to substitute the offence of counselling for that of attempt. Beeman's counsel argued that this was improper and that the case should have been returned to the juvenile court as soon as a different charge was laid. Macdonald J. took the view that section 478(2) was fatal to the appellant's case. Beeman argued that when another charge was substituted, the juvenile court should have been given the opportunity to rescind the order (as provided by section 9(2) of the Juvenile Delinquents Act). The learned judge distinguished *Regina* v. *Goodfriend*[10] on which Beeman placed strong reliance. In that case, a juvenile had originally been charged with unlawful possession of marijuana for the purpose of trafficking. When he appeared before the magistrate, the Crown withdrew this charge and substituted a charge of unlawful possession. The juvenile pleaded guilty. The Court of Appeal quashed the conviction on the submission that the magistrate was without jurisdiction. Macdonald J. distinguished this case on the basis that the initiating step in the proceedings in *Beeman* was valid and unchallenged and therefore the magistrate conducted a preliminary inquiry with full jurisdiction to do so. Therefore, in the judge's words, Beeman was "beyond recall to the juvenile court".[11]

It is not my intention to write a technical criticism of the procedural issues in this case. To one relatively untutored in the niceties of criminal procedure, the distinction between *Goodfriend* and *Beeman* seems minuscule. To someone more interested in the quality of juvenile justice, the disposition of the *Beeman* case seems a little difficult to follow. The whole basis of criminal procedure, particularly when interpreted by the vigilant eye of an appellate court, is to ensure that justice be not only done but also be seen to be done. If a juvenile is involved in the criminal process, then this judicial proverb should be applied with more circumspection, greater equity and, perhaps, less strict adherence to procedural exactness. Let us compare the two cases. In *Goodfriend*, the second charge laid against the juvenile was less serious than the original. In *Beeman*, the amended charge of counselling was more severe than the original attempt charge.[12] Goodfriend had pleaded guilty to the second charge while Beeman had sought, by means, *inter alia*, of mandamus, to defeat the indictment. The

[8] *Supra*, footnote 2, at p. 629.
[9] S.C., 1953-54, c. 51.
[10] (1968), 65 W.W.R. 189 (B.C.C.A.).
[11] *Supra*, footnote 2, at p. 629.
[12] See the following provisions of the Canadian Criminal Code, *supra*, footnote 9, s. 149 (punishment for gross indecency), s. 406 (b) (punishment for attempt), s. 407 (punishment for counselling). The punishment for counselling is twice that of attempt.

adult courts have shown that they are deeply concerned with the problem of drug-taking youth and are prepared to impose severe deterrent sentences.[13] The charge against Goodfriend involved drugs but he won his appeal. (The court's usual policy on drugs should not be condoned and the reference back to juvenile court was, no doubt, correct.) Beeman's offence was one of sexual deviance. Without knowing all the facts, one would assume that such behaviour in a juvenile calls for treatment rather than punishment and such disposition could be best dispensed by a sympathetic juvenile court. *Beeman's* case remained under the jurisdiction of the adult court.

The judgment of Macdonald J. took no account of the policy underlying the Juvenile Delinquents Act. The factors set out in section 38 seem to have been ignored by the learned judge who also ignored the social differences between the two cases as outlined above. In distinguishing *Goodfriend*, Macdonald J. should also have taken into account the social factors which McFarlane J.A. in *Goodfriend* saw as perhaps overriding the strict legalistic principles of criminal procedure. We might also note that the decision in *Goodfriend* was one of the British Columbia Court of Appeal, a superior court to that presided over by Macdonald J.

The decision in *Regina* v. *Proctor*, and the factors taken into account by Munroe J. of the British Columbia Supreme Court, are in stark contrast to the result in the *Beeman* case. While it is realized that *Proctor* was a simple waiver case, some of the judicial discretion wisely used in *Proctor* could have been profitably applied by Macdonald J. in the other case. *Proctor* has another unusual quality; it was one of those fairly rare cases where a superior court decided that the juvenile court judge should not have given up jurisdiction over the juvenile. Furthermore, Munroe J. seems to have a good understanding of the philosophy of the juvenile court.

Criticism of *Beeman* or any other waiver case should not be taken as an indication that no juvenile case should ever be waived to the adult court. In many instances, the waiver of a juvenile case should indicate that the philosophy of the juvenile court is inapplicable or that the resources of juvenile justice are inadequate or have failed in previous attempts to help the delinquent child. Such cases should be rare because juvenile institutions should have the best facilities and the authorities should be most hesitant before giving up on efforts to help juveniles. Too frequently, young men and women of sixteen to twenty-one years are incarcerated in adult institutions and learn nothing but the trade of crime from more sophisticated and old criminals. (The ideal solution may be

[13] *E.g. Regina* v. *Simpson*, [1968] 2 O.R. 270 (Ont. C.A.); *Regina* v. *Martin* (1969), 70 W.W.R. 282 (C.C. Co. Ct).

special forms of treatment for this intermediate group whose members are so impressionable and whose habits are still capable of improvement.)

Unfortunately, many waiver cases result in trials in the adult court and incarceration in adult institutions because juvenile and appellate court judges apply erroneous reasoning in ordering waiver. The rationale of section 9 of the Juvenile Delinquents Act, "The good of the child and the interest of the Community" is too frequently construed in a retributive way so that the court is really saying that the public will not tolerate this "junior criminal" being treated as a "misdirected and misguided" child. The child must be punished in "the interest of the community". On other occasions, the juvenile court judge waives a serious case because he does not want the responsibility of a trial under the adversary system applying strict rules of evidence. In some instances, which are the saddest of all, the case is waived because the jurisdiction has no treatment facilities for a seriously disturbed child or adolescent who has committed a major offence.

At first sight, the juvenile court judge appears to have made the correct decision in refusing to proceed with Proctor as a juvenile. Munroe J. of the British Columbia Supreme Court did not agree, however, and ordered the appellant to be "tried" under the Juvenile Delinquents Act. Possibly, the first judge was correct and appeals from juvenile court waivers may be unfortunate because a Supreme Court justice is not an expert in juvenile delinquency and has not had the benefit of observing the juvenile on previous occasions when he may have failed on juvenile probation or has abused the social welfare philosophy of the court for children. The indications in *Proctor* seemed most unpromising; the juvenile was seventeen years and ten months at the time of the alleged offence and was more than eighteen years at the time of the appeal. He was accused of armed robbery of a trust company. In 1965 and 1960, he had been adjudged delinquent on five occasions for thefts. At the time of the alleged robbery, he was on bail for two alleged offences of breaking and entering and theft in Toronto (where, of course, he was classed as an adult). There was further evidence that he had been adjudged delinquent in Ontario when he was eleven. Despite all these liabilities, one's instincts suggest that Munroe J. nevertheless made the proper decision.

Proctor was the product of a "broken home" and had "never known adequate parental control or discipline".[14] These factors certainly do not differentiate Proctor from many juvenile delinquents (or adult criminals) before the courts. The appellant was fortunate because Munroe J. found a unique quality in this case and took the opportunity to apply individualization of treatment.

[14] *Supra*, footnote 2, at p. 757.

While Proctor was in jail awaiting trial, he came under the influence of a Constable Foster of the Vancouver city police force. The constable, who found the young man "a fairly decent young fellow", "got to thinking that he needed a break".[15] The constable also told the court: "I have seen a lot of prisoners, young and old, go through jail in three years and this is the only one I have taken a liking to."[16] Constable Foster and his wife offered to take the juvenile into their own home and to raise him with their own children. The police officer had made arrangements for the employment of Proctor.

Munroe J.'s assessment of the juvenile can best be described in the judge's own words:

> . . . that he needs and is likely to respond favourably to supervision and discipline; that he needs the opportunity to develop self-control and to form a close tie with a substitute for a father and with mature adults, in the hope that he might absorb their standards; that he has no family, relatives or friends behind him anywhere; that he has had some training as an apprentice jockey; that he is mentally immature and emotionally insecure; that he is a lonely boy given to crying spells; that he has a heart-ache and needs affection; that in any penal institution he might find colleagues in crime, but in a home he would probably find brothers in life; that he has a potential for good; that institutional control is less likely to benefit him than is the atmosphere of a normal home; that he is susceptible to good influences as well as to bad ones, especially at this time.[17]

The learned judge also took into account that Proctor could be brought before the court by a probation officer any time before his twenty-first birthday if he should be in breach of probation. He also placed a heavy reliance on the desirability of Proctor avoiding a criminal record and that it was in the interest of the community if Proctor could be rehabilitated and kept out of penal institutions. In his wisdom, Munroe J. realised that penal institutions have a poor record of success. He referred to the Commissioner of Penitentiaries' remarks that "what is required is to put this juvenile in a setting where he can live and work next to persons who can bring out the admiration of the juvenile; whom the juvenile will try to imitate, and whom we hope he will remember as good sound sensible persons whom he would like to be like".[18] His Lordship then added the sad, but true, fact that "the major shortcoming in our prison system today is too few instructors of that calibre with too many inmates and lack of adequate training facilities".[19]

Proctor is a rare case—an enlightened judge providing, for a juvenile, an excellent placement with responsible and concerned

[15] *Ibid.*, at p. 756.
[16] *Ibid.*
[17] *Ibid.*, at p. 757.
[18] Cited, *ibid.*, at p. 759.
[19] *Ibid.*

citizens. This surely reflects the true philosophy of the Juvenile Delinquents Act.

The latest British Columbia case, *Regina* v. *R.*[20] also concerns waiver but from a different perspective. The juvenile, aged sixteen, was charged with one act of forgery and three of uttering. Eight youths were involved and all but two were juveniles. In the northern community of Prince Rupert, the judge of the family and children's court also wears another hat as adult court magistrate. The judge-magistrate waived the case of R to the adult jurisdiction without any application from the Crown, and without any evidence being taken other than proof of the child's age. On the face of it, the only factor taken into account was the magistrate's pronouncement that "under the circumstances . . . the good of the child and the interest of the community demanded"[21] the "raising" of the case as the magistrate termed it. In fact, the judge had further data although none of it was presented in court; he had consulted privately with two probation officers and had had prior knowledge of R as a result of another act for which R had been adjudged delinquent some six weeks previously. In his report to the appeal court, the judge had also intimated that one of the reasons for waiving the case was the lack of juvenile treatment facilities available in the Prince Rupert area.[22] This too had not been mentioned in court at the time of waiver.

The appellant delinquent submitted that no proper notice of the transfer was given and that there was "no evidence properly before the learned judge on which he could properly reach the conclusion he did".[23]

Rae J. upheld the appeal and made a careful examination of the case law. He found support for his decision in the judgment of Bastin J. in *Regina v. Pagee (No. 1)*[24] where the Manitoba Court of Queen's Bench held that a waiver application was a "very serious proceeding and the inconvenience of having another magistrate conduct the subsequent hearings should not interfere with a complete and searching inquiry".[25] The serious quality of the proceeding is reflected in the criteria which Bastin J. applied:

> I interpret the words "the good of the child" to mean the treatment which will provide the eventual welfare of the child by eradicating its evil tendencies and transforming its character. I interpret the word "community" to mean society at large.[26]

And:

> Is the limited treatment provided by . . . the *Juvenile Delinquents Act* of a nature to reform him or is he so mature or so incorrigible that

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[20] *Supra*, footnote 3.
[21] *Ibid.*, at p. 294.
[22] *Cf.* the citation from *Regina* v. *Arbuckle, supra*, footnote 1, at text accompanying footnote 31, *infra*.
[23] *Ibid.*, at p. 295.
[24] *Supra*, footnote 1.
[25] *Ibid.*, at p. 191.
[26] *Ibid.*, at p. 190.

his reclamation needs the harsher treatment provided by the *Criminal Code*.[27]

Similarly, Rae J. relied on *Regina* v. *Arbuckle*,[28] where McFarlane J.A., while admitting that a waiver decision required a "substantial exercise of administrative discretion",[29] decided that the judge must "establish facts and must act judicially in the sense of proceeding fairly and openly . . . giving proper consideration to the views and representations of the parties before him".[30] The inquiry would be of "a quite general nature into the background, character, conduct, education and potential of the child as well as the nature and facilities of the community".[31]

Rae J. also referred to the decisions of British Columbia courts in *Rex* v. *Benson and Stevenson*[32] and *Regina* v. *Dolbec*[33] where the hearsay evidence of probation officer's pre-sentence reports was successfully attacked. Of course, these cases were both adult cases and stricter evidentiary rules usually apply in such cases. A more informal procedure has been customary in the juvenile court. If, however, a juvenile case is likely to be waived to the adult court, then the courts should insist that the juvenile's rights are given full protection or the doubtful case should always result in the juvenile case being left in the non-criminal court.

The procedure adopted by the juvenile court judge in *Regina* v. *R.*[34] has all the ingredients found in the landmark decisions of the United States Supreme Court in *Kent*[35] and *Gault*.[36] Although the United States court did not go so far as to say that all elements of "due process" (as described in the United States constitution) should be applied to juvenile court proceedings that court did suspect, however, that the juvenile was receiving the worst, instead of the best, of the two worlds of criminal justice and social welfare which are joined in the juvenile court. Fortas J. stated that this denial of justice had to be stopped. The juvenile court judge in *Regina* v. *R.* had acted with little regard for the rights of the juvenile in that case and the greatest of the procedural sins committed was not the dual roles of juvenile court judge and adult court magistrate played by this member of the judiciary. The evidence presented in open court was minimal and the rights of the juvenile were flagrantly disregarded. The erroneous flavour of the case is that the onus of proof is upon the juvenile to show that the

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[27] *Ibid.*
[28] *Supra*, footnote 1.
[29] *Ibid.*, at p. 609.
[30] *Ibid.*, at p. 601.
[31] *Ibid.*, at p. 609.
[32] (1951), 3 W.W.R. (N.S.), 29 (B.C.C.A.).
[33] [1963] 2 C.C.C. 87 (B.C.C.A.).
[34] *Supra*, footnote 3.
[35] *Kent* v. *United States* (1966), 383 U.S. 541 (U.S. Sup. Ct).
[36] *Re the Application of Gault* (1967), 384 U.S. 997 (U.S. Sup. Ct).

case should not be waived. This is surely contrary to the philosophy of the Juvenile Delinquents Act and the need for the juvenile court to act in "the best interests of the child". The need for some semblance of due process in the juvenile court does not mean of course that sociological data should not be taken into account but these factors must be produced in open court (subject to problems of professional privilege) and must be scrutinised by the juvenile and his counsel. These protections cannot be limited to the waiver cases. A decision to send a child to a training school (or perhaps even label him a juvenile delinquent) must be given proper judicial consideration.

What is "proper judicial consideration"? In this regard, perhaps, *Regina* v. *R.* contains a hidden agenda. In *Regina* v. *R.*, Rae J. specifically states[37] that he is not concerned with the merits of the waiver decision. The learned judge makes some broad statements, however, which could have a very wide application. Although there are one or two oblique disclaimers by the judge that he is not making broad policy statements about the juvenile court, this case may have a future potential for changing the operation of juvenile courts in all their cases, not just those where an allegation of juvenile delinquency is transformed into an indictment of heinous crime.

When Rae J. discusses the behaviour of the juvenile court judge in *Regina* v. *R.*, he reminds us that the remarks of McFarlane J.A. in *Regina* v. *Arbuckle* are to be read while remembering that the case was one of waiver. Rae J. goes on, however, to discuss the important decision of the House of Lords in *Official Solicitor to Supreme Court* v. *K.*[38] and the meaning of "being administrative and ministerial". That case concerned the care and custody of wards of the court of chancery which operates on a basis of *parens patriae* which is also the supposed rationale of the juvenile court. This concept is best summarized in the phrase "the best interests of the child".

In this connexion, the remarks of Lord Devlin are cited:

> Save in so far as their powers are limited by statute, all judges do as they think fit. But what "they think fit" is not determined by their collective wisdom and embodied in judge-made rules. In the field of procedure these rules are those which Upjohn, L.J. in the Court of Appeal rightly called "the ordinary principles of a judicial inquiry". They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice.[39]

[37] *Supra*, footnote 3, at p. 304.
[38] [1965] A.C. 201, [1963] 3 All E.R. 191 (H.L.). [39] *Ibid.*, at p. 237.

Similarly, Lord Hodson had said in the *K* case that "it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticizing or controverting because he or she does not know what they are . . .".[40]

Both the House of Lords in the *K* case and Rae J. in *Regina* v. *R.* make it clear that the administration of the *parens patriae* jurisdiction does not preclude deciding the issue on judicial principles. Rae J. put it in these terms:

> Because the jurisdiction in the juvenile court is administrative and, in a measure, perhaps parental, does not, in my view, warrant the judge of the court acting on information and knowledge in the manner in which it was done here. The practice in question cannot pass the test of necessity, only the test of convenience or expediency.[41]

Perhaps the importance of *Regina* v. *R.* is that future waiver decisions of the juvenile court will be arrived at with much more circumspection. Despite Rae J.'s disclaimers, perhaps His Lordship's decision is of prime importance because it is putting juvenile court judges on notice that, in future, the juvenile's rights must be more stringently protected, particularly before the juvenile is thrown to the retributive wolves of the adult courts. Furthermore, the decision in *Regina* v. *R.* has the flavour of a case which is demanding minimal elements of a fair trial for all juvenile cases.

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[40] *Ibid.*, at p. 234.

[41] *Supra*, footnote 3, at p. 300.

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