COMMENTS
COMMENTAIRES

CONSTITUTIONAL LAW—FREEDOM OF ASSEMBLY—CRIMINAL LAW POWER—PROVINCIAL POWER OVER MATTERS OF A MERELY LOCAL OR PRIVATE NATURE—*Attorney-General of Canada* v. *Dupond*[1] was more than seven years in the judicial process before the Supreme Court of Canada gave a ruling in the case. On January 19th, 1978 the Supreme Court, in a six to three decision,[2] held that By-law 3926 of the City of Montreal and the ordinance issued thereunder in November of 1969, which banned all assemblies, parades, or gatherings in the city for a period of thirty days, were valid measures under the British North America Act.[3] There is reason to study the *Dupond* case with care: it is a judgment important to the development of judicial protection of civil liberties and, as well, it has significance for the balance of powers in the Canadian federal system through the new vigour imparted to section 92(16) of the B.N.A. Act, "matters of a merely local or private nature".

I

By-law 3926 was enacted on November 12th, 1969 as a measure to deal with the many demonstrations and assemblies occurring in Montreal around that time. The by-law's title referred to

> . . . exceptional measures to safeguard the free exercise of civil liberties, to regulate the use of the public domain and to prevent riots and other violations of order, peace and public safety.

Neither the case on appeal in the Supreme Court of Canada nor the transcript of the trial is enlightening as to the "exceptional" circumstances prevailing in Montreal, but it is likely that the triggering events included the Montreal police strike, the riots by the

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[1] (1978), 84 D.L.R. (3d) 420, 19 N.R. 478.

[2] Mr. Justice Beetz wrote the majority decision with concurrences by Martland, Judson, Ritchie, Pigeon, and de Grandpré JJ. The dissenting opinion by Chief Justice Laskin was concurred in by Spence and Dickson JJ.

[3] 30 and 31 Vict., c. 3 (Imp.), hereinafter cited as B.N.A. Act.

Murray Hill Limousine drivers, and the F.L.Q. disturbances of the time.[4] Section 5 of the by-law, the focus of the attack in the courts, allowed the Executive Committee to prohibit any or all assemblies on the public domain, in whole or in part, whenever it had "reasonable grounds to believe that the holding of assemblies, parades or gatherings will cause tumult, endanger safety, peace or public order". Reports of the Directors of the Police Department and Law Department that an "exceptional situation" exists were a condition precedent to exercising the power under section 5.[5] The penalty for contravening the by-law, contained in section 7, consisted of imprisonment not exceeding sixty days or a fine not exceeding one hundred dollars.

On November 12th, 1969 the Executive Committee issued Ordinance Number 1, banning all assemblies, except those previously authorized by the Police Department, for a period of thirty days. The requisite reports from the Police and Law Departments were attached, although they contain a disappointing lack of information as to the reason for the ordinance. The report from the Police Department refers to the increasing number of demonstrations (twenty-one since October), increasing violence, and the burdensome cost of police service (approximately seven million dollars annually). No reason is provided for the necessity of a ban extending thirty days at that particular time in November 1969.

While the by-law allegedly aimed in part at protecting civil liberties, it was in fact an excessive restraint on individual freedom. Recognizing this, Claire Dupond, a ratepayer in the City of Montreal, took it upon herself to challenge the constitutionality of the by-law and ordinance, arguing that it was an effort to legislate with regard to criminal law, a field of federal jurisdiction under section 91(27) of the B.N.A. Act. Alternatively, it was *ultra vires* as a provincial attempt to restrict the fundamental freedoms of speech, assembly, and association. She succeeded at trial, with Trépanier J. accepting the argument that the by-law and ordinance were in relation to criminal law and, therefore, *ultra vires*.[6] The Quebec

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[4] W. Tarnopolsky, The Canadian Bill of Rights (2nd ed., 1975), pp. 332-333.

[5] S. 5 of By-law 3926 reads: "When there are reasonable grounds to believe that the holding of assemblies, parades or gatherings will cause tumult, endanger safety, peace or public order or give rise to such acts, on report of the Directors of the Police Department and of the Law Department of the City that an exceptional situation warrants preventive measures to safeguard peace or public order, the Executive Committee may, by ordinance, take measures to prevent or suppress such danger by prohibiting for the period that it shall determine, at all times or at the hours it shall set, on all or part of the public domain of the City, the holding of any or all assemblies, parades or gatherings."

[6] Unreported (June 18th, 1970, Quebec Superior Court).

Court of Appeal disagreed, finding that the by-law and ordinance were valid attempts to regulate local matters and to protect the peaceful enjoyment of the public domain.[7]

A majority in the Supreme Court of Canada agreed with the Quebec Court of Appeal as to the constitutionality of the by-law. Beetz J. characterized the by-law as "regulations of a merely local character" and therefore within provincial legislative jurisdiction under section 92(16) of the B.N.A. Act, "matters of a merely local or private nature". The legislation being preventive in nature, rather than punitive, did not fall within the scope of the federal criminal law power.[8] Furthermore, the legislation did not restrict the fundamental freedoms of speech, assembly or association, both because of its limited scope and because there is no speech element to a demonstration.[9] The remainder of this comment will focus on Mr. Justice Beetz's reasons with a view to delineating the scope of provincial penal powers and the state of fundamental freedoms in Canada after *Dupond*.

II

Mr. Justice Beetz might take issue with the statement that his decision in *Dupond* expands provincial "penal" power, for he denies that the province is penalizing anyone through this by-law. In his mind, the by-law is a regulation of a local nature, related to the use of the public domain, and valid under section 92(16). It is essentially preventive in nature, as demonstrated by two facts: *all* assemblies are prohibited and the ordinance is temporary in nature. Thus, it is designed to deal with a local problem by preventing breaches of the peace and disruptions of public order. The provinces have authority to prevent conditions leading to crime, as cases such as the *Adoption Reference*, *Bédard* v. *Dawson*, and *Dilorio* make clear.[10]

Nevertheless, the opinion of Mr. Justice Beetz does seem to expand provincial penal power or, if that phrase is unsatisfactory, the provincial power to deal with local matters under section 92(16). While the *Adoption Reference* and the *Bédard* case do speak of a provincial power to legislate for the prevention of crime, they do so in a restricted sense. Prior to *Dupond*, one would say that provinces could not legislate strictly in relation to "crime prevention", for that

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[7] [1974] C.A. 402 (Que.).

[8] *Dupond*, *supra*, footnote 1, at p. 435 (D.L.R.).

[9] *Ibid.*, at pp. 437-439 (D.L.R.).

[10] *Reference re Adoption Act*, [1938] S.C.R. 398; *Bédard* v. *Dawson*, [1923] S.C.R. 681; *Dilorio* v. *Warden, Common Jail of Montreal* (1976), 73 D.L.R. (3d) 491 (S.C.C.).

would be legislation in relation to criminal law and so within federal jurisdiction under section 91(27) of the B.N.A. Act. The provinces could legislate for the prevention of crime if in so doing they were legislating in relation to a valid provincial matter under section 92 of the B.N.A. Act. As Laskin C.J. noted in his dissenting opinion in *Dupond*, the provinces must have a section 92 "anchor" before they can legislate to prevent crime.[11] Thus, in *Bédard*, the provincial legislation providing for an injunction or closing order to be issued against the owner or lessee of premises used as a disorderly house was valid because it was addressed to the suppression of a nuisance, a matter of property and civil rights under section 92(13).[12] Similarly, in the *Adoption Reference* or *DiIorio*, the provincial interest in crime prevention was linked to provincial heads of legislative jurisdiction.[13]

In *Dupond*, there is no equivalent section 92 anchor for the challenged legislation. Rather, the by-law creates a prohibition of all assemblies for a certain period and imposes a penalty for non-compliance. In effect, it creates a new offence of holding an assembly and so falls within the realm of criminal law. While prohibitions enacted by provincial legislation are not *per se* invalid, as section 92(15) of the B.N.A. Act makes clear, for validity they require a section 92 anchor.

It is Mr. Justice Beetz's opinion that there is such a section 92 anchor for the by-law in section 92(16) of the B.N.A. Act. The by-law deals with a merely local matter—regulation of the use of the streets and public domain in Montreal in light of exceptional local

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[11] *Dupond*, *supra*, footnote 1, at p. 425 (D.L.R.).

[12] *Bédard* v. *Dawson*, *supra*, footnote 10, at p. 685. Duff J. and Idington J. referred to provincial authority to legislate to prevent crime (at p. 684). Idington J. went on to discuss this crime prevention interest in relation to protection of neighbouring property owners, an indication that he was relying on s. 92(13) as an anchor for the provincial law. Only Duff J. focussed solely on provincial power to legislate with regard to crime prevention in a brief six-line opinion.

[13] In the *Adoption Reference*, *supra*, footnote 10, the provincial authority to enact various social welfare measures was linked to the education power (s. 93) and the administration of justice (s. 92(14)). Beetz J. quotes from the opinion of Duff C.J. in this case where the latter refers to " . . . the Provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime" (at p. 403). While the passage at first glance seems to support Mr. Justice Beetz's conclusion that the provinces can legislate to prevent crime, it is unwise to read the passage out of context. The provincial legislation had valid sections 92 and 93 anchors.

Similarly, in *DiIorio*, *supra*, footnote 10, the provincial power to investigate organized crime in an effort to suppress conditions leading to crime can be supported under s. 92(14), "the administration of justice".

conditions. Laskin, C.J. disagrees in his dissent, pointing out that the only "local" aspect of the subject matter of the by-law is its confined geographic scope.[14] In fact, the real subject matter of the legislation is control of breaches of the peace and suppression of violence. These are matters of criminal law, even though they are occurring only in Montreal.

It is ironic to read Mr. Justice Beetz's response to this argument, for his debate with Laskin C.J. as to the scope of section 92(16) echoes their debate with regard to the scope of the federal general power in the *Anti-Inflation Act Reference*.[15] According to Beetz J., section 92(16) is a provincial general power:

> Bearing in mind that the other heads of power enumerated in s. 92 are *illustrative of the general power of the Province* to make laws in relation to all matters of a merely local or private nature in the Province, I am of the opinion that the impugned enactments also derive constitutional validity from heads 8, 13, 14 and 15 of s. 92.[16]

It is not a novel proposition to regard section 92(16) as a provincial residuary power,[17] the assumption being that national matters were given to the federal jurisdiction and "local" matters to the provinces in 1867. It is, however, novel to describe section 92(16) as Beetz J. has done, for he treats section 92(16) as the dominant source of provincial legislative power when, in fact, that section has always been a relatively unimportant source of provincial legislative authority, subordinate in practice to section 92(13).[18] The interpretation of Mr. Justice Beetz does not accord with the structure of the B.N.A. Act, nor with the interpretation which has been accorded to sections 91 and 92. Section 91 assigns legislative authority to Parliament "in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces . . .". One of those classes is section 92(16). However, section 91 finishes with the words,

> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Interpretation of this proviso has separated section 92(16) from the other enumerated powers in section 92 and, in effect, subordinated

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[14] *Dupond*, *supra*, footnote 1, at p. 423 (D.L.R.).

[15] *Reference re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.).

[16] *Dupond*, *supra*, footnote 1, at p. 436 (D.L.R.), italics mine.

[17] See, for example, P. Hogg, Constitutional Law of Canada (1977), pp. 96, 246, 296; A. Abel, The Neglected Logic of 91 and 92 (1969), 19 U. of T.L.J. 487, at pp. 508-509; A. Abel, What Peace, Order and Good Government? (1968), 7 West. Ont. L. Rev. 1, at pp. 4 and 8.

[18] Hogg, *op. cit.*, *ibid.*, p. 242.

it.[19] Furthermore, Beetz J.'s opinion ignores the structure of section 91 as opposed to section 92. There, the federal general power is set out at the beginning of the section, and it is much easier to argue that the enumerated powers are set out as examples. Sub-section 92(16), coming at the end of section 92, does not have the same claim to prominence.

But one should not focus only on technical legal arguments to criticize this passage of the majority opinion. The concern with Mr. Justice Beetz's dicta is the potential effect on the shape of the federal system. The Supreme Court's role in constitutional adjudication is to draw what it perceives as the proper balance between federal and provincial governments in the federal system, and the two opinions in *Dupond* provide an interesting illustration of the contrasting views in the court as to the proper balance. Laskin C.J.'s greater "centralist" tendency in constitutional questions, as illustrated by his opinion in the *Anti-Inflation Act Reference*,[20] can be contrasted with Beetz J.'s effort to both protect and espouse the provincial side in the balancing process, as shown both in his dissent in the *Anti-Inflation Act* case and in his majority opinion in *Dupond*. Interesting as the contrasting conclusions may be, Mr. Justice Beetz's treatment of section 92(16) risks creation of an imbalance in the federal system because of the failure to articulate adequate reasons for the decision. He seems to treat the governing criterion for valid provincial legislation as its local roots, with geographic scope as the significant prerequisite for provincial jurisdiction. A geographic scope criterion has been clearly rejected as the test for federal legislative authority, whether under the federal general power to legislate for the peace, order and good government of Canada, or with regard to enumerated heads of section 91, such as the trade and commerce power under section 91(2).[21] The federal authority to legislate must be linked to an enumerated head in section 91, or based on the emergency power, or exercised in relation to a subject not covered by sections 91 or 92.[22] Beetz J. was insistent in his dissenting opinion in the *Anti-Inflation Act Reference* that the

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[19] *A-G. Ont.* v. *A-G. Can.* (*Local Prohibition Case*), [1896] A.C. 348 (P.C.), at p. 365.

[20] *Supra*, footnote 15.

[21] *Reference re Anti-Inflation Act*, *supra*, footnote 15, per Beetz J. (dissenting) and Ritchie J.; *MacDonald* v. *Vapour Canada Ltd* (1976), 66 D.L.R. (3d) 1 (S.C.C.), at pp. 19 and 26.

[22] The assumption is that the decision in the *Anti-Inflation Act* case has restricted the "peace, order and good government" clause to either an emergency use or a residuary power use, eliminating the national dimensions test. See W. Lederman, Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation (1975), 53 Can. Bar Rev. 597, at p. 606; G. LeDain, Sir Lyman Duff and the Constitution (1974), 12 Osgoode Hall L.J. 261, at p. 293.

federal Parliament must link its legislation to specific heads of power in section 91, as the following passage illustrates:

> It was argued that other heads of power enumerated in s. 91 of the Constitution and which relate, for example, to the regulation of trade and commerce, to currency and coinage, to banking, incorporation of banks and the issue of paper money may be indicative of the *breadth* of Parliament's jurisdiction in economic matters. They do not enable Parliament to legislate otherwise than in relation to their objects and it was not argued that the *Anti-Inflation Act* was in relation to their objects. The Act does not derive any assistance from those powers any more than the legislation found invalid in the *Board of Commerce* case.[23]

Valid provincial legislation should be similarly linked to an enumerated head of section 92, rather than to sub-section 16 and some amorphous criterion of local scope. Sub-section 16 is not a satisfactory head to which to link legislation, because there is no distinguishing characteristic of "local nature" with regard to a particular problem which would allow for a rational balancing of federal and provincial interests in legislating. Rather than geographic scope, the concern of the court should be the nature of the particular problem and who should address it in the Canadian federal system in the light of the enumerated powers. Only if the enumerated powers are of no assistance should a residuary powers analysis come into play, with the federal claim for jurisdiction under the "peace, order and good government" clause weighed against the provincial claim under section 92(16).

Nevertheless, Beetz J. has relied on section 92(16) in the *Dupond* case to find the by-law valid. What significance does this have for future provincial laws which claim to be valid because they are addressed to a "local" problem? While Beetz J. stresses the exceptional nature of the by-law, and its temporary and preventive cast, it is doubtful that he could reasonably find invalid a permanent by-law prohibiting assemblies so long as the legislating body has a rationale for enacting the measure.[24] It seems that provincial penal power is greatly expanded by this decision. This conclusion is particularly strong when one links *Dupond* with the decision of the court in *Nova Scotia Board of Censors* v. *McNeil*, delivered on the same day as *Dupond*.[25] In that case, dealing with the constitutional-

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[23] *Supra*, footnote 15, pp. 524-525 responding to the argument of Laskin C.J. at p. 499.

[24] Beetz J.'s use of case law was somewhat distressing in *Dupond*. He explicitly refused to deal with one case that seems particularly on point—*District of Kent* v. *Storgoff* (1962), 38 D.L.R. (2d) 362 (B.C.S.C.), in which a municipality passed a by-law to keep out an influx of Sons of Freedom Doukhobours because of concerns for health, education and order (mentioned in *Dupond*, *supra*, footnote 1, at p. 436 (D.L.R.)). The refusal to distinguish the case is especially disturbing in light of Laskin C.J.'s detailed discussion of *Storgoff*, at p. 426 (D.L.R.).

[25] (1978), 84 D.L.R. (3d) 1.

ity of Nova Scotia's film censorship laws, Ritchie J., in the majority judgment, stated that the provinces could legislate with regard to public morality under section 92(16).[26] Prior to the *McNeil* decision, the provinces could legislate with regard to morality only if the legislation could attach to a section 92 "anchor" other than sub-section 16. "Morality" alone was not a subject matter under provincial legislative jurisdiction. This is no longer the case, and with *Dupond* and *McNeil*, the provinces have a significantly wider scope for enacting penal legislation.

Many might ask whether there is any reason to worry about such a result. The City of Montreal was facing serious disruptions from demonstrations and costly demands for policing in 1969, and responsible government officials felt a need to act. Yet pragmatism should not be allowed to undermine constitutional principle. In acting in response to their problems, the City officials had an obligation to act within the constitutional framework established by the British North America Act, and the courts assessing the validity of their actions also had a responsibility to consider the allocation of power in that document. Authority over the criminal law is assigned to the federal level of government, the assumption of the Fathers of Confederation having been that national uniformity in the criminal law was a desirable end. Over the years, that original intent has been somewhat eroded, as the courts have recognized a significant degree of concurrency in penal law.[27] Nevertheless, in cases like *O'Grady* v. *Sparling* or *Mann* v. *The Queen*, the prohibitions and penalties in the provincial laws were in relation to provincial concerns such as highway safety.[28] The by-law in *Dupond* differs, for it is, in effect, a "mini-Criminal Code",[29] designed to supplement measures found in the federal Criminal Code which prohibit unlawful assembly and provide mechanisms for dealing with riots.[30] The result in the case

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[26] *Ibid*, at p. 28: "In a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable for public exhibition may be viewed as a matter of a 'local and private nature in the Province' within the meaning of s. 92(16) of the *British North America Act, 1867*, and as it is not a matter coming within any of the classes of subject enumerated in s. 91, this is a field in which the Legislature is free to act."

[27] See, for example, L.M. Leigh, The Criminal Law Power: A Move Towards Functional Concurrency? (1966-67), 5 Alta L. Rev. 237.

[28] *O'Grady* v. *Sparling*, [1960] S.C.R. 804; *Mann* v. *The Queen*, [1966] S.C.R. 238.

[29] The phrase is that of Laskin C.J. in *Dupond* (*supra*, footnote 1, at p. 423 (D.L.R.)). Beetz J. rejected the view that the by-law was aimed at supplementing federal criminal law. He noted that the provinces can legislate so as to complement federal law, so long as the provincial law is valid. That is the case here, where the by-law is supported by s. 92(16) (at p. 437 (D.L.R.)).

[30] R.S.C., 1970, c. C-34, as am., ss 64-70.

should have been a finding of *ultra vires*, for the by-law was clearly aimed at maintaining public order, through prohibition of certain conduct—a matter of criminal law. The finding that the by-law was a valid measure addressed to a "local" matter, when coupled with the result in *McNeil*, leads to the conclusion that there is virtually total concurrency in penal law with the provincial authorities able to regulate public order and standards of morality, previously the stuff of "criminal law", through penal sanctions.

III

Equally significant with the distribution of powers discussion is the effect of the *Dupond* decision on the state of fundamental freedoms in Canada. It is undeniable that constitutional protection for civil liberties in Canada is and has been rudimentary. As a result of the *Dupond* case, one might conclude that constitutional protection is virtually non-existent, for Mr. Justice Beetz, in six "propositions", effectively undercuts the jurisprudence which some members of the Supreme Court had tried to develop in order to give some protection to fundamental freedoms of speech, religion and assembly from at least provincial encroachment and, in the case of Abbott J. in *Switzman* v. *Elbling*, from federal encroachment as well.[31] In cases such as *Henry Birks and Sons Ltd*, *Saumur*, and *Switzman*,[32] several members of the court held that the provinces cannot legislate so as to restrict the fundamental freedoms. Only Parliament can do so in the exercise of its criminal law power under section 91(27) of the B.N.A. Act. Mr. Justice Beetz seems to jeopardize this approach in his six propositions, as the discussion in the next few pages will show.[33]

> *Proposition 1*: None of the freedoms referred to is so enshrined in the constitution as to be above the reach of competent legislation.

With this statement, Mr. Justice Beetz rejects the implied Bill of Rights theory espoused by Abbott J. in the *Switzman* case, yet without any reference thereto. Although that theory, which would prevent Parliament as well as the provincial legislatures from restricting fundamental freedoms, seems to contradict the doctrine of exhaustion of legislative powers under the Canadian constitution[34]

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[31] *Switzman* v. *Elbling*, [1957] S.C.R. 285, per Abbott J., at p. 328.

[32] *Henry Birks and Sons Ltd* v. *City of Montreal*, [1955] S.C.R. 759; *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299; *Switzman* v. *Elbling*, *ibid*.

[33] The propositions are found in *Dupond*, *supra*, footnote 1, at pp. 439-440 (D.L.R.). Laskin C.J. does not discuss the fundamental freedoms issue, having characterized the by-law as in relation to criminal law.

[34] Laskin's Canadian Constitutional Law (4th ed. rev. by A. Abel, 1975), p. 92. See also N. Lyon, The Central Fallacy of Canadian Constitutional Law (1976), 22 McGill L.J. 40, at p. 53.

and had never received widespread judicial support, its rejection at least merited a reference and some reasons, rather than an *ipse dixit*.

> *Proposition 2*: None of those freedoms is a single matter coming within exclusive federal or provincial competence . . . .

The case law seems to give support to this proposition, for the major decisions relating to fundamental freedoms recognize that such freedoms are not absolute and that the provinces can legislate with regard to speech or assembly when exercising legislative authority under section 92. For example, in the *Alberta Press Act* case, Duff C.J. acknowledged that the provinces could legislate with regard to libel and slander under section 92(13) (as "property and civil rights in the province"), even though the result was to restrict freedom of speech.[35] The provinces could not, however, suppress public debate nor substantially interfere with the parliamentary institutions of Canada. As Duff C.J. stated:

> Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting or through the press) would, in our opinion, be incompetent to the legislatures of the provinces, as repugnant to the provisions of the *British North America Act*. . . .[36]

Beetz J. makes no attempt to deal with this kind of restriction on provincial power, developed by implication from the B.N.A. Act. In Proposition 2, he seems to reject its existence, yet earlier dicta to the effect that the media are not being "muzzled" by this ordinance and that freedom of speech is not interfered with in such a way as to bring the matter within the federal criminal law power,[37] allow for the conclusion that there still remains some area of speech, assembly and religion protected from provincial legislation. Proposition 2 does *not* lead directly to that conclusion, however, and implies an overruling of the *Alberta Press* case without express reference. If that is not Mr. Justice Beetz's intention, it should have been more clearly stated.

> *Proposition 3*: Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. . . .
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> Demonstrations are not a form of speech but a collective action. They are of the nature of a display of force rather than of that of an appeal to reason, their inarticulateness prevents them becoming part of language and from reaching the level of discourse.

One cannot quarrel with the first statement in Proposition 3, for it is an effort to state that freedoms of speech, assembly, or religion are not absolute. These freedoms can be subjected to some

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[35] *Reference re Alberta Legislation*, [1938] S.C.R. 100, at p. 134.

[36] *Ibid.*, at p. 134.

[37] *Dupond, supra*, footnote 1, at pp. 437-438 (D.L.R.).

restrictions, and it is only the most doctrinaire civil libertarian who would argue that such freedoms are absolute. While many would agree to the acceptability of restrictions with regard to the time, place, or manner in which these freedoms can be exercised, there may come a point when such regulations of time, place, and manner cross over a forbidden line to become limitations on the content of speech and, therefore, excessive restrictions on the freedom to speak or assemble. A court, asked to adjudicate such an issue, must ultimately balance the value of freedom of speech against the objective which the legislative body is trying to achieve by its legislation—for example, maintenance of public order or protection of public morals weighed against suppression of unpopular views through prior restraints or prohibitions.

In the United States, a vast and complex jurisprudence has developed with regard to the First Amendment precept that Congress shall enact no law abridging the freedom of speech, and a complicated case law discloses the bounds of protected and unprotected speech and valid regulations pertaining to time, place and manner.[38] Although Canada lacks a similar constitutional guarantee of freedom of speech, which in the United States imposes on the judiciary the difficult task of balancing the interests of the individual citizen against those of the state, given the importance of the case it was open to the Supreme Court in *Dupond* to adopt a similar sophisticated approach to the protection of freedom of speech and assembly. It was not utilized. Instead, Beetz J. distinguishes the fundamental freedoms from the "*faculty* of holding assemblies on the public domain". One cannot quarrel so far, for regulation of time, place and manner is defensible. But the statement that follows shortly thereafter to the effect that there is no speech element to demonstrations is untenable. The purpose of most demonstrations is not to go out to cause property damage or to do violence but to express individual support for some position by making the effort to appear, along with others, on its behalf. Demonstrations are one of the few ways open to individuals to express political and social views, and they are more effective, through their dramatic effect, than a letter writing campaign to the Prime Minister or a Member of Parliament. To say that demonstrations are not a form of speech is to ignore reality. It is to be regretted that Mr. Justice Beetz did not refer to the extensive American literature and case law on "symbolic speech", when he said that demonstrations have no element of communication. There, not only demonstrations, but also flag-burning and wearing of black armbands can constitute speech.[39]

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[38] See, for example, T. Emerson, The System of Freedom of Expression (1970); A. Bickel, The Morality of Consent (1976); G. Gunther, Constitutional Law (9th ed., 1975), chs. 12 and 13.

[39] See, for example, *U.S.* v. *O'Brien* (1968), 391 U.S. 367; *Spence* v.

> *Proposition 4*: The right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done; it may also amount to a nuisance.

In support of this proposition, Beetz J. cites an 1888 English case, three English academic authorities from 1937, and one Canadian article,[40] and then concludes:

> Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian Constitution under the preamble of the *British North America Act, 1867*.

It is difficult to know where to start in reacting to these statements. One could initially fault Mr. Justice Beetz on his statements with regard to the right to hold public meetings in English law. While he is correct in stating that there was no right to hold a public *meeting*, since that was a trespass against the urban authority, it appears that there was a right in English law to hold a parade or a public procession on public streets. Such a public procession, while *prima facie* lawful, would be illegal if an unlawful assembly, riot, or public nuisance.[41] Seemingly this right to hold a public procession could have been imported into Canada in 1867.

But it is sterile indeed to rely on nineteenth century British cases or even English academic authorities from the 1930's in deciding whether a citizen of Montreal in 1969 or in 1978 has a right to participate in at least peaceful demonstrations. Reference to "trespass on the public domain", when by that phrase is meant the city thoroughfares, is archaic. Surely citizens of Canada have a right to use the streets which they as taxpayers own, subject to reasonable restrictions so as to allow for the orderly flow of traffic and to prevent damage to property. A total ban on parades or assemblies is *not* a reasonable restriction to avoid such detrimental effects, particularly when weighed against the individual's interest in passage and, more importantly, in the individual's interest in expression through group action. The municipal or provincial government which wishes to maintain order could and should do so through existing Criminal Code measures or regulations designed to

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Washington (1974), 418 U.S. 405; *Tinker* v. *Des Moines Independent School District* (1969), 393 U.S. 503, and generally, Dorsen *et al.*, Political and Civil Rights in the United States (4th ed., 1976), vol. 1, pp. 286-290.

[40] *Ex parte Lewis* (1888), 21 Q.B. 191; A.L. Goodhart, Public Meetings and Processions (1936), 6 Camb. L.J. 161; W. Ivor Jennings, The Right of Assembly in England (1931-32), 9 N.Y. U. L. Q. Rev. 217; E.C.S. Wade, Police Powers and Public Meetings (1937), 7 Camb. L.J. 175; A. Jodouin, La liberté de manifester (1970), 1 Rev. gén. de droit 9.

[41] See Goodhart, *op. cit.*, *ibid.*, at pp. 163, 169-170.

maintain order in the streets, while safeguarding this important avenue of expression.[42]

The Supreme Court of Canada in *Dupond* could have recognized demonstrations as a means of speech without jeopardizing provincial power to regulate that form of speech. That is, Beetz J. need not have gone so far as to say demonstrations are not a form of speech. The *Alberta Press* case made it clear that the provinces can regulate speech so long as they do not unduly restrict traditional forms of speech (which include assemblies).[43] They cannot act so as to interfere with the public discussion necessary in a parliamentary system. In *Dupond*, I would argue that the City of Montreal crossed the line of acceptable provincial restrictions on speech by its total ban on demonstrations for thirty days. Perhaps if more evidence had been presented in the reports from the Police and Law Departments as to the basis for the ordinance, it might be argued that the restriction is one limited in time and manner, rather than a suppression of speech. Even with further evidence, a thirty day ban seems excessive, and a grave interference with public expression.

These last statements as to provincial regulatory power are harmonious with Mr. Justice Beetz's fifth proposition in *Dupond*, which notes that "the holding of assemblies, parades or gatherings on the public domain is a matter which, depending on the aspect, comes under federal or provincial competence . . .". His sixth proposition is also without challenge, postulating that the Canadian Bill of Rights does not apply to provincial or municipal legislation.

IV

Dupond is a case that requires scrutiny by those concerned with the balance in the federal system of government and those concerned with fundamental freedoms in Canada. The court appears to have given a wide interpretation to the provincial "general" power found in section 92(16). The fact that provincial legislation addresses a problem geographically limited or "local" in scope has become of significant importance to the court in reviewing the constitutionality of such legislation. This development may give considerable power to the provinces in regulating activity, whether from perspectives of public morality (because of *McNeil*) or from concerns for public order. The dicta with regard to fundamental freedoms leave the civil libertarian to not only bemoan the lack of constitutional protection for civil liberties in Canada (a state of affairs that is hardly novel); they also engender concern because of the apparent rejection of both the implied Bill of Rights theory and the concept of symbolic speech.

In both the treatment of fundamental freedoms and the scope of

[42] See *Cox* v. *Louisiana* (1965), 379 U.S. 559 (*Cox II*) for a discussion of the U.S. Supreme Court on this matter.

[43] *Alberta Press* case, *supra*, footnote 35, at p. 134.

provincial power, the majority opinion leaves the reader with a feeling of dissatisfaction. The court has not dealt adequately with the precedents, whether the *Storgoff* case in relation to section 92 or *Alberta Press* in relation to freedom of speech. Perhaps this is the most distressing aspect of the *Dupond* case: it lacks reasoned principles. Yet, the legitimacy of judicial review rests on the articulation of such reasoned principles by the court as the final arbiter under the constitution.[44] *Dupond* leaves no clear indication of why the present result is justified in light of past practice or present requirements. More importantly, it leaves no guidelines for the future as to the scope of provincial penal power.

KATHERINE SWINTON*

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NEGLIGENCE—BARRISTER—IMMUNITY FROM ACTION FOR NEGLIGENCE AT THE SUIT OF HIS CLIENT—EXTENT OF IMMUNITY—ANOTHER SWING OF THE PENDULUM.—The decade since *Rondel* v. *Worsley*[1] has seen, both in Canada and in England, a significant expansion of the liability for negligence of members of diverse professions and occupations.[2] This judicial extension of liability to other practitioners stands in sharp contrast to the decision of the House of Lords in that case, which proclaimed the immunity of a barrister from action for negligence at the suit of his client in respect

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[44] The court itself has often acknowledged its crucial role as the "guardian of constitutional integrity" (Laskin C.J. in *Anti-Inflation Act* case, *supra*, footnote 15, at p. 481). See, also, Dickson J. in *Amax Potash Ltd* v. *Government of Saskatchewan* (1976), 71 D.L.R. (3d) 1, at p. 10.

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[1] [1969] 1 A.C. 191, [1967] 3 All E.R. 993.

[2] *Canada*: accountants: *Haig* v. *Bamford et al.*, [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68; *Toromount Industrial Holdings Ltd et al.* v. *Thorne, Gunn, Helliwell & Christenson* (1976), 10 O.R. (2d) 65, 62 D.L.R. (3d) 225 (H.C.), varied (1977), 14 O.R. (2d) 87, 73 D.L.R. (3d) 122 (C.A.); architects: *Dabous* v. *Zuliani et al.* (1976), 12 O.R. (2d) 230, 68 D.L.R. (3d) 414 (C.A.); bank managers: *Goad et al.* v. *Canadian Imperial Bank of Commerce et al.*, [1968] 1 O.R. 579, 67 D.L.R. (2d) 189 (H.C.); engineers: *Dominion Chain Co. Ltd* v. *Eastern Construction Co., Ltd* (1976), 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A.), aff'd (1978), 84 D.L.R. (3d) 344 (S.C.C.); municipal licence inspectors: *Windsor Motors Ltd* v. *District of Powell River* (1969), 4 D.L.R. (3d) 155 (B.C.C.A.); real estate agents: *Hauck et al.* v. *Dixon et al.* (1976), 10 O.R. (2d) 605, 64 D.L.R. (3d) 201 (H.C.); travel agents: *Yumerovski et al.* v. *Dani* (1977), 18 O.R. (2d) 704, 83 D.L.R. (3d) 558 (Co. Ct).

England: architects: *Sutcliffe* v. *Thackrah*, [1974] A.C. 727, 1 All E.R. 859 (H.L.); accountants when acting as valuers: *Arenson* v. *Casson, Beckman Rutley and Co.*, [1977]

of his conduct of litigation in the courtroom. While, admittedly, there was powerful and long-established authority to support that conclusion,[3] it would not have been surprising, in light of the judicial emanations that were to follow, if the House of Lords had characterized the barrister's immunity as an anachronism that could no longer "survive in the realistic atmosphere of the late 20th century".[4]

Surprisingly, *Rondel* v. *Worsley* aroused little judicial comment,[5] either in this country or that of its origin, until, almost ten years after it was decided, another case came along which squarely raised the question of the *extent* of the barrister's immunity for negligence. The case, *Saif Ali* v. *Sydney Mitchell & Co. et al.*,[6] involved a barrister's allegedly faulty decision about whom to sue in an action arising out of a motor vehicle accident. Ali had been injured when the van in which he was a passenger was involved in a collision with a car driven by a woman who was taking her children to school. The car was owned by the woman's husband. The wife was charged and pleaded guilty to driving without due care and attention. Both Ali and the driver of the van, who suffered serious injuries and were away from work for many months, consulted solicitors. The solicitors in turn consulted a barrister, who settled a draft writ and statement of claim in which damages were claimed only against the husband as the owner of the car, and not against his wife who was alleged to have driven it as his agent. Before the appropriate limitation period had expired, the solicitors informed the barrister that the solicitors for the husband's insurer had stated in the course of negotiations that the driver of the Ali vehicle should be joined as a defendant and that the allegation in the statement of claim that the wife had been driving as her husband's agent might be contested. The barrister advised that no amendment to the statement of claim was called for, and the statement of claim was not amended to add either the wife or the driver of the Ali vehicle as a defendant. Eventually, on the theory that the action against the husband could not succeed, the claim against him was discontinued;[7] but by then the limitation period had expired and it was too late to take action against either the wife or the driver of the

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A.C. 405, [1975] 3 All E.R. 901 (H.L.); building inspectors: *Anns* v. *London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.); borstal officers: *Home Office* v. *Dorset Yacht Co. Ltd*, [1970] A.C. 1004, 2 All E.R. 294 (H.L.); professional salvors: *The Tojo Maru*, [1972] A.C. 242, [1971] 1 All E.R. 1110 (H.L.).

[3] *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890, 29 L.J. Ex. 382, 157 E.R. 1436 and *Kennedy* v. *Broun* (1863), 13 C.B.N.S. 677, 32 L.J.C.P. 137, 143 E.R. 268.

[4] *Saif Ali* v. *Sydney Mitchell & Co. et al.*, [1978] Q.B. 95, [1977] 3 All E.R. 744 (C.A.); rev. [1978] 3 All E.R. 1033 (H.L.), per Lord Salmon, at p. 1051 (in another context).

[5] See Comment (1978), 56 Can. Bar Rev. 116.

[6] *Supra*, footnote 4.

[7] On the advice of "leading counsel", founded, presumably, on the authority of

Ali vehicle, a result that was later to be graphically described in these words:[8]

> The present appeal concerns a simple running down action in which Mr. Ali, if properly advised, must have recovered judgment, or settled his claim, for substantial damages against [the husband], [the wife] and [the driver of his vehicle] or one or more of them. As it is, after inordinate delays, while he had left himself in the hands of his lawyers and followed their advice for about eight years, he now finds himself barred in law from taking his case to court against any of the defendants whose negligence caused his damage, and accordingly he is deprived of any of the damages to which he was clearly entitled.

Contending that he had been wrongly advised, Ali sued his solicitors for damages for professional negligence. The solicitors issued third party proceedings against the barrister who had advised them. The Assistant Registrar ordered the third party notice to stand as a statement of claim on the barrister. The barrister applied successfully to the District Registrar to have the third party claim struck out on the ground that he was immune from the claim in negligence made against him. This order was reversed by a judge on appeal by the solicitors. The barrister successfully appealed to the Court of Appeal, which unanimously upheld the appeal and, once again, dismissed the third party proceedings. The solicitors appealed to the House of Lords which, by a three to two majority, allowed the appeal and directed that the third party claim could proceed.

In reaching that conclusion, the House of Lords was called upon to re-examine its previous decision—or, more accurately, the *scope* of that decision—in *Rondel* v. *Worsley*. In that somewhat bizarre case, a disgruntled client brought an action for damages for negligence against a barrister who, on a dock brief, had unsuccessfully defended him on charges of causing grievous bodily harm with intent and assault occasioning bodily harm. The barrister applied to have the claim struck out. When the application was heard, the client admitted that he had inflicted the injuries in respect of which he had been convicted, but complained that his counsel had failed to cross-examine the Crown witnesses to show that these injuries had been inflicted with the accused's teeth and bare hands, rather than with a knife. Apparently not even the client believed that this evidence would have altered the result, for he admitted in the subsequent proceedings that he would not have had any chance of being acquitted had counsel cross-examined the witnesses as suggested. At every judicial level at which the application was argued, including the House of Lords, the court was unanimous in the view that no action lay against the barrister in the circumstances which the client alleged.

Morgans v. *Launchbury et al.*, [1973] A.C. 127, [1972] 2 All E.R. 606 (H.L.), a case which at least one of their lordships in *Saif Ali* viewed as "obvious[ly]" distinguishable from the case at bar: *supra*, footnote 4, per Lord Salmon, at p. 1047.

[8] *Supra*, footnote 4, per Lord Salmon, at p. 1047.

Reduced to its essentials, the only matter for decision in that case was whether a barrister could be liable in negligence to his client for the manner in which he had conducted the defence in court of his client's trial on a criminal prosecution. The argument, however, ranged widely and the opinions expressed were not confined to criminal cases or to the actual conduct of a case in court, but referred also to civil cases and to work done out of court. Although the opinions were expressed in different terms, "the highest common factor" which at least one member of the House of Lords in the *Saif Ali* case[9] discerned from *Rondel* v. *Worsley* was that stated in the headnote in the following terms:[10]

> . . . a barrister [is] immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court *and the preliminary work connected therewith such as the drawing of pleadings*.

Taken at their face, these words applied to the negligence claimed against the barrister in *Saif Ali*, who was alleged to have been negligent in advising who should be joined as defendants to the plaintiff's claim and in settling the pleadings in conformity with that erroneous advice. It therefore fell to the House of Lords in *Saif Ali* to re-examine its decision in *Rondel* v. *Worsley*, and to consider whether it had intended to extend the barrister's immunity as far as the quoted words from the headnote would suggest. For while *Rondel* v. *Worsley* had rejected the argument that barristers should enjoy no greater immunity than other professionals, and had concluded that barristers had a special status[11] not accorded to members of any other profession or skilled craft,[12] the majority in *Saif Ali* felt there could be no justification for the extension of a blanket immunity to a barrister in respect of all of his work whether done in or out of court.[13] The question, in short, was: where should the line be drawn?

The answer to that question required an examination by the members of the House of Lords in *Saif Ali* of the reasons given in *Rondel* v. *Worsley* in justification of the barrister's exceptional immunity, and an examination of the applicability (or the contrary) of

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[9] *Ibid.*, per Lord Diplock, at p. 1040.

[10] [1969] 1 A.C. 191.

[11] *Supra*, footnote 4, per Lord Wilberforce, at p. 1037.

[12] *Ibid.*, per Lord Diplock, at p. 1041; in *Saif Ali*, only Lord Diplock expressed any unhappiness that the House of Lords had not had the benefit of argument in support of the "more radical submission" that the barrister's immunity of liability for negligence ought no longer to be upheld: *ibid*, at p. 1045; Lord Russell of Killowen, who dissented, conceded that there might be "much to be said for denying immunity from claims for negligence by a barrister in the conduct of civil litigation in court", but saw no escape, while that immunity stood, from its extension to pre-trial acts of alleged negligence, *ibid.*, at p. 1054.

[13] *Ibid.*, per Lord Salmon, at p. 1049.

those reasons to the fact situation before them.[14] The majority concluded that all of the grounds advanced in *Rondel* v. *Worsley*[15] to justify the barrister's immunity from suit for things done or said in court involved an aspect of public policy which was absent when the matter at hand was the barrister's alleged negligent failure to join the correct persons or to advise that they should be joined as defendants;[16] and, once the circumstances were such that no question of public policy was involved,

> . . . the prospects of immunity for a barrister against being sued for negligently advising his client vanish into thin air, together with the ghosts of all the excuses for such immunity which were thought to exist in the past.[17]

Where, then, was the line to be drawn between immunity and non-immunity? The majority drew it in the words of McCarthy P., of the Court of Appeal of New Zealand[18] in *Rees* v. *Sinclair*:[19]

> But I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.

and felt that the alleged negligent failure to add proper defendants and the settling of pleadings in accordance with such advice, when measured against that test,[20] fell outside the limited scope of the barrister's immunity and, subject to the plaintiff's ability to show that the barrister had failed in his duty to exercise reasonable care and competence,[21] was an issue which should be resolved at trial. The minority, unable to find any,

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[14] *Ibid.*, per Lord Diplock, at pp. 1042-1045; Lord Salmon, at p. 1051; and Lord Keith of Kinkel, at pp. 1054-1055.

[15] Such as the undesirability of inhibiting the barrister from discharging the duty he owes to the court as well as to his client; the undesirability of re-litigating as between barrister and client what was litigated between the client and his opponent; the general immunity from civil liability attaching to all persons in respect of their participation in judicial proceedings; and the need to maintain the integrity of public justice. For a more detailed examination of the policy considerations examined in *Rondel* v. *Worsley*, with references to the appropriate passages in their lordships' opinions, see Comment (1968), 46 Can. Bar Rev. 505.

[16] See, for example, per Lord Salmon, *supra*, footnote 4, at p. 1050.

[17] *Ibid.*

[18] Where (as in Canada) the professions of barrister and solicitor are fused rather than (as in England) divided: *supra*, footnote 4, per Lord Diplock, at p. 1046.

[19] [1974] 1 N.Z.L.R. 180, at p. 187.

[20] Which was rejected by the minority as inconsistent with "the principal ground of the decision in *Rondel* v. *Worsley*": *supra*, footnote 4, per Lord Keith of Kinkel, at p. 1055.

[21] *Supra*, footnote 4, per Lord Salmon, at p. 1051.

> . . . justifiable line to be drawn at the door of the court, so that a claim in negligence will lie against a barrister for what he does or omits negligently short of the threshold though not if his negligent omission or commission is over the threshold[22]

was of the view that, as the negligence alleged took place in connection with the barrister's conduct of litigation, it fell within the immunity conferred by law upon barristers, and would have dismissed the appeal.[23]

To those who, like the writer, applaud the result in *Saif Ali* in limiting the scope of an immunity conferred upon one profession to the exclusion of all others, one particular argument advanced by the minority is, at first blush, especially unappealing. That argument is that there is merit in maintaining a rule which is simple and easy to apply, and the extension of immunity to all of a barrister's work in connection with litigation is such a rule. Conversely, the argument runs, the restriction of the immunity suggested by the majority would:

> . . . prove difficult to apply in practice and would almost inevitably require inquiry into the facts. It would seldom, if ever, be possible to decide the issue of immunity on an application for striking out. So the objective of relieving the barrister of any apprehension of contentious litigation regarding the conduct of his cases would not be achieved.[24]

Respectfully, it is easy to scorn such an argument as simplistic and to disparage, with Emerson, the consistency thus advocated as "the hobgoblin of little minds". But, from at least one perspective, the "simplistic" view of the minority that the barrister's immunity should extend without limitation to all of a barrister's work would unquestionably result in a contraction rather than a protraction of litigation. For head-counters will not have failed to note that, as *Saif Ali* climbed its way up the judicial ladder, six judicial officers,[25] applying the immunity principle, would have dismissed the third party proceedings, and five judicial officers[26] were of the opposite view. Defining the test of immunity of the act under consideration by reference to its intimate connection

> . . . with the conduct of the cause in Court [such] that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing,[27]

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[22] *Ibid.*, per Lord Russell of Killowen, at p. 1053.

[23] *Ibid.*; *cf.* also Lord Keith of Kinkel, at pp. 1055-1056.

[24] *Ibid.*, per Lord Keith of Kinkel, at p. 1056.

[25] The District Registrar to whom the application to strike out the third party proceedings was made; the three members of the unanimous Court of Appeal; and the two dissenters in the House of Lords.

[26] The Assistant Registrar who first ordered the third party notice to stand; the judge whose decision was reversed by the Court of Appeal; and the majority of the House of Lords.

[27] See *supra*, footnote 19.

is surely a matter on which honest judicial minds are bound to differ, and the result will undoubtedly be a proliferation of disputes between accusing clients and accused barristers attempting, respectively, to place the impugned conduct on one or the other side of the line.

One final note. Observers of judicial coincidence will be interested to record that, almost a year to the day before the decision of the House of Lords in *Saif Ali*, an Ontario case came to the same result in a virtually identical fact situation. In *Banks et al.* v. *Reid*,[28] the same issue—failure to name an appropriate defendant—formed the basis of an action for negligence against a barrister and solicitor. The action was dismissed at trial on the ground that the client would not have recovered in any event, but the trial judge,[29] to whom neither counsel had referred *Rondel* v. *Worsley*, felt that the principle in that case would also have justified dismissal of the client's action. In reversing the trial judge, the Court of Appeal, having concluded that the lawyer was negligent, continued:[30]

> . . . no immunity should be afforded negligence of the character found in this case by the principles in [*Rondel* v. *Worsley*] or as that case was applied in *Saif Ali* v. *Sydney Mitchell & Co. et al.*, a judgment of the Court of Appeal reported since this case was argued. If it is applicable at all in this jurisdiction, where practitioners are both barristers and solicitors, *Rondel* v. *Worsley* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court and is dependent upon consideration of the barrister's duty to the Court and duty to his client. [The defendant's] negligence was his failure to carry out duties of a different nature, being duties that were fundamental to the relationship between a solicitor and his client.

The majority of the House of Lords in *Saif Ali* would clearly have approved.[31]

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[28] (1975), 6 O.R. (2d) 404, 53 D.L.R. (3d) 27 (H.C.), rev'd (1978), 18 O.R. (2d) 148, 81 D.L.R. (3d) 730 (C.A.).

[29] *Ibid.*, (H.C.): at pp. 418-419 (O.R.), 41-42 (D.L.R.).

[30] *Ibid.*, (C.A.): at p. 153 (O.R.), 735 (D.L.R.).

[31] Following preparation of this comment but before its publication, the reasons for judgment in *Demarco* v. *Ungaro et al.* (1979), 21 O.R. (2d) 673, were released. In his decision, dismissing a motion for a determination that a pleading by a former client against an Ontario lawyer in respect of his conduct of the client's case in court disclosed no reasonable cause of action, Krever J. reviewed extensively the decisions of the House of Lords in *Rondel* v. *Worsley* and *Saif Ali*, and concluded (at pp. 692-693): " . . . I have come to the conclusion that the public interest . . . in Ontario does not require that our courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in court. It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person."

And (at p. 697): " . . . in Ontario, a lawyer is not immune from action at the suit of a client for negligence in the conduct of the client's civil case in court."

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Public policy is truly an unruly horse[1] and even the most adept and experienced cannot ride it without some feeling for the dangers involved. One problem is that the rider may become saddle-sore and develop such a thick skin that he becomes insensitive to subtle and important changes in the applicability of prevailing policy considerations. Also, public policy is likely to carry the unwary off in directions that the rider did not anticipate or desire. An area of Anglo-Canadian law whose development has been strikingly dominated by the dictates of public policy is that of the possible immunity of the lawyer from actions for negligence in respect of the conduct of litigation. Unfortunately, the courts have proved poor horsemen in this respect. Not only are the recent developments in English law to be deplored, but any attempt to establish an immunity of any extent in Canada is to be strenuously resisted.[2]

For over a century, it had been accepted that in English law, a barrister was "not responsible for any mistake or indiscretion or error of judgment of any sort".[3] However, in 1964, with the introduction of liability for negligent statements by the House of Lords in *Hedley Byrne & Co. Ltd* v. *Heller and Partners*,[4] the continued existence of such an immunity became questionable. Three years later in 1967 in *Rondel* v. *Worsley*,[5] the House of Lords put such doubts to rest. Upholding the decision of Lawton J. at first instance[6] and the Court of Appeal,[7] it decided unanimously that a barrister was entitled to some immunity from actions in respect of professional negligence, specifically those arising from the conduct of proceedings in court although they could not agree upon the extent of such an immunity.[8] Ignoring the customary rationale of the

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[1] *Richardson* v. *Mellish* (1824), 2 Bing. 252, per Burrough J.

[2] Although Mr. Catzman gives no express indication of his particular stance on the issue, the general tenor of his comment is that, while the recent limiting of the scope of the immunity by the House of Lords is to be applauded, some immunity is appropriate. Furthermore, in an earlier comment, he stated: "*It will not* have escaped the reader's attention that substantially all of the considerations of public interest which the members of the House of Lords found so compelling are equally appropriate to the realities of Canadian litigation. In the writer's view, therefore, it is not unlikely that when a Canadian Rondel and a Canadian Worsley have the mutual misfortune to combine, our courts may well extend the immunity from action which the House of Lords saw fit to bestow upon Worsley to his hapless Canadian counterpart." See (1968), 46 Can. Bar Rev. 505, at p. 515.

[3] *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890, at p. 924, per Pollock C.B.

[4] [1964] A.C. 465, [1963] 2 All E.R. 575.

[5] [1969] 1 A.C. 191, [1967] 3 All E.R. 993.

[6] [1967] 1 Q.B. 499, [1966] 3 All E.R. 660.

[7] [1967] 1 Q.B. 443, [1966] 1 All E.R. 467.

[8] In brief, Lord Reid and Lord Morris believed that the immunity should only extend to work that was of a litigious nature and not to advisory work; Lord Upjohn

barrister's inability to sue for his fees,[9] the House chose to base such immunity on overriding considerations of public policy. In short, it concluded that "the claim of an individual to a remedy for injustice suffered is held to be prejudicial to the sound administration of justice and, being a matter of overriding public interest, must prevail".[10] Disregarding their own warning that public policy is "a very unstable and dangerous foundation on which to build",[11] they relied upon three broad grounds of public interest:

(a) A barrister owes a duty to the court which must be carried out fearlessly and independently. It is superior to any duty he may owe his client.

(b) An action for negligence against a barrister would involve a re-trial of the original case which would only serve to increase and prolong litigation.

(c) A barrister is under an obligation to accept any client, however difficult or undesirable who seeks his services.

Almost a decade later, in 1978, in *Saif Ali* v. *Sydney Mitchell & Co.*[12] the House of Lords were asked to rule on the extent of such an immunity; that is, "what is the extent of a barrister's immunity, if any, against a claim for damages for negligence in the performance of his professional duties out of court?"[13] All five law lords were of the firm opinion, although for slightly differing reasons, that the decision in *Rondel* v. *Worsley*[14] was conclusive on the question of the existence of an immunity and that the purpose of the present case was simply to provide "a fringe decision rather than a new pattern".[15] By a slender majority, the House decided not to sanction

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felt that the immunity of counsel should start at that letter before action where taxation of party and party costs start; Lord Pearson expressed doubt as to whether there would be immunity for doing "pure paper work"; and Lord Pearce believed that the immunity did not extend to pure paper work but did cover work carried out in chambers. On balance, it would seem that their lordships were not in favour of a blanket immunity.

[9] *Re Le Brasseur and Oakley*, [1896] 2 Ch. 487; *Kennedy* v. *Brown* (1803), 13 C.B.N.S. 677; *Wells* v. *Wells*, [1914] P. 157.

[10] M.A. Millner, Negligence in Modern Law (1967), p. 55. See also, John G. Fleming, The Law of Torts (5th ed., 1977), pp. 138-139.

[11] *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484, at p. 507, per Lord Linley.

[12] [1978] 3 All E.R. 1033, rev'ing [1978] Q.B. 95, [1977] 3 All E.R. 744 (C.A.). A number of actions were brought against barristers since 1967 but they were all settled out of court; see Q. Edwards, The Saif Ali case: a new liability for the Bar? Guardian Gazette, 29th Nov, 1978, p. 1185.

[13] *Ibid.*, at p. 1046, per Lord Jalmon.

[14] *Supra*, footnote 5.

[15] *Supra*, footnote 12, at p. 1037, per Lord Wilberforce.

a blanket immunity and imposed a limit on the extent of such immunity. While the minority felt that, if there was a public policy basis to ground any immunity, that immunity should extend to all work done in every aspect of the civil litigation process,[16] the majority maintained that these policy considerations lose much of their relevancy and cogency when "the scene of the exercise of the barrister's judgment . . . is shifted from the hurly-burly of the trial to the relative tranquility of the barrister's chambers".[17] The majority adopted the test laid down by McCarthy P. in the New Zealand case of *Rees* v. *Sinclair*:[18]

> The protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to hearing.

Do the policy considerations that the English courts feel warrant the continued existence of an immunity, albeit limited to the conduct of litigation, have any relevance to the Canadian predicament and, in particular, should such an immunity be established in Canadian law? Such questions are no longer merely academic for in the recent case of *Demarco* v. *Ungaro and Barycky*,[19] the Supreme Court of Ontario was faced with such a problem. In reaching his decision, Mr. Justice Krever did not duck any of the important policy matters raised, but, with admirable judicial fortitude and perspicacity, met the issues squarely and came to a commendable decision that left no doubt as to the stance he had taken.

The facts alleged by the plaintiff were quite straightforward. In July 1975, an action was brought against the plaintiff in the present case, Mark Demarco, for an unpaid debt of $6,000.00. He retained the services of the defendants, Guy Ungaro and George Barycky, who were partners in a Niagara Falls law practice. The plaintiff lost his action and had costs awarded against him. In September 1978,

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[16] Although the opinions of Lord Russell and Lord Keith are likely to be ignored, they both make a couple of points worth repeating. For instance, Lord Russell remarks that, "there may be much to be said for denying immunity from claims for negligence by a barrister in the conduct of civil litigation in court. But while that immunity stands, as I think it does as involved in the decision of this House in *Rondel* v. *Worsley*, I see no escape from the extension to pre-trial alleged negligence so strongly supported (*obiter*) in that case;" *ibid.*, at p. 1054.

[17] *Ibid.*, at p. 1043, per Lord Diplock.

[18] [1974] 1 N.Z.L.R. 180, at p. 187 (C.A.). In the recent case of *Biggar* v. *McLeod*, [1978] 2 N.Z.L.R. 9, the New Zealand Court of Appeal held that the settlement of an action by compromise in court was work related to the conduct of litigation and, as such, was covered by the immunity of the barrister. It should be noted that the New Zealand legal profession is a hybrid of the English and Canadian professions. Certain lawyers can act as both barristers and solicitors whereas others are barristers alone and cannot act as solicitors.

[19] (1979), 21 O.R. (2d) 673.

the plaintiff commenced an action against the defendants alleging that the earlier action had been lost due to the negligence of the defendants. In a catalogue of unfortunate events,[20] the plaintiff's central claim was that the second defendant had failed to lead evidence which he knew was available and which would have supported the plaintiff's position. The defendants brought a motion to strike out that part of the plaintiff's statement of claim for disclosing no cause of action and for being frivolous and vexatious.[21] With the agreement of the plaintiff and with the leave of the court, an order was made to hear the point of law involved.[22] In bringing this motion, the defendants relied upon the principles and rationale adopted by the House of Lords in *Rondel* v. *Worsley*[23] and submitted that such a decision was good law in Ontario. The question for the court, therefore, was, in the words of Krever J., quite blunt:

> All that is involved is whether a dissatisfied client is without any right to sue his or her lawyer. Put another way, the question is whether a lawyer, in the conduct of a trial, or other proceeding in court, is, alone among all other professional persons, incapable of being sued by the client for negligence.[24]

A brief glance at the case law in Ontario regarding the possible immunity of an advocate shows that such a suggestion has received a decidedly cool reception. As early as 1863, the Court of Queen's Bench in the Upper Canada case of *Leslie* v. *Ball*,[25] on very similar facts to the *Demarco* case, was of the opinion that little could be gained from following English authority, since the fusion of the legal profession in Upper Canada resulted in there being policy considerations of a different character at work. This distinction was further articulated a couple of decades later in *R.* v. *Doutre*[26] by Lord Watson who entertained serious doubts whether:

> [i]n an English colony where the common law of England is in force, [considerations of public policy] could have any applicability to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every

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[20] The plaintiff claimed that the defendants did not assist or confer with him in preparation for the examinations for discovery or the trial; that the defendants failed to proceed expeditiously with the defence and caused him unnecessary expense; and that the first defendant failed to appear at trial and sent the second defendant who was totally unprepared. The defendants conceded that such allegations revealed a proper cause of action.

[21] Rule 126 (Ont.).

[22] Rule 124 (Ont.).

[23] *Supra*, footnote 5.

[24] *Supra*, footnote 19, at p. 675.

[25] (1863), 22 U.C.Q.B. 512 (Q.B.). See also, *McDougall* v. *Campbell* (1877), 41 U.C.Q.B. 332 (Q.B.); *Wade* v. *Ball* (1870), 20 U.C.C.P. 302 (C.P.); *Robertson* v. *Furness* (1879), 43 U.C.Q.B. 143 (Q.B.).

[26] [1884] A.C. 745 (P.C.).

> class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law.

Until the decision in *Rondel* v. *Worsley*,[27] the question of a possible immunity did not come before the Canadian courts[28] and, therefore, it seems reasonable to assume that no such immunity existed. Indeed, even after the decision in *Rondel* v. *Worsley*,[29] it seemed agreed on most sides that the policy considerations that supported the continued existence of the immunity in England were "not germane to the Canadian milieu"[30] and that the decision should be ignored. For instance, Laskin J.A., as he then was, speaking in a personal capacity, was unequivocal:

> The rules of conduct that in England govern the relations between barristers and solicitors have no meaning in Canada. Lawyers here are generally both barristers and solicitors, and certainly belong to the same Law Society. It was possible in Ontario until 1964 to be admitted as a solicitor without being called to the Bar; since that date the rules of the Law Society of Upper Canada provide for admission in both capacities or not at all. In sum *Rondel* v. *Worsley* is based on considerations which have no Canadian relevance.[31]

Such resolve and certainty were given a firm jolt by the decision of the Ontario High Court in *Banks* v. *Reid*.[32] Involving a failure to amend pleadings within the stipulated limitation period, Henry J. indicated that had he been called to do so, he would "have dismissed the action on the principle confirmed by the House of Lords in *Rondel* v. *Worsley*".[33] The Court of Appeal, although deciding the matter on other grounds, took time to comment on the trial judge's dictum. Delivering the judgment of the court, Brooke J.A. said that "[i]f [an immunity] is applicable at all in this jurisdiction where practitioners are both barristers and solicitors, *Rondel* v. *Worsley* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court and is dependent upon consideration of the barrister's duty to the Court and duty to his

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[27] *Supra*, footnote 5.

[28] In the few reported cases concerning a lawyer's negligence that came before the courts, there was no discussion of the existence of any immunity; see *Hett* v. *Pun Pong* (1891), 18 S.C.R. 290; *Simpson* v. *S.G.I.O.* (1967), 61 W.W.R. 741 (Sask. C.A.); *Page* v. *Solicitor* (1971), 20 D.L.R. (3d) 532 (N.B.S.C.), aff'd. without reasons, (1974), 29 D.L.R. (3d) 386 (S.C.C.).

[29] *Supra*, footnote 5.

[30] Jeremy A. Nightingale, The Negligent Practice of Law in Canada: A Chronicle of Client Frustration (1976), 40 Sask. L. Rev. 47, at p. 50.

[31] The British Tradition in Canadian Law (1969), p. 26. See also, T.G. Bastedo, A Note on Lawyer's Malpractice; Legal Boundaries and Regulations (1969), 7 O.H.L.J. 311, at p. 312; G.A. Martin, The Role and Responsibility of the Defence Advocate (1970), 12 Crim. L.Q. 376; and A. Linden, Canadian Tort Law (1977), pp. 111-112. But, *contra*, M. Catzman, comment (1968), 46 Can. Bar Rev. 505.

[32] (1975), 6 O.R. (2d) 404, 53 D.L.R. (3d) 27.

[33] *Ibid.*, at pp. 418 (O.R.), 41 (D.L.R.).

client''.[34] Consequently, prior to the decision in the *Demarco* case, the question of whether a lawyer can be held liable for his conduct in court had been resurrected and become a matter of genuine concern for the legal profession and public alike.

This problem of lawyer's malpractice is of especial concern to the public at large for it puts into doubt the very efficiency and quality of the legal process: factors which are of critical importance in fostering and retaining the requisite degree of respect for the law and the legal system.[35] Nevertheless, whatever rigorous standards or elaborate safeguards are maintained by the legal system, it would be naive and unrealistic to claim that there are no faultless lawyers and that all advocates are masters of their craft. The fact that most clients place themselves entirely within the control and discretion of their lawyer is to be weighed heavily in deciding on the course and measures to be taken when there is an occasional and inevitable breakdown in that relationship. In short, the continued integrity and well-being of the legal system demands that such instances be dealt with not by submerging them beneath a unique professional immunity and, in some way, pretending they do not exist, but by bringing them into the open and treating them in accordance with the procedures and standards designed to meet other types of professional negligence.

In the *Demarco* case, Mr. Justice Krever was clearly of the opinion that the immunity of a lawyer from action for negligence at the suit of his client by reason of the conduct of a case in court has no place in the law of Ontario:

> It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as

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[34] (1978), 18 O.R. (2d) 148, at p. 153, 81 D.L.R. (3d) 730, at p. 735. See also *Gouzenko* v. *Harris et al.* (1976), 13 O.R. (2d) 730, at p. 751, 72 D.L.R. (3d) 293, at p. 314, per Goodman J.

[35] Lord Evershed M.R. stated, in *Kitchen* v. *R.A.F. Association*, [1958] 2 All E.R. 241, at p. 245, that "an action against a [lawyer] for alleged negligence . . . is always a matter of special anxiety to the court: for to some extent, inevitably, our system and profession of law is impugned and its adequacy and competence challenged". Also, "Legal malpractice differs significantly from other torts, however, in its particularly close relationship to the functioning of the legal system. Lawyers' negligence constitutes a malfunction of the system through which society seeks to enforce its definition of justice. When an attorney's negligence deprives his client of property or rights to which he would otherwise be entitled under the applicable law, damage is done not only to that person but also to the societal objectives embodied in the substantive rule and to the capacity of the legal system as a dispute-solving mechanism.", Improving Information on Legal Malpractice (1973), 82 Yale L.J. 590, at pp. 591-592.

> opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence. I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence.[36]

Although Mr. Justice Krever did not comment at any great length on the policy considerations considered by English courts to be supportive of an immunity, there are at least six grounds on which those considerations can be challenged. In the first place, although the demands of justice and its efficient administration are of paramount importance, the advocate is in an entirely different position to other participants in the judicial process, such as the judge, jury and witnesses who are in general, immune from civil suit.[37] He holds himself out as a professional man and is engaged by his client on the basis of his ability to conduct litigation with special skill, knowledge and experience. Furthermore, he accepts remuneration precisely on those terms. Accordingly, he should be treated in the same manner as other professionals and owe a similar duty of care to his clients. This "in no way seems inconsistent with him holding certain other privileges and immunities *qua* participant in the judicial process".[38]

Secondly, there is no evidence to suggest that the disastrous consequences anticipated by certain judges and commentators, namely, "a proliferation of disputes between accusing clients and accused barristers",[39] would flow from the suspension of the immunity. The fear of a deluge of negligence actions is a groundless one and it is pure hyperbole to talk of the advocate being haunted by the daunting spectre of impending litigation.[40] As Krever J. noted,

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[36] *Supra*, footnote 19, at p. 693.

[37] Such participants are immune from civil actions in respect of words spoken or acts done in the course of judicial proceedings. However, as Krever J. noted, "The privilege, a fundamental aspect of the law of slander, is not concerned with relationships among persons. It relates to legal proceedings in open court. The special relationship of lawyer and client is not involved as it is, of course, when one is considering the law of negligence"; *ibid.*, at pp. 695-696.

[38] P.C. Heerey, Rondel v. Worsley: The Australian Viewpoint (1968), 42 A.L.J. 3, at pp. 6-7.

[39] M. Catzman, *supra*.

[40] *Supra*, footnote 12, at p. 746, per Lord Denning M.R. In his recent book, Lord Denning reaffirms his belief in the need for a broad immunity to be bestowed on the barrister. Commenting on *Saif Ali*, he gives implied approval to the opinions of

"between the dates of the decision in *Leslie* v. *Ball* (1863) and *Rondel* v. *Worsley* (1967), the immunity of counsel was not recognised in Ontario and negligence actions against lawyers respecting their conduct of court cases did not attain serious proportions".[41] Also, while no immunity exists in the United States,[42] there seems to be no reported cases in which an advocate has been successfully sued for his negligent conduct in court. Furthermore, while the prospect of re-litigating an action is not an attractive one, it is not, as Krever J. states, "a contingency that does not already exist in our law and [is] inherently involved in the concept of *res judicata* in the recognition that a party, in an action *in personam* is only precluded from litigating the same matter against a person who was a party to the earlier action".[43]

A third point is that it is highly unlikely that the quality of a lawyer's work would, in fact, deteriorate simply because of the possibility of his liability in negligence. The courts have not seen fit to extend such an immunity to other professions, such as surgeons[44] and architects,[45] who manage to carry out work of an equally vital nature to the community and to comply with exacting professional standards. Indeed, it can be forcefully argued that the threat of litigation will provide an extra incentive to improve the quality of work. As Dr. Johnson dryly observed: "Depend on it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."[46]

Fourthly, the alleged reasons given for the existence of an immunity disregard the reality of insurance which now underlies the modern operation of the law of negligence. Accordingly, the

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the minority. "In *Saif Ali* v. *Sydney Mitchell*, a new set of Law Lords disagreed with their predecessors. They restricted the immunity greatly. It was by a narrow majority of 3 to 2. They confined the immunity virtually to the actual conduct of a case in Court. Lord Keith of Kinkel, in a persuasive dissent, thought this went 'some length towards defeating the purpose of the immunity' and the considerations of public interest on which it was based.", The Discipline of Law (1979), p. 250.

[41] *Supra*, footnote 19, at p. 694.

[42] In short, "an attorney must exercise reasonable care, skill and knowledge in the conduct of litigation and must be properly diligent in the prosecution of the case"; see 7 C.J.S., pp. 982-984. See also, Wade, The Attorney's Liability for Negligence (1959), 12 Vand. L. Rev. 755; Gillen, Legal Malpractise (1973), 12 Washb. L.J. 281; and Haughy, Lawyers' Malpractice (1973), 48 Notre Dame L. Rev. 888.

[43] *Supra*, footnote 19, at p. 694. See also, *Wade* v. *Ball*, *supra*, footnote 25, at p. 304, per Magarty C.J.

[44] *Wilson* v. *Swanson*, [1956] S.C.R. 804 and *Ostrowski* v. *Lotto*, [1973] S.C.R. 220.

[45] *Dabous* v. *Zuliani et al.* (1976), 12 O.R. (2d) 230, 68 D.L.R. (3d) 414 (C.A.).

[46] Boswell's Life of Johnson (1792), vol iii, p. 167.

suggested advantages to be gained from immunity are completely disproportionate to the potential loss suffered by the client, especially when the ease, availability, relative cheapness and tax deductibility of insurance is taken into account. Moreover, insurance reduces the pressure on the lawyer, which seems to trouble a number of judges, yet would not leave the dissatisfied client without a remedy. In fact, all Ontario lawyers are required to have professional liability insurance which would amply cover the negligent handling of a case in court.[47]

Fifthly, without such immunity, it would be entirely erroneous to imagine the lawyer as vulnerable and exposed, without any defence against the disgruntled client. The advocate would not be liable for the smallest mistake or error of judgment. His conduct would not be adjudged against some absolute standard, but would be measured against that of a prudent and ordinarily competent lawyer, following the customary practise adopted by the profession.[48] This notion was correctly articulated by Lord Diplock:[49]

> Those who hold themselves out as qualified to practise . . ., although they are not liable for damage caused by what in the event turns out to have been an error of judgment on some matter upon which the opinions of reasonably informed and competent members of the profession might have differed, are nevertheless liable for damage caused by their advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do.

Finally, the reliance on the fact that a lawyer is obliged to accept any client is unwarranted for, whatever its significance in English criminal law, it forms no part of the practise of civil litigation in Ontario. Furthermore, Lord Diplock in *Saif Ali* was not persuaded by the force or validity of such a supporting ground.[50]

When all these considerations and concerns are weighed together, it is submitted that the advantages and benefits accruing from the existence of an immunity are insufficient to balance the hardship and injustice that the client would have to suffer. In effect, the client has to bear the whole cost of a state of affairs that was no fault of his own. Furthermore, the reputation of the whole legal system is tarnished and respect for that system is unwarrantedly endangered. Despite fervent claims to the contrary, the immunity

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[47] At a present premium of $450.00 a year, an Ontario lawyer receives cover up to $100,000.00 for "any act or omission . . . arising out of the performance of professional services . . . as a lawyer".

[48] *Aaroe* v. *Seymour*, [1956] O.R. 736 (C.A.) and *Hauck* v. *Dixon et al.* (1975), 10 O.R. (2d) 605. See A. Linden, Canadian Negligence Law (1972), pp. 108-112.

[49] *Supra*, footnote 12, at p. 1041, per Lord Diplock.

[50] *Ibid.*, at pp. 1043-1044.

appears to be nothing more than the Bench granting a special status and privilege, not to be enjoyed by others, to an emanation of its own.[51] Consequently, the decision of Mr. Justice Krever in the *Demarco* case is to be applauded and commended for its good sense and wise appreciation of the contemporary dictates of public policy.

Finally, it would seem appropriate to consider briefly the implications of a lawyer being found civilly liable for the negligent handling of a criminal case. Although there already exist provisions whereby the issue of the lawyer's incompetence can be raised as a ground of appeal[52], the Canadian courts have taken an unduly formalistic approach to the problem and have been extremely reluctant to rely on the ineffective performance of counsel as forming a cogent reason for a successful appeal[53]. While the courts have been rightly concerned to guard against encouraging the unscrupulous defence counsel,[54] their restrictive attitude has caused them to give insufficient effect to other equally valid policy considerations.[55] Nevertheless, the attempt to utilise the decision of a civil court on the negligence of counsel as a possible ground of appeal runs across problems of a slightly different nature. Firstly, the fact that a decision in a civil action will often not be given until several years after the criminal case in question presents an obvious difficulty in that the sentence given may have been completed. Secondly, a decision in a civil case cannot be admitted in a criminal case as proof of the facts relied on therein. Accordingly, if the convicted person is still completing his sentence, then, it is suggested that a civil finding of incompetence should be sufficient to warrant leave to appeal being granted under section 607 of the Criminal Code[56] regarding application for appeal out of time, or that such a finding would represent appropriate grounds for a reference to the Court of Appeal by the Attorney General under section 605 of the Criminal Code.

ALLAN C. HUTCHINSON*

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[51] F. James, The Law of Torts (1956), p. 32.

[52] There is no special procedure, but the ordinary process of appeal from conviction or a sentence can be utilised.

[53] For a survey of the approach of Canadian case law to the problem, see Asher D. Grunis, Incompetence of Defence Counsel in Criminal Cases (1973-74), 16 Crim. L.Q. 288.

[54] It is conceivable that defence counsel might deliberately neglect a weak case in order to secure a quashing of conviction by raising his own incompetence on appeal or he might omit relatively important evidence, use this as a ground of appeal and have a second chance at obtaining an acquittal before the appeal court; see *People* v. *Mitchell* (1952), 104 N.E. 2d 285 and *R.* v. *Cutter*, [1944] 2 All E.R. 337.

[55] See, generally, P.M. North, *Rondel* v. *Worsley* and Criminal Proceedings, [1968] Crim. L. Rev. 183.

[56] R.S.C., 1970, c. C-34, as am.

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REMEDIAL CONSTRUCTIVE TRUSTS—MATRIMONIAL PROPERTY DISPUTES—JUSTICE AND EQUITY OR "PALM-TREE" JUSTICE? — During the past two or three decades innumerable cases involving matrimonial property disputes have come before the courts. This is, no doubt, a reflection of our weakened societal institutions in general, and of marriage in particular. In their attempts to deal with matrimonial property disputes the courts have been hampered, on the one hand, by the fact that, since the nineteenth century Married Women's Property Acts[1], marriage *per se* does not, in law, change the ownership of property acquired by the respective spouses and, on the other, by the increasing realization that marriage is a unique institution in which the allocation of property rights cannot be dealt with in the same way as in commercial transactions, even though it is, in many respects, a form of partnership.

Adherents of the traditional view of marriage accordingly take the view that before a court may assign a beneficial interest to one spouse in property the title to which is held by the other spouse, it must find either a contract or a gift. In other words, they look to the intent of the parties and they are thus referred to as the "intent" school.

If the court finds an express agreement between the parties to share the matrimonial property, the titled spouse will be declared to hold it on a resulting trust for the other to the extent of the beneficial interest agreed upon.

Adherents of the modern view of the marriage relationship, on the other hand, look not to intent, but are concerned to do justice and equity between the parties, having regard to the fact that both spouses have contributed to the acquisition of the matrimonial property, directly or indirectly. They are referred to as the "justice and equity" school.

Under this approach it may, in certain circumstances, be found to be unjust and inequitable for one party to retain title absolutely and, if so, the court should declare that he holds an interest in the property on a constructive trust for the other. However, while many recent cases exhibit the latter approach,[2] the courts have had to

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[1] *E.g.* Married Women's Property Act, 1882, 45 & 46 Vict., c. 75 (U.K.); *cf.* R.S.O., 1970, c. 262.

[2] The following modern cases employ this approach in varying degrees: *Tinker* v. *Tinker*, [1970] P.136 (C.A.); *Falconer* v. *Falconer*, [1970] 1 W.L.R. 1333 (C.A.); *Heseltine* v. *Heseltine*, [1971] 1 All E.R. 952 (C.A.); *Davis* v. *Vale*, [1971] 1 W.L.R. 1022 (C.A.); *Trueman* v. *Trueman* (1971), 18 D.L.R. (3d) 109 (Alta S.C., App. Div.); *Wiley* v. *Wiley* (1971), 23 D.L.R. (3d) 484 (B.C.S.C.); *Humeniuk* v. *Humeniuk*, [1970] 3 O.R. 521; *Moore* v. *Moore* (1971), 16 D.L.R. (3d) 174 (B.C.C.A.); *Re Taylor & Taylor*, [1971] 1 O.R. 667; *Calder* v. *Cleland*, [1971] 1 O.R. 715 (C.A.); *Beard* v. *Beard*, [1973] 1 O.R. 165, 30 D.L.R. (3d) 513; *Fiedler* v.

couch their decisions in terms of intent, that is, in terms of a resulting trust, for that approach was until recently firmly entrenched in the appellate decisions both in England and Canada.[3]

It should be noted that the courts do not base their decisions on contract or on express trusts for the simple reason that there is usually no defined agreement between the parties. Even if there were, the agreement would normally be oral and thus unenforceable under the Statute of Frauds.[4] While it is, of course, possible to overcome this by means of the rule that the Statute cannot be used as an instrument of fraud,[5] use of the resulting trust (and of the constructive trust) avoids this need since they are not subject to these formalities. In addition, the resulting trust is an appropriate vehicle in these cases because they usually involve a purchase in the name of or a transfer to one person while another claims to be entitled to an interest in it because he or she made a financial contribution to its acquisition. A presumption of resulting trust is then raised which is rebuttable only by evidence that the parties intended to make a gift.

Regrettably the courts have not generally defined their terms very clearly. In not a few cases they have said that it matters not what one calls the trust that is to be imposed, whether it be resulting, implied or constructive.[6] One of the reasons for failing to draw a distinction between these several trusts arises out of a faulty classification. Clearly, an express trust arises because the parties intend to create it. Implied trusts, properly so called, are really express trusts which can only be so identified after the court has construed them to ascertain the parties' intention. However, in his classification, Underhill[7] treats implied trusts as those which arise by implication of a court of equity and he calls them constructive trusts. The latter are then further subdivided into resulting trusts and pure constructive trusts, the former of which are explicable on the basis of the presumed intent of the parties, while the latter arise independent of their intent. Lewin[8] distinguishes between resulting trusts and

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Fiedler (1975), 55 D.L.R. (3d) 397; *Whiteley* v. *Whiteley* (1975), 4 O.R. (2d) 393 (C.A.); *Madisso* v. *Madisso* (1976), 11 O.R. (2d) 441 (C.A.); *Hazell* v. *Hazell*, [1972] 1 W.L.R. 301, at p. 304, per Lord Denning M.R.

[3] In an illuminating Comment (1975), 53 Can. Bar Rev. 366, Professor Waters documents this by reference to many modern cases. It would be superfluous to cover the same ground again in this comment.

[4] *E.g.*, (1677), 29 Car. 2, c. 3, R.S.O., 1970, c. 444, ss 4, 9.

[5] *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196 (C.A.).

[6] See, *e.g.*, *Gissing* v. *Gissing*, [1971] A.C. 886, at p. 906, per Lord Diplock; *cf.* *Murdoch* v. *Murdoch* (1973), 41 D.L.R. (3d) 367 (S.C.C.), per Martland J.

[7] Underhill's Law Relating to Trusts and Trustees (12th ed., 1970, by R.T. Oerton), pp. 9-10.

[8] Lewin on Trusts (16th ed., 1964, by W.J. Mowbray), p. 8.

constructive trusts and treats implied trusts as a species of resulting trust. The difficulty in classification arises principally from the concept of resulting trusts. It arises in certain defined circumstances, namely (a) where one person purchases property, the title to which is placed in the name of a volunteer who is not his wife or child; (b) where one person transfers property to a volunteer who is not his wife or child; (c) where the trust property is not completely disposed of; and (d) where the trust fails in whole or in part because it contravenes a rule of law or its purpose is illegal. In the first two instances the law raises a presumption of resulting trust (and a corresponding presumption of advancement where the purchase or transfer is in the name of or to a wife or child), that is, the law presumes that the parties did not intend the stranger to have the beneficial interest. In that sense intent is relevant in resulting trusts. In the last two instances, however, it is probably more correct to say that the property results to the donor not because of any presumed intent, but because of an implication of law.[9]

The constructive trust, on the other hand, arises not because of the presumed intent of the parties but because the law requires the person who has title to the property to hold it for the benefit of another on the ground that he would be unjustly enriched if he were allowed to keep it. It is, thus, purely a remedial or restitutionary device.[10]

There is thus an important distinction between resulting and constructive trusts. Moreover, even though the cases have not made this clear, they in fact apply the resulting trust because they look to the intent or presumed intent of the parties.

In the recent case, *Rathwell* v. *Rathwell*,[11] however, three members of the Supreme Court of Canada have opted squarely for the justice and equity school and have applied the remedial constructive trust to effect restitution. In a subsequent case, *Becker* v. *Pettkus*,[12] the Ontario Court of Appeal approved of and followed this approach.

There have been other instances in which the court used language appropriate to a constructive trust, or, indeed, referred specifically to a constructive trust. Thus, in *Hussey* v. *Palmer*,[13] Lord Denning, clearly attempts to apply the remedial constructive trust to a situation in which a person made a substantial contribution

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[9] Waters, Law of Trusts in Canada (1974), pp. 17-20, 277-278.

[10] Scott, The Law of Trusts (3rd ed., 1967), vol. 1, para. 2.1, p. 36.

[11] (1978), 83 D.L.R. (3d) 289 (S.C.C.).

[12] (1978), 20 O.R. (2d) 105.

[13] [1972] 1 W.L.R. 1286, at pp. 1289-1290.

to the rebuilding of a house. The court's order in that case used the language of a resulting trust, however.

The Rathwell Case.

The facts in the *Rathwell* case are straightforward and typical of matrimonial property disputes. Mr. and Mrs. Rathwell pooled their joint savings in a joint account shortly after their marriage and with these funds paid the downpayment for their first farm in 1946. On two subsequent occasions, further parcels of land were purchased out of the joint account. Title to all the land was taken in Mr. Rathwell's name. Mr. Rathwell admitted that the farming operation was a joint venture and, indeed, his wife, in addition to contributing to the original purchase price, was actively involved in the running of the farm. She performed physical labour, cooked the meals, raised the family, and kept the books and records. In 1967 the marriage ran into difficulties and the parties separated. Mr. Rathwell later acquired further properties by way of gift from his mother. However, as this occurred after the separation, the wife clearly had no claim to them and they need not be considered further.

Subsequently Mrs. Rathwell commenced an action for a declaration that she had an interest in one-half of all the real and personal property owned by her husband and for an accounting. At trial[14] Disberry J., dismissed her action, holding that while the parties regarded their joint account as a common purse, on the whole of the evidence any presumption that the wife's contribution to the account should give her an interest in the farm was rebutted, that there was no agreement between them that Mrs. Rathwell was to receive an interest in the farm, and that she did not make a contribution to its acquisition by her labour. Her appeal to the Saskatchewan Court of Appeal was successful.[15] Woods J.A., found that there was an agreement to share between the parties and held that Mrs. Rathwell was accordingly entitled to a one-half interest in the farm property on the basis of a trust. It would seem that he is referring to a resulting trust, although he does not define the type of trust more closely. Brownridge J.A., also found evidence of a common intention to share or, alternatively, if there were no common intent that Mrs. Rathwell was entitled to an interest under a constructive trust. On the evidence he felt, however, that the wife was not entitled to a half share and therefore, restricted her interest to a half share in the first two parcels of land purchased. Hall J.A., was of the opinion that while there was no evidence of a common intent to share the land when the joint bank account was opened, Mrs.

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[14] (1974), 14 R.F.L. 297.

[15] (1976), 71 D.L.R. (3d) 509.

Rathwell contributed one-half of the moneys in the account originally and she did not intend that to be a gift to her husband. Thus, she acquired a half interest in the land through her monetary contributions. The basis of her claim was under an "implied trust", by which presumably the learned judge meant a resulting trust.

In the Saskatchewan Court of Appeal all three judges found sufficient evidence to support a resulting trust, while one judge would have been prepared, in the alternative, to support Mrs. Rathwell's claim on the basis of a remedial constructive trust, in support of which he cited the dissenting opinion of Laskin J. (as he then was), in *Murdoch* v. *Murdoch*.[16]

In the Supreme Court of Canada Mrs. Rathwell was again successful and the common basis for the decision in all three judgments is the resulting trust based on the common intention of the parties to share. Martland J., with whom Judson, Beetz and de Grandpré JJ., concurred, does not in fact refer to a resulting trust *per se*, but this is clearly the trust which he has in mind for he specifically disapproves of the applicability of a constructive trust in cases of this kind. Ritchie J., with whom Pigeon J., concurred, in a short judgment, applied the resulting trust doctrine to the facts and found it unnecessary to consider the applicability of the constructive trust. However, Dickson J., with whom Laskin C.J.C., and Spence J., concurred, in a well-reasoned judgment, came to the conclusion that Mrs. Rathwell was entitled to a half-share in the lands on the basis of a resulting trust and of a remedial constructive trust.

Becker v. Pettkus.

The facts in *Becker* v. *Pettkus* are very similar to those in *Rathwell*, with the important exception that there was no common intention of the parties that both should have a property interest in the assets acquired by them during their relationship. The parties were immigrants and began to live together soon after their arrival in Canada. They were never married. During the initial period both parties worked; the appellant paid all the rent, living expenses, food and clothing for both; the respondent deposited his entire salary in bank accounts opened in his name. The respondent then began an apiary business, using the money in his accounts to purchase a farm and equipment. The title to the farm was taken in his name. The appellant participated fully in every aspect of the business, which was a success, but the respondent handled all the receipts. The appellant also participated fully in the restoration of the farm house. Subsequently the respondent bought two further farm properties on one of which the parties built a house. The business was moved to

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[16] *Supra*, footnote 6, at p. 388.

the new location. The old farm was sold and the proceeds were paid into the respondent's bank account.

The appellant moved out in 1972 because the relationship started to deteriorate. The respondent gave her $3,000.00 and some other property at that time and told her "to get lost". However, she returned in 1973 at the respondent's request. The appellant returned a substantial portion of the $3,000.00, which was redeposited in the respondent's bank account.

When their relationship again deteriorated, the appellant brought an action for a declaration that she was entitled to a one-half interest in the real property and other assets acquired by the parties through their joint efforts and that the respondent held this interest in trust for her.

Her claim was rejected at trial. In the opinion of the trial judge the appellant's contributions during the initial period were "in the nature of risk capital invested in the hope of seducing a younger defendant into marriage".[17] Her contributions to the apiary business, he characterized as seasonal and marginal. Finally, he concluded that she accepted the payment of $3,000.00 in 1972 as settlement of their financial affairs.

The Ontario Court of Appeal strongly disagreed. On the evidence the court concluded that the appellant's contribution to the business and the acquisition of the assets was substantial. However, because of the absence of a common intention on the part of both parties that the appellant should have a share in the property, a resulting trust could not be raised. That left only the constructive trust and the court, following the judgment of Dickson J., in *Rathwell*, and the dissenting judgment of Laskin J., in *Murdoch* v. *Murdoch*,[18] imposed a constructive trust on the respondent in respect of the apiary business for a one-half interest in favour of the appellant.

What Is the Remedial Constructive Trust?

The remedial constructive trust is a restitutionary device, and has been used as such in American, though not in Anglo-Canadian law.

The principle of restitution was adopted in Canada in *Deglman* v. *Guaranty Trust Co.*[19] and subsequent cases,[20] but generally the

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[17] The respondant was four years younger than the appellant.

[18] *Supra*, footnote 6.

[19] [1954] S.C.R. 725, [1954] 3 D.L.R. 785, per Cartwright J., applying *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*, [1943] A.C. 32, per Lord Wright, at p. 61.

[20] *County of Carleton* v. *City of Ottawa* (1965), 52 D.L.R. (2d) 220 (S.C.C.);

courts have been hesitant in extending the doctrine and have not applied it unless the case falls squarely within the facts of the *Deglman* case.[21] Moreover, in these cases the constructive trust was not adopted as the necessary vehicle to achieve restitution. The cases usually involved oral contracts whereby one person agreed to make provision on his death for another if the latter performed certain services for the former during his lifetime without remuneration. Such agreements are unenforceable, but the cases held that a person performing the services could recover for them on a *quantum meruit* or quasi-contractual basis, which is an action at law.

Such a basis is clearly inapt where one person has title to the property in which another claims a beneficial interest. American authorities hold that the latter will be entitled to such interest where the person having title would be unjustly enriched if he were allowed to rely on his title to exclude the claimant.[22] There are different ways in which the desired result may be reached. In some cases, an action at law may be sufficient, as where the title to a chattel, which is not unique, is acquired by fraud. The owner then has an action at law for conversion, although, if the defendant is insolvent, the plaintiff can recover the chattel itself under a constructive trust.[23]

The specifically equitable devices available to redress unjust enrichment are the contructive trust, the equitable lien and subrogation. An equitable lien is the appropriate remedy where, for example, a person makes improvements upon the property of another through fraud or mistake where he acts on the representations of the owner.[24] Subrogation is appropriate where, for example, a person pays another's debt at the debtor's request. He is then entitled to be subrogated to the position of the creditor.[25] The constructive trust is typically available where a person obtains another's property and purchases new property with the proceeds.[26] In some cases too, where the constructive trust would be the appropriate remedy, the person who seeks redress may have an option as to whether to seek to recover the property under a constructive trust or to enforce his claim by way of an equitable lien. The former remedy would be more

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Arnett and Wensley Ltd v. *Good* (1967), 64 D.L.R. (2d) 181 (B.C.S.C.); *Re Gilroy*, [1971] 3 O.R. 330.

[21] See, *e.g.*, *Re Burgess* (1965), 52 D.L.R. (2d) 233; *Farrar* v. *MacPhee* (1971), 13 D.L.R. (3d) 204; and see Angus, Restitution in Canada since the Deglman Case (1964), 42 Can. Bar Rev. 529.

[22] *Op. cit.*, footnote 10, vol. 5, para. 461.

[23] *Ibid.*, para. 462.3.

[24] *Ibid.*, para. 463. *Cf. Preeper* v. *Preeper* (1978), 84 D.L.R. (3d) 74 (N.S.S.C., T.D.) in which the defendant should have been given a lien on the plaintiff's property.

[25] *Ibid.*, para. 464. [26] *Ibid.*, para. 461.

valuable if the property has increased in value. However, Professor Scott is of the opinion that the plaintiff only has this option if the defendant is a conscious wrongdoer.[27]

The constructive trust as a doctrine of Anglo-Canadian law has, of course, been recognized for several hundred years, but is has not usually been regarded as an instrument to effect restitution. The landmark case, *Keech* v. *Sandford*[28] is regarded as the origin of the doctrine. In that case, an express trustee acquired the renewal of a lease of the profits of a market in his own name because the lessor refused to renew it in his name as trustee for an infant. While the trustee did not act with *mala fides* the court nevertheless held that he took the lease on trust, that is, on a constructive trust for the infant, the reason being that such cases are easily susceptible of fraud on the beneficiary. In subsequent cases this rationale has been more clearly defined as a prohibition against permitting a trustee to place himself in a position where his duty and interest may conflict, however honest the actions of the trustee may be.[29] Nor is this application of the constructive trust restricted to express trustees. It applies also to strangers who intermeddle with trust property, that is, trustees *de son tort*[30] and to other fiduciaries such as agents,[31] solicitors,[32] corporate directors and officers[33] and joint venturers.[34]

While this was a natural development, the courts often failed to appreciate that a distinction can and should be drawn between the case of an express trustee and of other fiduciaries. The difference lies in the intensity of the fiduciary relationship, which is a factor of the autonomy of the fiduciary. It should follow that the duty of loyalty, that is, the duty not to let one's own interest and one's duty come into conflict, should be more stringent in the case of a trustee than in the case of an agent or of a corporate director.[35]

In most cases,[36] however, the courts tend to regard the principle

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[27] *Ibid.*, para. 463.

[28] (1726), Sel. Cas. Ch. 61, 25 E.R. 223.

[29] See, *e.g. Re Knowles' Will Trusts*, [1948] 1 All E.R. 866; *Ex. p. James* (1803), 8 Ves., Jr. 337, 32 E.R. 385; *National Trust Co.* v. *Osadchuk*, [1943] S.C.R. 89.

[30] *Selangor United Rubber Estates Ltd* v. *Cradock*, [1968] 1 W.L.R. 1155, at p. 1179; *Barnes* v. *Addy* (1874). L.R. 9 Ch. App. 249; *Soar* v. *Ashwell*, [1893] 2 Q.B. 390.

[31] *Parker* v. *McKenna* (1874), L.R. 10 Ch. 96.

[32] *Boardman* v. *Phipps*, [1967] 2 A.C. 46 (H.L.).

[33] *Regal (Hastings) Ltd* v. *Gulliver*, [1942] 1 All E.R. 378 (H.L.); *Canadian Aero Service Ltd* v. *O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.).

[34] *McLeod* v. *Sweezey*, [1944] S.C.R. 111.

[35] Scott, The Fiduciary Principle (1949), 37 Cal. L. Rev. 539.

[36] Notable exceptions are: *Crocker and Croquip Ltd* v. *Tornroos*, [1957] S.C.R.

as an inflexible rule of equity, applicable to all fiduciaries. Thus, in *Parker* v. *McKenna*,[37] James L.J., stated:

> . . . the rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact, by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

If the rule is applied inexorably it must follow that despite the honesty of the actors, their energy, their risk, they may receive no benefit, but that some other person who has contributed nothing, and who was unable in law or in fact to acquire the property, receives a windfall,[38] to which he is entitled even if he took with notice.[39]

As Professor Gareth Jones has shown in an excellent article,[40] the question whether a fiduciary has breached his duty of loyalty can only be determined if the court ascertains (a) that the fiduciary was unjustly enriched at his principal's expense, *and* (b) that policy demands, in the circumstances of the case, that a penal liability should be imposed. In other words, in certain circumstances, despite the fiduciary's honesty, it may be necessary to make an example of him on policy grounds. However, even if the court considers that the fiduciary should be punished, the proprietary remedy of the constructive trust should not be used; he should not be required to disgorge the property, but his liability should be limited to a liability to account to the extent of his enrichment.[41] Usually the courts have imposed the constructive trust, however, or speak of a constructive trust coupled with the duty to account for profits.[42] In many cases it may not make a difference whether a fiduciary is merely held accountable or whether he holds the property under a constructive trust. However, the two are different, the one obligation being personal and the other proprietary. Thus, the duty to account may be meaningless if the fiduciary is insolvent or if he has sold the property to a *bona fide* purchaser for value who took with notice.[43] It is appropriate that where the fiduciary has been dishonest, he should

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151; *Peso Silver Mines Ltd* v. *Cropper*, [1966] S.C.R. 673; *Holder* v. *Holder*, [1967] Ch. 353 (C.A.).

[37] *Supra*, footnote 31, at pp. 124-125.

[38] *Boardman* v. *Phipps*, *supra*, footnote 32.

[39] *Regal (Hastings) Ltd* v. *Gulliver*, *supra*, footnote 33.

[40] Unjust Enrichment and the Fiduciary's Duty of Loyalty (1968), 84 L.Q. Rev. 472.

[41] *Ibid.*, at p. 497.

[42] See, *e.g.* The judgment of Wilberforce J., at trial in *Boardman* v. *Phipps*, [1964] 1 W.L.R. 993, and the speech of Lord Guest in the House of Lords in that case, *supra*, footnote 32, at p. 117.

[43] See generally on the distinction between the two remedies Hanbury, Modern Equity (10th ed., 1976, by R.H. Maudsley), pp. 518, 527.

hold the property on a constructive trust so that the principal will be able to reap the fruits from the property and not merely the profits made by the fiduciary; it is inappropriate that an honest trustee should disgorge the property, as opposed to the profits, where the principal has suffered no loss.[44]

In all of these cases a pre-existing fiduciary relationship was held to be essential in order to raise a constructive trust. And, in order to achieve the desired result, the courts have sometimes had to strain to find such a relationship.[45]

In addition, it is generally agreed that the constructive trust applies to the case of mutual wills, to the vendor of land, to secret trusts, and to cases where a person who holds the registered title attempts to deny the claim of another to a beneficial interest in the property under an oral trust or agreement. However, the courts do not usually specify what type of trust they are dealing with in the circumstances and, in many cases, it is at least arguable that they are enforcing an express trust based on an agreement between the parties.[46]

In all of these cases, however, Anglo-Canadian law has treated the constructive trust as a substantive institution, that is, as one type of trust. But, since it does not arise to give effect to the intention of the parties, it is, in truth, a remedial institution, for it is imposed by the court to effect restitution in order to prevent unjust enrichment. This is how the American law regards the constructive trust.

The remedial constructive trust has been defined as "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee".[47] Furthermore, the *Restatement of Restitution*[48] defines the circumstances under which a remedial constructive trust arises as follows:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

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[44] Jones, *op. cit.*, footnote 40, at p. 498.

[45] Thus in *Reading* v. *A.G.*, [1951] A.C. 513 (H.L.), the fact that an army sergeant was in uniform while escorting a truck transporting liquor illegally was held to constitute him a fiduciary *vis à vis* the Crown and he held his profits from the operation on a constructive trust for the Crown.

[46] For a discussion of the type of trust involved in these cases see Waters, *op. cit.*, footnote 9, pp. 219 *et seq.*, and 351 *et seq.*

[47] *Beatty* v. *Guggenheim Exploration Co.* (1919), 225 N.Y. 380, at p. 386, 122 N.E. 378, per Cardozo J.

[48] (1936), para. 160.

The typical situations in which a constructive trust arises are where property is transferred because of mistake, fraud, duress or undue influence, in mutual wills, in the case of a vendor under an enforceable agreement of purchase and sale, in cases where a person relies on the Statute of Frauds[49] to deny the interest in land of another under an oral agreement, in secret trusts, in cases where a person acquires property by a crime, and where a fiduciary acquires property which he is required to convey to the beneficiary.

It follows from the foregoing that a constructive trust is not a fiduciary relationship at all and, while it may arise in circumstances involving a fiduciary relationship, it is not necessary to find a fiduciary relationship before a court can impose a constructive trust. Furthermore, it has nothing to do with the intention of the parties. Rather, a court "construes", or interprets, the circumstances and declares that because of the circumstances some of the consequences which attend the creation of an express trust should follow.[50] The device to achieve these consequences is the constructive trust. In this respect a constructive trust differs from an express trust in which intention is relevant, and from a resulting trust which arises because of, or which can be explained on the basis of, the presumed intention of the parties. In both cases the trustee is a fiduciary.[51]

For these reasons, constructive trusts are dealt with in the *Restatement of Restitution*, rather than in the *Restatement of Trusts*, except insofar as they arise out of express trusts.[52]

It is this remedial constructive trust which Dickson J., applied in *Rathwell* v. *Rathwell* and the Ontario Court of Appeal in *Becker* v. *Pettkus*.

The Remedial Constructive Trust in the Rathwell and Becker Cases.

In *Rathwell* Dickson J., calls the constructive trust "a third head of obligation quite distinct from contract and tort" in which a court imposes a constructive trust on a person who holds title to property subject to an equitable obligation to convey it to another on the ground that he would be unjustly enriched if he were permitted to

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[49] *Supra*, footnote 4.

[50] The court does not "construct" a trust in the circumstances as is sometimes said. The point is not that the court imposes a trust in a situation where there was not one before, but declares that because the agent was under a duty to hold property in equity for the principal, he holds it on a constructive trust for him. The constructive trust does not arise when the court so declares but it dates back to when the wrong was committed which gives rise to the duty of restitution. See 5 Scott (3d), *op. cit.*, footnote 10, para. 462.4, pp. 3420-3421.

[51] Restatement, Restitution, para. 160, comment b.

[52] *Ibid.*, comment a; Restatement, Trusts (2d) (1959), para. 1, comment e; Scott, *op. cit.*, footnote 10, vol 5, para. 461.

retain it.[53] This is somewhat inexact in that the constructive trust is not the third head of obligation but the principle of restitution based on unjust enrichment is. The constructive trust is merely one vehicle for effecting restitution. The question is, when may that vehicle be utilized in matrimonial property disputes. Dickson J., suggests that there must be found a causal connection between a contribution to family life and the disputed asset, which, of course, is a question of fact.[54]

Thus, before a constructive trust may be imposed, there must be "an [unjust] enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law—for the enrichment".[55] Clearly, if the parties have agreed that the husband shall have the beneficial interest as well as the legal, he is not unjustly enriched.

If the facts support the imposition of a constructive trust, the court must assess the contribution made by each spouse and must make an equitable distribution having regard to the contribution.[56] In this respect the result is not likely to differ from cases where a resulting trust is imposed. But the machinery is different. In resulting trusts, the distribution depends on intent; in constructive trusts the distribution is made on the basis of what is equitable.

Under the principle of restitution, Mrs. Rathwell clearly should succeed and Dickson J., so held. She should succeed not only because of her capital contributions, but, even if she had not made any, because Mr. Rathwell was only able to acquire title through the joint efforts of both spouses.

In *Becker* v. *Pettkus* the Court of Appeal was unable to find a common intention or agreement between the parties that the plaintiff should have the beneficial interest in the business. This is somewhat strange in that many cases have held that a wife is entitled to an interest in the property under a resulting trust where her contributions are such as to enable the husband to save for and to acquire the property in question. The common intention is thus drawn from the conduct of the parties, not from any subjective intention actually expressed.[57] The Court of Appeal, however, applied the dissenting

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[53] *Supra*, footnote 11, at p. 305.

[54] *Ibid.*, at p. 306.

[55] *Ibid.*

[56] *Ibid.*

[57] See, *e.g.*, *Hazell* v. *Hazell*, *supra*, footnote 2, at p. 304, per Denning M.R.; *Madisso* v. *Madisso*, *supra*, footnote 2, at p. 442, per Evans J.A.; *Gissing* v. *Gissing*, *supra*, footnote 6, at p. 906, per Lord Diplock; *Rathwell* v. *Rathwell*, *supra*, footnote 11, at pp. 291-293, per Martland J.; at p. 297, per Richie J.; at p. 304, per Dickson J.

judgment of Laskin J. (as he then was), in *Murdoch* v. *Murdoch*[58] to the effect that where a resulting trust cannot readily be used because of difficulty in finding intent in that there was no express or implied agreement between the spouses and the wife's contribution consisted not of money but of labour, it is not necessary to bend the concept of the resulting trust to fit the facts; the constructive trust suits the purpose admirably. As in *Rathwell* the Court of Appeal in *Becker* v. *Pettkus* found that a constructive trust arose in favour of the appellant because the respondent was able to acquire the property by the joint efforts of the parties.

Other Matters Arising from Rathwell and Becker.

In *Becker* v. *Pettkus* the parties were not married. However, as the Court of Appeal quite properly held, the principles of resulting and constructive trusts apply with as much force to persons who live together in common law as to married persons. *Quaere* whether this means that now the presumption of advancement applies in favour of a woman who lives common law with a man? If so, she has a distinct advantage over a married woman in respect of whom the presumption of advancement has been abolished and replaced with the presumption of resulting trust.[59]

Another matter that arose in both cases was whether the principles of resulting and constructive trusts apply only to the matrimonial home, or whether they apply also to the titled spouse's business. Most cases involving matrimonial property disputes concern only the matrimonial home and sometimes it has been suggested that the resulting trust is thus applicable only to the matrimonial home or the homestead.[60] The courts in both *Rathwell* and *Becker*, however, held unequivocally that these principles apply to all property, real and personal, that was acquired through the joint efforts of both spouses.[61]

Effect of the Application of the Constructive Trust in Matrimonial Cases.

The main beneficial effect of the use of the remedial constructive trust in matrimonial property disputes, I submit, is that it avoids a determination of the question whether the parties had a common intent to share the property. That question forces the court into a straight-jacket, for in most cases there is no express intent and the court is then obliged to search for an implied intent, or even, under

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[58] *Supra.*, footnote 7.

[59] Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 11(1).

[60] See, *e.g.*, *Murdoch* v. *Murdoch*, *supra*, footnote 6, at p. 375, per Martland J.

[61] See also *Re Cummins*, [1971] 3 All E.R. 782.

the guise of finding the latter, to impute a common intention to the parties. This is unrealistic and unnecessary if the constructive trust approach is followed.

The disadvantage of the use of the constructive trust seems to be that it vests an unlimited discretion in the court which many, including Martland J., in the *Rathwell* case, feel should not be vested in the court except under appropriate legislation. The fact is, however, that the courts have exercised their discretion very widely in re-ordering the property interests of spouses by means of the resulting trust. In order for that doctrine to apply it was often necessary to interpret the facts in such a way as to fit the doctrine. Use of the constructive trust avoids this fiction but employs the same judicial discretion already exercised before.

It is, of course, true that the court's discretion is limited by its statutory power to solve property disputes between spouses.[62] The courts may not under that power re-allocate property interests where there were none before. They may only award a spouse an interest in property the title to which is held by another if the non-titled spouse has an equitable interest in it as found by the court. While the cases have generally held that such a finding can only be made where the non-titled spouse has contributed financially to the purchase of the property, this would not seem to exhaust the non-titled spouse's equity. This is one of the bases on which Dickson J., in *Rathwell* distinguished *Thompson* v. *Thompson* and *Murdoch*. If the resulting trust is restricted in its application to financial contributions, the constructive trust casts its net wider to encompass, for example, a wife's labour as the equivalent of money's worth. Indeed, Dickson J., suggests that the resulting trust should apply to that type of situation as well and many cases have applied it in such circumstances. The constructive trust was, of course, not argued in *Thompson* and *Murdoch*.

It would seem, therefore, that the constructive trust does not in fact confer a wider discretion on the court than does the resulting trust. Does it, however, apply to a wider range of situations? Could it, for example, apply to the case where a wife contributes nothing in money or money's worth to the acquisition of a property or the building up of a business, but stays at home and raises the family? There is some suggestion in Mr. Justice Dickson's judgment that it can. For example, he says that where the spouse contributes to family life the court must ascertain whether there is a causal

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[62] *E.g.*, under the Married Women's Property Act, *supra*, footnote 1, s. 12 (Ont.), s. 17 (U.K.): *Thompson* v. *Thompson* (1960), 26 D.L.R. (2d) 1 (S.C.C.); *Pettit* v. *Pettit*, [1970] A.C. 777 (H.L.).

connection between the contribution and the disputed asset.[63] On the use of the constructive trust he says that the "emergence of the constructive trust in matrimonial property disputes reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life".[64] Again, in answer to the argument that the application of the doctrine may entitle the spouse to an interest in a law practice just as much as she might obtain an interest in a business, he replied that there is no reason in principle why she should not be so entitled in appropriate circumstances.[65] The latter is said in the context of a discussion of the resulting and constructive trust, however, and the learned judge is careful to circumscribe the wife's right in such cases. She may only become entitled if she has worked continuously and effectively with her husband in the development of the law practice.

It may well be desirable in the context of contemporary family life to give a wife who has raised the family a share in the husband's assets on a breakdown of the marriage. There is undoubtedly a causal connection between his acquisition of the assets and the wife's work at home. But the causal connection is not sufficiently close, it is submitted, to award the wife an interest on the basis of a constructive trust. The connection is simply too remote. Typically, a constructive trust is raised or a duty to account is imposed where the parties are directly or closely interested in the property or its product on which the trust or in respect of which the duty to account is imposed and it seems inappropriate, therefore, to apply the doctrine in matrimonial disputes where the causal connection is tenuous. In such cases the matter should indeed be left to the legislature to effect a change in the law.

Recent Legislation.

The effect of these decisions in matrimonial property disputes is less important under the recent family law reform legislation. Thus, under the English Matrimonial Proceedings and Property Act, 1970,[66] where a spouse contributes in money or money's worth to the improvement of property, the contributing spouse, if the contribution is substantial, is to be treated as having acquired a share (or a larger share) in the beneficial interest in such property to the extent agreed upon by the parties or, in default of agreement, as may seem in all the circumstances to be just.

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[63] *Supra*, footnote 11, at p. 306.

[64] *Ibid.*, at p. 307.

[65] *Ibid.*, at p. 308.

[66] 1970, c. 45, s. 37; and see now Matrimonial Causes Act, 1973, c. 18.

Similarly, in Saskatchewan, in legislation enacted after the *Rathwell* case arose,[67] a husband or wife, or any person on whom conflicting claims are made by them may make application to a judge of the Court of Queen's Bench in any dispute between them as to the title to or possession or disposition of property for a resolution of the dispute. The court has wide powers under the legislation to re-order the property of the spouses, subject to any written agreement to the contrary, whether the spouse making the application has a legal or equitable interest in the property or not, and may make such order as it considers fair and equitable. Before making an order the court must inquire into and assess the respective contributions of the spouses "whether in the form of money, services, prudent management, caring for the home and family or in any other form whatsoever".

The Ontario Family Law Reform Act, 1978,[68] also precludes the application of resulting and constructive trusts in many cases. Thus, to the extent that under Part I of the Act there is a *prima facie* equal division of family assets upon a breakdown of marriage, there is no further room for the operation of these doctrines in this respect.[69] The court has power to order an unequal division of family assets where an equal division would be inequitable.[70] "Family assets" are defined as including a matrimonial home (but not land around it where it is used for farming or other business purposes and is not reasonably necessary to the use of the home as a residence), and property owned by one or both spouses and ordinarily used or enjoyed by both or their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes. Property held for the benefit of a spouse by a corporation, trust, or under a power of appointment or revocable gift is also included, but not property defined in a domestic contract as not being a family asset.[71]

The court may also make a division of any property that is not a family asset where a spouse has unreasonably impoverished the family assets or the result of a division of the family assets would be inequitable in all the circumstances.[72]

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[67] Married Women's Property Act, R.S.S., 1965, c. 340, s. 22, repealed and substituted by S.S., 1974-75, c. 29.

[68] *Supra*, footnote 59. For comparable recent legislation in other provinces, see Family Law Reform Act, S.P.E.I., 1978, c. 6; Marital Property Act, S.M., 1978, c. 24; Family Maintenance Act, S.M., 1978, c. 25; Matrimonial Property Act, S.A., 1978, c. 22; Family Relations Act, S.B.C., 1978, c. 20.

[69] *Ibid.*, s. 4.

[70] *Ibid.*, s. 4(4).

[71] *Ibid.*, s. 3(b). [72] *Ibid.*, s. 4(6).

It would appear, however, that the doctrines of resulting trust and constructive trust retain their validity in other respects under the Act. Thus, under section 7 the court may, *inter alia*, resolve a dispute on any question between spouses as to the ownership or right to possession of any particular property and the court may declare the ownership or right to possession. Presumably this would be done on the basis of either a resulting or constructive trust.

Under section 8 of the Act, where a spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of the property, other than family assets, which property is owned by the other spouse, the court may direct the payment of an amount in compensation therefor, or award an interest in the property to the spouse making the contribution, and the court is to determine and assess the contribution without regard to the marriage relationship or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. If a court awards a share, this would presumably be done under a resulting trust.

Section 11 of the Act abolishes the presumption of advancement in questions of ownership of property between husband and wife and replaces it with the rule of law applying a presumption of resulting trust as if they were not married, except that where the property is taken in the name of the spouses as joint tenants or in the case of joint bank accounts, *prima facie* each has a one-half beneficial interest in it. Thus the principles of resulting trusts and, since they are not specifically dealt with, the principles of constructive trusts, are still applicable in this respect.

Use of the Remedial Constructive Trust in Other than Matrimonial Property Disputes.

The principal advantage of the *Rathwell* and *Becker* cases is that they open the way to the recognition of the remedial constructive trust as a restitutionary device in cases other than matrimonial property disputes. As has been indicated, the constructive trust in Anglo-Canadian law to date has been used primarily in the context of fiduciary relationships. It is then regarded as a type of trust and the declaration of a constructive trust is seen as imposing the same kinds of duties that are imposed upon an express trustee. This is clearly not the case. The duties of an express trustee are multifarious. Usually he is vested with extensive powers of management to be exercised over a period of time. The constructive trust normally does not involve duties of management by the fiduciary. Rather, it is imposed as a device to vest the property interest in a beneficiary or to return the legal and beneficial interest to the beneficiary. Moreover, as has been seen, it is imposed regardless of the parties' intention, to

achieve an equitable result, whereas the express trust arises only where the parties intend that it should.

While there are legitimate concerns about the extent to which the constructive trust should be used to solve matrimonial property disputes, that is, whether it should apply to cases where the non-titled spouse's contribution is not money, money's worth or labour directly related to the acquisition of the property in dispute, the use of the device in this context is legitimate. It eliminates the need to search for an elusive and often fictional common intention of the parties required under a resulting trust. In that respect it places the law on a more rational basis. Furthermore, by recognizing the constructive trust solely as a remedial device to effect restitution in cases of unjust enrichment, it enables the law to develop in areas other than matrimonial property disputes and frees it from the artificial confines of fiduciary relationships.

A. H. OOSTERHOFF*

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COMPANY LAW—CAPACITY TO ACT ON DATE OF INCORPORATION BEFORE DATE OF REGISTRATION.—In *C.P.W. Valve and Instrument Ltd* v. *Scott et al.*,[1] the Appellate Division of the Alberta Supreme Court considered the question of whether or not a company is capable of performing a legal act on the date of incorporation mentioned in the Registrar's certificate of incorporation, if the company was not actually placed on the register on such date. The majority held that the company had no such capacity.

The facts of the case are as follows: by agreement between the two defendants and the plaintiff, the defendants were appointed distributors for a product manufactured by the plaintiff. The agreement contemplated that the defendants would incorporate a company to handle the distributorship business and provided that the distributor was required to purchase a certain quantity of products prior to June 16th, 1971. On June 15th, 1971 the defendants informed the plaintiff that a company had been incorporated as contemplated by the agreement. At the same time that company placed sufficient orders to fulfill the quantity requirements for the purchase of the products prior to June 16th, 1971. The company's order was rejected by the plaintiff, one of the grounds being that the company was not incorporated on the date the order was received by

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[1] 84 D.L.R. (3d) 673, 3 B.L.R. 204.

the plaintiff. The issue raised in the case was whether, if the company was not actually placed on the register of companies until June 16th, 1971, it was open to the plaintiff to contest its corporate existence on such date if its certificate of incorporation stated that it was incorporated on June 15th.

Section 26 of The Companies Act[2] of Alberta provides that: "On the registration of the memorandum of a company the Registrar shall issue a certificate under his seal of office, showing (a) that the company is incorporated. . . ." This section appears to require that the company be placed on the register before a certificate is issued and that the certificate be dated no earlier than the date the company is actually placed on the register. Indeed, McDermid J.A. in his dissenting opinion[3] states that if the evidence were to show that the Registrar dated a certificate earlier than the date the company was actually placed on the register "he is open to the gravest censure". However even if he were so open to censure sections 27 and 28 of The Companies Act of Alberta appear at first glance to provide ground for a finding that a company is nonetheless capable of performing legal acts on the date mentioned in the certificate. Sections 27 and 28 provide as follows:

> 27. A certificate of incorporation given by the Registrar in respect of a company is conclusive proof that all the requirements of this Act in respect of registration and of matters precedent and incidental to incorporation have been complied with, and that the company is a company authorized to be registered and duly registered under this Act.
>
> 28. From the date of incorporation mentioned in the certificate of incorporation the subscribers, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

How then did the majority reach the conclusion the company could not act prior to the date it was actually placed on the register?

Clement J.A., speaking for himself and Lieberman J.A. referred to and relied on the Supreme Court of Canada case of *Letain* v. *Conwest Exploration Co. Ltd*[4]. In that case the court held that even though a corporation incorporated under the federal Companies Act conclusively had (by reason of what is now section 142 of the Canada Corporations Act)[5] legal status from a date prior to the time

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[2] R.S.A., 1970, c. 60.

[3] *Supra*, footnote 1, at p. 675 (D.L.R.).

[4] [1961] S.C.R. 98, (1960), 26 D.L.R. (2d) 266, 33 W.W.R. 665.

[5] R.S.C., 1970, c. C-32, as am.

that the letters patent bearing such date were actually issued, this did not necessarily establish that the persons incorporating that company had satisfied the requirement in a contract to cause the company to be incorporated by a fixed date that was prior to the date the letters patent were actually issued. Holding that the *Letain* case was applicable to the instant case, Clement J.A. stated that on June 15th, if the Registrar had not registered the company, it had no legal existence on that date and a purchase order from it consequently had no legal validity. He stated that section 28 might have the effect of providing "legal substance and life" to the "concept" of the company for the purposes of the Act but that the words were not sufficient "to negate a breach of contract that had already existed, the contract being between parties other than the *ex post facto* company."[6]

With respect, two problems arise from the reasoning of Clement J.A. The first is that he does not distinguish between the requirement in *Letain* that a company be actually incorporated by a certain date and the requirement in the instant case that an order be placed by a certain date. This distinction is clearly set out in the dissenting judgment of McDermid J.A.[7] In the former case it was the very existence of the company that was required to fulfill a contractual obligation; in the latter case it was only the ability of a company to place an order on a certain date that was required.

The second problem follows from the first: section 28 provides that "[f]rom the date of incorporation mentioned in the certificate the subscribers . . . are a body corporate . . . capable of exercising all the functions of an incorporated company". Surely one of these functions must be the ability to order goods. Yet Clement J.A. states as a fact that on June 15th the company had "no legal existence". It is hard to comprehend how on the plain meaning of section 28 the company could on June 15th be capable of exercising the functions of a company yet have no legal existence. One can, it is submitted, support this proposition only by finding that the date of incorporation is other than the date mentioned in the certificate and to do this one must ignore section 27. This Clement J.A. does by summarily stating that the section "has no bearing on the issue at hand".[8] It is suggested, with respect, that the section does have a bearing and if section 28 is read in conjunction with section 27, one is drawn to the conclusion that a company has status to place an order for goods on the date set forth in its certificate of incorporation. This is the conclusion reached by McDermid J.A.

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[6] *Supra*, footnote 1, at p. 685 (D.L.R.).

[7] *Ibid.*, at p. 678 (D.L.R.).

[8] *Ibid.*, at p. 683 (D.L.R.).

The fact is that the company's certificate of incorporation stated it was incorporated on June 15th. Section 27 provides that a certificate "is conclusive proof that all requirements of this Act in respect of registration have been complied with and that the company is . . . duly registered". If one can look to see whether or not, in fact, the company was registered on the date of the certificate, how can it constitute conclusive proof? And if the date of a certificate can be questioned, why can the certificate not be questioned in respect of any other matter at any time? In *Re Barned's Banking Co., Peel's Case*[9] (cited by Clement J.A.) Lord Cairns J.A. in considering what is now section 15(1) of the English Companies Act[10] (a section substantially identical to section 27 of the Alberta Act) stated:[11]

> . . . once the memorandum is registered . . . it would be of most disastrous consequence if, after all had been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration, and the regularity of the execution of the document received by the Registrar.

The present case creates just this consequence, since, if the certificate is not conclusive in respect of the company's being placed on the register, it does not appear possible to argue successfully it would be conclusive in respect of other pre-conditions. Nor does there appear to be any legal reason why, if the company's status may be attacked soon after the purported date of incorporation, it may not also be attacked long after that date.

It is submitted that there are three essential factors to the majority decision in this case: (1) the finding that on the date set forth in the certificate of incorporation, the company had no legal existence; (2) the requirement of the Act that a company be placed on a register of companies before a certificate of incorporation is issued; (3) the holding that the status of incorporation does not derive from the certificate of incorporation. What follows now is a brief consideration of the applicability of the majority decision to the other general commercial incorporation statutes of Canada in light of these three factors.

The following statutes have provisions that are identical to or are substantially the same as sections 27 and 28 of the Companies Act of Alberta and hence it is submitted that *C.P.W. Valve and Instrument Ltd* v. *Scott et al.* is indistinguishable for purposes of interpreting them:

(a) The Companies Act of Nova Scotia;[12]

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[9] (1867), L.R. 2 Ch. App. 674.

[10] 1948, 11 & 12 Geo. 6, c. 38. [11] *Supra*, footnote 9, at p. 682.

[12] R.S.N.S., 1967, c. 42, ss 24(2) and 26. The sections referred to in the Nova Scotia Act are identical to ss 13(2) and 15(1) of The Companies Act, 1948 of

(b) The Companies Ordinance of the North-West Territories;[13]

(c) The Companies Ordinance of Yukon Territory.[14]

Sections 13 and 14 of the Companies Act of British Columbia[15] are similar to sections 27 and 28 of the Alberta Act but contain variations that could be significant. In particular section 13 provides that the certificate of incorporation is "conclusive evidence . . . that the company has been duly incorporated under this Act". The word "incorporated" contrasts with the word "registered" in the Alberta Act and thus it may be more difficult for a court to find that a corporation had no legal existence on a date when it is conclusively deemed to have been duly incorporated. However, it must be noted that section 10 of the British Columbia Act does require a company to be entered in the register of companies prior to the issuance of a certificate of incorporation. Hence, despite the variation in wording, the reasoning of Clement J.A. may be applicable.

The wording of section 20 of the Companies Act of Newfoundland[16] includes provisions to the same effect as sections 27 and 28 of the Alberta Act and, although the wording is considerably different, it is submitted that the judgment of Clement J.A. could apply to this statute as well as it does to the Alberta statute.

The foregoing are all the general incorporation statutes in Canada that provide for incorporation by the registration of a memorandum of association. The other statutes provide for incorporation either by delivery of articles of association or by means of letters patent.

The model for all the statutes in Canada (other than that of Ontario) now providing for incorporation by articles of association is the Canada Business Corporations Act.[17] Section 9 of that Act provides that: "A corporation comes into existence on the date shown in the certificate of incorporation." This statute has no

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England. It must be noted that in *Official Receiver and Liquidator of Jubilee Cotton Mills Limited* v. *Lewis*, [1924] A.C. 958, both Viscount Finlay, at p. 967, and Lord Dunedin, at p. 969, indicated that the date of the certificate under what is now s. 15(1) of the English Act (the equivalent of s. 27 of the Alberta Act) was conclusive that registration had been duly effected. This case is particularly relevant since it appears that at that time the general practice was to date the certificate as of the date of receipt of the papers requisite for registration even though the company was not placed on the register until a later day (see at pp. 973-974). Lord Sumner stated "A revision of this practice might well be considered". He nonetheless held the date of the certificate to be conclusive.

[13] R.O.N.W.T., 1974, c. C-7, ss 20 and 21.

[14] R.O.Y., 1976, c. C-10, ss 25(4) and 26(1).

[15] S.B.C., 1973, c. 18.

[16] R.S.N., 1970, c. 54.

[17] S.C., 1974-75-76, c. 33.

requirement that a corporation be placed on a register of corporations prior to the date of its certificate. Hence two of what have been suggested to be the three essential factors to the majority decision in *C.P.W. Valve and Instrument Ltd* v. *Scott et al.* appear not to apply to this statute. The Corporations Act of Manitoba[18] and The Business Corporations Act, 1977 of Saskatchewan[19] are identical in this respect to the Canada Business Corporations Act and section 5(2) of The Business Corporations Act of Ontario[20] is also substantially the same.

It is submitted that the variation of these statutes in the elements outlined above is sufficient to distinguish them for purposes of applying *C.P.W. Valve and Instrument Ltd* v. *Scott et al.* from the memorandum type statutes, even though, like the latter type of statute, the status of incorporation does not derive from the certificate of incorporation.

The remaining general commercial incorporation statutes provide for incorporation by letters patent. As with the articles jurisdictions, there is no requirement in any of the letters patent statutes that the corporation be placed on a register of corporations. In letters patent jurisdictions it is from the letters patent that corporate status derives. Hence again two of the three essential factors are missing. So far as the effective date of the creation of corporate status is concerned, the letters patent statutes provide as follows:

(a) The Companies Act of Quebec[21] contains the following provisions:

> 6. The Minister may, by letters patent . . . grant a charter to any number of persons . . . constituting such persons . . . a corporation. . . .
>
> 11. Notice of the granting of the letters patent shall be forthwith given . . . by one insertion in the *Quebec Official Gazette* . . . and, subject to such publication, but counting from the date of the letters patent, the persons therein named . . . shall be a corporation.

These sections, it is submitted, are sufficient to create corporate status as of the date of the letters patent.

(b) The Companies Act of New Brunswick[22] does not contain a clear statement as to when a corporation incorporated thereunder comes into existence but sections 4(1), 12 and 37 thereof contain

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[18] S.M., 1976, c. 40, s. 9. Although the Act provides for registration of articles, it is submitted that this is a different concept from the register of companies provided for in The Companies Act of Alberta, *supra*, footnote 2.

[19] S.S., 1976-77, c. 10, s. 9.

[20] R.S.O., 1970, c. 53.

[21] R.S.Q., 1964, c. 271, as am.

[22] R.S.N.B., 1973, c. C-13.

an inference that corporate existence commences upon the date of the letters patent.[23]

(c) Section 11 of the Companies Act of Prince Edward Island[24] provides that "from the date of the letters patent, the persons named therein and their successors shall be a body politic and corporate".

It is submitted that, in light of the foregoing, the reasoning of Clement J.A. would not apply to a corporation incorporated under any of these letters patent statutes.

In conclusion, the reasoning of the majority in *C.P.W. Valve and Instrument Ltd* v. *Scott et al.* appears to apply to the general incorporation statutes of Alberta, Nova Scotia, Newfoundland, the North-West Territories, the Yukon Territory, and possibly, British Columbia but to no other general Canadian incorporation statute.

N. WILLIAM C. ROSS*

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INSURANCE—AUTOMOBILE—ONTARIO-QUEBEC AUTOMOBILE INSURANCE AGREEMENT.—On December 15th, 1978, the Quebec Minister of Financial Institutions, Companies and Cooperatives and the Ontario Minister of Consumer and Commercial Relations announced that an agreement had been reached between Quebec and Ontario concerning compensation for victims of bodily injury suffered in autobomile accidents.[1]

The main purpose of this agreement which applies to all accidents occurring since January 1st, 1979, is to provide that an insured Ontario resident who is injured in an accident occurring in Quebec will receive the indemnities provided for by the Quebec plan, regardless of who is at fault.

Accidents occurring in Quebec

The agreement does not alter the rights of Ontarians who own,

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[23] In *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.* (1903), 2 O.W.R. 6, Meredith C.J. held that a letters patent company incorporated under the Ontario Companies Act comes into existence on the date of the letters patent. The relevant section of the Ontario Act considered in that judgment was substantially the same as section 4(1) of the New Brunswick Act.

[24] R.S.P.E.I., 1974, c. C-15.

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[1] Memorandum of Agreement between *Régie de l'assurance automobile du Québec* and Minister of Consumer and Commercial Relations for Ontario, Dec. 27th, 1978, No: 1978-54.

drive or are passengers in vehicles registered in Quebec; such accident victims will continue to be compensated by the *Régie de l'assurance automobile du Québec*[2] on a no-fault basis.

The agreement provides that any Ontario resident having automobile insurance issued in Ontario will be compensated by his insurer, according to the rates provided under the Quebec Automobile Insurance Act,[3] regardless of who was responsible for the accident. This provision also applies to an insured person's spouse and dependents, and to any Ontarian driving or riding in an automobile owned by an insured person or driven by him, his spouse or dependent. The Ontario insurer will also be responsible for compensating Ontario pedestrians injured in Quebec by an automobile owned or driven by an insured Ontario resident or by his spouse or dependents, according to the rates provided under the Quebec Act.

For its part, the *Régie* waives the exercise of its right to recover from an Ontarian responsible for an accident, the compensatory sums it has paid to the other victims of the accident.

There is one noteworthy exception to these provisions: an uninsured Ontario resident will continue to be compensated by the *Régie* in inverse proportion to his liability for the accident; the *Régie* may exercise its right of subrogation against such person.

Accidents occurring in Ontario

The agreement does not affect the rights of parties involved in accidents occurring in Ontario. The *Régie* will continue to compensate Quebeckers for their bodily injuries received in accidents occurring in Ontario; these persons will retain their right to take legal action for the excess amount, if any. Ontario residents retain their right to take legal action against Quebeckers who are at fault.

As for the *Régie*, it may exercise its right of subrogation and may take legal action against any Ontario resident who is responsible for an accident, or against his insurer. The amount that the *Régie* may claim, however, is limited to the difference between the amount it has paid, and that payable under the Ontario insurance policy, on a no-fault basis.

Compentation provided

The Quebec plan provides for the payment of the following types of compensation:

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[2] Quebec Automobile Insurance Board.

[3] L.Q., 1978, c. 68.

— income replacement indemnity;

— death benefits;

— indemnity for injury, disfigurement, dismemberment, suffering or loss of enjoyment of life;

— reimbursement of certain reasonable expenses incurred as a result of the accident.

The income replacement indemnity is paid in the form of a pension for the duration of the disability. It should be noted that even persons who are unemployed or holding casual or part-time employment, persons at home, students and children are entitled to the income replacement indemnity. In most cases, the death benefit is a pension payable to the spouse for his or her life-time, or to the dependents of the victim. The pensions are adjusted annually to protect their purchasing power.

Lump-sum indemnities are also paid in the case of injury, disfigurement, dismemberment or loss of enjoyment of life. The maximum amount of these indemnities is $21,800.00.[4] In addition, either the Ontario insurer or the *Régie*, as the case may be, will reimburse reasonable expenses not already covered by a public health plan incurred as a result of the accident for medical and hospital care, medicaments and transportation by ambulance. Reimbursements for clothing and funeral expenses are also provided, up to the maximum amounts determined.

The insurer or the *Régie* will also assume the cost of rehabilitation programmes to facilitate the victim's return to a normal life. Calculation of all benefits paid as pensions is based on a net income, which in turn is based on a gross income not exceeding 20,000.00[5] per year.

What to do in case of accident

An Ontario resident who is injured in an automobile accident in Quebec should:

1. Notify the police immediately.
2. Contact his insurer who will send him the forms and documents necessary and provide any technical assistance needed for the submission of the claim.
3. Contact the *Régie* if, at the time of the accident, he was an owner, driver or passenger of a vehicle registered in Quebec; the same applies if he is uninsured.

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[4] These amounts are adjusted annually. The figures quoted are applicable from March 1st, 1979, until February 29th, 1980.

[5] *Ibid.*

4. Retain all documents respecting the accident for future evidence.

The compensation to which the Ontario resident is entitled will be paid promptly either by his insurer or by the *Régie*, as the case may be.

The Ontario Minister of Consumer and Commercial Relations stated that he considered the Ontario-Quebec agreement fair and equitable. It was reached, he said, after long and amicable negotiations between the Superintendent of Insurance for Ontario and the President of the *Régie de l'assurance automobile du Québec*. The Minister also said that he believed the agreement to be a precedent in Canada and hoped it would be viewed favourably as a model for other negotiations. He expressed confidence that other parties would enjoy the same co-operation and mutual understanding that the Ontario Government had encountered with the Province of Quebec. Finally, he stressed that, according to the agreement, insured Ontario motorists travelling in Quebec would be guaranteed full payment to the extent permitted under Quebec law, without deduction for their own negligence, and would enjoy the additional benefits of Ontario accident coverage on a no-fault basis.

BRUNO GIROUX*

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