COMMENTS

COMMENTAIRES

PARTITION—WEIGHING OF RELATIVE HARDSHIP—INTERRELATIONSHIP OF THE PARTITION ACT AND THE MARRIED WOMEN'S PROPERTY ACT.—Much attention has been directed in recent years to the right of a wife to share in the ownership of the matrimonial home, title to which is in the name of the husband. But correspondingly little has been paid to her right to remain in occupation of the jointly owned home if the husband seeks an order for partition or sale. More precisely, does a wife have a right to remain living there, if eviction would cause her inconvenience or hardship? Or, to put the question in a different and more general form, does a court have discretion to refuse one co-tenant an order for partition and sale solely on the ground of the inconvenience or hardship that would be caused to the occupying co-tenant?

When, as is most often the case, the co-owned property is the matrimonial home and the co-tenants are husband and wife, the claim to continued possession derives both from the marital relationship and from the proprietary title. This suggests the possible application of two different Acts: The Married Women's Property Act[1] and The Partition Act,[2] and the solution of Ontario courts has been to apply both Acts.[3] Accordingly, the judge has

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[1] R.S.O., 1970, c. 262, s. 12(1) of which provides: "In any question between husband and wife as to the title or possession of property, either party . . . may apply in a summary way to a judge . . . and the judge may make such order as he thinks fit. . . ."

[2] R.S.O., 1970, c. 338, s. 2 of which reads in part as follows: "All joint tenants, tenants in common . . . may be compelled to make or suffer partition or sale. . . ."

[3] *Re Jollow & Jollow*, [1954] O.W.N. 800, [1954] O.R. 895 (C.A.); *Re Rush & Rush* (1960), 24 D.L.R. (2d) 248 (Ont. C.A.). These cases held that an application by one spouse under The Partition Act for partition and sale of the matrimonial home occupied by a deserted spouse has to be postponed until the court has considered the application under The Married Women's Property Act, because a deserted wife has a right

at his disposition a fairly wide discretion under The Married Women's Property Act and may permit the wife—at least if she is deserted—to continue to live in the matrimonial home if forcing her to leave would cause her inconvenience or hardship.

When, however, the parties are not husband and wife, as in the case of a recent divorce, the judge may resort only to The Partition Act. That an application under this Act is discretionary has been decided in Ontario since 1950.[4] Most often, however, the courts have exercised their discretion in a very limited manner, holding that there is a *prima facie* right to partition which will be enforced, unless the applicant is acting vexatiously or oppressively, or does not come to court with clean hands.[5] Where inconvenience

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to remain in the matrimonial home (be it jointly owned or not) unless and until an order is made against her under s. 12 of that Act. See also, for example, *Re Cates & Cates*, [1968] 2 O.R. 447 (C.A.); *Re Hearty & Hearty* (1970), 10 D.L.R. (3d) 732 (Ont. H.C.); *Re Perkins & Perkins*, [1973] 1 O.R. 598, 9 R.F.L. 349, 31 D.L.R. (3d) 694 (H.C.); *Re Maskewycz & Maskewycz* (1973), 2 O.R. (2d) 713, 44 D.L.R. (3d) 180 (C.A.). Some cases are considered under both Acts, although both have not been specifically pleaded: *Neeson* v. *Neeson* (1971), 5 R.F.L. 348 (Ont. H.C.); *Green* v. *Green* (1971), 5 R.F.L. 361 (Ont. H.C.); *Lindenblatt* v. *Lindenblatt* (1974), 48 D.L.R. (3d) 494 (Ont. H.C.). Resort to both Acts seems necessary because the remedies under each vary. On the one hand, there is doubt whether an order for partition and sale can be made under The Married Women's Property Act alone. *Re Maskewycz*, *ibid.*, at p. 206 (D.L.R.). On the other hand, under The Partition Act alone, the court is limited to granting or refusing the application and may not order a sale on terms. *Re Jollow & Jollow*, *ibid.*; *Re Hearty & Hearty*, *ibid.* However, as Arnup J.A. confessed in *Re Maskewycz*, *ibid.*, at p. 198: "Their [the two Acts'] interrelationship is far from clear to me, despite the fact that I have read everything I could find on the subject." For a detailed discussion of this question, see M. C. Cullity, Property Rights During the Subsistence of Marriage, in Studies in Canadian Family Law, Vol. I (1972), pp. 229-242.

[4] *Re Hutcheson and Hutcheson*, [1950] O.R. 265, [1950] 2 D.L.R. 751. At about the same time, similar decisions were reached by the Courts of Appeal of British Columbia: *Evans v. Evans (No. 2)*, 1 W.W.R. (N.S.) 280, [1951] 2 D.L.R. 221, and Manitoba: *Fritz* v. *Fritz (No. 2)* (1952), 60 Man. R. 28, 4 W.W.R. (N.S.) 650. See Partition Act, R.S.B.C., 1960, c. 276 and The Law of Property Act, R.S.M., 1970, c. L-90. Partition is also discretionary in Nova Scotia: Partition Act, R.S.N.S., 1967, c. 223, New Brunswick: Order 56, r. 23, of the Rules of Court, and Prince Edward Island: The Real Property Act, R.S.P.E.I., 1951, c. 138. It is mandatory, as of right, in Alberta, Saskatchewan and Newfoundland, where the Partition Act, 1868 (U.K.), c. 40 applies, as the provinces do not have acts of their own. But see *Re Kornacki & Kornacki* (1975), 58 D.L.R. (3d) 159 (Alta S.C. App. Div.) holding, without citing authority, that the judge does have discretion.

[5] Following the lead of Ferguson J. in *Szuba* v. *Szuba*, [1950] O.W.N. 669, [1951] 1 D.L.R. 387 (H.C.). See *Watts* v. *Watts*, 4 W.W.R. (N.S.)

or hardship will result, the courts have sometimes been able to place their refusal within the generally accepted parameters of discretion, by holding that the resultant hardship was intended by the applicant, who was therefore acting maliciously, vexatiously or oppressively.[6]

Occasionally, however, the facts do not permit of such an interpretation, and the question of whether partition can be refused solely because of inconvenience or hardship is squarely before the court. In this event, Ontario courts have, until recently at least, felt bound by the decision of the Court of Appeal in *Davis* v. *Davis*,[7] and have held that resulting inconvenience or hardship

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566, [1952] 1 D.L.R. 652 (B.C.S.C.); *Brown* v. *Brown*, [1953] 1 D.L.R. 158 (Ont. H.C.); *Davis* v. *Davis*, [1954] O.R. 23, [1954] 1 D.L.R. 827 (C.A.); *Klemkowich* v. *Klemkowich* (1954), 63 Man. R. 28, 14 W.W.R. 418 (Q.B.); *Rayner* v. *Rayner* (1956), 3. D.L.R. (2d) 522 (B.C.S.C.); *Lothrop* v. *Kline* (1957), 21 W.W.R. 333 (B.C.S.C.); *Steele* v. *Steele* (1960), 67 Man. R. 270 (Q.B.); *McGeer* v. *Green & Westminster Mtge Corp. Ltd* (1960), 22 D.L.R. (2d) 775 (B.C.S.C.); *Roblin* v. *Roblin*, [1960] O.R. 157 (H.C.); *Alexander* v. *Alexander & Caterline Cookies Ltd* (1962), 33 D.L.R. (2d) 603 (B.C.S.C.); *Shwabiuk* v. *Shwabiuk* (1965), 51 W.W.R. 549, 51 D.L.R. (2d) 361 (Man. Q.B.); *Fetterley* v. *Fetterley* (1965), 54 W.W.R. 218 (Man. Q.B.); *Bergen* v. *Bergen* (1969), 68 W.W.R. 196 (B.C.S.C.); *Korolew* v. *Korolew* (1972), 7 R.F.L. 162 (B.C.S.C.); *Klakow* v. *Klakow* (1972), 7 R.F.L. 349 (Ont. S.C., in Chambers); *Czarnich* v. *Zagora* (1972), 8 R.F.L. 259 (Ont. S.C., in Chambers); *Re Perkins & Perkins, supra,* footnote 3; *Kaplan* v. *Kaplan* (1974), 15 R.F.L. 239 (B.C.S.C.); *Fenik* v. *Fenik* (1974), 16 R.F.L. 14 (Ont. S.C.).

[6] See especially *Rayner* v. *Rayner, ibid.*, where the court refused the husband's application to partition a summer cottage, in which financial difficulties had forced the wife to reside in order to rent their former home, after her husband had persuaded her to sell her interest in their jointly-run floral business to her assistant so they could retire together, then left his wife to work with the former assistant, building the floral business with her into one of the most prosperous in Vancouver; *Steele* v. *Steele, ibid.*, *Klakow* v. *Klakow, ibid.*, where the court refused the wife's application to partition the home in which her blind and unemployable husband continued to live after she had deserted him for another man; *Czarnich* v. *Zagora, ibid.*, where the former wife did not exercise her right to apply for partition for nine years, until the husband's employment was becoming uncertain and his health had declined.

[7] *Supra,* footnote 5. Speaking for the court, Laidlaw J.A. said, at pp. 831-832 (D.L.R.): "On the other hand it appears to one that an order compelling the respondent to partition or sell the lands would occasion only inconvenience and difficulty to him in carrying out his legal obligation to maintain the children entrusted by the Court to his custody. That is not sufficient reason to deprive the appellant of her *prima facie* right."

is not a proper ground for refusing an order for partition and sale.[8] The recent Ontario High Court decision in *Re Yale & MacMaster*[9] represents an imaginative attempt to reverse this line of authority.

On February 23rd, 1973, Mr. Yale, the trustee in bankruptcy of Mr. MacMaster, launched an application under The Partition Act for an order for partition and sale of the matrimonial home, jointly owned by the bankrupt and his former wife.[10] The application was opposed by Mrs. MacMaster who, together with their three children, aged eight, seven and six years, had continued to live in the matrimonial home since the spouses' separation in October, 1967.

Mrs. MacMaster opposed the application on two separate grounds: firstly, it would create a very serious degree of hardship for herself and the three children; and secondly, her continued occupation of the matrimonial home was pursuant to a

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[8] Similar statements, rejecting hardship and convenience as a ground, can be found in *Brown* v. *Brown, supra,* footnote 5. *Quaere* whether in this case, which was decided before *Davis* v. *Davis,* LeBel J. would have been prepared to find in favour of the respondent had she been able to show hardship and not merely inconvenience. *McGeer* v. *Green & Westminister Mtge Corp. Ltd, supra,* footnote 5; *Re Roblin & Roblin, supra,* footnote 5, where, at p. 602 (O.R.), Pennel J. made the apparently more flexible statement that personal inconvenience and hardship were not "necessarily" sufficient; *Kaplan* v. *Kaplan, supra,* footnote 5. Recently, the B.C. courts seem to be moving to a position of refusing an order for partition if the defendant can show "economic oppression" (something more than mere hardship) "in a purely objective sense" (that is, without this hardship being intended by the applicant, as in the cases mentioned *supra,* footnote 6). See *Meadows* v. *Meadows* (1974), 17 R.F.L. 36 (B.C.S.C.); *Reitsma* v. *Reitsma,* [1974] 3 W.W.R. 281 (B.C.S.C.).

[9] (1974), 46 D.L.R. (3d) 167, 18 C.B.R. (N.S.) 225 (Ont. H.C., per Galligan J.). I have been able to find only two other cases in which an application under a Partition Act was refused clearly on the sole ground of the balance of convenience. The first is the earlier British Columbia case of *Cleathero* v. *Cleathero* (1955), 14 W.W.R. 473 (B.C.S.C.), in which Whittaker J. dismissed the application because an order for sale would mean that the wife would be deprived of means of supporting herself, which she did by raising birds on the property, which was unique and especially suited for the purpose. The second is a recent Ontario case (hence more interesting), *McFadden* v. *McFadden* (1972), 5 R.F.L. 299 (Ont. Co. Ct), where Costello J., without citing any cases (except *Re Hutcheson & Hutcheson, supra,* footnote 4, as authority for the proposition that partition is discretionary) decided that the needs of the children and the father for a stable home life was to be preferred to the financial need of the former wife.

[10] They were divorced by decree *nisi* dated January 24th, 1972, which was made absolute on June 6th, 1972. Mr. MacMaster filed an assignment in bankruptcy on March 15th, 1972.

verbal agreement entered into at the time of their separation. Galligan J. found for the wife on both grounds,[11] but directed himself principally to the problem of inconvenience and hardship.

He clearly felt that *if* resulting inconvenience and hardship were a proper ground for exercising his discretion to refuse an order under the Act, the facts of the case called for such a refusal. "I think in this case, if an order for partition and sale is made, it would amount to more than hardship to this family. It would be a disaster."[12] The infant children, already fatherless, would have lost the security of the only home and school environment they had really known. Mrs. MacMaster had found part-time employment in the area in order to supplement her only other source of income, a mother's allowance; she had also been taking courses at a local high school to qualify for an eventual nursing programme. As well, in view of the serious shortage and high cost of housing in the Toronto area, she would not have been able to procure suitable alternate accommodation with her share of the sale price if the home were sold. Finally, there was no real possibility that her former husband, now bankrupt, could have increased his maintenance payments; indeed, he was already in arrears to the extent of $3,000.00. On the other hand, because property values were likely to continue to increase, the creditors would have suffered no real hardship if their rights were postponed until such time as the children were old enough to move and Mrs. MacMaster self-supporting. In short, stated Mr. Justice Galligan:[13]

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[11] He found that the oral agreement raised an estoppel in favour of the wife who, relying upon it, had acted to her serious prejudice in not seeking relief available at the time the decree *nisi* was granted. It was a valid agreement which, although unenforceable because it involved an interest in land and was therefore governed by the Statute of Frauds, R.S.O., 1970, c. 444, was available as a defence, not only in an action by Mr. MacMaster but also in one by the trustee, who stood in the shoes of the bankrupt. At p. 184, (D.L.R.) *supra*, footnote 9: "And, in addition (or it may be expressing the same concept in a different way), whatever may be the restrictions upon the exercise of the discretion conferred upon the Court by the Partition Act, that discretion is broad enough to entitle a Court to refuse relief to someone who has agreed not to seek it." To discourage any tendency to regard his decision on the separation agreement as the *ratio* of the case, dismissing his conclusions concerning hardship as dicta, he said, *ibid.*, at p. 185 (D.L.R.): "While I have dismissed it on two grounds, I feel it proper to indicate that I would have dismissed the application on either one of them."

[12] *Ibid.*, at p. 172 (D.L.R.).

[13] *Ibid.*, at p. 173 (D.L.R.).

> When I compare the virtual disaster which would befall Mrs. MacMaster and her children if the order sought is made at this time, with the relative lack of prejudice that a delay in the realization of the asset would work upon the creditors, I would have no hesitation in saying that it would be just and fair for me to refuse to exercise my discretion in favour of the applicant at this time. The issue is whether or not my discretion is broad enough to refuse the application or whether that discretion is so limited that I am bound to grant the relief claimed.

His evident hesitation was caused by the *Davis* case.[14] However, a close examination of several recent appellate decisions[15] in Ontario convinced him that the Court of Appeal had overruled its earlier decision, so that it was no longer binding authority upon him. In interpreting these three cases—in which, as the parties were husband and wife, the applications had been brought under The Married Women's Property Act as well as under The Partition Act—the main hurdle facing Mr. Justice Galligan was to show that the Court of Appeal now regards the weighing of relative hardship as a discretion properly exercised under The Partition Act rather than under The Married Women's Property Act. To do so, he looked principally at *Re Maskewycz*.[16]

In this case, the specific holding of the Court of Appeal was that in an application for partition and sale of the matrimonial home involving as parties the husband and wife, where the issue of desertion is raised, an order under The Partition Act may not be made unless and until the court has decided upon the matters appropriate for consideration under section 12 of The Married Women's Property Act. As Galligan J. interpreted *Re Maskewycz*, only the question of desertion is appropriate for such consideration. Essentially, he reasoned that if a spouse is deserted, he or she has a legal right to remain in the matrimonial home, in which event the deserting spouse would not have a *prima facie* right to partition. But if there is no desertion, so that the applicant has a *prima facie* right, the court must consider relative hardship in deciding whether or not to grant the order to which the *prima facie* right has been established. "This consideration would then be an

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[14] *Supra*, footnote 5.

[15] *Cmajdalka* v. *Cmajdalka* (1973), 11 R.F.L. 302 (Ont. C.A.); *Re MacDonald & MacDonald*, unreported both at the Divisional Court and Court of Appeal levels (see pp. 174-176, 180-181 (D.L.R.) of Galligan J.'s judgment, *supra*, footnote 9); and *Re Maskewycz & Maskewycz*, *supra*, footnote 3.

[16] *Ibid.* This case will probably be cited most often as authority for the proposition that a deserted wife's right to occupation of the matrimonial home still exists in Ontario, in spite of *National Provincial Bank Ltd* v. *Ainsworth*, [1965] A.C. 1175, [1965] 2 All E.R. 472 (H.L.), and that a deserted husband has similar rights.

appropriate one for the Court in deciding how it ought to exercise its discretion under the Partition Act, not in deciding whether there is a right to the order."[17]

That a judge may properly weigh relative hardship when exercising his discretion under The Partition Act is a proposition with which this writer is in total agreement. It is rather with the suggestion that this proposition represents the present state of the law in Ontario that one must take issue.

Firstly, Galligan J.'s analysis suggests that a deserted spouse has a right to remain *permanently* in occupation of the matrimonial home, whereas the traditional approach is that he or she may remain there *only* until the court decides otherwise in an application under section 12 of The Married Women's Property Act.[18]

Secondly, it does not seem to us that *Re Maskewycz* supports his interpretation.[19] As noted above, the specific question before the court in that case was a fairly narrow one: "On an application launched by a wife under the Partition Act for the partition and sale of a matrimonial home held jointly by a husband and wife, may the order be made notwithstanding the fact that the husband proves he has been deserted by his wife?"[20] And the answer of the court was equally precise: "No, unless and until the court has decided upon the matters appropriate for consideration under s. 12 of the Married Women's Property Act".[21] In other words, the question which the court answered *presupposed* a finding of desertion; therefore, in saying that the court had to decide upon the matters appropriate under section 12, the Court of Appeal clearly must have had in mind matters *other than* desertion. These matters can only be those mentioned in the preceding

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[17] *Supra*, footnote 9, at p. 180 (D.L.R.). Interestingly enough, this is exactly the approach taken by Galligan J. himself in *Neeson v. Neeson* and *Green* v. *Green*, *supra*, footnote 3.

[18] See, for example, *Re Jollow* and *Re Rush*, *supra*, footnote 3.

[19] All the more so because in *Re Maskewycz* itself, Arnup J.A. was very careful to distinguish and not to overrule the *Davis* case, when he said, *supra*, footnote 3, at pp. 198-199 (D.L.R.): "*Davis* v. *Davis*... ought not to be applied to cases where the property in question is the matrimonial home, jointly owned by a husband and wife, where the issue of desertion is raised. The phrase 'matrimonial home' does not appear anywhere in the judgment in that case. Nor does the word 'desertion'. The *Davis* case and *Re Jollow & Jollow*... can only be reconciled if this principle is recognized." See also *Fenik* v. *Fenik*, *supra*, footnote 5, at p. 24, *per* Henry J.

[20] *Ibid.*, at p. 183 (D.L.R.).

[21] *Ibid.*, at p. 207 (D.L.R.).

paragraph of the judgment: "... including (but not limited to) the financial position of the spouses, whether there are children and who has custody of them, the existence or otherwise of other proceedings between the spouses, and the competing needs of the wife to realize upon her interest, and of the husband to find a place to live."[22] In other words, it is the relative balance of convenience that the court must weigh under The Married Women's Property Act.

Thirdly, it does not seem correct to suggest that the court's discretion under The Married Women's Property Act is "quite a limited one"[23] (so that, presumably, it is not wide enough to permit a weighing of relative convenience) and to support this with cases dealing with title to, and not enjoyment of, property.[24] While Canadian judicial authority would restrict a court's power to award *title* to property under The Married Women's Property Act, surely it would not limit its discretion over the *enjoyment* of that property.

We can agree with Mr. Justice Galligan that, as the law of Ontario presently stands, *one* of the factors a court must consider under the Married Women's Property Act is desertion. But whereas Galligan J. would have the court stop there, it seems clear from the general line of Ontario cases[25]—within which we would place *Re Maskewycz*—that the court's discretion under The Married Women's Property Act is much wider. While it cannot award property rights where none exist, it can postpone the exercise of existing rights (be it the rights of a sole owner or of a co-tenant) where their immediate application would be unfair—that is, where it would constitute a hardship—to the occupying spouse. It is only when the court has decided that no hardship would result that it has recourse to The Partition Act for the remedy.

Traditionally, therefore—leaving aside the *MacMaster* case —Ontario courts have unduly compartmentalized applications for partition of co-owned property into three groups: those between strangers, those between husband and wife where there is no desertion, and those between husband and wife where there is

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[22] *Ibid.*

[23] *Re Yale & MacMaster, supra,* footnote 9, at p. 178 (D.L.R.).

[24] *Carnochan* v. *Carnochan,* [1955] S.C.R. 669, [1955] 4 D.L.R. 81; *Thompson* v. *Thompson,* [1961] S.C.R. 3, 26 D.L.R. (2d) 1; *Murdoch* v. *Murdoch,* 41 D.L.R. (3d) 367, [1974] 1 W.W.R. 361 (S.C.C.).

[25] See especially Cullity, *op. cit.,* footnote 3. Recent examples are *Lindenblatt* v. *Lindenblatt, supra,* footnote 3; *Verzin* v. *Verzin* (1974), 16 R.F.L. 94 (Ont. S.C., in Chambers).

desertion. The first group is governed by The Partition Act alone and therefore the *Davis* case applies; hence, the court is not entitled to weigh relative hardship. The second is governed by both The Partition Act and The Married Women's Property Act; but because the occupying spouse is not deserted, she or he does not have a right to remain in possession until the court makes an order under section 12 of The Married Women's Property Act. The court thus turns immediately to The Partition Act, under which, as with the first group, the *Davis* case rules out a consideration of relative hardship. As discussed above, it is only with the third class of cases that relative hardship is weighed, and then only when the court is considering making an order under section 12 of The Married Women's Property Act to end the deserted spouse's right to occupation of the matrimonial home.

In *Re Maskewycz,* Arnup J.A. questioned the basic division between deserted and non-deserted spouses,[26] and suggested that it could be strongly argued "that the Partition Act ought not to be applied to *any* case of property jointly owned by the husband and wife but rather resort should be had to the provisions of s. 12 of the Married Women's Property Act".[27] We would question, rather, the even more basic difference in treatment between applications involving strangers and those involving husband and wife, which difference, in our view, ought to be eliminated. More often than not, strangers are strangers in name alone: being former spouses now divorced[28] or, as in the *MacMaster* case, the trustee in bankruptcy—or some other such successor in title—of one of the spouses or former spouses. However, it seems to us that the same basic policy considerations remain: the right to occupation of the matrimonial home, the duty to support, and the well-being of the family unit. Surely, therefore, the courts should have the same wide discretion in each situation. This could be accomplished in one of two ways. Either the court's discretion under The Partition Act could be widened so as to be the same as that under The Married Women's Property Act—which would permit it to weigh relative hardship. Or *all* applications for partition—whether between husband and wife, or not—could be brought under The Partition Act alone,[29] with the court exercising a wide discretion entitling it to weigh relative hardship.

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[26] *Supra,* footnote 3, at p. 206 (D.L.R.).

[27] *Ibid.,* at p. 199 (D.L.R.).

[28] As, for example, in *Czarnich* v. *Zagora, supra,* footnote 5, or *McFadden* v. *McFadden, supra,* footnote 9.

[29] As is the procedure followed in B.C.

The first solution, which is the one attempted by Galligan J. in *Re Yale & MacMaster,* would require a reversal of *Davis* v. *Davis*; the second, which we think procedurally simpler, would entail an overturning of both *Re Jollow & Jollow*[30] and *Davis* v. *Davis.*

Arnup J.A. feels that legislation would be required to effectuate any change.[31] We disagree. The procedural problems, judicially created, can be judicially resolved. In *Re Yale & MacMaster*, Galligan J. made an imaginative attempt to do so, within the limits of his position as lower court judge. But it clearly rests with the Court of Appeal to resolve the problems definitively. From this point of view, it is regrettable that *Re Yale & MacMaster* was not pursued on appeal.[32]

JANE MATTHEWS GLENN*

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PARTNERSHIP—DISSOLUTION—UNDISTRIBUTED ASSETS—FIDUCIARY DUTY OF GOOD FAITH.—The recent case of *Thompson's Trustee in Bankruptcy* v. *Heaton*[1] presented a novel set of facts for the application of the fiduciary doctrine. The parties had formed a partnership to carry on the business of farming two properties one of which was held by the partners under a tenancy and occupied and worked by the defendant. The partnership was dissolved by mutual consent in 1952 but in the absence of any disposition of the leasehold, the defendant, with the plaintiff's concurrence, continued to occupy the leased land for a decade and a half. When the defendant[2] purchased the reversion and subsequently sold the

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[30] *Supra,* footnote 3.

[31] *Supra,* footnote 3, at p. 206 (D.L.R.). The Ontario Law Reform Commission also seems to favour legislation to effect similar changes. See its Report on Family Law, Part IV: Family Property Law (1974), p. 203, Recommendations 116 and 117.

[32] From this point of view, it is interesting that the *MacMaster* case has recently been applied with approval by an appeal court in *Melvin* v. *Melvin* (1975), 58 D.L.R. (3d) 98 (N.B.S.C. App. Div.).

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[1] [1974] 1 All E.R. 1239 (Ch.D.).

[2] For simplicity's sake the original parties to the partnership will be designated here as plaintiff and defendant. Actually the original plaintiff had been succeeded by his trustee in bankruptcy. The other partner had incorporated himself in 1961 and died in 1966.

farm at a substantial gain, the plaintiff successfully sued for a declaration that he was entitled to share in the profit. Pennycuick V.C. was satisfied that the leasehold had remained as an undistributed asset of the dissolved partnership and that the defendant therefore occupied a fiduciary position from which he could not profit.[3]

One possible line of analysis would have been to postulate that the opportunity of securing the reversion was one of the incidents of the leasehold and that this incident was as much the property of the partnership as the leasehold itself. However, this approach, by which an opportunity is designated as property and then protected as such, is itself merely the restatement of a conclusion which avoids confronting the question of why an expectancy should be assimilated to more tangible forms of property.[4] Pennycuick V.C. preferred to base his judgment not on the existence of trust property, but on the fiduciary's duty of good faith.[5]

But the fiduciary obligation should itself be applied with a sensitivity to the interplay between the purposes it serves and the nuances of the particular fact situation. At its narrowest, it controls the discretion of a person who by advice or negotiation can affect his principal's position within a sphere of activity delegated to him by that principal. It was this aspect to which King L.C. adverted in the seminal case of *Keech* v. *Sandford*[6] when he expressed his fear that "if a trustee, on the refusal to renew might have a lease to himself, few trust estates would be renewed to *cestui que* use", and for which subsequent cases have constructed the prohibition of conflicts between duty and interest. More broadly, the fiduciary obligation is the vehicle through which the law strikes an uneasy balance between the encouragement of incentive and the protection of the integrity of a particular enterprise, especially against temp-

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[3] Citing *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61, *Phillips* v. *Phillips* (1885), 29 Ch. D. 673, *Protheroe* v. *Protheroe*, [1968] 1 All E.R. 1111 (C.A.). For discussion of the preclusion of a fiduciary who is holding a lease from acquiring a renewal or reversion for himself, see Walter G. Hart, Development of the Rule in *Keech* v. *Sandford* (1905), 21 L.Q. Rev. 258, Stephen Cretney, The Rationale of Keech v. Sandford (1969), 33 Conveyancer and Property Lawyer 161, and the notes on *Protheroe* v. *Protheroe*, *ibid.*, in (1968), 84 L.Q. Rev. 309 (Lindsay Megarry) and (1968), 31 Mod. L. Rev. 707 (Paul Jackson).

[4] *Cf.* Felix Cohen, Transcendental Nonsense and the Functional Approach (1935), 35 Col. L. Rev. 809, at p. 814.

[5] *Supra*, footnote 1, at pp. 1249e, 1250a.

[6] *Supra*, footnote 3.

tations of self-interested behaviour by those who occupy strategic positions in the operation of that enterprise. In such a context a court might appropriately speak of the impossibility of profiting from a fiduciary position.[7] The decision in the instant case seems to serve neither the narrow nor the broad purpose. Even if prospective dealings in the reversion could be considered to have been within the scope of the discretion originally delegated to the defendant partner the delegation could not survive the cessation of the partnership. And if the court was solicitous for the firm's integrity, this solicitude was misplaced in view of the fact that the partnership had not been carrying on business for fifteen years.

In the present circumstances of a partnership dissolved but with one of its assets undistributed Pennycuick V.C. applied in its full rigour a doctrine appropriate to subsisting partnerships. But the scope of the fiduciary obligation should be narrower in the former situation than in the latter. For if the partnership exists, the fiduciary obligation is the tool for controlling the partner's discretion and preventing the undermining of the relationship especially through the diversion of potential profit, whereas if the partnership is no longer carrying on business the law's sole interest is in the equitable division of the existing assets. Previous cases had compelled an accounting where the undistributed assets of a defunct partnership were used by one of the partners in the very line of business for which the partnership had been formed.[8] This seems to be a sensible place to draw the line since one partner would be unjustly enriched if he were allowed to monopolize the profits generated by using an asset in accordance with an arrangement excogitated by all members of the enterprise. Even in such cases the courts are prepared to recognize the pre-eminent contribution of the exploiting party by invoking the doctrine of laches to prevent one former partner from belatedly claiming the profits of an extraordinarily speculative venture which has been brought to fruition by the labours of another.[9] In the instant case, where the profit was produced by the acumen of the defendant in a manner

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[7] For the importance of distinguishing between the broad and narrow concepts, see my article on The Fiduciary Obligation (1975), 25 U. of T. L.J.1. The distinction is most clearly brought out by contrasting *McLeod and More* v. *Sweezey*, [1944] 2 D.L.R. 145 (S.C.C.) and *Pre-Cam Exploration and Development Ltd* v. *McTavish* (1966), 57 D.L.R. (2d) 555 (S.C.C.) or by contrasting the majority and dissenting opinions in the classic American case *Meinhard* v. *Salmon* (1928), 164 N.E. 545 (N.Y.C.A.).

[8] *Crawshay* v. *Collins* (1826), 2 Russ. 325, 38 E.R. 358 (Ch.); *Nerot* v. *Burnand* (1827), 4 Russ. 247, 38 E.R. 798 (Ch.).

[9] *Clements* v. *Hall* (1858), 2 De G. & J. 173, 44 E.R. 954 (C.A. Ch.).

not contemplated by the long-defunct partnership arrangement, it seems harsh to allow the plaintiff to share in the gain.[10]

There have been many decisions on fiduciaries in the last few years, and some of these have yielded exemplary analyses of the policies pertinent to the respective factual backgrounds.[11] But as the present case indicates, litigation in this area provides its own temptation: to view the broad rule against profiting from the fiduciary position as mechanically applicable for the production of an "inescapable conclusion".[12]

E. J. WEINRIB*

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CONTRACTS—FRUSTRATION—FORCE MAJEURE CLAUSES—NON-AVAILABILITY OF MARKET.—Since at least the eighteenth century men of commerce have complained of the seeming irrelevancy of the law of contract to their day-to-day affairs. In present times it is probably the purchasing and supply managers who most frequently throw up their hands at the apparent mysteries of offer and acceptance, the injustices of the operation of the *iusdem generis* rule and the absolutism of the modes of construction. The purpose of this comment is to bring together some recent decisions on the construction of *force majeure* clauses and to suggest that the application of the rules by the courts reveal that what is the law for the supplier is also the law for the purchaser. That fact alone may go someway toward consoling the complainants since, as every sportsman knows, it really does not matter whether the umpire is subjectively right or wrong so long as he makes an objective decision.

The distance between the rules of law and the customs of the market-place stems not only from the unwillingness of the courts to interfere with the bargains struck by professionals but also from the assumptions accepted by the law as to their capabilities.

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[10] If the partner's exploitation of the opportunity had been closely attendant upon the dissolution, imposition of the fiduciary remedies would have been more justifiable; *cf. Canadian Aero Service Ltd* v. *O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.).

[11] *Holder* v. *Holder*, [1968] 1 Ch. 353 (C.A.); *Jones* v. *Canavan*, [1972] 2 N.S.W.L.R. (C.A.); *Canadian Aero Ltd* v. *O'Malley*, *ibid.*

[12] *Supra*, footnote 1, at p. 1250a.

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That is, judges show habitual suspicion[1] of claims for relief and are not readily inclined to release parties from bad deals no matter how severe the consequences. Similarly, the law assumes that all businessmen are equal, that all purchasers and suppliers are cognisant of all of the customs of their trade and of the applicable law, and that all can foretell the future.[2] The resultant of the principles of non-intervention coupled with these presumptions of total equality, omnicompetence and omniscience is the long established "battle of the forms". In that contest both sides seek to protect their competing interests by means of express, and sometimes exhaustive, clauses supplemented by well-directed attacks on the contractual defences raised by the opponent. It is therefore of interest to note that several recent decisions of provincial courts[3] along with a unanimous judgment of the Supreme Court of Canada[4] have underlined the certainty of the contractual rules and reaffirmed the impartiality of their application in purchaser-supplier disputes.

Both purchasers and suppliers have historically sought to protect themselves against the consequences of their particular deal going sour, whether by God-given or man-made forces, by protective clauses incorporating the phrase *force majeure.*

The term *force majeure* itself derives from the law merchant and its twentieth century history still reveals occasional unease of the English common law courts in dealing with an alien concept.[5] This uneasiness, possibly based on an unawareness of its true origins and meaning, has resulted in restricted interpretations of the phrase and of limitations being placed on the import of the idea.[6] The common lawyers of Canada, despite their reliance on English precedents, cannot claim ignorance of the history of

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[1] *Bunten & Lancaster Ltd* v. *Wilts Quality Products (London) Ltd,* [1951] 2 Ll.R. 30, at p. 32.

[2] See MacNeil, The Many Futures of Contracts (1974), 47 S. Cal. L. Rev. 690, at pp. 726-735.

[3] *Parrish & Heimbecker* v. *Gooding Lumber,* [1968] 1 O.R. 716 (C.A.); *Re Dominion Coal Co.* (1974), 44 D.L.R. (3d) 463 (N.S.S.C.); *Re Baldasaro & MacGregor and the Queen in Right of Ontario* (1975); 4 O.R. (2d) 557 (H.C. Div.); *Canso Chemicals Co.* v. *Can. Westinghouse Co.* (1975), 54 D.L.R. (3d) 517 (N.S.C.A.).

[4] *Atlantic Paper Stock Ltd* v. *St Anne-Nackawic Pulp and Paper Co. Ltd* (1975), 56 D.L.R. (3d) 409 (S.C.C.).

[5] *Matsoukis* v. *Priestman & Co.,* [1915] 1 K.B. 681. For the story of the contribution of the law merchant to the common law generally, see Keeton, English Law: The Judicial Contribution (1974), ch. 9.

[6] *Cf. Lebeaupin* v. *Richard Crispin & Co.,* [1920] 2 K.B. 714, at p. 720.

the idea with a Civil Code close at hand. Article 1072 of the Quebec Civil Code states:[7]

> The debtor is not liable to pay damages when inexecution of the obligation is caused by a fortuitous event, or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract.

The interpretation article reads further:[8]

> A "fortuitous event" is one which is unforeseen, and caused by superior force which is impossible to resist.

The breadth of the concept has been discussed in numerous cases over the years[9] but so far there does not appear to have been much in the way of cross-fertilization between the common and civil law systems. Nevertheless while the theory may differ the purposes of those who invoke the protection of *force majeure* clauses are the same. It is employed to avoid the possibility of a court refusing to imply such a term when the contract becomes impossible to perform or is frustrated in a commercial sense. Thus, it is common place to attempt to exclude liability for the consequences of Acts of God, earthquakes or floods[10] as well as the disruptions of strikes, violence, riot and civil commotion. And many protective clauses are extended to cover changes in major legislation, local by-laws and alterations in the regulations of governmental agencies.[11]

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[7] In France see Code Napoléon, art. 1148.

[8] Art. 17 (24).

[9] *Damontigny* v. *Vincent* (1915), 15 R.P. 408; *Marineau* v. *Cousineau* (1921), 59 C.S. 373; *Wulkan v. Seville*, [1956] C.S. 402; *Canada Trust Co.* v. *Florence Shop Inc.*, [1962] C.S. 66; *Guy St-Pierre Automobile Inc.* v. *Lavalle*, [1964] C.S. 353.

[10] *Dryden Construction Co. Ltd* v. *H.E.P.C.*, [1960] S.C.R. 694 (on appeal from Ont.).

[11] *Holland Amer. Metal Corp.* v. *Goldblatt*, [1953] O.R. 112 (C.A.). The State of Mississippi has attempted to codify the events covered by the term *force majeure*: "Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lock-out, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accidents, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contracts shall otherwise remain unaffected." Miss. U.C.C., s. 75-2-67. See Squillante and Congalton, Force Majeure, [1975] Comm. L.J. 4, at p. 8.

In short, the aim is to off-set the risk of financial loss through some irresistible force which makes performance of the contractual obligations radically different or impossible. In the event of such an occurrence the supplier will wish to avoid performance and to be rendered immune from an action for damages for failure to deliver.[12] The clauses in current use in Canada vary considerably in legal sophistication and efficiency. Some merely attempt to exclude liability for delay caused by *force majeure* or strikes, or both, at the manufacturing plant.[13] Others seek to make the contract subject to delay for strikes, fires and other causes beyond the control of the supplier. This of course achieves no more than it claims—protection against claims for loss suffered by reason of a delay. A more effective and comprehensive clause makes the obligation to supply contingent on the happening of strikes, fires, breakdown of machinery and other causes beyond the supplier's control. The duty to supply therefore becomes conditional on the non-occurrence of such events as are serious enough to create substantial interference with the performance of the agreed duties.

From the supplier's point of view the acme of perfection lies in an exhaustive and detailed clause which expressly covers all possible, not to say foreseeable, eventualities. That used by the former Dominion Coal Company of Nova Scotia is instructive. The clause below appeared in a charter-party for the transport of coal from Cape Breton to Toronto with regard to a contract for the supply of coal to the Hydro Electric Power Commission of Ontario. It offered protection against:

> Acts of God, perils, dangers and accidents of the seas, rivers, canals and other waters, fire from any cause on land or in water, barratry of the Master and crew, acts of enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted even when occasioned by negligence, default or error in judgment of pilot, Master, mariners, or other servants of the shipowner. Riots and strikes, lockout, stoppages of labour and all and every other unavoidable hindrances which may prevent the loading and delivery during the said voyage, and any other similar or dissimilar circumstances beyond the control of a party hereto, always mutually excepted. Ship not answerable for losses through explosion, bursting of boilers, breakage of shaft or any latent defect in the

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[12] *Ziger* v. *Shiffer & Hillman Co.*, [1933] O.R. 407 (C.A.), provides an example of success *without* a protective clause. This is however risky as the courts are not often persuaded by the last ditch plea of frustration, *cf. George Eddy Co.* v. *Corey et al.*, [1951] 4 D.L.R. 90 (N.B.S.C.).

[13] This basic clause will cover a general strike but will not protect against the adverse consequences of threatened strikes or such as adverse weather conditions. More recent clauses attempt to cope with threatened strikes by the phrase "labor unrest".

> machinery or hull not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager. Moreover, the Charterers shall not be responsible or held liable for failure to perform their part of this Agreement if such failure of performance is caused by circumstances beyond their control created by the termination of the contract between the Charterers and the Consignees under which the Charterers agreed to sell and deliver and the Consignees agreed to purchase estimated annual quantities as set forth in this charter-party, the requisition or threat of requisition of the coal by authority, priorities or other action or direction of any government or government authority or agency, including but not limited to the Dominion Coal Board.[14]

Not surprisingly, this was interpreted to protect the company against its failure to perform due to actions of the Government of Canada which took over both the company's supplies of coal and its means of production. Other, less comprehensive clauses, have been found wanting, as the supplier in *Parish & Heimbecker* v. *Gooding Lumber*[15] discovered. The clause,

> If the above is not correct, please wire or phone us immediately; failure to do this is understood as acceptance of these terms. Subject to strikes, embargoes, etc. or other conditions beyond our control.

was construed by the Court of Appeal of Ontario against the supplier. The majority held that it did not protect against non-availability of the product within a locality when supplies were obtainable elsewhere in the province. Mr. Justice Laskin, as he then was, made a plea in his dissenting judgment for a subjective approach to the interpretation of the parties' documents and in particular where there was evidence of mutual assumptions underlying the agreement. He hinted at but did not give authority for his revisionist point of view.

The vulnerability of the less than comprehensive clause lies in the judicial modes of interpretation and the long-established rules of construction of documents. The absolute nature of the rules combined with the attitudes of the judiciary have exposed the careless draftsmanship of the lawyers of many corporations' legal departments. Yet twenty-five years ago the courts warned that the use of generic phrases such as *force majeure* are limited in scope by the list of examples which precede or succeed them.[16]

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[14] *Re Dominion Coal Co., supra*, footnote 3. Barratry comprises any fraudulent conduct on the part of the ship's Master which is contrary to the best interests of the owner of the vessel.

[15] *Supra*, footnote 3.

[16] *In re An Arbitration between The Podar Trading Co. Ltd, Bombay and François & Tagher, Barcelona*, [1949] 2 K.B. 277, at p. 286. The particular clause reads: "Should the seller be able to produce satisfactory

And again, if a phrase such as *force majeure* is to be used as a blanket to protect against non-availability of materials, then the courts will insist on proof of total non-availability. In other words a plea of "more difficult than contemplated" does not fall within the meaning conveyed by the term *force majeure*.[17] Despite the clear intransigency of the courts, when faced with such clauses, it would appear that lawyers, in addition to their clients, have yet to learn that the throw away clause "subject to the usual *force majeure* clause" is fraught with danger.[18]

A recent comment on the relevant United States law[19] suggests a similar pattern despite the provisions of the Uniform Commercial Code. The authors give the following examples and commentary:[20]

> *Variations on Clause Construction*
>
> Variation 1
>
> The promissor may assume absolute liability for non-performance with a contract statement that specifically delineates those factors which will not excuse his performance:
>
> > The seller hereby assumes absolute liability for performance of the above mentioned obligations and may not employ as grounds for excuse of non-performance the following....
>
> With this particular clause the parties may add specific circumstances under which the promissor gives assurance of his performance regardless of the supervening happening that would otherwise render his performance impossible or impracticable.
>
> Variation 2
>
> A second variation other than one for absolute liability might be drafted as follows:
>
> > The seller is excluded from the right to claim excuse for non-performance by any supervening circumstances whatsoever. However, the Uniform Commercial Code §2-613 shall govern the parties' obligations as to delayed delivery.

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evidence that the timely fulfilment of any contract for the purchase or sale of cotton was rendered impossible owing to unforeseen obstruction to traffic, strike, lockout, riot, war, quarantine, or *force majeure*, or should the buyer be unable to take delivery of the cotton owing to such unforeseen contingencies, and should the buyer and seller be unable to come to a mutual agreement, then the arbitrators shall take such facts into consideration in making their award."

[17] *Bunten & Lancaster Ltd* v. *Wilts Quality Products (London) Ltd, supra*, footnote 1.

[18] *British Electrical & Associated Industries (Cardiff) Ltd* v. *Patley Pressing*, [1953] 1 All E.R. 94 (Q.B.D.). But it need not always fail and will in fact be effective where there is evidence of prior dealings between the parties: *cf. British Crane Hire Corporation Ltd* v. *Ipswich Plant Hire Ltd*, [1974] 1 All E.R. 1059 (C.A.).

[19] Squillante and Congalton, *op. cit.*, footnote 11.

[20] *Ibid.*, at p. 9.

Variation 3

The promissor in this particular variation may provide for excuse only in certain stated circumstances. Thus, such a clause can be drafted as follows:

> The seller shall not be liable for failure to deliver any (or all) of the above mentioned goods should the failure to deliver result from (1) strikes, (2) floods, (3) *et cetera.*

Variation 4

Should the parties to the contract wish to avoid the somewhat harsh clauses as set forth in the first three variations, there is a liberal clause which could be drafted as follows:

> The promissor is excused from non-performance of any and all contractual obligations in the event that his performance is hindered by some supervening force not procured by his own hand and not foreseeable at the time of the making of the contract.

The writers' advice to American draftsmen is to beware the *iusdem generis* rule and watch the unconscionability sections of the Uniform Commercial Code.[21] Their Canadian counterparts must heed the first warning but can ignore as yet such ideas as unconscionability, at least in the robust world of commercial affairs.

Up to this point the clauses quoted have favoured suppliers, yet purchasers have proved to be no less resourceful and no less careless in their choice of defensive weapons. The Ontario Water Resources Commission employs an effective clause which successfully transfers the risk of loss unequivocally to the supplier-contractor:[22]

> The Contractor declares that in tendering for his works and in entering into this Contract he has either investigated for himself the character of the work and all local conditions that might affect his tender or his acceptance of the work, or that not having so investigated, he is willing to assume and does hereby assume all risk of conditions arising or developing in the course of the work which might or could make the work, or any items thereof, more expensive in character, or more onerous to fulfil, than was contemplated or known when the tender was made or the Contract signed. The Contractor also declares that he did not and does not rely upon information furnished by any methods whatsoever by the Commission or its officers or employees, being aware that any information from such sources was and is approximate and speculative only, and was not in any manner warranted or guaranteed by the Commission.

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[21] U.S.C. §2-302(1): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

[22] *Re Baldasaro & MacGregor Ltd and The Queen in Right of Ontario, supra,* footnote 3.

But most recently, as if to emphasize that the courts do not favour one side over the other, the Supreme Court of Canada has held that a purchaser could not lawfully refuse to accept delivery due to non-availability of market and must pay damages totalling $108,250.00 to the suppliers. [23] The purchaser having agreed to take 10,000 tons of material per year over a period of some ten years intimated, after fourteen months, that it would not accept further deliveries. The supplier sued for damages to which the purchaser raised the following clause:

> St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the non-availability of markets for pulp or corrugating medium.

The New Brunswick Court of Appeal, in a judgment delivered by Mr. Justice Limerick,[24] decided the appeal on the interpretation of the phrase "non-availability of market". The court upheld the appellants' argument that the words must mean a profitable or economic market and so rejected the plaintiff's traditionalist contention that a market is a market without connotations of price or loss.[25] The learned Justice made the point that "available" does not mean "existing" but rather implies "in such a condition as that it can be taken advantage of"; and for this he quoted authority.[26] Throughout the judgment there flows the basic commonsense approach of commercial practicality.[27] The Supreme Court of Canada, however, would have none of this. Mr. Justice Dickson, reading the judgment of the court, held that the meaning of "non-availability" was to be determined by the preceding words of the clause under scrutiny so that the cause of the non-availability of the market must be one beyond the control of the purchaser. The Supreme Court accepted as fact that the lack of market was due to the ineffectiveness of the defendant's marketing plans and to the unreality of their appreciation of the demand for their product. The court confirmed the approach

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[23] *Atlantic Paper Stock Ltd* v. *St Anne-Nackawic Pulp and Paper Co. Ltd, supra,* footnote 4.

[24] (1974), 46 D.L.R. (3d) 732.

[25] *Ibid.,* at p. 737.

[26] *Devitt* v. *Mutual Life Ins. Co. of Canada* (1915), 22 D.L.R. 183, at p. 187 (Ont. A.D.); *Brett* v. *Monarch Investment Building Society,* [1894] 1 Q.B. 367 (C.A.).

[27] *Supra,* footnote 24, at p. 739.

of the trial judge, whilst rejecting that of the Appeal Division of the Supreme Court of New Brunswick, and emphasized that such clauses must be construed objectively and in the manner of the reasonable man. Accordingly "available market" means available market and *not* a market which is advantageous or profitable to the purchaser. Orthodoxy has therefore prevailed and the efforts of the Appeal Division of the Supreme Court of New Brunswick to effect relaxation in the absolutist approach to the construction to commercial agreements has proved no more effective than Mr. Justice Laskin's earlier dissent.[28]

In conclusion, the recent Canadian decisions suggest that nothing much has changed. The law remains certain and the rules are being applied impartially. Subjective considerations of mutual assumptions and equitable ideas of justice and fairness have been firmly scotched. Unconscionability is nowhere to be seen. Businessmen may therefore rest easy, comforted by the knowledge that the courts can be relied upon to render unprejudiced, if somewhat severe, decisions. In the meantime commercial lawyers should buckle down to the task of drafting impregnable clauses which recent cases reveal is well within the art of the possible.

EDWARD VEITCH*

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CONFLICT OF LAWS—NULLITY—RECOGNITION OF FOREIGN DIVORCE—COMMON LAW PRINCIPLES—DIVORCE ACT—INTER-TEMPORAL CONFLICT.—In *Bevington* v. *Hewitson*,[1] a Canadian court was faced, possibly for the first time in Canada, with a deceptively simple case presenting all of the problems of *Indyka* v. *Indyka*[2] and more.

The facts, apparently, only involved the issues of nullity of marriage and recognition of foreign divorce. The defendant husband, at all times an Ontario domiciliary, married a Maine domiciliary resident in Maine in 1952. His stay in Maine was composed of two four-day visits approximately one year apart. In 1954 his wife obtained a Maine divorce. In 1958, the defendant married his second wife who was also an Ontario domiciliary in New York.

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[28] *Re Baldasaro, supra*, footnote 3.

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[1] (1974), 47 D.L.R. (3d) 510 (Ont.).

[2] [1969] 1 A.C. 33.

The second wife then petitioned for a nullity decree based on the fact of a prior subsisting marriage, which action was dismissed.

The case presents two different types of conflict of laws problems. The first is the traditional interspatial conflict involving the handling of two intertwined legal issues: essential validity of marriage and recognition of foreign divorce, the role of post-1968 developments in recognition of foreign divorces, and the acceptance of the substantial and real connection doctrine for the recognition of foreign divorces. Perhaps more importantly, the court deals with the somewhat more confusing problem of the intertemporal conflict, in particular the difficulties of the rule in *Travers* v. *Holley*.[3]

Whenever a court is faced with a fact situation involving two intertwined issues, a decision must be made whether to deal with them as two major issues[4] or by the more academic devise of the incidental question. The difference of course is that with the former the conflicts' analysis of the *lex fori* handles both issues, whereas with the latter, the conflict of laws analysis of the *lex causae* of the major issue will handle a subsidiary question. Obviously, the incidental approach will only have value where the *lex causae* of the major issue leads to a different conclusion than the forum's analysis. *A fortiori* the doctrine cannot apply if the *lex causae* is the *lex fori* as in the instant case. Unfortunately, there has been very little judicial discussion of the point and even *obiter* guidelines as to when the approach should be used would have been helpful. More importantly, however, is the fact that Mr. Justice Lacourciere did not even advert to the alternative methodologies, even though the case bandied about as exemplifying the incidental approach[5] was not only dealing with the same two issues but also was a Supreme Court of Canada case on appeal from Ontario.

In dealing with the problem of post-1968 recognition reasons, Lacourciere J. faces the problem of section 6(2) of the Divorce Act[6] but never really deals with the difficult policy problem of the forced common law development. It was, as Dr. Morris points out,[7] because of the fact that the wife could not while married,

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[3] [1953] P. 246, at p. 257.

[4] For an example of such an approach see *Beaudoin* v. *Trudel*, [1937] 1 D.L.R. 216 (Ont. C.A.).

[5] *Schwebel* v. *Ungar* (1964), 48 D.L.R. (2d) 644 (S.C.C.).

[6] R.S.C., 1970, c. D-8.

[7] The Conflict of Laws (1971), p. 136 *et seq.*

have a domicile separate from her husband, coupled with the strict domicile recognition test of *Le Mesurier*[8] that the courts developed their multiferous recognition rules. Under section 6 of the Divorce Act the wife is entitled to have a separate domicile for divorce purposes. With this enactment the underlying rationale of the case law which culminated in *Indyka* disappeared. Lacourciere J., however, probably properly interpreted the trend of the cases in the field as broadening the recognition bases without reference to this rationale. The fact that cases allowed the husband to utilize the expanded rules was probably sufficient justification for his approach.[9] The difficulty, however, is that one of the problems the rules attempted to alleviate (that is, limping marriages) may have been advanced since Ontario now recognizes more divorces than most other states. To say, "I do not interpret the activity of the Canadian Parliament in enacting s. 6(2) as closing the door to this process [of judge made recognition law]", is surely to beg the question as Lacourciere J. never gives any reasons for his interpretation. His references to the comments of Mr. Justice Lerner in *Rowland* v. *Rowland*[10] on this point adds little insight for nowhere does Mr. Justice Lerner explain his reasoning.

People whose marriages have collapsed will not live together. The law should not perpetuate a sham by refusing to sanction the *de facto* split. Moreover, if they have been "divorced" the position is even more apparent. More importantly in many cases, as in *Bevington* v. *Hewitson*, reliance has been put on the decree to set up another union and we ought not to allow the historical anomaly of nullity[11] to break up another marriage. In all probability, the decision of Mr. Justice Lacourciere presents a reasonable conclusion albeit for inarticulated reasons.

The pivotal part of Lacourciere J.'s judgment is concerned with the substantive point of our recognition of foreign divorces rules. Initially in this context, the *Indyka* test of substantial and real connection is approved. Although it has been pointed out, that it is not obvious this is the *Indyka* rationale,[12] subsequent judges and writers have accepted it as so.[13] More interesting is the

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[8] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.

[9] *E.g. Mayfield* v. *Mayfield*, [1969] P. 119.

[10] (1974), 2 O.R. (2d) 161.

[11] See D. Mendes da Costa, Studies in Canadian Family Law, Vol. 2 (1972), p. 652.

[12] J. H. C. Morris, Cases on Private International Law (4th ed., 1968), p. 152.

[13] See J.-G. Castel, Conflict of Laws (3rd ed., 1974), pp. 376-377.

attempt to describe when there will be a substantial and real connection by categorizing a number of factors, then making functional determinations as to whether such factors amount to a substantial and real connection. The listing of factors embodies the potential bases of recognition developed by the House of Lords in *Indyka*. Although as a matter of law it is questionable if these contacts were expressly used as substantial connections, it is clear the House of Lords was looking to them as examples of substantial connection.

The interesting point is the resurrection and expansion of the negative approach of *Messina* v. *Smith*[14] that if the connection is not so tenuous as to lead to forum shopping and avoidance of law it will be a substantial and real connection. If the purpose of the test is, as Professor Mendes da Costa says,[15] to avoid creating limping marriages this negative test would appear to be a workable base since by forbidding forum shopping and legal avoidance it strikes at the heart of the creation of limping marriages.

The more unusual problem identified by the court is the problem of the intertemporal conflict. As Dr. Morris indicates[16] the intertemporal problem can arise at any point in the interspatial analysis. In this case the intertemporal conflict arises at the choice of law stage. In particular, the question before the court was where there is a judge-made choice of law rule (here the rule in *Travers* v. *Holley*)[17] patterned on a statute (the Divorce Act)[18] and the legislation changes thus altering the effect of the choice of law rule, is the effect to be retrospective or prospective? This same question arose in *Indyka* v. *Indyka*.[19] In that case, the court held it would be retrospective and without reasons Lacourciere J. did also. The effect of the change in section 6(1) and section 5 of the Divorce Act is thus to allow recognition of a divorce obtained by a woman fitting section 5 and having the ability by section 6 to obtain a separate domicile. This result is in fact, very close to the recognition rule of section 6(2) which by its terms is confined to post-1968 decrees. As a result of allowing the

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[14] [1971] P. 322.

[15] *Op. cit.*, footnote 11, p. 969.

[16] *Op. cit.*, footnote 7, p. 497.

[17] *Supra*, footnote 3. Discussed by *inter alia*, Graveson (1954), 17 Med. L. Rev. 501 and Webb (1958), 7 Int. Comp. L.Q. 374.

[18] *Supra*, footnote 6.

[19] *Supra*, footnote 2. Although the case is looked at primarily for the development of the real and substantial connection doctrine, the main question was one of conflict of laws in time.

retrospective change of *Travers* v. *Holley*, Lacourciere J. has brought into issue what is to be the state of the previous *Travers* v. *Holley* applications, that is utilizing the statutory base of the 1930 Divorce Jurisdiction Act.[20] Logically, if the rule is applied retrospectively, the effect of the utilization of the 1968 Divorce Act base, excludes the prior base since by definition "retrospective" implies the eradication of all that existed in the same area previously. Yet Mr. Justice Lacourciere has ignored this dilemma. He goes to great lengths to explain how *Travers* v. *Holley* plus a 1930 Divorce Jurisdiction Act works, but never explains if it still has validity as a result of the inherent problem of the retroactive theory.

In the end however, he reaches the conclusion as did the House of Lords in *Indyka,* that it is unnecessary to pursue this recognition tool since it is all embodied within the real and substantial connection test. There is no doubt as to the retroactivity of a change in a judge-made choice of law rule by a judge as was pointed out in *Indyka.*[21] Thus, there is no need to pursue the difficult theory of *Travers* v. *Holley* and its statutory bases. Instead, by the theory of judge-made changes of judge-made laws being retrospective, any situation whether before *Indyka* or after, can be handled by *Indyka's* broad doctrine.

In conclusion, Mr. Justice Lacourciere's decision is encouraging since it adopts and attempts to explain the substantial and real connection doctrine of *Indyka* v. *Indyka* while adverting to a number of other issues. Yet it is still disappointing in that he fails to articulate a number of his underlying assumptions dealing with *Travers* v. *Holley,* intertemporal implications, the incidental question approach and the validity of the post-1968 judge-made recognition rules.

J. G. McLeod*

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Conflict of Laws—Choice of Law—Place of Tort.—Twice recently the Supreme Court of Canada has had to decide where a tort was committed. In *Moran* v. *Pyle*[1] the question related to jurisdiction. In *Inter-provincial Co-operatives Limited and Dryden*

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[20] S.C., 1930, c. 15.

[21] J. H. C. Morris, *op. cit.*, footnote 7, p. 498.

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[1] [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239 (S.C.C.).

Chemicals Limited v. *Her Majesty the Queen in Right of the Province of Manitoba*[2] it related to the choice of law. The *Moran* case broke new ground.[3] It appeared to be the commencement of the rationalization of the law on the question, but the contribution of the *Inter-provincial* case to that process is much less significant.

In the *Inter-provincial* case, a Manitoba statute[4] purported to impose civil liability for damage caused to Manitoba fisheries by contaminants discharged in other provinces (in this instance Saskatchewan and Ontario) into rivers which flow into Manitoba. The statute provided that permission granted by a regulatory authority in the upstream province was not a lawful excuse. The Crown in right of Manitoba sued under the statute as well as under the common law, both as the owner of fisheries alleged to have been damaged and as the assignee of the claims of fishermen and others to whom provincial funds had been paid as compensation for economic loss caused by the closure of the fisheries resulting from the pollution of the rivers. The defendants applied to strike out the allegations based upon the statute. It appears to have been assumed that the defendants held permits for what they did which were valid in Saskatchewan and Ontario.

Seven members of the court heard the appeal. Four were in favour of restoring the judgment of the trial judge which struck out the allegations. Three dissented. However, six of the seven judges, including three of the majority (Pigeon, Martland and Beetz JJ.) and all three members of the minority (Laskin C.J. and Judson and Spence JJ.), held that the location of the alleged tort was Manitoba. No question of jurisdiction arose as the defendants were within the territorial jurisdiction of the Manitoba courts.

The judgment of Mr. Justice Pigeon, with whom Martland and Beetz JJ. concurred, is based upon the proposition that the Manitoba statute purported to have extra-territorial effect, and the location of the tort was not essential to it. Mr. Justice Pigeon said:[5]

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[2] (1975), 53 D.L.R. (3d) 321 (S.C.C.).

[3] See Hurlburt, comment, (1974), 52 Can. Bar Rev. 470, of which this is a continuation.

[4] Fishermen's Assistance and Polluters' Liability Act, R.S.M., 1970, c. F-100.

[5] *Supra*, footnote 2, at p. 358 (D.L.R.).

> ... it appears to me ... impossible ... to hold that Manitoba can, by prohibiting the discharge of *any contaminant* into waters flowing into its territory, require the shutting down of plants erected and operated in another Province in compliance with the laws of that province.

Legislation protecting fisheries owned by the province is within the powers of the Legislature but "... in respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another Province any more than when they are accomplished in another country".[6] The legislation "is not directed against acts done in that Province: the basic provision on which the claim is founded is an act done outside the Province, namely, the discharge of the contaminant".[7]

Mr. Justice Pigeon also held that Saskatchewan and Ontario could not license the operations of the defendants so as to deprive of a legal remedy those suffering injury in Manitoba. In the result Manitoba was entitled and restricted to such remedies as are available at common law or under federal legislation. It seems to follow from this that it does not matter what law applies. On the basis of his judgment neither the law of Saskatchewan or Ontario on the one hand, nor the law of Manitoba on the other, would recognize either the power of the Saskatchewan and Ontario legislatures to authorize acts which would cause injury in Manitoba, or the power of the Manitoba legislature to prohibit acts in Saskatchewan and Ontario. The common law must therefore apply. The common law of Saskatchewan and Ontario would presumably be regarded by the Supreme Court of Canada as being the same as the common law of Manitoba.

His statement as to the location of the tort is as follows:[8]

> It seems to me that there is decisive authority, especially *Composers, Authors & Publishers Ass'n of Canada Ltd* v. *Int'l Good Music, Inc. et al.* (1963), 37 D.L.R. (2d) 1, [1963] S.C.R. 136, 40 C.P.R. 1, in favour of the proposition that a cause of action arises where damage is caused by acts performed in another State or Province.

The *Composers* case[9] is, I submit, of doubtful authority for that proposition. The allegation there was that the defendant had communicated copyrighted works in Canada by television pro-

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[6] *Ibid.*, at p. 359.

[7] *Ibid.*, at p. 352.

[8] *Ibid.*, at p. 356.

[9] *Composers, Authors & Publishers Ass'n of Canada Ltd* v. *Int'l Good Music, Inc. et al.*, [1963] S.C.R. 136, (1963), 37 D.L.R. (2d) 1, 40 C.P.R. 1.

grammes beamed at Canada from the United States. What was before the court was an application for service *ex juris* which involved the same question as the case itself, namely, whether or not the works had been communicated in Canada, and Mr. Justice Martland, who delivered the judgment of the court, thought that the point should not be determined at that stage of the proceedings but ought to be tried. In any event, Mr. Justice Pigeon did not in the *Inter-provincial Co-operatives* case put forward any philosophical basis for holding that the tort occurred in Manitoba, but contented himself by referring to the one authority.

The location of the tort had greater importance to Chief Justice Laskin with whom Judson and Spence JJ. concurred. It occurred in Manitoba and the statute therefore applied. He said:[10]

> In my opinion, choice of law principles relative to the place of commission of the tort in the present case make it appropriate for Manitoba to apply its own law....

His reason is as follows:[11]

> Manitoba's predominant interest in applying its own law, being the law of the forum in this case, to the question of liability for injury in Manitoba to property interests therein is undeniable. Neither Saskatchewan nor Ontario can put forward as strong a claim to have their provincial law apply in the Manitoba action; in other words, the wrong in this case was committed, or the cause of action arose in Manitoba and not in Saskatchewan or in Ontario.

His opinion being that the tort was committed in Manitoba, there was no need to consider either the rule in *Phillips* v. *Eyre*,[12] or cases such as *Chaplin* v. *Boys*,[13] "since these cases involve the situation where the tort or wrong or the cause of action had arisen outside the forum or the jurisdiction in which suit was brought".[14] He went on to say:[15]

> To the extent that the recent judgment of this Court in *Moran* v. *Pyle National (Canada) Ltd*... may be said to relate to choice of law principles as well as to jurisdiction, it supports the view I take here as to the place where the cause of action arose.

The seventh judge, Mr. Justice Ritchie, though part of the majority in the result, appeared to hold the view that the tort

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[10] *Supra*, footnote 2, at p. 339 (D.L.R.).

[11] *Ibid.* The words "tort" and "wrong" appear to be used interchangeably.

[12] (1870), L.R. 6 Q.B. 1.

[13] [1971] A.C. 356.

[14] *Supra*, footnote 2, at p. 339 (D.L.R.).

[15] *Ibid.*, at p. 340.

was not committed in Manitoba. He would have applied the rule in *Phillips* v. *Eyre*, which applies if a wrong is alleged to have been committed abroad. He went on to hold that the acts of the defendants, if justified by regulatory permission, were justifiable where they were committed and therefore were not civil wrongs, a statement which tends to suggest that whatever was done was done outside Manitoba. However, he ended his reasons for judgment by saying that if the common law action should be pursued and it should develop that the appellants were not licensed, "then I have no doubt that the courts in Manitoba would have jurisdiction to entertain the suit in accordance with the reasoning expounded by Mr. Justice Dickson in *Moran* v. *Pyle National (Canada) Ltd*".[16] Since the *Moran* case indicates that in some circumstances a tort can be held to take place where the injury occurs, the passage might be intended to suggest that if the permits are not to be taken into consideration (though not otherwise), the tort might be said to have occurred in Manitoba.

The *Moran* case held that for purposes of deciding whether a court should take jurisdiction a test which looked only to the place where the wrongdoer acted or to the place where the damage was suffered would be arbitrary and inflexible, and suggested that the appropriate course of action was to look for a jurisdiction which was substantially affected by the defendant's activities or its consequences and the law of which was likely to have been in the reasonable contemplation of the defendant. In the *Inter-provincial Co-operatives* case, Mr. Justice Pigeon returned to a "place of harm" theory and Chief Justice Laskin, while his language is based upon the "claim" or "interest" of a jurisdiction to have its law apply, finds Manitoba's interest predominant simply because there was injury in Manitoba to property interests therein. Mr. Justice Pigeon said that the *Moran* case did not apply because it dealt with situs for purposes of jurisdiction rather than for the choice of law, while the Chief Justice thought that it supported his view. It is unfortunate that the court did not find it necessary to explore more fully the philosophic basis of their decision. We now have in *Moran* v. *Pyle* a decision that a real and substantial connection test (which is more often discussed in connection with the choice of law) is to be applied to cases of jurisdiction, and in the *Inter-provincial Co-operatives* case a decision that a "place of harm" test is to be applied to cases of choice of law. If there is to be a distinction, I submit that the

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[16] *Ibid.*, at p. 351.

reverse one would be more natural. It is quite arguable that the substantive law under which a defendant acts is the law by which his actions should be tested, and that the law of the place where he acted should therefore be applied. It is also arguable that the courts of the place where the harm occurred should take jurisdiction over the case so that the plaintiff will not be denied a remedy because he cannot follow the defendant to the defendant's country.[17] In the result the law has not been rationalized as much as might have been hoped.

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[17] Though see the arguments to the contrary, Hurlburt, *op. cit.*, footnote 3, at pp. 476-478.

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