

REPUDIATION OF CONTRACTS IN CANADIAN LAW

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Introduction

This study is concerned with the law relating to repudiation of contracts as developed in Canadian courts.¹ Its objectives are twofold; first, to clarify an area of the law that is often seen as somewhat obscure, and secondly, to provide an account of the way the law has developed in Canada. The approach taken has been to consider the law predominantly through the decisions of the Canadian courts. Reference is made to English decisions and to developments in the United States only where it is necessary to explain why certain developments have occurred or to explore alternative approaches.

It is ironic that one should feel it necessary to justify an approach that seeks to analyze the law in Canada by principal reference to Canadian decisions. Yet in many areas of the law of contract (and in other areas of the law) analyses of the law emphasize the developments that have occurred in the courts of England and do not focus on what judges in Canada have been doing. This is due partly to the lack of a substantial literature in Canada on the law of contract.² The major English texts are used in the classrooms of law

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² At the time this article was commenced only two books purporting to be analyses of the general law of contract in Canada had appeared. These were Wyatt Paine, *Canadian Law of Contracts* (1914); J. E. Côté, *An Introduction to the Law of Contracts* (1974). The latter makes extensive references to the decisions of courts in Canada. The sixth edition of Leake on *Contracts* (1911), includes annotated decisions from Canadian courts. Since that time Professor G. H. L. Fridman has published a work on *The Law of Contract in Canada* (1976). Professor Fridman's approach, similar to that taken here, is "to provide a text which, while not jettisoning the English authority upon which the law of contract in common law Canada is securely founded, nonetheless takes its stand as firmly as possible upon Canadian

faculties, and in law offices, and, presumably, they are prominent in judges' libraries. Thus the English decisions become well-known, but the decisions of the Canadian courts may be overlooked when subsequent cases are argued.

This is not to imply that judges in Canada should restrict themselves to their own earlier decisions on points of contract law. A decision from a court of another jurisdiction may be better reasoned or more consistent with principle. Yet the development of a Canadian conspectus on the law of contract is dependent upon consistent appraisal and examination of the decisions of Canadian courts. It is with this consideration in mind that the approach in this study was adopted.

I. *The Scope of Repudiation.*

The term "repudiation" has long been in use in Canadian courts. Repudiation occurs, according to a classic statement of Lord Coleridge C.J. in *Freeth v. Burr*,³ where one party's acts or conduct amount "to an intimation of an intention to abandon and altogether to refuse performance of the contract".⁴ The words of the Lord Chief Justice are often quoted in cases involving repudiation decided in Canada.⁵ When a repudiation occurs the other party to the contract is entitled to treat the contract as at an end and sue for damages immediately. This was recognized in Canada as early as 1856 by Macauley C.J. of the Ontario Common Pleas Division, in *Sanders v. Baby*,⁶ and has been acknowledged and applied in numerous cases ever since.⁷

decisions, and such statutes as have relevance to this part of the law". Preface, p. v. More recently a further book on the law of contracts has appeared: S. M. Waddams, *The Law of Contracts* (1977).

³ (1874), 9 L.R.C.P. 208.

⁴ *Ibid.*, at p. 213. He went on to restate the point in similar words: "The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract".

⁵ See e.g., *Auchterlonie et al. v. Arms* (1875), 25 U.C.C.P. 403, at p. 415 (C.P.); *Midland Railway v. Ontario Rolling Mills Co.* (1883), 2 O.R. 1 (Q.B.D.), (1884), 10 O.A.R. 677, at p. 685 (C.A.); *Crowston v. Tate* (1907), 6 W.L.R. 70, at p. 75 (N.W. Provinces Full Court); *McKim v. Cobalt-Nepigon Syndicate* (1907), 10 O.W.R. 1121, at p. 1123 (H.C.); *Pugsley v. Fowler* (1909), 4 N.B. Eq. 122, at pp. 136-137 (N.B.S.C. in Equity); *Stein v. Kileel* (1929), 1 M.P.R. 263, at p. 266 (N.B. App. Div.).

⁶ (1856), 5 U.C.C.P. 441 (C.P.).

⁷ See *infra* at pp. 241 *et seq.* The English authority principally relied upon in this regard is *Johnstone v. Milling* (1886), 16 Q.B.D. 460, and particularly the judgment of Cotton L.J., at p. 470. In *Roy v. Kloeffer Wholesale*, [1951] 3 D.L.R. 122, Wells J., explained that the reason for the rule is convenience. He said, at p. 128: "The reason for the rule may be put in various ways, but the really decisive ground is convenience. The alternative doctrine which appeared tenable till the middle of the

In 1914, in his book *Canadian Law of Contracts*, Wyatt Paine referred to the doctrine of anticipatory breach, which he said,⁸ "is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, . . . may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action". He cited only one Canadian decision in support of this proposition⁹ but it is clear that the principle had been well established in Canada.¹⁰ Though the doctrine of anticipatory breach normally refers to a repudiation occurring before the time for performance has arrived, it is clear that an intention not to perform can be manifested at the time for performance or during performance as well.¹¹ For the purpose of this article, "repudiation" occurs where one party by act of conduct indicates "an intention to abandon or refuse performance of a contract", whether that intention manifests itself before the date for performance, at the time performance is due, or after performance has been commenced.

II. What Constitutes a Repudiation?

Though the basic test for whether a repudiation has occurred is clear its application is not always simple and straightforward. There are many situations where the defendant's intention not to perform or not to continue performance is obvious. Notification by one party to the other that he is not prepared to perform;¹² disposal of the subject

nineteenth century was that the promisee's only election is to rescind the contract, thereby renouncing any claim for damages, or to ignore the refusal and await the time for performance, thereby remaining bound to show himself ready and willing to perform at that time though he knows the promisor will not be. The refusal which under the modern rule may be treated as a present breach must, of course, be total, and the promisee's choice whether to treat the contract as rescinded by consent (which might sometimes though seldom be for his advantage) or proceed as for a breach must be clear and final"

⁸ P. 55.

⁹ *Phelps v. McLachlin* (1904), 35 S.C.R. 482.

¹⁰ The only possible exception to this general principle arises out of the case of *Melanson v. Dominion of Canada General Ins. Co.*, [1934] 2 D.L.R. 459 (N.B. App. Div.) which is probably confined to its facts.

¹¹ *Clark v. Murray* (1907), 3 E.L.R. 277 (N.B. Full Ct); *Pugsley v. Fowler*, *supra*, footnote 5; *Klemmer v. Birmingham* (1909), 11 W.L.R. 9 (B.C. Co. Ct); *Foley v. McIlwee* (1916), 27 D.L.R. 196 (P.C.); *Kennedy v. Eastern Telegraph Co. Ltd.* (1910), 45 N.S.R. 26 (N.S. App. Div.); *Skwarchuk v. Skwarchuk*, [1937] 3 W.W.R. 492 (Sask. C.A.); *Wenzoski v. Klos*, [1940] 1 W.W.R. 523 (Man. C.A.).

¹² *Dullea v. Taylor* (1873), 34 U.C.Q.B. 12 (Q.B.); *The Sydney Boat and Mfg. Co. v. Gillis* (1908), 43 N.S.R. 259 (App. Div.); *Garrison v. Thomsen and Clarke Timber Co. Ltd.*, [1926] 2 D.L.R. 803 (B.C.S.C.); *American National Red Cross v. Geddes Bros.* (1920), 61 S.C.R. 143 (S.C.C.); *Connors et al. v. McGregor*, [1924] 2 W.W.R. 294 (Alta App. Div.); *Amicale Yarns Inc. v. Canadian Worsted Mfg. Ltd.*, [1968] 2 O.R. 59 (H.C.); *cf. Doolan v. Schaffer Ltd* (1932), 5 M.P.R. 424 (N.B. App. Div.).

matter of the contract by the defendant;¹³ disabling oneself from performing,¹⁴ becoming insolvent,¹⁵ or preventing the other party from performing his contractual obligations,¹⁶ are all examples of situations where the courts have been prepared to find that a repudiation has occurred. In all cases it is a question of looking at the actual evidence to deduce whether the defendant's actions indicate that he no longer intends to continue with the contract. Thus, many of the cases are decided on purely factual grounds and reversals on appeal are occasionally explicable on the basis of different perceptions of the facts at the trial and appellate levels.¹⁷ In some cases refusal to pay part of the purchase price owing has been held to amount to a repudiation,¹⁸ and in other cases it has not been treated as such.¹⁹

The crucial significance of the particular facts of each case often makes it difficult to anticipate whether the conduct in question amounts to a repudiation. For example, generally where a defendant asserts contractual rights inconsistent with the actual terms of his contract his actions amount to repudiation. Yet not all applications of this principle are obvious. A defendant who alleged that some of the terms of the contract had not been properly complied with by the plaintiff was held to have repudiated his contract when it was found that the plaintiff had in fact tendered proper performance.²⁰ Insisting that the terms of the contract are different from what in fact they are (or what the court subsequently finds them to be) has also been held to amount to a repudiation.²¹ Recently, however, Anderson J. of the Supreme Court of British Columbia held that an assertion that a lease extended a year beyond its actual term did not amount to a repudiation; in the circumstances it did not constitute an absolute refusal to perform the terms of the lease.²²

¹³ *Sanders v. Baby*, *supra*, footnote 6; *Sawyer v. Pringle* (1891), 18 O.A.R. 218, at p. 225 (C.A.).

¹⁴ *Gilbert v. Campbell* (1869), 12 N.B.R. 474 (N.B.S.C.).

¹⁵ *William Hamilton Manufacturing Co. v. Hamilton Steel* (1910), 23 O.L.R. 270 (Div. Ct); *Bingham v. Mulholland et al.* (1875), 25 U.C.C.P. 210 (C.A.).

¹⁶ *McKenzie v. Dancey* (1885), 12 O.A.R. 317 (C.A.); *Clayton v. McConnell* (1888), 15 O.A.R. 560 (C.A.); *Boon v. Bell and Bell*, [1932] 2 W.W.R. 304 (Sask. C.A.); *Alexander Hamilton Institute v. McNally* (1919), 53 N.S.R. 303 (App. Div.).

¹⁷ See *Midland Railway v. Ontario Rolling Mills*, *supra*, footnote 5.

¹⁸ *McKim v. Cobalt-Nepigon Syndicate*, *supra*, footnote 5.

¹⁹ *Harris v. Geiger* (1916), 10 W.W.R. 338 (Sask. S.C.); *Townsend v. Moon Motor Co.*, [1924] 1 D.L.R. 511 (S.C.C.).

²⁰ *McCowan v. McKay* (1901), 13 Man. L.R. 590 (Q.B.); *McFarlane v. McLean* (1909), 43 N.S.R. 304 (App. Div.).

²¹ *Festing v. Hunt* (1890), 6 Man. L.R. 381 (Q.B.); *Dominion Radiator Co. v. Steel Company of Canada* (1918), 44 D.L.R. 72 (Ont. S.C.).

²² *Anderson v. Anchor Hotel Ltd.*, [1973] 2 W.W.R. 582. It seems clear from the

A party who attempts to exercise rights he does not have under the contract generally will be taken to have repudiated. Thus, a defendant who purported to cancel the contract claiming that he was exercising a contractual right, which in fact did not exist, was held to have repudiated the contract.²³ Where a defendant, believing incorrectly that the other party has repudiated, purports to rescind, or brings an action for rescission for innocent misrepresentation, his conduct will amount to repudiation.²⁴ In such cases it is clear that the defendant has no intention of carrying out the contract. Where, however, a defendant sought to give notice suspending the contract, in accordance with its terms, the purported suspension did not amount to a repudiation, even though the conditions for suspending the contract were not in existence.²⁵ In this case, presumably, the defendant's intention was only to suspend the obligations of the contract, not to refuse to carry them out completely. Exercise of a contractual right of cancellation or suspension cannot, of course, amount to a repudiation.²⁶

If the defendant's actions amount to an attempt to impose new terms or conditions upon the plaintiff then this may amount to repudiation. An attempt to prevent a professional football player from attending training camp if he did not sign a new agreement was held to be a repudiation of the original contract,²⁷ but a statement to the purchaser of property that he would forfeit his security if he delayed in making payments, when no contractual provision for forfeiture had been made, did not constitute a repudiation.²⁸ In another case a demand for further security, in a sale by hire-purchase, after the contract was entered into, but before payments were made, was held to be a repudiation.²⁹ Further, an

decision of the Supreme Court of Canada in *Highway Properties Ltd v. Kelly, Douglas & Co. Ltd*, [1971] S.C.R. 562 that in Canada the doctrine of repudiation is applicable to leases of land; see further Fridman, *op. cit.*, footnote 2, pp. 522, 533-535.

²³ *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306; see also *Clausen v. Canada Timber and Lands Ltd*, [1923] 4 D.L.R. 751 (P.C.). In the *Adolph Lumber Co.* case the purported cancellation was deemed to have been acquiesced in by the plaintiff and the contract mutually rescinded.

²⁴ *Cromwell v. Morris* (1917), 34 D.L.R. 305 (Alta App. Div.).

²⁵ *Clausen v. Canada Timber and Lands Ltd*, *supra*, footnote 23.

²⁶ *Kum Jow v. Elliott* (1920), 55 D.L.R. 622 (B.C.C.A.).

²⁷ *Philadelphia Eagles v. Armstrong* (1951), 3 W.W.R. (N.S.) 637 (Man. K.B.).

²⁸ *Budzak v. Bene* (1963), 42 D.L.R. (2d) 679 (Sask. C.A.). See also *Campbell-Bennett Ltd v. Geo. L. McNicol Co. Ltd and Federal Lumber Co. Ltd*, [1952] 3 D.L.R. 247 (B.C.S.C.).

²⁹ *Robert Bell Engine and Thresher Co. v. Farquharson* (1918), 39 D.L.R. 625 (Sask. App. Div.).

attempt to terminate a contract of indeterminate length, without giving reasonable notice amounts to a repudiation³⁰ and a demand for earlier payment under a contract may constitute repudiation.³¹ On the other hand an order for more lumber than the contract required the supplier to provide has been held not to be a repudiation.³²

In some circumstances the actual mode of performance adopted may be a repudiation of the contract, although again the question to be determined is whether the defective or imperfect performance indicates that the party responsible no longer intends to continue with or to be bound by the contract. Delay in performance beyond a reasonable time has been held to amount to a repudiation,³³ but mere neglect to deliver on time,³⁴ or delivery of goods not in accordance with the contract, will not necessarily be considered repudiatory.³⁵ An indication that the defendants may not be able to perform or may wish to postpone time for performance can also, depending on the circumstances, fall short of repudiation.³⁶ In some situations the performance tendered may not conform to the contract because it is in response to defective performance already tendered by the other party. This, of course, cannot be regarded as repudiatory.³⁷ Moreover, refusal to perform a particular term, not amounting to a refusal to perform the whole contract is not a repudiation,³⁸ unless of course this constitutes a breach going to the root of the contract.

III. *The Distinction Between Repudiation and Breach Going to the Root of a Contract.*

Repudiation, it has been seen, may occur before the time for performance has arrived (anticipatory breach), at the time for performance, or after performance has been commenced. Non performance or defective performance at the time performance is due constitutes a breach of contract. The remedy for a breach of contract is an action for damages and, if the breach "goes to the root of the contract", termination of the contract at the election of the innocent

³⁰ *Toronto Type Foundry Ltd et al. v. Miehle-Goss-Dexter Inc.*, [1969] 2 O.R. 431 (H.C.).

³¹ *Campbell v. Mahler* (1918), 14 O.W.N. 348 (K.B.); *aff'd.* 15 O.W.N. 339 (App. Div.).

³² *Freedman v. French* (1921), 64 D.L.R. 494 (Ont. App. Div.).

³³ *Mortimer Co. Ltd v. Dominion Suspender Co. Ltd* (1917), 11 O.W.N. 397 (H.C.).

³⁴ *Stein v. Kileel*, *supra*, footnote 5.

³⁵ *Thompson v. Smith*, [1933] S.C.R. 172.

³⁶ *Richardson v. Shenk* (1909), 13 O.W.R. 913 (Div. Ct); *Midland Railway v. Ontario Rolling Mills Company*, *supra*, footnote 5.

³⁷ *Townsend v. Moon Motor Co.*, *supra*, footnote 19.

³⁸ *Cromwell v. Morris*, *supra*, footnote 24.

party. A breach "goes to the root of the contract" when it has the effect of depriving the innocent party substantially of the benefit he expected to receive under the contract,³⁹ regardless of whether the party in breach intended to deprive the other of that benefit. Thus it can be seen that the same acts or conduct may amount both to a breach going to the root of the contract and to a repudiation, and whether they are one or the other depends upon the presumed intention of the party in breach or the repudiating party as the case may be.⁴⁰ On the other hand conduct evidencing an intention by one party no longer to be bound by the contract but not depriving the innocent party substantially of the benefit expected may amount to repudiation but not to a breach going to the root of the contract. The same would be so in reverse.

The distinction between the test for repudiation and the test for breach has not always been observed in Canadian cases. In *Foley v. McIlwee*,⁴¹ the Privy Council, in an appeal emanating from the British Columbia courts, had to deal with a repudiation by the defendant after performance had been commenced by the plaintiff. The Judicial Committee, though speaking of repudiation, applied the test of whether the wrong went to the root of the contract. In that case the refusal to perform could have been treated as a repudiation as readily as a breach, for the defendant's intention clearly was not to continue with the contract. In other cases as well the tests have been confused or used interchangeably, although it is doubtful in most instances whether a different result would have been reached if the correct test for repudiation or breach, as the case may be, had been applied.⁴² The court can, however, make what is a relatively straightforward issue somewhat more complex by failing to clarify whether the case is one of breach or one of repudiation.⁴³

An example of the different consequences that can result from treating the case as one of repudiation rather than one of breach is found in *Jarvinen v. Tip Top Cannery Ltd and Gilmore*.⁴⁴ In that case

³⁹ *Polar Refrigeration Service Ltd. v. Moldenhauer* (1967), 61 D.L.R. (2d) 462 (Sask. Q.B.).

⁴⁰ *Festing v. Hunt*, *supra*, footnote 21; *Greenwood v. Estevan* (1910), 15 W.L.R. 568 (Sask. S.C.).

⁴¹ (1916), 27 D.L.R. 196 (P.C.).

⁴² *Boon v. Bell and Bell*, *supra*, footnote 16.

⁴³ See for example *Campbell-Bennett v. Geo. L. McNicol Co. Ltd and Federal Lumber Co. Ltd*, *supra*, footnote 28, where the question was whether a purported exercise of a cancellation right under the contract amounted to a repudiation; *Ainscough et al. v. McGavin Toastmaster Ltd* (1974), 45 D.L.R. (3d) 687 (B.C.C.A.), per Seaton J.A., at pp. 711-714; *aff'd* (1975), 54 D.L.R. (3d) 1 (S.C.C.).

⁴⁴ [1947] O.W.N. 195 (H.C.), 773 (C.A.).

the plaintiff, a tomato farmer, contracted to sell his whole crop to the defendant. One of the deliveries was not collected by the defendant and was therefore spoiled. The defendant refused to pay for the spoiled delivery, and the plaintiff without picking the rest of the crop brought an action for the full contract price. The plaintiff's action of treating the contract at an end and suing was consistent either with an allegation of breach, or with an allegation of repudiation by the defendant.

The Ontario High Court, treating the case as one of repudiation, concluded that the defendant's action did not amount to an abandonment of the contract and hence was not repudiatory. The Court of Appeal, however, treated the case as one of breach and concluded that the defendant's failure to collect the tomatoes went to the root of the contract, hence entitling the plaintiff to elect to treat the contract at an end. Although the Ontario court did not refer to it a similar approach had been taken by the Nova Scotia Supreme Court in 1921 in *Berliner Gramophone Co. Ltd v. Phinney Co. Ltd*,⁴⁵ where, in a case involving a contract giving an exclusive right to supply musical equipment, the court held that a failure to supply instruments, although evidencing no intention on the part of the party in breach to abandon the contract, went to its root giving the other party the right to terminate.⁴⁶ In doing so the court pointed out that as the breach "went to the very root and foundation of the contract"⁴⁷ the principle in *Freeth v. Burr* was inapplicable.⁴⁸

The point made in the *Berliner* case, and implicit in *Jarvinen v. Tip Top Canners Ltd*, is clear. Repudiation and breach going to the root of a contract are separate grounds for terminating a contract, each with different criteria for determining the existence of the right to terminate. In the one an intention not to perform or to continue performance is the criterion and in the other deviation from contractual performance going to the very root of the contract must be shown. Either is sufficient for ending a contract and the criteria for both need not be satisfied in order to justify termination.

Where an intention not to perform is accompanied by actual non-performance of a kind sufficiently serious to entitle the innocent party to elect to terminate the contract, then repudiation and breach merge and it matters little which one is referred to. Where, on the other hand, the repudiation is not accompanied by such a breach then

⁴⁵ (1921), 57 D.L.R. 596 (N.S.S.C.).

⁴⁶ In order to reach this result the court had to imply a term that the plaintiffs would keep the defendants supplied (at p. 598). The dissenting judge, Russell J., found the agreement to be invalid in any event for want of mutuality (at p. 602).

⁴⁷ *Ibid.*, at p. 598.

⁴⁸ *Ibid.*, at p. 599.

it is incorrect and misleading to equate the two. It is sometimes said that where as a consequence of a repudiation, an election to terminate has been made, the repudiation has been "accepted as breach". Yet conceptually and practically this is incorrect. An actual breach occurs when one party does not live up to the obligation to which he has committed himself. Although, as will be seen later, repudiation is in one sense a breach, repudiation occurs where one party indicates that he does not intend to live up to his obligations, but has not yet broken his contract. The fact the law grants certain remedies in the case of a repudiation is justified on grounds other than that the contract has been broken.⁴⁹

Failure to maintain the distinction between repudiation and actual breach has led to a somewhat loose use of terminology in this area. Thus, the British Columbia Sale of Goods Act,⁵⁰ section 17(2) refers to a condition as a term, "the breach of which may give rise to a right to treat the contract as repudiated", when clearly there was no intention to introduce into that section the concept of repudiation. Similar uses of the term can be found in the cases. Often such usage causes little harm apart from initial confusion. However, in some areas as will be seen later, particularly with reference to mitigation of loss, a failure to distinguish between the concepts of breach and repudiation has left the law in a rather uncertain state.⁵¹

IV. *Consequences of Repudiation.*

It is accepted in the decisions of Canadian courts that upon repudiation by one party the rights of the other arise immediately,⁵² although the terms of the contract dealing with termination may affect those rights. In an early case,⁵³ a claimant under an insurance policy was unable to bring a claim before sixty days had elapsed as required by the policy even though the defendant company had intimated that it was under no obligation to pay. The action of the company should surely have amounted to a repudiation and the decision can best be regarded as doubtful. It has been held by the Ontario High Court that a party who wrongfully repudiates cannot

⁴⁹ Corbin on Contracts (1951), Vol. 4, s. 961; Williston on Contracts (3rd ed., 1968), Vol. 11, s. 1319.

⁵⁰ R.S.B.C., 1960, c. 344.

⁵¹ See *infra*, p. 258.

⁵² See e.g. *Dullea v. Taylor*, *supra*, footnote 12; *McFarlane v. McLean*, *supra*, footnote 20; *Greenwood v. Estevan*, *supra*, footnote 40; *Neostyle Envelope v. Barber-Ellis Ltd.* (1914), 6 O.W.N. 43 (App. Div.); *Le Blanc v. Wetmore*, [1944] 2 D.L.R. 130 (N.B. App. Div.); *Journal Publishing Co. v. The King*, [1930] 4 D.L.R. 644 (Exch. C.C.). *Fridman, op. cit.*, footnote 2, pp. 526-535.

⁵³ *Hatton v. The Provincial Insurance Co.* (1858), 7 U.C.C.P. 555 (C.P.).

justify termination by pointing to a termination clause in the contract that may or may not have been invoked.⁵⁴ There is, however, no Canadian decision dealing directly with the situation considered by the English Court of Appeal in the *Mihalis Angelos*⁵⁵ where the circumstances were such that if the party repudiating had waited he could have cancelled in accordance with the contract, and most likely would have done so. In that case the English Court of Appeal concluded that no damages could have resulted from the wrongful repudiation, a conclusion not inconsistent with that of the Ontario High Court mentioned above.

The right of the innocent party upon repudiation is either to treat the repudiation as a breach, thereby putting the contract to an end, or to ignore the repudiation and continue with the contract until an actual breach has occurred. There has, however, been some difficulty in Canada in applying principles developed in the early English cases. In *McCowan v. McKay*,⁵⁶ Killam C.J.M. after quoting Cockburn C.J. in *Frost v. Knight*,⁵⁷ and Bowen L.J. in *Johnstone v. Milling*,⁵⁸ said:⁵⁹

It is evident, then that there must be action on the part of the promisee. A mere passive attitude is not enough. In *Frost v. Knight*, and in other cases, it is said that the promisee may sue at once. That is, I take it, a cause of action at once arises, and he may evidence his election by suing without prior act. He may, however, I think, make his election, and make it in a binding manner, by other acts, and bring his action much later. The time within which he must elect and the extent and manner in which that election should be made known to the other party do not seem to be settled by any authority to which we have been referred.

A number of consequences of repudiation are referred to in this extract that will now be considered in more detail.

1. *What Action is Necessary by the Innocent Party?*

A repudiation does not of itself operate to terminate a contract; the future obligations of the parties come to an end once the innocent party has elected to treat the repudiation as a justification for termination.⁶⁰ For this some conscious act is required. The law was

⁵⁴ *Coady Store Fixtures and Equipment Co. Ltd v. Tosh* (1964), 46 D.L.R. (2d) 368 (Ont. H.C.).

⁵⁵ *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.M.B.H.*, "The *Mihalis Angelos*", [1971] 1 Q.B. 164, [1970] 1 All E.R. 673.

⁵⁶ *Supra*, footnote 20.

⁵⁷ (1872) L.R. 7 Ex. 111.

⁵⁸ *Supra*, footnote 7.

⁵⁹ *Supra*, footnote 20, at p. 596.

⁶⁰ *Tanenbaum and Downsview Meadows Ltd v. Wright-Winston Ltd* (1965), 49 D.L.R. (2d) 386, at p. 392 (Ont. C.A.); *McBride and Hogaboam v. Johnson*, [1962] S.C.R. 202. The action by the innocent party is often described as "acceptance of the repudiation;" see *Fridman, op. cit.*, footnote 2, pp. 524-526. Though the position

stated clearly by Bain J. in *McCowan v. McKay*: [B]efore the plaintiff can claim . . . that the contract has been rescinded it must be shown that he acted upon and adopted the renunciation by the defendant."⁶¹ In *McCowan v. McKay* the defendant had agreed to purchase 100 tons of hay from the plaintiff. After the delivery of the first two car-loads the defendant wrote and telegraphed the plaintiff in a manner deemed by the court to be repudiatory. The plaintiff thereupon shipped his next consignment to an alternative destination and resold it there. The plaintiff's lawyers were consulted and after several attempts to settle the dispute an action for damages was commenced. It was argued by the defendant that the plaintiff had not "acted upon" the repudiation as for a period of time subsequently he had sought to achieve a settlement, including one on the basis that the remaining quantities of hay would be supplied by the plaintiff. The Chief Justice was concerned that the subsequent actions of the plaintiff may have been inconsistent with an election to terminate, but felt that on balance the plaintiff had elected to treat the repudiation as a ground for termination. His subsequent conduct was explicable as an attempt to persuade the defendant to enter into a new agreement to avoid the time and expense of litigation. Mr Justice Bain agreed that the plaintiff had made clear his election to treat the repudiation as a breach and he regarded the actions of the plaintiff's solicitors once the matter was placed in their hands as removing any doubt over whether an election had been made.⁶²

One way of exercising the option to treat the contract as at an end is to issue a writ. This was made clear by the Supreme Court of Canada in *Canada Egg Products Ltd v. Canadian Doughnut Co. Ltd.*,⁶³ although, as Estey J. there pointed out, whether the writ is an effective election to terminate will depend upon the circumstances of the case.⁶⁴ Where the writ seeks damages for breach there can be little doubt that an election to terminate has been made. It appears, for example, that noting in a company's files that the other party did not intend to perform and reselling the goods may have constituted exercising an election,⁶⁵ and calling on the other party to perform in accordance with the contract by a specified date constitutes an

expressed in the text appears accepted in the English and Canadian authorities, it has been rejected in many jurisdictions in the United States: see Corbin on Contracts, *op. cit.*, footnote 49, s. 981; Williston on Contracts, *op. cit.*, footnote 49, s. 1334. For a possibly contrary view see the decision of Laskin J.A., as he then was, in *Finelli et al. v. Dee et al.* (1968), 67 D.L.R. (2d) 393 (Ont. C.A.), discussed *infra*.

⁶¹ *Supra*, footnote 20, at p. 604.

⁶² *Ibid.*, at p. 605.

⁶³ [1955] S.C.R. 398.

⁶⁴ *Ibid.*, at p. 407.

⁶⁵ *American National Red Cross v. Geddes Bros.*, *supra*, footnote 12.

adopting of or acting upon a repudiation if performance has not been commenced by that date.⁶⁶ However, it is not possible to hold the other party to the contract and seek to treat the repudiation as a ground for termination at the same time.⁶⁷ In each case, it appears the question is whether on the facts there is unequivocal evidence of an intention to treat the repudiation as a justification for termination. The related question of whether that intention has to be communicated to the repudiating party is dealt with below.

2. When Must the Election to Terminate Take Place?

The question when the election must occur has often been confused in Canadian decisions with the question of whether the election has to be communicated. The implication from the cases, is that the election must be made within a reasonable time, and quotations from English authorities support this. In the *Canada Egg Products* case Estey J. said that "adoption must be made known 'with every reasonable dispatch' ",⁶⁸ which he described as meaning "what is reasonably required or dictated by the circumstances". In the circumstances of that case he concluded that twenty-four days from repudiation was not unreasonable.⁶⁹

3. Must the Election to Terminate Be Communicated to the Repudiating Party?

Chief Justice Killam in *McCowan v. McKay* pointed out that no authority had been cited to him on the necessity for communication to the repudiating party of the election to terminate, and he said that in the present case, "the plaintiff is not shown to have expressly announced his election to the defendant or even to have notified him of the shipment and sale of the third carload".⁷⁰ In the circumstances, however, Killam C.J.M. took the view that the defendant having put the plaintiff in the position that the plaintiff was obliged to resell the hay, that action in itself was sufficient to constitute an election,⁷¹ the defendant having in some way deprived himself of any right to be notified. In any event, Killam C.J.M. said, "no action would, I think, be necessary, if the suit were brought at once".⁷² It is to be noted, however, that in this case the action was

⁶⁶ *Kamlee Construction Ltd v. Town of Oakville* (1960), 26 D.L.R. (2d) 166 (S.C.C.).

⁶⁷ *Garrison v. Thomsen & Clarke Timber Co. Ltd*, *supra*, footnote 12.

⁶⁸ *Supra*, footnote 63, at p. 407.

⁶⁹ *Ibid.*

⁷⁰ *Supra*, footnote 20, at p. 599.

⁷¹ *Ibid.*, at p. 600.

⁷² *Ibid.*

brought at least some four months after the date of repudiation. Mr. Justice Bain, it is to be recalled, found the election to have occurred when the matter was placed in the hands of the plaintiff's solicitors. He did not indicate whether notice was unnecessary or whether the solicitor's communications constituted notice.

This issue came before the Supreme Court of Canada in 1920, on appeal from the Supreme Court of Ontario. In *American National Red Cross v. Geddes Bros.*,⁷³ an action for non-delivery of goods was defended on the ground that the plaintiff had repudiated the contract. The question for the Supreme Court was whether the repudiation had been acted upon. The repudiation had been contained in a letter to the defendant and upon receipt the defendant's manager had the contract marked "cancelled" in the files. There was no communication with the plaintiff indicating an election to treat the contract as at an end; the issue therefore, was whether notice had to be given to the repudiator or whether election could be implied from the facts. Sir Louis Davis C.J. considered that the election had occurred. He stated:⁷⁴

It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary, but that adoption may be reasonably inferred from all the circumstances as proved.

He later elaborated as follows:⁷⁵

I can see little difference between writing an adoption of the renunciation on the letter containing it, or directing the cancellation of the contract renounced in the records of the party receiving the renunciation. In either case, it is some evidence of adoption of the renunciation, and a letter to the renouncing party, though a prudent and businesslike course, is not an essential necessary to complete the adoption in cases where facts proved allow of a fair inference of acceptance of renunciation being drawn.

Though he agreed in the result Anglin J. did not appear to agree with the reasoning of the Chief Justice. He was prepared to decide for the defendants on an alternative ground,⁷⁶ but his view was that if the case was one of anticipatory breach "the defendants could not succeed because of their failure to communicate by word or act their election to accept this declaration as a renunciation of the contract".⁷⁷ In this he was supported by the dissenting judge Mignault J. who said that the defendants' decision to terminate upon receipt of the plaintiff's repudiatory letter, "not being notified to the

⁷³ *Supra*, footnote 12.

⁷⁴ *Ibid.*, at p. 145.

⁷⁵ *Ibid.*, at p. 147.

⁷⁶ See text, at footnote 119, *infra*.

⁷⁷ *Supra*, footnote 12, at p. 163. He later reiterated that the plaintiff's repudiation was "ineffectual to put an end to the contract because acceptance of it was not communicated" (at p. 166).

respondents, could not operate as an exercise of its option or as a rescission of the contract".⁷⁸ Neither Iddington J. nor Duff J. who both decided the case on different grounds, dealt specifically with this point. It is interesting to note, however, that on this issue the Supreme Court of Canada referred only to the early English decisions of *Johnstone v. Milling*, *Frost v. Knight* and *Freeth v. Burr*. No reference was made to *McCowan v. McKay*, where the point had also been discussed, or to other decisions of Canadian courts dealing with repudiation.⁷⁹

The approach of Anglin J. was apparently adopted by Locke J. in a later case before the Supreme Court of Canada: *Canada Egg Products Ltd v. Canadian Doughnut Co. Ltd.*⁸⁰ There the court was directly concerned with whether the commencement of an action constituted an election to terminate in view of the delay since repudiation. However, Locke J. without referring to any authority, said:⁸¹

Where the promisee elects to treat the contract as at an end or, as it is sometimes described, to rescind the contract, his election is not complete until it is communicated to the other party, and this must be done within a reasonable time.

The other members of the court did not appear to concern themselves with this particular point, although Estey J. speaking for himself, Fauteux and Abbott JJ. said "It is stated the adoption [of a repudiation] must be made known 'with every reasonable dispatch' "⁸² and referred to *Halsbury*, *Leake on Contracts* and *Pollock on Contracts*. Chief Justice Kerwin did say, rather equivocally:⁸³

Once it is found that the repudiation was still alive, the respondent was not obliged to say in so many words, or in writing, that it treated the repudiation as putting an end to the contract, but it was sufficient to bring this action while the matter remained in that position.

The Chief Justice could have well meant that since a writ had been issued there was no need to communicate the election to treat the repudiation as breach. On the other hand, Kerwin C.J. went on to quote the words of Sir Louis Davies C.J. in *American National Red*

⁷⁸ *Ibid.*, at p. 170.

⁷⁹ The Ontario Court of Appeal and the trial judge Rose J. also took the view of Anglin J. that the acceptance of a repudiation had to be communicated to the repudiator; both courts also referred to the English authorities, see (1920), 47 O.L.R. 163.

⁸⁰ *Canada Egg Products Ltd v. Canadian Doughnut Co. Ltd.*, *supra*, footnote 63.

⁸¹ *Ibid.*, at p. 413.

⁸² *Ibid.*, at p. 407.

⁸³ *Ibid.*, at p. 401.

Cross v. Geddes Bros., set out above,⁸⁴ seemingly without disapproval, and said:⁸⁵

The facts in that case led the Court to the conclusion that the Red Cross had adopted Geddes Brothers' renunciation; the evidence in the present case requires the same result. Other cases were cited but an examination of them shows that the judgments depend on their particular facts.

The Supreme Court again had the opportunity to consider this question in *Kamlee Construction Ltd v. Town of Oakville*.⁸⁶ In that case the appellant had been employed by the respondent to construct a storm sewer. After disputes with the respondent's engineer, the appellant withdrew its men from the site. A letter was sent by the respondent indicating that unless the appellant returned to work within two days steps would be taken to complete the job without them and to hold them responsible for any loss. Negotiations for the appellant's return to work were unsuccessful and the respondent employed another firm to complete. It was argued by the appellant that even if the action of withdrawing from the job amounted to a repudiation it had not been adopted or acted upon by the respondent. Mr. Justice Locke, in a dissenting judgment, accepted the appellant's argument. Quoting from Anglin J. in the *American National Red Cross* case, and reiterating the view he expressed in the *Canadian Doughnut* case, he stated that an election by the innocent party to treat a repudiation as breach "is not effective until the fact of such election has been communicated to the other party".⁸⁷ He concluded that the respondent's letter, though an indication of an intention to treat the contract as repudiated unless work was resumed, was not an unequivocal adoption of that repudiation.

The majority view of the court was written by Ritchie J. He considered that the respondent's letter was notice that unless work was commenced the repudiation would be taken as a basis for termination. He quoted with approval the statement of Sir Louis Davies C.J.C., in the *American National Red Cross* case, that "an actual notice of acceptance of adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved". It was, therefore, a reasonable inference for the appellants that if they did not return to work their repudiation would be acted upon.

Recently the British Columbia Court of Appeal has adverted to this problem. In *Ginter v. Chapman and Keen*⁸⁸ the court had to

⁸⁴ See text, at footnote 74, *supra*.

⁸⁵ *Supra*, footnote 63, at p. 402.

⁸⁶ *Supra*, footnote 66.

⁸⁷ *Ibid.*, at p. 174.

⁸⁸ (1967), 60 W.W.R. 385 (B.C.C.A.).

decide whether the plaintiffs had elected to terminate as a result of a default notice incorrectly given under an agreement thus amounting to a repudiation. Mr. Justice Tysoe delivering the judgment of the court said:⁸⁹

Repudiation of a contract by one party is of no consequence in law unless the other party accepts it as such and communicates the acceptance to the repudiator within a reasonable time.

He referred to the statement of Locke J. in the *Canadian Doughnut* case, but also quoted from Kerwin C.J. in the *American National Red Cross* case and then went on to say:⁹⁰

In the case at bar there was no acceptance of the respondent's repudiation by words, either oral or written. Is it to be "inferred from all the circumstances as proved?"

Though the position is unclear it might be inferred that Tysoe J. was in fact adopting Kerwin C.J.'s approach, that is, that the election to terminate need not be communicated directly if in the circumstances the repudiator ought to presume that it has been made. Nor is the matter clarified in the Supreme Court of Canada in which the decision of the British Columbia Court of Appeal was upheld. Hall J. delivering the judgment of the court said simply:⁹¹

I am fully in agreement with Tysoe J.A. on his findings . . . that the appellants failed to elect to accept the repudiation and communicate their acceptance to the respondent within a reasonable time.

But if Tysoe J.'s position was unclear, the Supreme Court's position is no less so.⁹²

If the rule to be deduced from the authorities in Canada, as it would appear to be, is one that requires communication of the election to treat a repudiation as breach⁹³ then there seems little to

⁸⁹ *Ibid.*, at p. 389.

⁹⁰ *Ibid.*, at p. 392.

⁹¹ [1968] S.C.R. 560, at p. 568.

⁹² In *Ainscough et al. v. McGavin Toastmaster Ltd*, *supra*, footnote 43, Robertson J.A. dissenting, but not on this issue, stated (at p. 701): "In order that an election to rescind may be effective, it must be communicated to the party who has repudiated within a reasonable time," and referred to *Ginter v. Chapman*, *supra*, footnote 88. However, he then went on to say, "It is not, however, necessary that the election be communicated in express terms: it can be inferred from the circumstances." Mr. Justice McFarlane (at p. 689) did "not find it necessary to consider whether there was a communicated election to accept the repudiation". In *Highway Properties Ltd v. Kelly, Douglas & Co. Ltd*, *supra*, footnote 22, Laskin J., as he then was, said, "Where repudiation occurs . . . the innocent party has an election to terminate the contract which, if exercised, results in its discharge *pro tanto* when the election is made and communicated to the wrongdoer" (at p. 571, emphasis added).

⁹³ Côté, *op. cit.*, footnote 2, pp. 213-214, states that the rule in Canada is that the innocent party must communicate an intention to accept within a reasonable time.

commend it. It operates to cast an onus on the party who is entirely innocent and serves to protect the party who is seeking to terminate wrongfully. The rule proposed by Sir Louis Davies C.J. would appear to have more merit, in that it allows the question of whether or not the repudiation has been adopted or acted upon to be inferred from all the circumstances. The innocent party would be required to be clear and decisive in making an election; if this is done it is difficult to see how the proper inference could not be drawn by the repudiating party. The view that there is an obligation on the innocent party to communicate his election to the repudiator derives, it is suggested, from a confusion of termination of a contract as a result of adopting a repudiation with "mutual rescission", and the consequent introduction of the terminology of "offer and acceptance". This will be dealt with again later.

4. *Effect of an Election to Terminate*

Upon the Obligations of the Innocent Party.

Once an election has been made the innocent party has an immediate right to an action for damages.⁹⁴ Though normally "a readiness to perform his own side of the contract is a condition precedent to the right of either of the contracting parties to sue",⁹⁵ once the repudiation has been acted upon the innocent party is fully relieved from having to fulfil his obligations under the contract.⁹⁶ However, a failure by the plaintiff to carry out obligations prior to the time of repudiation may be a justification for the repudiation, although a repudiating party relying on this excuse must be able to prove such a failure.⁹⁷ It is to be noted, however, that an election to

Fridman, *op. cit.*, footnote 2, does not make any specific reference to a requirement of communication. The position taken in the English decisions is not wholly clear. None of the English authorities cited in the Canadian decisions states that the election to terminate has to be communicated to the repudiating party, though they do say that the innocent party must give some evidence of having made the election. (Pollock on Contracts (13th ed., 1950), p. 219). Cheshire and Fifoot, Law of Contracts (8th ed., 1972), p. 571, assert that the election must be communicated but they cite no authority dealing with repudiation that states such a rule. The learned authors cite *Scarf v. Jardine* (1882), 7 App. Cas. 345, a case referred to in some of the Canadian decisions but which does not deal with repudiation, and say that the rule laid down there is a general one applicable to all elections. Halsbury's Laws of England (3rd ed., 1954), Vol. 8, simply provides, p. 204: "The party to whom the right of election falls must signify his election to rescind in an unqualified manner and with every reasonable dispatch."

⁹⁴ *Dullea v. Taylor*, *supra*, footnote 12; *Neostyle Envelope v. Barber and Ellis Ltd*, *supra*, footnote 52; *Le Blanc v. Wetmore*, *supra*, footnote 52.

⁹⁵ Per Burton J.A., in *McKenzie v. Dancey*, *supra*, footnote 16, at p. 319.

⁹⁶ *McFarlane v. McLean*, *supra*, footnote 20.

⁹⁷ *McKenzie v. Dancey*, *supra*, footnote 16, at pp. 324-325.

terminate is final and irrevocable and once it has been made the innocent party cannot change his mind and affirm the contract.⁹⁸

Just as the innocent party cannot revoke his election to terminate, neither can the repudiator change his mind, and withdraw his repudiation once an election has been made. However, any such attempt by the repudiator may be relevant when considering the innocent party's obligation to mitigate loss.⁹⁹ That the innocent party must mitigate loss upon adoption of a repudiation as a ground for termination is clear.¹⁰⁰ An attempt by the innocent party to dispose of the goods, the subject of the contract, to an alternative buyer must be regarded, then, as an action in mitigation of loss, and not as evidence of an intention to acquiesce in any abandonment of the contract.¹⁰¹ In *Arden Hotel Co. v. Mills*¹⁰² the lessee repudiated the lease before taking possession; the lessor remained in possession for a period of three months following the repudiation and then re-let the premises. These actions were deemed to be normal actions taken in mitigation of loss and did not signify any intention to acquiesce in the proposed surrender of the lease by lessee. Thus an action for damages for breach of contract could be maintained. Similarly, a new arrangement with the defendant may amount only to an attempt to minimize loss, not acquiescence in a repudiation.¹⁰³

5. *Effect of Electing Not to Terminate.*

It has been asserted frequently that if the innocent party upon learning of the repudiation elects not to terminate, the contract remains open and unaffected by the repudiation. However, as was pointed out by Beck J. in *Cromwell v. Morris*¹⁰⁴ in such a case the innocent party,

... keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it but also to take advantage of any supervening circumstance that would justify him in declining to complete it.¹⁰⁵

⁹⁸ *Osmack and Domestic Mining v. Reynolds*, [1974] 1 W.W.R. 409 (Alta App. Div.).

⁹⁹ *Landreville v. Graham Nail Co.*, [1934] 4 D.L.R. 681, at p. 686 (Ont. C.A.).

¹⁰⁰ *Neostyle Envelope Co. v. Barber Ellis Ltd.*, *supra*, footnote 52, at p. 45. The question of mitigation is dealt with *infra*.

¹⁰¹ *Ibid.*

¹⁰² (1910), 20 Man. L.R. 14 (C.A.).

¹⁰³ *Garrison v. Thomsen and Clarke Timber Co. Ltd.*, *supra*, footnote 12.

¹⁰⁴ *Supra*, footnote 24, at p. 307.

¹⁰⁵ A reference to the English decision of *Frost v. Knight*, *supra*, footnote 57, follows this extract.

Thus, an unsuccessful action for rescission for misrepresentation in *Cromwell v. Morris*, though a repudiation, did not operate to put an end to the contract as the other party had failed to elect to treat the repudiatory action as a ground for termination.

The important consequence of electing not to terminate is that the innocent party remains subject to all obligations under the contract and must be ready and willing to perform his side of the bargain before bringing an action for an eventual breach by the party that has earlier repudiated the contract. An early case in which this situation arose was *McLellan v. Winston*,¹⁰⁶ where the plaintiffs contracted to cut railway ties on the defendant's property. After the plaintiff had procured the necessary equipment the defendant telegraphed to say that he was going to cut the ties himself. The plaintiff telegraphed in response "shipped outfit according to promise, will hold you for tie contract at price as made". Mr. Justice Rose concluded that the plaintiff had elected not to treat the defendant's repudiation as breach with the consequence that he had "the onus of shewing that at the hour of sending it, and afterwards until in some manner prevented by the defendants, he was ready and willing to perform".¹⁰⁷ As there was no evidence that the plaintiff had attempted to carry out his part of the contract, the action failed.

The matter was discussed more fully by the Ontario Court of Appeal in *Dalrymple v. Scott*.¹⁰⁸ The defendants purported to cancel an "order" from the plaintiffs, which the court concluded was in fact a binding contract. The plaintiffs did nothing upon receipt of this communication and their inactivity was considered by the court to be insufficient to constitute adoption of the repudiation or exercise of an election to terminate. The plaintiffs waited until the end of the first month of the contract, during which time delivery should have taken place, and then sued for breach of contract based on the non-delivery. However, they failed to provide any demand or order for delivery to the defendants with instructions where the order was to be shipped.

The view of the majority of the court was that since the contract remained open whoever sued on it must show that he had performed his obligations under it.¹⁰⁹ The plaintiff, not having elected to terminate could only sue once a breach had occurred and this would not happen until an order for delivery had been presented and not been fulfilled. The dissenting judge, McLennan J.A. argued that the

¹⁰⁶ (1885), 12 O.R. 431 (C.P.).

¹⁰⁷ *Ibid.*, at p. 439.

¹⁰⁸ (1891), 19 O.A.R. 477.

¹⁰⁹ *Ibid.*, at p. 484, per Burton J.A.

refusal of the defendants to perform amounted to a continuing breach, which if unretracted down to the date of performance would relieve the innocent party from having to perform his conditions precedent.¹¹⁰ His view, it appears, was that the plaintiff was now treating the repudiation as a ground for termination and was not suing for the actual breach of failing to deliver. In this way the plaintiff was relieved from showing that he had fulfilled his conditions precedent or was able and willing to carry out his side of the bargain.¹¹¹ The majority, however, viewed the case as one of an action on the actual breach, and not an action on the earlier repudiation. Nevertheless, McLennan J.A.'s judgment, albeit a dissenting one, represents a powerful argument against the position of the majority, and in favour of allowing an innocent party to act on a repudiation at any time up to and including the date for performance, unless it is retracted by the repudiator.¹¹² To adopt such a view, however, would involve extending the time within which an election to terminate has to be made.

The other consequence of not electing to terminate as a result of a repudiation is that if the repudiating party changes his mind and goes ahead and completes the contract, the other party will have lost any right arising from the repudiation, and will be liable for breach of contract if he in turn does not complete his obligations under the

¹¹⁰ *Ibid.*, at p. 491. MacLennan J.A. relied on the decision in *Ripley v. McClure* (1849), 4 Exch. 345, 154 E.R. 1245. Support for this view is occasionally found in other cases as well. In *McCowan v. McKay*, *supra*, footnote 20, Bain J., said, at p. 602: "A positive, absolute refusal by one party to carry out the contract is in itself a complete breach of the contract on his part, and dispenses the other party from the useless formality of tendering the performance of the condition precedent." The succeeding parts of the judgment, however, make it clear that Bain J. was of the view that whether the repudiation amounted to a breach, and whether the innocent party was freed from the fulfilment of conditions precedent, depended on whether the repudiation had been accepted or acted upon. Another case that might be seen as supporting MacLennan J.A. is *The Sydney Boat and Mfg Co. v. Gillis*, *supra*, footnote 12, where the defendant repudiated a contract to purchase a motor boat. The plaintiffs tendered the boat but without the anchor contracted for. The Nova Scotia Supreme Court concluded that because of their defective delivery the plaintiffs were unable to maintain an action for price, but could bring an action for damages relying on the defendant's repudiation which relieved the plaintiffs from the necessity of completing their side of the bargain. Although the judgments are not entirely clear, it would appear that the court overlooked, or saw as unnecessary, any requirement for acting upon the repudiation.

¹¹¹ If this was so then the plaintiff may have been open to the argument that he had delayed unreasonably before making an election; on the other hand the repudiation occurred on April 15th, 1890 and the action was commenced on June 14th, 1890, a delay that may not have disqualified the plaintiff from making an election.

¹¹² For a subsequent decision that purports to apply *Ripley v. McClure*, *supra*, footnote 110, and may be supportive of MacLennan J.A.'s view, see *Tufts v. Poness* (1900), 32 O.R. 51 (Div. Ct.).

contract. In *Tanenbaum and Downsview Meadows Ltd v. Wright-Winston Ltd*,¹¹³ the plaintiff had agreed to build a sewer and a pumping station for the use of the defendant; subsequently the plaintiff decided not to construct the pumping station but went ahead and completed the sewer. In an action to recover the cost of the sewer construction the defendant argued that the decision not to build the pumping station constituted a repudiation of the whole contract. The court pointed out, however, that the defendant took no action while the plaintiff went ahead and constructed the sewer according to the defendant's specifications and then the defendant had in fact used the sewer. They were unable now to complain of the repudiation.¹¹⁴

V. *The Distinction Between Termination as a Result of Repudiation, Mutual Rescission, and Abandonment.*

In 1883 in *Jones v. De Wolf*,¹¹⁵ King J. of the Appellate Division of the New Brunswick Supreme Court, pointed out that when confronted by a repudiation a party to a contract has an option in addition to that of electing to terminate or to keep the contract open. This is to "assent to the abandonment of the contract".¹¹⁶ In fact this is the interpretation placed upon the conduct of the parties in *American National Red Cross v. Geddes Bros.*, by three of the members of the Supreme Court of Canada who regarded the contract as having been terminated by mutual rescission or abandonment. In that case, it will be recalled, the plaintiff having repudiated the contract subsequently brought an action against the defendant for non-delivery. The defendant sought to excuse this failure to perform by relying on the plaintiff's earlier repudiation. Mr. Justice Iddington said:¹¹⁷

... there is to my mind clear and convincing evidence to be inferred from the steps taken by and conduct of both parties, that there was a well understood mutual rescission. . . .

Duff J. stated:¹¹⁸

It is equally clear that the appellants intended to acquiesce in the abandonment of the contract by the respondents;

¹¹³ *Supra.*, footnote 60.

¹¹⁴ The court rejected the argument that this was an "entire" contract and thus had to be performed only according to its complete terms.

¹¹⁵ (1883), 23 N.B.R. 356 (App. Div.).

¹¹⁶ *Ibid.*, at p. 372. In 1860 in *McAuley v. Geddes* (1860), 9 N.B.R. 526, the Chief Justice of the New Brunswick Supreme Court appeared to suggest that where both parties had breached their part of the contract, the effect was to rescind the contract subject to a claim by either party for *quantum meruit*. The report is, however, too brief to draw any real conclusions. See also *Adolph Lumber Co. v. Meadow Creek Lumber Co.*, *supra*, footnote 23.

¹¹⁷ *Supra*, footnote 12, at p. 156.

¹¹⁸ *Ibid.*, at p. 161.

And Anglin J. said:¹¹⁹

... both parties acted as if the contract had ceased to exist—as if the defendants were acquiescing in the plaintiff's request to be relieved from it and in their treating it as abandoned.

Though his judgment is otherwise consistent with the conclusion that he was treating the contract as being terminated by acceptance of the repudiation the Chief Justice also said:¹²⁰

... the fair inference which should be drawn from all these proved facts is that the contract had been put an end to by consent and assent of both parties.

In 1955, in *Dawson v. Helicopter Exploration Co. Ltd.*,¹²¹ Estey J. treated the *American National Red Cross* case as one where the contract had been abandoned. He did not consider, however, that the silence of the appellants alone was sufficient to warrant this conclusion and quoting from the judgments of Duff and Anglin JJ. he showed that it was the silence of the appellants together with their conduct that had led to the inference that the contract was being treated as at an end. In the *Dawson* case itself, Estey J. considered that there was insufficient evidence of abandonment as only the silence of the plaintiff was being relied upon.

It is not always clear, however, that when judges have used the term "mutual rescission", they have intended the consequence that flows from such a rescission. In *Wellington Oil and Gas Co. v. Alberta Pipe Line Co.*,¹²² Kerwin J. delivering the decision of the Supreme Court of Canada, said:¹²³

It is always a question of fact whether any particular letter or conduct amounts to a repudiation, and as to whether such repudiation is acquiesced in so as to effect a rescission of an agreement by mutual consent.

That case, like the *American National Red Cross* case, involved pleading repudiation by way of defence, so that it was immaterial whether the contract had been terminated on the ground of repudiation, or as a result of abandonment. However, directly after the statement quoted above Kerwin J. cited a decision of the English Court of Appeal,¹²⁴ which deals with whether the conduct of one of the parties amounted to a repudiation, and not with mutual rescission. On the other hand, a District Court in Saskatchewan,

¹¹⁹ *Ibid.*, at p. 164.

¹²⁰ *Ibid.*, at p. 146. Only Mignault J., who dissented in the result, enunciated a clear distinction between "acceptance" of an anticipatory breach and abandonment: *ibid.*, at pp. 170-172.

¹²¹ [1955] 5 D.L.R. 404 (S.C.C.).

¹²² [1936] 2 D.L.R. 335 (S.C.C.).

¹²³ *Ibid.*

¹²⁴ *Conzorzio Veneziano Di Armamento E Navigazione v. Northumberland Shipbuilding Co. Ltd* (1919), 88 L.J.K.B. 1194.

dealing with an action by a school teacher against a school board that had accepted his resignation as tendered, treated the case as one of repudiation whereas the issue clearly was of mutual rescission or abandonment. The teacher had argued that his intention had not been to resign, and, therefore, he had been wrongfully dismissed.¹²⁵

The importance of not confusing mutual rescission or abandonment with termination resulting from the adoption of a repudiation becomes clear when the plaintiff is the innocent party and is suing for damages. If he has elected to terminate his right of action remains, although the contract is no longer in effect. If the contract has been abandoned or rescinded by agreement then he has no right of action at all. This, indeed, was the consequence intended by the defendants in *Dawson v. Helicopter Exploration Co. Ltd.*, for they sought to avoid being held liable for damages by the plea of abandonment. This consequence too was perceived by Iddington J. in the *American National Red Cross* case, for he said: "The appellant could not on the facts disclosed have recovered anything for any breach of contract."¹²⁶ Such a conclusion could not have been drawn if the case had been treated as one of wrongful repudiation with an election to terminate.

A confusion of these two concepts can result from the terminology adopted to explain them. An early book on rescission of contracts,¹²⁷ described a repudiation as an "offer to rescind"¹²⁸ which could then be "accepted" by the innocent party. Although the author was careful to point out that this kind of rescission was distinct from "rescission by express agreement"¹²⁹ the use of the terminology of "offer and acceptance" is entirely inappropriate. There is no element of mutuality in this context. The innocent party is electing to relieve himself from any further obligations, and, seeking to minimize his losses by taking his remedies now instead of facing market and other kinds of uncertainties that waiting until the performance date might entail. It is confusion over the meaning of an "offer to rescind" or "mutual rescission" that may have led to the approach adopted by the Supreme Court of Canada in the *American National Red Cross* case and to the dictum of Kerwin J. in

¹²⁵ *Schull v. Glenhurst School District*, [1941] 3 W.W.R. 454.

¹²⁶ *Supra*, footnote 12, at p. 156. Anglin J. too, at p. 166, made it clear that he considered that the appellants would have no right to bring an action for damages, for they had failed to communicate their acceptance of the repudiation thereby, in his view, disentitling them to claim that the contract had been terminated for the repudiation.

¹²⁷ C. B. Morison, *The Principles of Rescission of Contracts* (1919).

¹²⁸ *Ibid.*, p. 37.

¹²⁹ *Ibid.*, p. 34. Rescission as a result of acceptance of a repudiation is referred to as rescission by "constructive consent", *ibid.* p. 16.

*Wellington Oil & Gas v. Alberta Pipe Line Co.*¹³⁰ An expurgation of the term "acceptance" when signifying the election by the innocent party to terminate the contract would assist in producing clarity in this area. It might also make clear that there is no logical necessity for a requirement that an election to terminate must be communicated to the repudiator. Use of the term "acceptance" may well have led to the introduction of this requirement.

VI. Remedies.

An action based upon a repudiation will generally be an action for damages.¹³¹ That the contract has been terminated as a result of the plaintiff's repudiation will also be an adequate defence to an action for damages¹³² or for specific performance or for an injunction.¹³³

In some cases it has been said that the plaintiff upon terminating the contract may claim *quantum meruit*. It is not clear, however, whether this term is used loosely to mean an action for damages, as opposed to an action for contract price, or whether it has a more specific meaning. In *MacFarlane v. McLean*¹³⁴ an action was brought against a tailor to recover for cloth supplied for manufacture into suits; when time for payment came the defendant denied any obligation to pay or, indeed, any purchase of the cloth. Mr. Justice Russell of the Appellate Division of the Nova Scotia Supreme Court concluded that the defendant's action constituted a repudiation which entitled the plaintiff to consider himself discharged under the contract "and enabled him to sue on a *quantum meruit* for the value of the goods".¹³⁵ The *quantum* he found to be fixed by the actual purchase price. It is difficult, therefore, to see in this case anything more than an action for damages.

¹³⁰ The point was made by Bowen L.J. in *Mersey Steel & Iron Co. v. Naylor* (1882), 9 Q.B.D. 648, who said, at p. 671: "A fallacy may possibly lurk in the use of the word 'rescission'. It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties, but we are dealing here not with the right of one party to rescind the contract, but with his right to treat a repudiation of the contract by the other party as a complete renunciation of it."

¹³¹ It has been pointed out in a number of cases that if the innocent party elects to terminate the contract and not to keep it open, his action is for damages and not for price. It has been held too that where a contract is entire and the defendant's repudiation prevents the plaintiff from performing then the total price payable under the contract is recoverable, rather than an action for damages: *Alexander Hamilton Institute v. McNally*, *supra*, footnote 16.

¹³² *American Red Cross v. Geddes*, *supra*, footnote 12.

¹³³ *Berliner Gramophone Co. Ltd v. Phinney & Co. Ltd*, *supra*, footnote 45.

¹³⁴ *Supra*, footnote 20.

¹³⁵ *Ibid.*, at p. 310.

In *Festing v. Hunt*¹³⁶ the Appellate Division of the Court of Queen's Bench in Manitoba also allowed recovery based on *quantum meruit* following repudiation, but in this case the action was for services performed and not for general damages. By electing to terminate the contract, under which he was to continue in the employ of the defendant for five years, the plaintiff had relieved himself from any obligation to finish the uncompleted years of service, and had enabled himself to sue for services already performed.¹³⁷ This principle was reaffirmed in *Van Wezel v. Risdon*,¹³⁸ where the Egbert J. of the Alberta Supreme Court pointed out that the plaintiff having wrongfully repudiated the contract and the defendant having "elected to accept the repudiation and thereby rescinded the contract",¹³⁹ an action for damages could be maintained or alternatively a claim could be brought on a *quantum meruit*. In that case, no recovery could be made in the claim for damages for the defendant would have suffered a loss anyway if the contract had been properly performed. He was able, however, to recover on a *quantum meruit* for services actually performed.¹⁴⁰

Though a *quantum meruit* claim may be pursued by the innocent party, the repudiator cannot sue on a *quantum meruit*, unless he can show that a new contract has been expressly entered into or that one can be inferred from the circumstances.¹⁴¹ Moreover, the repudiator will have to forfeit any money paid by way of deposit, although the position would be different if the money was given as a part payment.¹⁴²

If the innocent party elects not to terminate but to keep the contract open he may ask the court for a declaration that the contract is still valid and subsisting, and for a decree for specific performance.¹⁴³ It is clear that the decree cannot operate to

¹³⁶ *Supra*, footnote 21.

¹³⁷ In doing so the court applied the rule set out in *Cutter v. Powell* (1795), 6 Term Rep. 320, 101 E.R. 573, that upon termination or rescission of a contract the innocent party can elect to sue for damages or sue on a *quantum meruit* for materials and labour, or services performed.

¹³⁸ [1953] 2 D.L.R. 382 (Alta S.C.).

¹³⁹ *Ibid.*, at p. 392.

¹⁴⁰ The principle has been again applied in a recent decision of Macdonald J. of the British Columbia Supreme Court in a case involving repudiatory action which came to the knowledge of the plaintiffs after the contract had been fully performed. Macdonald J. allowed the plaintiffs to recover on a *quantum meruit*: *Northern Powerplant Builders Ltd v. B.C. Hydro* (unreported judgment of December 6th, 1974).

¹⁴¹ *Tuhotte v. Jervis Inlet Lumber Co.* (1911), 18 W.L.R. 336 (B.C.C.A.).

¹⁴² *DePalma v. Runnymede Iron & Steel Co.*, [1950] 1 D.L.R. 557 (Ont. C.A.).

¹⁴³ *Kloepfer Wholesale Hardware v. Roy*, [1952] 2 S.C.R. 465 aff'ing the

accelerate the obligations of the defendants,¹⁴⁴ and that bringing such an action does not signify an election to treat the repudiation as breach and to terminate. Of course the plaintiff cannot insist that the contract be performed and at the same time claim damages; the two are inconsistent.¹⁴⁵

A question related to mitigation is whether there is any limitation upon the damages recoverable by a plaintiff who elects not to terminate upon learning of the repudiation, but leaves the contract open and waits till the date of performance before suing. In *Campbell v. Mahler*¹⁴⁶ the plaintiff had entered into an agreement to purchase apples, which was repudiated before the time set for shipment. Chief Justice Falconbridge concluded that repudiation had occurred but that the "plaintiffs always insisted upon their contract".¹⁴⁷ However, on assessing damages, Falconbridge C.J.K.B. stated that the plaintiffs did not have any right to assert that the measure of damages was the price which they had to pay at the time of shipment. "When the plaintiffs found that the defendants would not carry out the contract, the plaintiffs ought to have gone into the market and done the best they could with a similar contract".¹⁴⁸ In the result he awarded only nominal damages. The suggestion, then, was that upon learning of the repudiation the plaintiffs had an obligation to mitigate; the onus was on them to elect to terminate. This negates any right in the innocent party to an election either to terminate or to ignore the repudiation.

This approach was not adopted by a county court judge in New Brunswick in 1956. The case, *Welcome Wagon Ltd v. Meyers Studios*,¹⁴⁹ involved a contract under which the plaintiff's representatives would make house calls to promote the defendant's services. Prior to the end of the contract period the defendant notified the plaintiff that it no longer required the services of the plaintiff's representatives. The plaintiff ignored the repudiation and subsequently brought "an action on the original contracts in the same way as if the purported letter of cancellation had never been written".¹⁵⁰ Judge Kierstead concluded that the repudiation had not

Ontario Court of Appeal, [1952] 1 D.L.R. 158 which upheld the decision of Wells J. of the High Court, [1951] 3 D.L.R. 122. The distinction made by Weatherston J. in *Pamarta Holdings Ltd v. Routledge* (1975), 52 D.L.R. (3d) 19 (Ont. H.C.), between cases where the judgment is prior to performance date and cases where the judgment is subsequent to performance appears doubtful.

¹⁴⁴ *Kloepfer Wholesale Hardware v. Roy*, *ibid.*, at p. 470 (S.C.C.).

¹⁴⁵ *Bonner-Worth Co. v. Geddes Bros.* (1921), 64 D.L.R. 257 (Ont. S.C.). In this respect too repudiation differs from a breach going to the root of a contract.

¹⁴⁶ *Supra*, footnote 31.

¹⁴⁷ *Ibid.*, at p. 349.

¹⁴⁸ *Ibid.*, at pp. 349-350.

¹⁴⁹ (1956), 6 D.L.R. (2d) 373. ¹⁵⁰ *Ibid.*, at p. 380.

been accepted by the plaintiff. It had continued as if the contract was still in force and then sued for the defendant's failure to pay the amounts due for the services rendered under the contract. No suggestion was made that upon learning of the repudiation the plaintiff had any obligation to attempt to mitigate its loss. The right of the plaintiff to an election was expressly recognized.¹⁵¹

More recently the Ontario Court of Appeal has had to consider this question. In *Finelli et al. v. Dee et al.*,¹⁵² the plaintiff had agreed to pave the drive of the defendant's home. The defendant later purported to cancel the contract, but while he was away the plaintiff completed the work anyway, and brought an action for the price. The county court judge dismissed the claim and the Ontario Court of Appeal upheld this decision. Mr. Justice Laskin delivered brief oral reasons in which he pointed out that before the contract could be performed the plaintiff had to obtain permission to enter on the defendant's land, and this had not been given.¹⁵³ Accordingly, the plaintiff could not claim he had carried out his bargain properly and was not entitled to sue for the price.

Mr. Justice Laskin made some further comments on the question of repudiation. He referred to the decision of the House of Lords in *White and Carter (Councils) Ltd v. McGregor*¹⁵⁴ where a majority had held that "a repudiation by one party to a contract does not preclude the innocent party from carrying out the contract and suing for the price, at least where this can be done without the assent or co-operation of the party in breach".¹⁵⁵ Mr. Justice Laskin expressed sympathy with the views of the dissenting judges in that case, pointing out that he was not bound by the House of Lords decision. He went on to say, "repudiation is not something that calls

¹⁵¹ *Ibid.*, at p. 381.

¹⁵² *Supra*, footnote 60.

¹⁵³ The original contract did not set a time for performance and it was apparently understood that performance by the plaintiffs was to be postponed until the defendant had sufficient funds to pay for the paving, thus no permission to enter upon the land had been given.

¹⁵⁴ [1962] A.C. 413. In that case the appellants had agreed to manufacture advertising signs for the respondents and to display them. The contract was subsequently repudiated, but the appellants went ahead and manufactured the signs and displayed them; they then sued for the contract price. The majority held that since the repudiation was unaccepted no breach had occurred and, therefore, no duty to mitigate had arisen.

¹⁵⁵ *Finelli et al. v. Dee et al.*, *supra*, footnote 60, at p. 395. As Laskin J.A., as he then was, pointed out, the House of Lords in the *White & Carter* case had made an exception for the kind of case before him. However, in the light of the views expressed in a subsequent decision of the English Court of Appeal, this interpretation of the *White & Carter* decision may be doubtful: see *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.*, [1971] 2 All E.R. 216, especially per Sachs L.J., at p. 228.

for acceptance when there is no question of rescission, but merely excuses the innocent party from performance and leaves him free to sue for damages''.

The implications of Laskin J.A.'s remarks are far reaching, for they appear to deny any need for an act of adoption by the innocent party in order to signify an election to terminate. In this respect they parallel the approach taken in the United States,¹⁵⁶ where a distinction is made between repudiation, which entitles the innocent party to refuse to perform, or to continue with performance and to sue for damages, and breach going to the root of the contract which requires a conscious act of election by the innocent party in order to terminate the contract.¹⁵⁷ In proposing an approach which rejects the need for adoption or election by the innocent party in order to take advantage of the other's repudiation, Laskin J.A., as he then was, has provided the principle upon which the rejection of the mitigation rule adhered to in *White and Carter (Councils) Ltd v. McGregor* can be based. If a duty to mitigate arises only after the innocent party has elected to treat the other's breach as a ground for terminating the contract then by not electing to terminate after an anticipatory repudiation the innocent party can "enhance the defendant's damages".¹⁵⁸ However, if the repudiation *is itself a type of breach*, as the American authorities suggest,¹⁵⁹ then the duty to mitigate arises immediately and the situation in the *White and Carter (Councils) Ltd* case is avoided.¹⁶⁰

What justification is there in principle for treating repudiation as a breach? As was shown earlier repudiation is anticipatory in nature and relates to prospective obligations; breach going to the root of a contract concerns an actual obligation due and owing. Again

¹⁵⁶ See footnote 60, *supra*. The Uniform Commercial Code in section 2-610 provides that where a repudiation has occurred the aggrieved party may, "resort to any remedy for breach . . . even though he has notified the repudiating party that he would await the latter's performance and has urged retraction". The comment to section 2-610 provides that "inaction and silence by the aggrieved party may leave the matter open, but it cannot be regarded as misleading the repudiating party. Therefore, the aggrieved party is left free to proceed at any time . . . unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued".

¹⁵⁷ Corbin, *op. cit.*, footnote 49, s. 983.

¹⁵⁸ Williston, *op. cit.*, footnote 49, p. 174, footnote 1.

¹⁵⁹ *Ibid.*, p. 173.

¹⁶⁰ The rule requiring mitigation following an anticipatory repudiation is not absolute, see Corbin, *op. cit.*, footnote 49, Vol. 5, s. 1053, p. 314: "The seller has no power by disregarding the repudiation to increase the recovery against the buyer by completing and tendering the goods unless the case is one where there would be a greater economic waste caused by stopping performance than would be caused by its completion."

some assistance is gained from the American writers who have long been troubled over the theoretical foundation for actions for repudiation or anticipatory breach.¹⁶¹ Williston has pointed out the logical impossibility of having an anticipatory "breach",¹⁶² as nothing can be breached until the duty to perform arises, and it is generally recognized that the justification for the remedies in the case of repudiation lie in their practical convenience and prevention of delay in settling rights rather than as redress for non-fulfillment of contractual obligations. The interest protected through such remedies is the innocent party's expectation of performance. The important conclusion, however, is that a repudiation is not a breach going to the root of a contract and the policy reasons for giving the innocent party an election to terminate in the case of such a breach may not be relevant to repudiation.

In what sense, then, is a repudiation a breach? Williston has suggested that a repudiation is a breach of an obligation not to repudiate,¹⁶³ rather than a breach of the contract, and Stoljar has argued that repudiation "does not break a performance, it only breaks a duty or *promise to perform*".¹⁶⁴ A breach of this obligation not to repudiate, or an attempted revocation of the promise to perform, has been regarded in the United States as sufficient to invoke the rule relating to mitigation and thus the ability of the plaintiff to enhance the defendant's damages is avoided. This will have the effect in some cases of denying the plaintiff a right to ignore the repudiation and continue with the contract, but only in those cases where to continue would impose an undue burden upon the defendant. Thus the technical rules relating to the occurrence of breach become secondary to the duty to avoid unnecessary loss or waste.

There is difficulty with applying the position developed in the American cases in its entirety in Canada. The rule that the innocent party must accept the repudiation in order to terminate, appears to have been consistently upheld,¹⁶⁵ although the possibility of aggravating damages has not been before the court. Moreover, the view espoused by MacLennan J.A. in *Dalrymple v. Scott*,¹⁶⁶ that an

¹⁶¹ See Williston, Repudiation of Contracts (1900-01), 14 Harv. L.Rev. 317, 421; Ballantine, Anticipatory Breach and the Enforcement of Contractual Duties (1923-24), 22 Mich. L.Rev. 329.

¹⁶² *Op. cit.*, *ibid.*, at pp. 428 *et seq.*

¹⁶³ *Op. cit.*, footnote 49, at s. 1332.

¹⁶⁴ Some Problems of Anticipatory Breach (1973-74), 9 Melb. U.L.Rev. 355, at p. 361. See also Neinaber, The Effects of Anticipatory Repudiation: Principle and Policy, [1962] Camb. L.J. 213; Fridman, *op. cit.*, footnote 2, at p. 515, note 4, points out that a repudiation "is not really an anticipatory breach of an act to be done in the future, but the breach of a *presently binding promise*" (author's italics).

¹⁶⁵ See page 252, *supra*. ¹⁶⁶ *Supra*, footnote 108.

unretracted repudiation can be acted upon at any time, and that the effect of an unretracted repudiation is to excuse the innocent party from performance of his obligations, was not adopted by the majority of the Ontario Court of Appeal. Nevertheless, the position taken by Falconbridge C.J.K.B. in *Campbell v. Mahler* and the views expressed by Laskin J.A. in *Finelli v. Dee* appear to open the door for Canadian courts to move closer to the American approach.¹⁶⁷

Conclusion

At the outset of this study it was stated that its purpose was to analyze the law relating to repudiation as developed in Canadian courts. It can be seen from the above that there is a body of law developed in Canadian cases sometimes distinctive and sometimes dispositive of issues not dealt with in the English cases. Nevertheless, there remains areas where little clarity exists and a full explication of the law would have to involve a consideration of decisions from other jurisdictions.

The decisions considered here show a general reluctance in the courts to engage in a full analysis of the relevant principles on the particular question at issue. Many of the judgments are brief and some of the difficulties that have been discussed have arisen as a consequence of failing to analyze the issues before the court fully. This is compounded where imprecise usage of terms has led to an overlapping of concepts that clearly ought to be regarded as distinct. The result does not assist in the orderly development of a Canadian jurisprudence.

In two areas particularly the law is in need of some clarification. The distinction between termination as a result of a repudiation and termination as a result of mutual rescission or abandonment has been obscured by the failure of the courts to be clear in their use of the appropriate terminology and to characterize the termination as one or the other. Although in some cases this does not matter, in others it affects substantive rights. The more significant question in the law of

¹⁶⁷ In a recent case, although not dealing with repudiation, a court has appeared to give some priority to the rule concerning mitigation of loss. In *R.G. McLean v. Canadian Vickers Ltd* (1970), 15 D.L.R. (3d) 15 (Ont. C.A.), Arnup J.A. speaking of the right to rescind or affirm on breach of contract, said, at p. 24: "Once the innocent party is in a position to make this election, in a case where the other party has purported to complete its performance, he cannot make an election which has the effect of increasing the burden on the wrongdoer." However, he went on to say, *ibid.*: "The situation would undoubtedly be different in a case of an instalment contract, or one requiring the performance of a series of future acts. In such case, where fundamental breach occurs, the innocent party may decide he wants the rest of the contract performed and he is entitled to require that that be done."

repudiation is that of mitigation. Should the courts follow the approach in the United States and find that the obligation to avoid unwarranted loss overrides the technical rules relating to the occurrence of a breach, or should they follow the English authorities that find no such obligation until an act of election to treat the repudiation as a breach has occurred? The Canadian decisions on this point leave the issue open. Adoption of the former approach would have important implications for other aspects of the law relating to repudiation, and some of the existing law as outlined here would have to be revised.
