

Notes of Cases

Jurisprudence

TREATY-POWER, AND MORE ON RULES AND *OBITER* DICTA.—The recent decision of the Supreme Court of Canada in the case of *Schneider v. The Queen*,¹ is of interest from a number of perspectives. The decision contains an important exposition of provincial legislative jurisdiction in respect of the prevention and mandatory treatment of disease. In the same case,² we learn that the Chief Justice disassociates himself from the view of four colleagues, expressed in his absence, in *Hauser v. The Queen*³ that the Narcotic Control Act is an exercise of the peace order and good government power rather than the criminal law power. Chief Justice Laskin suggests that there is “good ground to reconsider that basis of decision . . .”.⁴ However if the court appears to be climbing down from a precarious limb,⁵ in *Schneider v. The Queen*, it appears to be taking itself out on another and equally tenuous branch concerning the treaty power. It is this aspect of the judgment that constitutes the subject of this comment.

Among several arguments made to attack the constitutionality of the British Columbia Heroin Treatment Act⁶ it was suggested that Parliament had occupied the field of heroin treatment by legislating to implement an international convention. It was argued that “Parliament has jurisdiction to enact laws in relation to obligations assumed by Canada as a signatory to international treaties or conventions”⁷ and that such laws would be valid “even if the exercise of federal implementation of treaty obligations touches upon a provincial subject matter”;⁸ thus by adopting the Narcotic Control Act⁹ Parliament had acted to implement the Single Convention on Narcotic Drugs 1961, and had thereby rendered the provincial law inoperative. Dickson J., for the majority of the court, gave the following answer:¹⁰

¹ (1983), 139 D.L.R. (3d) 417, (1983), 43 N.R. 95, [1982] 6 W.W.R. 673.

² *Ibid.*, at p. 422 (D.L.R.).

³ [1979] 1 S.C.R. 984.

⁴ *Supra*, footnote 1, at p. 422.

⁵ The descent began in *R. v. Aziz*, [1981] 1 S.C.R. 188.

⁶ R.S.B.C. 1979, c. 166.

⁷ *Supra*, footnote 1, at p. 437 (D.L.R.).

⁸ *Ibid.*, at p. 437.

⁹ S.C. 1960-61, c. 35 now R.S.C. 1970, c. N-1, ss 17(1), 19, not yet proclaimed.

¹⁰ *Supra*, footnote 1, at pp. 437-438 (D.L.R.).

This court in the *Macdonald v. Vapor* case held that even assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference.

There is nothing in the *Narcotic Control Act* to indicate that that Act or any part of it was enacted in implementation of Canada's treaty obligations under the terms of the Single Convention. I agree with McEachern C.J.S.C. at trial that "giving the convention its full force and effect only means that Canada is treaty bound to involve itself in active treatment which, thus far, it has failed to do" (at p. 137 C.C.C., p. 38 D.L.R., p. 36 W.W.R.). The *Heroin Treatment Act* is not legislation falling within the scope of any federal power to legislate for the implementation of international treaties.

Few members of the Supreme Court of Canada are given to unintended *obiter dicta*. Mr. Justice Dickson in particular is known for his elegant and carefully drafted opinions, he is not a man to use words lightly. We must therefore treat these paragraphs as reflecting the view of the court on a most important issue and analyze these paragraphs to determine what policy and perhaps what new rule is implied.

Mr. Justice Dickson's *obiter dictum* refers to a passage, also *obiter dictum* in the decision of the Supreme Court of Canada in the case of *John A. MacDonald and Railquip Enterprises Ltd v. Vapour Canada*.¹¹ In this case, the court for the first time put in doubt the rule declared in the *Labour Conventions Reference*¹² that legislative jurisdiction to adopt laws for the purpose of implementing international treaties is divided according to the ordinary rules governing the division of legislative powers, and that Parliament had no special jurisdiction to implement international treaties covering matters within provincial legislative jurisdiction apart from the powers vested by section 132 of the Constitution Act 1867.

In the *Vapour Canada* case it was argued that section 7(e) of the Trade Marks Act¹³ was valid federal law because it had been adopted to implement an international obligation assumed by Canada. Chief Justice Laskin upon examining the legislation decided that there was no basis for the assertion that it was passed with a view to implementing the convention cited to the court.¹⁴ However the Chief Justice did weigh the argument that Parliament was empowered to legislate with a view to implementing international treaties. He addressed himself to the following two questions.¹⁵

¹¹ [1977] 2 S.C.R. 134, at p. 167.

¹² [1937] A.C. 326.

¹³ R.S.C. 1970, c. T-10.

¹⁴ International Convention for the Protection of Industrial Property of March 20th, 1881, revised 1900, 1911, 1925, 1934 and 1967, Canadian accession July 20th, 1951.

¹⁵ *Supra*, footnote 11, at pp. 167-168.

There are two important issues that arise in this connection. First, assuming that I have correctly concluded that s. 7, as it stands, is outside of federal legislative power, does the *Labour Conventions* case, stand in the way of federal power to enact it in implementation of an international obligation arising out of an international treaty or convention? Second, if the answer to that is "no" and there is such power, was there a proper implementation of an international obligation in the enactment of s. 7?

In answering these questions Chief Justice Laskin explored a number of judicial and extra-judicial statements that cast doubt upon the wisdom or authority of the *Labour Conventions Reference*.¹⁶ He then reviewed the law and the international convention which it supposedly implemented and found that there was no evidence implicit or explicit to link them. This led him to conclude that:¹⁷

There is nothing in the Trade Marks Act of 1953 to indicate that it was passed in implementation of the aforementioned Convention except that there is a reference to the Convention in the interpretation section and there is a definition of "country of origin" and "country of the Union" which bring in the Convention. These references are for a very narrow purpose of trade mark regulation, as is evident from ss. 5, 29 and 33 of the Trade Marks Act. They do not, in themselves, support the conclusion that the Act was passed in implementation of the Convention, and certainly not that s. 7 was so enacted.

Chief Justice Laskin appeared to question the *Labour Conventions Reference* rule, and in its place, "assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty which might otherwise be for provincial legislation alone",¹⁸ he proposed two tests. First, that the legislation must manifest an intention to implement a treaty or convention. Second, the legislation must not go beyond the scope of the treaty or convention. In *Schneider* Mr. Justice Dickson is both shy and bolder. Shy, because he reminds us of Lord Atkin's statement "that there is no such thing as treaty legislation",¹⁹ but bolder because he then goes on to state that "even assuming" Parliament had power to pass treaty implementing legislation the intention to do so "must be manifested" in the legislation and can not be left to inference.²⁰ He then applied the announced test and determined that no such intention could be discerned.

Where do we stand now? Do we have two *obiter dicta* or do we have a new rule based upon an *obiter dictum*? In the respectful view of this writer, the passages under examination are open to criticism both with respect to

¹⁶ Statement by Kerwin C.J.C. in *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; Comment by Lord Wright (1955), 33 Can. Bar Rev. 1123 that the *Labour Conventions Reference* cannot be reconciled with a proper understanding of the general power; and the statement by Mr. Justice Rand that the general power embraced the power to implement treaties (1960), 38 Can. Bar Rev. 135, at p. 142.

¹⁷ *Supra*, footnote 11, at p. 171.

¹⁸ *Ibid.*, at p. 171.

¹⁹ *Labour Conventions Reference*, *supra*, footnote 12, at p. 351.

²⁰ *Schneider v. the Queen*, *supra*, footnote 1, at p. 437 (D.L.R.).

method and result. The method of reasoning employed appears to be incomplete and insufficiently motivated to justify the result. The result itself could be used by Parliament to justify massive incursions into spheres normally reserved to provincial legislative action.

What is implied?

The first difficulty is to interpret Justice Dickson's statements, for he both gives and takes away. He applies what appears to be a mere *obiter dictum* in *Vapour Canada* as though it were a rule. But he prefaces his recourse to a new rule that Parliament can legislate to implement any treaty "as a matter of national concern"²¹ by rehearsing the old and totally contradictory rule set out in the *Labour Conventions Reference*. Justice Dickson raises the first contention only to state that "the point was left open in this court in *Macdonald et al. v. Vapour Canada*"²² and that "the appellant's proposition is questionable in the face of Lord Atkin's judgment on behalf of the Privy Council".²³ Having said this, he proceeds to apply a variant of the very test whose worth he has cast in doubt. The reader is thus free to argue that this is simply one more *obiter dictum*, a new rule or a balancing act. All that can be said with assurance is that the reviewability of the *Labour Conventions Reference* rule is left open by Justice Dickson and that no other judge dissented from this treatment of the matter.

One question which immediately springs to mind is that of the nature and effect of an *obiter dictum*. In *Vapour Canada* the Supreme Court speculated upon the possibility of reviewing the *Labour Conventions Reference* rule and suggested that some formal tests would be essential to determine whether federal legislation purporting to implement conventions in respect of matters normally falling within provincial legislative jurisdiction actually did so. In *Schneider v. The Queen* the hypothetical tests are used and the court is described by Dickson J. as having "held" something albeit immediately followed by "even assuming". Do two *obiter dicta* make a rule? Can an *obiter dictum*, suitably qualified, be cut loose from its qualifying words and be elevated into a rule without further demonstration of the need or purpose of the new rule?

The Supreme Court of Canada recently suggested that everything it stated, including *obiter dicta*, were important.²⁴ But are we now to conclude that there is no difference at all between an *obiter dictum* and a *ratio decidendi*?²⁵

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ See *Sellers v. The Queen* (1980), 52 C.C.C. (2d) 345; see also Gilbert, Comment, (1982), 60 Can. Bar Rev. 373, and Peltomaa, Correspondence (1982), 60 Can. Bar Rev. 823.

²⁵ The House of Lords continues to have a very keen sense of the distinction. See *Paul Wilson & Co. v. Bluth*, [1982] 3 All E.R. 394, at pp. 400-401.

Setting aside the first question, a more complex problem is to know what new rule is actually implied if one reads this passage as a reconsideration of the *Labour Conventions Reference*. At first blush it would appear that the Supreme Court is proposing a rule akin to that developed by the courts in Australia. Under the Australian Constitution, article 51(29), the Commonwealth Parliament has exclusive jurisdiction over "External Affairs". After many years of questioning and uncertainty this seems to have been interpreted as allowing the Commonwealth Parliament to legislate with a view to implementing treaty obligations assumed by the Crown, provided the legislation is restricted to the confines of the treaty being implemented.²⁶ Many issues appear to be unresolved but it would seem that the Commonwealth has exercised this broad power with considerable self-restraint.²⁷ This restraint may in part be due to the continuing uncertainty of the ambit of the rule. Does it apply to all treaties, conventions, exchanges of notes, pacts, protocols, non-binding United Nations resolutions said to be declaratory of international law, less formal "understandings" or "inter-agency agreements"? What degree of commitment is required: ratification, signature, signing the final act of a conference, belief that a rule is binding? What of the large body of customary international law? These questions are equally pertinent to the Canadian context and entirely without an answer from the Supreme Court of Canada

Is a new rule justified?

One reason for moving away from an established rule, which is not founded on an explicit statutory provision, is the rule's ambiguity. Is the rule stated in the *Labour Conventions Reference* ambiguous?²⁸ Clearly not. It is unequivocal with respect to the process of treaty implementation. Admittedly, the *Labour Conventions Reference* leaves some doubt as to the treaty-making process by not explicitly stating that the Governor General exercises a monopoly to the complete exclusion of the Lieutenant Governors,²⁹ but there is no doubt as to the division of powers to implement treaty obligations dealing with matters within federal and provincial legislative jurisdiction.

Outmoded rule?

Another reason justifying judicial departure from an established rule would be the rule's inability to cope with the demands of changing

²⁶ Howard, *Australian Federal Constitutional Law* (2nd ed., 1972), p. 453.

²⁷ Docker, *The Treaty-Making Power in the Commonwealth of Australia* (1966), pp. 219-242.

²⁸ *Supra*, footnote 19, at p. 351.

²⁹ Although this is the clear implication of the Letters Patent 1947, R.S.C. 1970, Appendices No. 35.

circumstances. Is this the case here? No easy answer to this question can be given. The need to obtain provincial legislative action, or the promise of such action in the future, does introduce an element of rigidity into the treaty-implementation process in Canada and ultimately has an impact upon the international obligations assumed by Canada. A good case in point is the relatively tardy Canadian ratification of the United Nations Covenants on Civil and Political Rights and Social and Economic Rights. Delay was certainly caused by the need to orchestrate a federal-provincial consensus as the need for ratification and the consequent legislative measures.

Some Canadian international lawyers, such as the late Marcel Cadieux, have felt keenly that the *Labour Conventions Reference* imposed undue limitations upon the conduct of foreign relations by the Government of Canada.³⁰ Several judicial commentators have also felt the rule to be unduly restrictive.³¹ Other distinguished diplomats, including A.E. Gotlieb, a subsequent Under-Secretary of State for External Affairs, have been more guarded.³² Some learned commentators have accepted the rule.³³ Others have been strongly critical.³⁴ Still others strongly support the rule.³⁵ The possibility of reconsideration was implied by Professor (as he then was) Bora Laskin in 1965,³⁶ and the need for a new accommodation of

³⁰ Interview with the late Marcel Cadieux, November 25th, 1980.

³¹ *Supra*, footnote 16.

³² Canadian Treaty-Making (1968), pp. 73-78.

³³ R. Delisle, Treaty Making Power in Canada, in Ontario Advisory Committee in Confederation (1967), p. 117; K.C. Wheare, Federal Government (4th ed., 1963), p. 176.

³⁴ See, *inter alia*, F.C. Cronkite, The Social Legislation References (1937), 15 Can. Bar Rev. 478; Vincent C. MacDonald, The Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401; N.A. MacKenzie, Canada and the Treaty-Making Power (1937), 15 Can. Bar Rev. 436; Hendry, Treaties and Federal Constitutions (1955), ch. 8; F.R. Scott, Correspondence (1956), 34 Can. Bar Rev. 114; G.J. Szablowski, Creation and Implementation of Treaties in Canada (1956), 34 Can. Bar Rev. 28; Gerald L. Morris, The Treaty-Making Power: A Canadian Dilemma (1967), 45 Can. Bar Rev. 478; R. St.J. Macdonald, The Relationship between International Law and Domestic Law in Canada in Macdonald, Morris & Johnston, eds, Canadian Perspectives on International Law and Organization (1974), pp. 118 and 130. Macdonald views the *Labour Conventions Reference* rule have been *obiter dictum*.

³⁵ See, *inter alia*, J.-Y. Morin, La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé (1965), 3 Can. Y.B. Int'l L. 127, at p. 137; J.-Y. Morin, Treaty-Making: The Position of the Quebec Government (1967), 45 Can. Bar Rev. 160; A.M. Jacomy-Millette, L'Introduction et l'application des traités internationaux au Canada (Paris, 1971), pp. 75 *et seq.*; A. Dufour, Fédéralisme canadien et droit international, in Macdonald, Morris & Johnston, eds, Canadian Perspectives on International Law and Organization, *ibid.*, p. 72. See also Edward McWhinney, Canadian Federalism and the Foreign Affairs and Treaty Power; The Impact of Quebec's Quiet Revolution (1969), 7 Can. Y.B. Int'l L. 3, at pp. 4-5.

³⁶ The Provinces and International Agreements in Ontario Advisory Committee on Confederation, p. 111, and Laskin's Constitutional Law (4th rev. ed., 1975), p. 215.

some kind has been argued by Professor Lederman³⁷ and by Justice LaForest.³⁸

A lack of unanimous support among the authorities for changing the *Labour Conventions Reference* rule is significant; it is, perhaps, even more significant that the most interested party of all, the Government of Canada, has failed to argue unequivocally that the rule is outmoded and in need of amendment. A *White Paper*, issued in 1968, describes the *Labour Conventions Reference* rule as placing Canada "in an unusual position" and notes that "doubts" have been expressed as to its wisdom.³⁹ However, the *White Paper* describes the means by which "harmony through cooperation" can be achieved rather than calling for a new rule.

On its face is the rule outmoded? Is Canadian treaty-making hamstrung? A complete answer to this question would require demonstration based upon an exhaustive analysis of Canadian participation in many international negotiations. Suffice it to say here that, in the view and in the experience of the writer, despite some inevitable rigidity inherent in any federal system, no such case can be made.⁴⁰ In the international arena, Canada has lived well with the *Labour Conventions Reference* rule.

Was the Reference wrongly decided?

A most compelling reason for rejecting a precedent is that the decision was wrongly decided. This writer would reject any such suggestion. The arguments that the *Labour Conventions Reference* was wrongly decided turn largely upon the failure of the Privy Council to follow its own ruling in the *Radio Reference*⁴¹ where there is the strong inference that treaty-making falls under the general power and that section 132 must be interpreted broadly to take into account the reality, un contemplated in 1867, of Canada conducting her own external affairs. To argue that the limited rule set out in section 132 of the Constitution Act 1867 should be extended beyond "Empire treaties" when the language of the section plainly precludes any such interpretation would cross the boundary between creative interpretation and naked instrumentalism. The ordinary meaning of the letter of the Constitution simply does not give Parliament the general power to implement treaties relating to matters within provincial legislative jurisdiction; hence the Privy Council was right so to decide. Nor can the general power be used to embrace treaty-making in respect of any matter whatsoever.

³⁷ Legislative Power to Implement Treaty Obligations in Canada in *The Political Process in Canada*, Essays in Honour of R. MacGregor Dawson (1963), p. 171.

³⁸ The *Labour Conventions Case Revisited* (1974), 12 Can. Y.B. Int'l L. 137.

³⁹ See P. Martin, *Federalism and International Relations* (1968), p. 25.

⁴⁰ See A.E. Gotlieb, *op. cit.*, footnote 32, p. 82, who notes that the Canadian record of ratification of major international conventions is as good as that of other major states.

⁴¹ *Supra*, footnote 11.

er regardless of the provincial legislative powers under the Constitution Acts, 1867-1982.

Demand for a new rule?

Is there any demand for a new rule? In particular, has there been any demand for a new rule, or serious expression of dissatisfaction with the old rule, by Parliament or those representatives of the Crown in right of Canada charged with the conduct of international relations? There is no evidence that Parliament has clearly manifested dissatisfaction with the rule or expressed the intention to change it, either by way of resolution or by way of preamble or operative provision of any law passed since 1937. Between 1937 and 1983, Parliament has legislated to implement a great many bilateral treaties and multilateral conventions,⁴² but with a few debatable exceptions, these texts relate to matters within the legislative jurisdiction of Parliament. The argument for a change is therefore not strong here.

If the Government of Canada had experienced serious difficulties with the *Labour Conventions Reference* rule it has had ample opportunity to say so during the last twenty years of constitutional negotiations. Yet the only explicit commentary on the rule by the Government of Canada is found in the *White Paper* of 1968.⁴³ This was hardly a call to make major changes to the treaty power. Other parties to the constitutional negotiation since 1964 have made proposals to give the Provinces treaty-making powers.⁴⁴ The Canadian Bar Association made proposals in 1978 to extend the federal treaty-implementing power, subject to the approval of a reformed Senate.⁴⁵ The Joint Committee of the Senate and the House of Commons on the Constitution of Canada, in its *Report* of 1972 also made proposals concerning international relations,⁴⁶ but no changes were proposed concerning treaty implementation. Since the most immediately interested party, the Government of Canada, does not seem to consider the establishment of a new rule to be a matter of great importance or priority, should the Supreme Court of Canada do so?

Since the end of the Second World War, and especially since the Fulton-Favreau negotiations in 1962-1965 this country has been in the throes of almost permanent constitutional negotiations which have dealt

⁴² By the writer's count no less than twenty percent of the Revised Statutes of Canada 1970 are based in whole or in part on international agreements.

⁴³ P. Martin, *op. cit.*, footnote 39, pp. 24-25; see also, M. Sharp, *Federalism and International Conferences on Education* (1969), pp. 48-55, where proposals for cooperation are made, but where one finds call to overturn the *Labour Conventions Reference* rule.

⁴⁴ The most recent of many emanating from provincial governments and parties being the "Livres beiges" of the Liberal Party of Quebec, *Une nouvelle fédération canadienne* (1980).

⁴⁵ *Towards a New Canada* (1978), p. 126.

⁴⁶ *Constitution of Canada, Final Report* (1972), p. 68.

with many aspects of the Constitution. The federal and provincial governments, as well as private groups and individuals have been free to propose major changes to the Constitution. The lively constitutional debate has not prevented the Supreme Court of Canada playing an important role in the fashioning of constitutional law during this period. This writer would not have wished the Supreme Court do otherwise or to withdraw into sterile quietude during this period. However, where the issue involves a radical change in a rule which has served its purpose for over four decades, the court would do well to leave such major changes to the political process. This process is not over yet.

Furthermore, given that the apparent offer of willingness by the Supreme Court in *Vapor Canada* to review the *Labour Conventions Reference* rule, does not appear to have been taken up in succeeding years by Parliament or the federal or provincial governments, it is respectfully suggested that a second offer of the same kind is premature.

Impact of the new rule?

What would be the impact of the implied change? To take one area, is it really wise to adopt a rule which would allow the Parliament of Canada to adopt legislation implementing every one of the many hundreds of conventions and "recommendations" adopted by the International Labour Organization since 1919? To do so would be to supercede virtually all existing provincial labour legislation, leaving the provinces with only a residuum of jurisdiction, constantly at the mercy of every new International Labour Organization convention. Those who consider the proposed new rule to reflect a valuable addition to the powers of Parliament would do well to contemplate the volume annually published by the Secretary General of the United Nations *Treaties and Conventions for which the Secretary-General of the United Nations acts as Depositary*. This volume sets out vast lists of international conventions negotiated under the aegis of the United Nations and its Specialized Agencies in the fields of health, welfare, human rights, transportation, communications, industry, commerce, economic relations, education, culture, and many aspects of property. Is Parliament really to gain jurisdiction over all these matters simply by virtue of alleging that it is implementing international agreements dealing with these matters?

To implement the Law of the Sea Convention⁴⁷ fully in respect of the pollution of the oceans it will be necessary for Canada to restrict marine pollution from all "land-based" sources.⁴⁸ Will Parliament have authority to supercede provincial laws or impose more severe pollution controls than those presently existing at the provincial level in order to implement this

⁴⁷ U.N. Doc. A/Conf. 62/121, Oct. 21st, 1982, Final Act signed by Canada on Dec. 10th, 1982; (1982), 21 Int'l Leg. Mat. 1245.

⁴⁸ *Ibid.*, art. 203.

great convention? Simply to ask the question makes it clear that the answer given by the Privy Council in 1937 was eminently sensible.

A new rule

In the view of this writer, concern to enlarge federal jurisdiction to implement treaties stems from an erroneous view of the need to grant governments maximum flexibility in international relations. The international law-making process is not sacred; it deserves the same scrutiny as any other legislative process, but in fact often receives much less, due to the relative flexibility and absence of formality at diplomatic conferences in the manner of reaching and recording decisions. At the international level the law-making process is marked by great flexibility and tends to produce vague and general compromise texts, based on the lowest-common denominator, rather than clear and forceful language. At the domestic level the processes and conventions governing ratification, parliamentary approval and implementation are marked by a considerable degree of flexibility and discretion both before and during parliamentary study. The wisdom of international law needs to be scrutinised more not less than that of domestic law, and the mere fact that the executive has negotiated a treaty with a foreign state should not make it above suspicion. Yet to remove the application of the normal rules governing the division of powers in Canada would have precisely this effect unless some special procedure for legislating pursuant to an international treaty were also adopted.

A constitutional amendment allowing Parliament to legislate to implement an international agreement subject to a two-third vote or subject to the approval of a reformed Senate where the Provinces were directly represented might be politically acceptable in respect of certain classes of treaties. But this is a very different approach from that implied in *Schneider*, and it is completely beyond the court's power to create the requisite checks and balances to achieve such a situation. Without appropriate checks and balances, such as exist in the United States Constitution, sole authority vested in Parliament to implement treaties would surely put unacceptable pressures upon the Canadian federal system.

Conclusion

With the *obiter dicta* in *Vapor Canada* and *Schneider* concerning the treaty-implementing power, the Supreme Court of Canada has taken itself very far out on a limb. If the court is not careful the branch will soon break and the court and the country will be the worse for it. There is still time to climb down.

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CONTRACTS—ILLEGALITY AND SECTION 305.1 OF THE CRIMINAL CODE.—The purpose of this note is to comment upon the recently pronounced judgment in the case of *Mira Design Co. v. Seascope Holdings*.¹ the first reported case dealing with the usury provisions in section 305.1 of the Criminal Code.²

The relevant portion of section 305.1 is as follows:

- (1) Notwithstanding any Act of the Parliament of Canada, everyone who
 - (a) enters into an agreement or arrangement to receive interest at a criminal rate or
 - (b) receives a payment or partial payment of interest at a criminal rate is guilty of
 - (c) an indictable offence and is liable to imprisonment for five years.
 - (d) an offence punishable on summary conviction and is liable to a fine of not more than twenty-five thousand dollars or to imprisonment for six months or to both.

In the *Mira Design* case, the petitioners were the purchasers of a piece of property by agreement for sale and they assigned their interest therein to the respondent. The respondent gave the petitioners a mortgage back to secure the unpaid balance. The mortgage document provided for a face amount of \$100,000.00 to secure the repayment of \$84,000.00, being the unpaid balance of the purchase price under the assignment. The mortgage provided it would be void if \$84,000.00 plus interest at prime plus two per cent per annum was paid within thirty days, failing which the sum of \$100,000.00 plus interest on the unpaid purchase price amount would be due and payable on demand. The respondent failed to pay the balance of the unpaid purchase price within the thirty day period which failure continued after demand for payment was made by the petitioners. The petitioners subsequently commenced a foreclosure action for \$100,000.00 principal. The respondent defended on the basis that the mortgage was rendered illegal by a breach of section 305.1 and was therefore void and unenforceable.

The application for foreclosure was adjourned for the purposes of an inquiry to determine the effective annual rate of interest charged as a result of the increased principal.³ At a subsequent hearing, the court held that although the mortgage in question fell within section 305.1 in that the difference between the balance of the unpaid purchase price and the face amount of the mortgage amounted to interest at a criminal rate,⁴ the making of the mortgage was not prohibited by the statute and was not illegal or void.⁵ The court applied the doctrine of severance to remove the provision with respect to the increase in the principal amount of the mortgage.⁶

¹ [1982] 4 W.W.R. 97 (B.C.S.C.).

² R.S.C. 1970, c. C-34, as am. by 1980, c. 43, s. 9.

³ [1982] 1 W.W.R. 744.

⁵ *Ibid.*, at p. 104.

⁴ *Supra*, footnote 1, at p. 98.

⁶ *Ibid.*, at pp. 104-105.

It is submitted that although the *Mira Design* case is correct in its result, the application of the principles of the doctrine of illegality should be analyzed and commented upon.

The court rightly states that "the courts will not enforce a contract incapable of recognition because it has been rendered invalid by statute expressly or by necessary implication".⁷ This proposition is clearly supported by authority to which the court makes reference.⁸ A distinction is drawn between "invalidity by necessary implication from a statute and invalidity at common law, for the first is not subject to any qualifications".⁹ Invalidity at common law refers to contracts rendered illegal for public policy reasons. The court states that if the mortgage is prohibited by section 305.1, then it is "invalid and a legal nullity".¹⁰ The result would be that the mortgage would be unenforceable against the respondent. These quoted words "for the first is not subject to any qualifications" seem to imply that if a mortgage is prohibited by section 305.1 then nothing can save it.

There is no doubt that this would result in an unfortunate hardship on the petitioners and a windfall to the respondent. The facts disclosed that neither the petitioners nor the respondent had any knowledge of the provisions of section 305.1 until one week before the application for foreclosure. In fact, it was the solicitors of the respondent who drew up the mortgage document in question.

The court stated that:¹¹

The purpose of s. 305.1 is to punish everyone who enters into an agreement or arrangement to receive interest at a criminal rate. It does not expressly prohibit such behavior, nor does it declare such an agreement or arrangement to be void. . . . Moreover, to find that s. 305.1 necessarily prohibits the entering into of agreements or arrangements to receive interest at a criminal rate would be to accomplish that which Parliament has chosen not to do, or cannot do, directly.

and held that the mortgage agreement was not fundamentally illegal. The court stated that the offending portions of the mortgage "were severable".¹²

It is clear that if a contract or agreement is expressly or impliedly prohibited by statute, it is illegal.¹³ When a contract is not expressly

⁷ *Ibid.*, at p. 101.

⁸ *Cope v. Rowlands* (1836), 2 M. & W. 149, 150 E.R. 707; *Lound v. Grimwade* (1888), 39 Ch. D. 605; *United Dominion Promotion Sales Inc. v. Shaw* (1957), 119 C.C.C. 380, 9 D.L.R. (2d) 759 (N.B. Co. Ct). See also M.P. Furnston, *Cheshire and Fifoot's Law of Contract* (10th ed., 1981), pp. 308-309; *Commercial Life Assurance Co. v. Drever*, [1948] S.C.R. 306.

⁹ *Supra*, footnote 1, at p. 101.

¹⁰ *Ibid.*

¹¹ *Ibid.*, at p. 104.

¹² *Ibid.*, at p. 105.

¹³ *Supra*, footnote 8.

prohibited, it is necessary to examine the construction of the statute having regard to the particular circumstances surrounding the transaction in order to determine the object of the legislation. The question to be asked is whether or not the object of the legislation forbids the contract.¹⁴ If so, the contract is impliedly prohibited by statute and is illegal. Section 305.1 provides for a penalty where one enters into an agreement to receive interest at a criminal rate. It does not expressly state that such an agreement is prohibited and illegal. The question is, whether such an agreement is prohibited by implication.

The case of *Cope v. Rowlands*¹⁵ considered a statute which provided that a broker must be licensed before doing business and that one acting as a broker without a licence would be subject to a penalty. The court held that the clause imposing the penalty implied a prohibition of unlicensed persons to act as brokers and prohibited by necessary implication, contracts for reward with brokers acting as such.¹⁶ The court based its decision on the finding that the object of the legislation was the protection of the public in their dealings with brokers.

The court in *Mira Design* stated that "Most Canadians would agree that the purpose of the Criminal Code is to protect the public by providing for the punishment of behavior that Parliament considers to be against the public interest"¹⁷ and that Section 305.1 "is designed to protect borrowers".¹⁸

The Public Health Act, 1875 provided that officers employed by a local authority "shall not" be interested in any contract with the authority for any of the purposes of the Act. The statute provided a penalty for breach. The court in *Mellis v. Shirley Local Board*¹⁹ held it was the legislature's intention that a contract in violation of these provisions not be legally valid. In *Prince Albert Properties and Land Sales Ltd v. Kushneryk*²⁰ the court discusses the difficulty of determining whether a contract is prohibited by implication in a case where a statute imposes a penalty on one who acts contrary to or in violation of a statute. Culliton J.A., states that:²¹

The material factor then to consider is whether the sole purpose of the penalty may be taken to be the protection or increase of the revenue or whether it is also designed for the protection of the public.

¹⁴ Furmston, *op. cit.*, footnote 8, p. 309.

¹⁵ *Supra*, footnote 8.

¹⁶ *Ibid.*, at p. 711.

¹⁷ *Supra*, footnote 1, at p. 104.

¹⁸ *Ibid.*

¹⁹ (1885-86), 16 Q.B.D. 446.

²⁰ [1955] 5 D.L.R. 458.

²¹ *Ibid.*, at p. 465.

Culliton J.A. states the rule to be followed to determine the purpose of the penalty as that laid down by Lord Esher in *Mellis v. Shirley Local Board* as follows:²²

But the rule to be followed, as laid down by the cases, is that though there may be no express words in a statute making an act void, yet, when a penalty is attached to a contravention of its provisions, the Court must consider the whole scope of the statute, and, looking at the words of the Act and the subject matter with which it deals, it must determine whether the statute intended merely to impose the penalty for punitive and possible revenue purposes or to make the contract itself invalid.

Although in both of the above cases, the statutes in question included words to the effect that one "shall not" commit a certain act and imposed a penalty on one so doing, it is submitted the statutes no more expressly prohibit a contract encompassing the act prohibited than does section 305.1. The issue in the cases is identical to the issue in *Mira Design*; that is, whether a contract encompassing or including the act for which a penalty is provided, is impliedly prohibited.

In *Victorian Daylesford Syndicate v. Dot*²³ Buckley J. stated:

... there is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. ... If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal.

Reference is also made to the oft quoted case of *Bartlett v. Vinor*²⁴ where Lord Holt stated that:

... every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho' the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.

Reference is made to the Saskatchewan Court of Appeal case of *Prudential Exchange Co. v. Edwards*²⁵ which dealt with the effect of an agreement made in violation of section 231 of the Criminal Code.²⁶ The wording of section 231 was similar in form to the wording of section 305.1 and the relevant portions provide as follows:

Everyone is guilty of an indictable offence and liable to five years imprisonment and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise

²² *Ibid.*, at p. 465.

²³ [1905] 2 Ch. 624, at pp 629-630; see also *St. John Shipping Corp. v. Joseph Rank*, [1957] 1 Q.B. 267; *Wasel Bros. v. Laskin*, [1934] 3 D.L.R. 798; *Archibolds (Freightage) v. Spanglett*, [1961] 1 Q.B. 374.

²⁴ (1692), 90 E.R. 750.

²⁵ [1938] 1 D.L.R. 219.

²⁶ R.S.C. 1927, c. 36.

or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise.

- (a) without the bona fide intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares, or merchandise; or
- (b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the bona fide intention to make or receive such delivery.

Like section 305.1, section 231 does not expressly prohibit the making of a contract or agreement to do the act subject to a penalty, but penalizes those who do make such a contract or agreement. The court held that promissory notes given as security for money which was loaned for such a purpose were founded upon an illegal purpose and therefore were not enforceable. The court went on to say that the purpose had been carried out at least to a substantial degree. It perhaps can be implied that if the purpose had not been substantially carried out, the notes might have been enforceable.

Similarly, the Manitoba Court of Appeal case of *Baldwin v. Snook*²⁷ considered section 38 of the Animal Contagious Diseases Act,²⁸ which provided:

Every person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off any animal infected with or labouring under any infectious or contagious disease . . . shall, for every such offence, incur a penalty not exceeding two hundred dollars.

In effect this section created a criminal offence and again the form of the wording was similar to section 305.1; that is, a penalty was imposed but a contract to carry out the act penalized was not expressly prohibited. The court stated that "the statute was intended for the protection of the public"²⁹ and further that:³⁰

In determining the effect of a penal statute, if the Legislature intended to prohibit the contract itself, for the protection of the public the maxim *ex dolo malo non oritur actio* applies and no action will be maintainable on it.

The court referred in its judgment to the case of *Brown v. Moore*³¹ where Chief Justice Strong stated that:³²

It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute.

²⁷ [1918] 2 W.W.R. 314.

²⁸ R.S.C. 1906, c. 75.

²⁹ *Supra*, footnote 27, at p. 317.

³⁰ *Ibid.*, at p. 319.

³¹ (1902), 32 S.C.R. 93; see also *Bartlett v. Vinor*, *supra*, footnote 24.

³² *Supra*, footnote 27, at p. 319.

The British Columbia Supreme Court in *Exhibition Advertising Enterprises v. Victoria Exhibition*³³ considered section 179(1)(d) of the Criminal Code³⁴ which provided that:

Everyone is guilty of an indictable offence and is liable to imprisonment for two years who

- (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of.

It was held that although an agreement to carry on the activity was not expressly prohibited by the section, a contract to operate a lottery involving giving away a home to a winning ticket holder was illegal and void and the plaintiff could not succeed in an action for damages for breach of a renewal clause contained in that contract.

It is submitted that there is no essential difference between the facts in the previous three cases and the *Mira Design* case.

Does section 305.1 of the Criminal Code prohibit an agreement to receive interest at a criminal rate? It is clear that this section was enacted for public policy reasons; that is, the protection of the borrower from a lending transaction imposing interest at a criminal rate. The cases, in determining whether a contract is impliedly prohibited and thus illegal, stress the purpose of the legislation in question.³⁵ It is submitted that by necessary implication from the purpose and wording of section 305.1, a contract or agreement which includes the exactment of interest at a criminal rate is illegal and void. Furthermore the fact that the parties entered into the agreement not knowing that it was contrary to section 305.1 of the Criminal Code does not avail the petitioners. Generally, where a contract is illegal expressly or impliedly by statute, no allowance is made for the innocent intent of the parties.³⁶ Ignorance of the law is no defence and a defendant who is a party to an illegal transaction can resist the plaintiff's remedy.³⁷ In *Mira Design* the respondent relied upon the illegality of an agreement which was drafted by its own solicitors and accepted by the petitioners as drawn, in order to deprive the petitioners of the balance of the unpaid

³³ (1963), 36 D.L.R. (2d) 232.

³⁴ S.C. 1953-54, c. 51.

³⁵ *Prince Albert Properties and Land Sales v. Kushneryk*, *supra*, footnote 20; *Maschinen Fabrik Seydelman K.G. v. Presswood Bros. Ltd* (1964), 47 D.L.R. (2d) 214; *Halifax Relief Commission v. City of Halifax* (1965), 50 D.L.R. (2d) 69; *Wasel Bros. v. Laskin*, *supra*, footnote 23; *Advance Rumely Thresher Co. v. Yorga*, [1926] S.C.R. 397; *Chai Sau Yin v. Liew Kwee Sam*, [1962] A.C. 304; Chitty on Contracts (24th ed., 1977), pp. 476-477.

³⁶ *Agatlos v. Community Communications* (1974), 3 O.R. (2d) 316; *Re Mahmoud and Isphani*, [1921] 2 K.B. 716; *Furmston, op. cit.*, footnote 8, p. 329; Chitty on Contracts, *op. cit.*, *ibid.*, p. 419. *J.M. Allan (Merchandise) v. Cloke*, [1963] 2 All E.R. 258.

³⁷ *Furmston, op. cit.*, *ibid.*, p. 331; Chitty on Contracts, *op. cit.*, *ibid.*, p. 418.

purchase price secured by the mortgage. Unfortunately, the case does not disclose which party stipulated that the face value of the mortgage be increased to \$100,000.00.

Can the provision for interest at a criminal rate appearing in the mortgage be severed to allow the remainder of the mortgage to be enforced? Older cases have held that severance will not operate to sever an illegal portion of a contract where the contract is rendered illegal by statute.³⁸ The court in *Mira Design* implies that severance will not be allowed where a contract is illegal by statute.

Generally, in applying the doctrine of severance the courts will not make a new contract for the parties and will not sever if principles of public policy are infringed.³⁹ Thus, in a case where the doctrine of severance can be applied, if the unlawful part of the contract can be severed without changing the nature of the contract, it may be severed.⁴⁰ Further, early cases have held that if the illegal part of the contract is the main consideration for the promise, then the court will not sever.⁴¹ In *Mira Design* it is clear that the receipt of interest at a criminal rate is not the main consideration for the repayment of the unpaid purchase price. This is confirmed in the judgment of the court.⁴² In this case the offending portions of the mortgage can be severed without rewriting the contract and without changing the nature of the contract. This in fact was achieved by the court in its decision.⁴³ The writer is in agreement with the court's conclusion that there is no public policy reason for not applying the doctrine of severance here and although the doctrine of severance has been discussed most often in cases involving restraint of trade, it is not restricted thereto.⁴⁴

The question remains, however, whether severance will apply to sever the illegal part of an agreement which is rendered illegal expressly or by necessary implication by statute. *Chitty on Contracts* states that unless a statute stipulates that an agreement made in violation of its provisions shall be void "then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute".⁴⁵ In further support of this proposition, the case of *Royal*

³⁸ *Chitty on Contracts*, *op. cit.*, *ibid.*, p. 494; see also, *Furnston*, *op. cit.*, *ibid.*, p. 373.

³⁹ *Chitty on Contracts*, *op. cit.*, *ibid.*, p. 495; *Attwood v. Lamont*, [1920] 3 K.B. 571; *Kenyon v. Darwen Cotton Manufacturing Co.*, [1936] 2 K.B. 193.

⁴⁰ J.E. Côté, *An Introduction to the Law of Contract* (1974), p. 120 and cases cited there.

⁴¹ *Chitty on Contracts*, *op. cit.*, footnote 35, p. 497; *Bennett v. Bennett*, [1952] 1 K.B. 249.

⁴² *Supra*, footnote 1, at p. 104.

⁴³ *Ibid.*, at p. 105.

⁴⁴ *Ibid.*, at p. 105; Law Reform Commission of British Columbia, *Illegal Contracts*, Working Paper No. 38 (1982), pp. 47-52.

⁴⁵ *Op. cit.*, footnote 35, p. 494 referring to *Pickering v. Ilfracombe Ry. Co.* (1868), L.R. 3 C.P. 235, at p. 250; *Doe d. Thompson v. Pitcher* (1815), 6 Taunt 359, 128 E.R.

*Exchange Assurance Corporation v. Sjørorsakrings Aktiebolaget Vega*⁴⁶ decided that a contract of insurance which was rendered illegal by statute was not severable but went on to say that severance might be possible in other circumstances. The court referred to the case of *Pickering v. Ilfracombe Ry Co.*⁴⁷ where Willes J. stated: "The general rule is that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, *whether the illegality be created by statute or by the common law*, you may reject the bad part and retain the good." It is submitted, therefore, that the doctrine of severance could be applied in this case to sever the provisions with respect to interest at a criminal rate and render the balance of the mortgage enforceable. In the event that the doctrine of severance will not be applied to render the mortgage enforceable, the petitioners can perhaps sue for the amount of the unpaid purchase price in a separate action on two additional grounds.

The general rule is that neither party to an illegal contract can recover any consideration provided pursuant thereto at law or in equity. One cannot recover money or property paid or delivered pursuant to an illegal contract⁴⁸ subject to limited exceptions. One exception arises where the parties are not *in pari delicto*. For example, where the object of the statute rendering the contract illegal is the protection of the public or a class of persons of which the plaintiff is a member, then a remedy will not generally be denied to the protected party.⁴⁹ In *Mira Design* this exception will only avail the protected party, the respondent, and will not aid the petitioners.

In the event that the respondent brings an action in the future to discharge the mortgage, the court might require the respondent to pay the outstanding balance, excluding interest at a criminal rate, as a condition of the discharge. In *Lodge v. National Union Investment Co. Ltd.*,⁵⁰ a borrower who entered into an illegal lending transaction with an unlicensed moneylender sued for the return of certain securities given pursuant to the transaction. The court held that the party for whose protection the statute was enacted may bring an action on the illegal contract. The court further held that the return of the securities was in equity conditional upon the repayment of the loan. The *Lodge* case has been subsequently distinguished.⁵¹

1074; *Electrical Trades Union v. Tarlo*, [1964] Ch. 720, at p. 731; *Pallister v. Gravesend* (1850), 9 C.B. 774, 137 E.R. 1096.

⁴⁶ [1901] 2 K.B. 567, at p. 573; see also, *Kenyon v. Darwen Cotton Manufacturing Co. Ltd.*, *supra*, footnote 39.

⁴⁷ *Supra*, footnote 45, at p. 573, italics mine.

⁴⁸ *Supra*, footnote 8.

⁴⁹ *McDonald v. Fellows* (1979), 17 A.R. 330; *Royal Bank of Canada v. Grobman* (1978), 18 O.R. (2d) 636; *Browning v. Morris* (1778), 2 Cowp. 790, 98 E.R. 1364.

⁵⁰ [1907], Ch. 300.

⁵¹ *Kasumu v. Baba-Egbe*, [1956] A.C. 539; *Chapman v. Michaelson*, [1908] 2 Ch. 612, aff'd. [1909] 1 Ch. 238; *Cohen v. J. Lester Ltd.*, [1939] 1 K.B. 504; *Sidmay Ltd. et al.*

Secondly, an exception is made under certain circumstances when the one seeking the remedy puts the matter right before the contract is performed.⁵² It is unclear, however, at what point it is too late for the one "repenting" to do so.⁵³ Some cases have held that one must renounce before substantial performance of the contract and while it is still executory, although it is not clear what the term "substantial performance" and "executory" will mean in any individual case.⁵⁴

In the Alberta case of *McDonald v. Fellows*⁵⁵ the court held that although a sale of real property which took place on a Sunday was illegal and void pursuant to the provisions of the Lord's Day Act,⁵⁶ the deposit paid was recoverable by the purchaser as there had not yet been substantial performance. In that case an offer to purchase had been signed by the purchaser and accepted in writing by the vendor on a Sunday. The court found that "repentance" was present even though the only reason the purchaser refused to complete was because he was unable to obtain interim financing. In *Mira Design*, the petitioners waived recovery of the difference between the unpaid purchase price and the face amount of the mortgage after it was discovered that the mortgage contravened the provisions of the Criminal Code. There would appear to be a greater degree of true "repentance" in the *Mira Design* case than in *McDonald v. Fellows*. Further, it appears from the facts which appeared in the judgment of *Mira Design* that no monies had yet been paid to the petitioners pursuant to the mortgage, although demand for payment had been made. It is submitted that the degree of performance was no more "substantial" in *Mira Design* than in *McDonald v. Fellows*. In both cases a contractual agreement was in existence, an agreement which was rendered illegal and void by statute. The illegal purpose in both cases was not to be carried out; that is the property would not pass in *McDonald v. Fellows* and the criminal interest rate would not be paid in *Mira Design*. As the purchaser was allowed the return of his deposit, the petitioners in *Mira Design* should be allowed the return of the actual unpaid purchase price plus interest thereon at a reasonable rate. In the alternative, the petitioners may recover the unpaid purchase price on the basis of an independant cause of action in which they need not rely on the mortgage or the illegality within. Recovery is permitted where the plaintiff can base his claim on a contract which is separate from

v. Wehttam Investments Ltd. [1966] 1 O.R. 457, aff'd. [1967] 1 O.R. 508; *Haug & Nellermore v. Murdoch* (1916), 26 D.L.R. 200.

⁵² *Furmston, op. cit.*, footnote 8, p. 338; *Browning v. Morris*, *supra*, footnote 49.

⁵³ *Furmston, op. cit.*, *ibid.*, p. 339; *Harry Parker v. Mason*, [1940] 2 K.B. 590; *Kearley v. Thomson* (1890), 24 Q.B.C. 742; *Alexander v. Rayson*, [1936] 1 K.B. 169.

⁵⁴ *McDonald v. Fellows*, *supra*, footnote 49; *Zimmerman v. Letkeman* (1977), 79 D.L.R. (3d) 508 (S.C.C.); *Williams v. Gleenwood Holdings* (1973), 41 D.L.R. (3d) 631; *Kearly v. Thomson*, *ibid.*

⁵⁵ *Ibid.*

⁵⁶ R.S.C. 1970, c. L-13, s. 4.

the illegal transaction.⁵⁷ The mortgage was given in *Mira Design* as security for the repayment of the unpaid purchase price pursuant to an assignment of an agreement for the sale of land. It could be argued that the debt created by this transaction is not tainted by the existence of the illegal mortgage and the petitioners can rely on an unpaid vendor's lien to recover the outstanding balance of the original transaction. The cases conflict as to whether the unpaid vendor's lien is extinguished when a sale is completed and a mortgage given to secure the outstanding purchase price.⁵⁸ A rebuttable inference of extinguishment may arise from the fact that the vendor takes a mortgage back as security and the circumstances of the transaction in question must be examined.⁵⁹

It is not the purpose of this comment to determine the existence or non-existence of an independent cause of action based on an unpaid vendor's lien. If the line of cases supporting the extinguishment of the lien are followed, it might be argued that upon a contract being declared illegal and void it is as if it never existed and therefore, the unpaid vendor's lien revives as if it was never extinguished.

Reference is made to the Law Reform Commission of British Columbia, *Working Paper on Illegal Contracts*.⁶⁰ The Commission discusses the uncertain, inadequate and often unjust state of the law of illegal contracts and proposes the enactment of an Illegal Contract Act based on legislation in force in New Zealand.⁶¹ The Commission suggests that restitutionary remedies should be available to the parties to an illegal contract in order to avoid unjust enrichment and to restore property or money which has been transferred or paid pursuant thereto.⁶² Although application of the proposed Act could be expressly limited by another statute,⁶³ it would allow the court to grant relief in certain circumstances as outlined in the Act. Relief could include the transfer of property, restitution and compensation.⁶⁴ The Act would also outline certain factors to be considered in granting relief including the public interest, the conduct of the parties, the circumstances of the transaction, the extent of performance of the contract and the object of the statute in question.⁶⁵ The Act would

⁵⁷ *McDonald v. Fellows*, *supra*, footnote 49; *Furmston, op. cit.*, footnote 8, p. 335; *Bowmakers Limited v. Barnet Investments Limited*, [1945] K.B. 65.

⁵⁸ *Anderson v. Trott* (1873), 19 Gr. 619; *Hamlyn et al. v. Kaplan*, [1936] 2 W.W.R. 293; *Stevens v. Hawrisha* (1978), 6 Sask. R. 87; *Galt v. Erie & Niagara Ry.* (1869), 15 Gr. 637.

⁵⁹ *Anderson v. Trott, ibid.*; *Houck v. Bank of Montreal* (1932), 41 O.W.N. 106.

⁶⁰ *Op. cit.*, footnote 44.

⁶¹ *Illegal Contracts Act 1970*, Vol. 1, No. 129.

⁶² *Op. cit.*, footnote 45, pp. 64, 68.

⁶³ *Ibid.*, p. 111.

⁶⁴ *Ibid.*, p. 112.

⁶⁵ *Ibid.*, p. 113.

also allow a declaration that part only of the illegal contract would be enforceable.⁶⁶

In conclusion, it is submitted that the mortgage in the *Mira Design* case is illegal and unenforceable. The doctrine of severance should be applied in this case to sever the provisions with respect to interest at a criminal rate and render the balance of the mortgage enforceable. In the event that the doctrine of severance is not applied, the mortgage is unenforceable and the petitioners can only recover the unpaid purchase price by alleging that there has been "repentance before substantial performance" or by basing their claim on a separate and independent cause of action.

LINDA M. SHERWOOD*

* * *

CONTRACTS—TORTS—STATUTE OF LIMITATIONS—WHEN DOES TIME BEGIN TO RUN?—The recent decision of the Ontario Court of Appeal in *Robert Simpson Co. Ltd v. Foundation Co. of Canada Ltd*¹ is of considerable interest with regard to the effect of limitation periods on contract and tort actions. The plaintiffs, who occupied a retail department store in North York, sought damages in negligence in respect of allegedly inadequate anchors which formed part of the means of support of the ceiling in the store. The defendants were respectively the builders of the store, the builders of the ceiling, the designers and manufacturers of the anchors and the vendors of the anchors.

The plaintiffs conceded that the allegedly negligent manufacturing, construction and design work of all the defendants had been completed more than six years before the writ was issued, also that negligent misrepresentations allegedly made by the vendors of the anchors and the ceiling builders took place more than six years prior to the issue of the writ. It was further alleged that certain negligent misrepresentations had been made by the builders of the store; one, again, made more than six years before the issuing of the writ, others made less than six years before the writ was issued.

The trial judge held that the statement of claim disclosed a cause of action, but that section 45(1) (g) of the Limitations Act² barred the claim.

⁶⁶ *Ibid.*, pp. 112, 113.

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¹ (1982), 36 O.R. (2d) 97 (C.A.).

² R.S.O. 1980, c. 240.

The effect of section 45(1) (g) is to require a claim in negligence to be brought within six years of the accrual of the cause of action, and the judge held that the damage occurred when the inadequate anchors were incorporated in the building, but in any event no later than when the building was turned over to the plaintiffs. Consequently the claim was time-barred. Both sides appealed; the plaintiffs against the decision that they were out of time, the defendants against the decision that the statement of claim disclosed a cause of action.

On the question of limitation, the defendants contended that the decision of the Ontario Court of Appeal in *Schwebel v. Telekes*³ was decisive. In that case property was conveyed to the plaintiff and registered in May 1959, as part of the settlement of a matrimonial dispute between the plaintiff and her husband. In September 1960 the plaintiff's husband claimed an interest in the land, and the existence of this interest was confirmed by the Court of Appeal in June 1965.

The plaintiff issued a writ against the defendant, a notary public who had represented her in the settlement of the dispute, in April 1966. The Court of Appeal held that the cause of action occurred at the date of the breach of contract, which was, at the latest, in May 1959. Consequently the plaintiff was time-barred. The courts also stated that the position would be no different if the claim had been for tortious negligence, relying *inter alia*, on *Bagot v. Stevens Scanlan & Co.*⁴ and *Cartledge v. E. Jopling & Sons Ltd.*⁵

It was argued for the defendants in *Robert Simpson* that this decision was authority for the proposition that in cases where the limitation period is specified as running from the time when the cause of action arises, time begins to run in a contract case from the date of the breach, and time begins to run in a negligence case from the date when the negligent act was committed.

The court in *Robert Simpson* decided that it was not bound by *Schwebel v. Telekes* to find for the defendant, nor did the decision of the same court in *Farmer v. H. H. Chambers*,⁶ which followed *Schwebel*, necessitate this conclusion. *Farmer* concerned a claim for damages in negligence against a builder who, pursuant to a contractual obligation, constructed a wall, but did so negligently. The wall collapsed more than six years after it was constructed, and it was held that time ran from when the wall was completed: hence the plaintiff was out of time. In the course of his judgment, McGillivray J.A. stated: "The result is the same whether the

³ [1967] 1 O.R. 541.

⁴ [1964] 3 All. E.R. 577.

⁵ [1963] A.C. 758.

⁶ (1973), 31 D.L.R. (3d) 147.

action is framed in tort or for breach of contract. Breach of the contract and not damages for negligence is the basis of the action."⁷ Both *Schwebel* and *Farmer* were reviewed in *Dominion Chain Co. Ltd v. Eastern Construction Co. Ltd.*⁸ In *Dominion Chain* it was held that an engineer who was successfully sued by a building-owner under a building contract could not claim contribution under section 2(1) of the Negligence Act⁹ from a builder who, under the contract, had a defence to the owner's claim; for, although they were both tortfeasors, the builder was not liable to the owner and hence the statute was inapplicable. Jessup J.A. for the majority confirmed the application of *Schwebel* to actions for breach of a duty of care arising out of a contract of employment for services.¹⁰ Jessup J.A. noted that:¹¹

[*Schwebel*] was not concerned with when a cause of action arises for breach of a duty of care, founded on tort but occurring in the performance of a contract to erect and provide a structure as distinguished from a contract of employment for services.

Jessup J.A. also considered *Farmer v. H. H. Chambers* and regarded that decision as *obiter* insofar as it might appear to decide that an action in negligence in constructing a retaining wall lay only in contract, since "in my view it was unnecessary, in that case, to determine whether the cause of action sounded in tort or in contract, since, in the view of the court, the result was the same in either event".¹²

In *Robert Simpson* the court followed the reasoning of Jessup J.A. in *Dominion Chain* and held that *Schwebel* did not apply, as the instant case did not concern "breach of duty of care arising out of a contract of employment for services by someone in a common calling exercising a particular skill".¹³ *Farmer v. H. H. Chambers* was held to be inapplicable as there was no contractual relationship between the plaintiff and defendant in *Robert Simpson*.

A further obstacle in the way of a finding in favour of the plaintiff was the decision of the House of Lords in *Cartledge et al. v. E. Jopling & Sons Ltd.*,¹⁴ in which case the plaintiff contracted pneumoconiosis during the course of his employment; more than six years elapsed between the time when the damage occurred and the time when the plaintiff realized that he had the disease and sued. He was held to be time-barred, as the six year limitation period ran from the date of damage, not from the time when the

⁷ *Ibid.*, at p. 148.

⁸ (1976), 68 D.L.R. (3d) 385, *aff'd sub nom. Giffels Associates Ltd v. Eastern Construction Co.* (1978), 84 D.L.R. (3d) 344 (S.C.C.).

⁹ R.S.O. 1970, c. 296.

¹⁰ (1976), 68 D.L.R. (3d) 385, at p. 400.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Supra*, footnote 1, at pp. 104-105.

¹⁴ *Supra*, footnote 5.

damage was discovered. This decision appeared to favour the defendants in *Robert Simpson*, but the Ontario Court of Appeal, encouraged by the distaste and reluctance expressed by members of the House of Lords for the consequences of their decision,¹⁵ were happy to restrict the applicability of *Cartledge* to cases of personal injury not arising out of a contractual relationship.

This disposed of the problem cases. But what should the test be in the instant case? The court decided to apply the test employed by the English Court of Appeal in *Sparham Souter et al. v. Town & Country Developments (Essex) Ltd*,¹⁶ a case concerning a claim for damages against a local authority whose building inspector had negligently failed to detect defects in the foundations of a building. The Court of Appeal held that time in such a case did not begin to run until the plaintiff discovered the existence of damage or reasonably ought to have discovered its existence, and consequently, though more than six years had elapsed since the date of the negligent inspection, the plaintiffs were not out of time. In *Anns v. Merton L.B.C.*¹⁷ the House of Lords approved the decision in *Sparham-Souter* and in a decision on essentially similar facts held that time began to run when the state of the building was such that there was present or imminent danger to the health or safety of persons occupying it.¹⁸

The Ontario Court of Appeal in *Robert Simpson* was of the view that the reasoning in *Sparham-Souter* was specifically approved in *Anns*, and consequently applied the reasoning of Lord Denning M.R. and held that, where there was no contractual relationship between the parties and the plaintiff's claim was based upon work negligently performed and covered up, the cause of action did not accrue until such time as the plaintiff discovered or ought reasonably to have discovered the damage. Consequently, the plaintiff's appeal was allowed.

Difficulty has been found since 1976 with the notion that in the case of a tort such as negligence where damage must be shown, time can be said to begin to run not from the date of the damage, but from the date when the damage was discovered or ought reasonably to have been discovered. This extension of the notion of damage, laudable though the purpose behind it may be in a case of latent damage, is fundamentally artificial, and runs the risk of inflicting undue hardship upon a defendant. For, even making allowance for the increasing difficulties of proof as time passes, such an interpretation of "damage" will mean that there can never be a time when, with absolute certainty, files can be destroyed and insurance cover ended.

¹⁵ The effect of the decision was speedily negated, as regards personal injuries, in the Limitation Act 1963 (now the Limitation Act 1980, c. 58).

¹⁶ [1976] Q.B. 858.

¹⁷ [1978] A.C. 728.

¹⁸ *Ibid.*, at p. 760.

This is not, of course, to deny the strength of the argument that can be made by the victim of latent damage that he, who was not at fault, and had no means of realizing that damage existed, should not be the one to shoulder the burden. But it is important to remember that the argument is not on one side only.

Leaving the policy arguments aside for a moment, it is worth noting that as early as 1977 the English Law Reform Committee stated that they were unclear as to what was the true ratio of *Anns* on the limitation point.¹⁹ It does not follow that the *Anns* "test" of present or imminent danger to the health or safety of persons occupying it necessarily incorporates the *Sparham-Souter* test of discovery or reasonable discoverability of damage,²⁰ for surely there may be a present or imminent danger which is latent and not reasonably discoverable.

In the light of the acceptance by the Ontario Court of Appeal in *Robert Simpson* of the test propounded by Lord Denning M.R. in *Sparham-Souter* it will be interesting to see what the reaction of the Canadian courts will be to the most recent pronouncement by the House of Lords on the limitation question, in *Pirelli General Cable Works Ltd v. Oscar Faber & Partners*.²¹ In this case, in which negligent design of a chimney was alleged against the defendants, the House held that, in a case concerning a cause of action in tort in respect of damage to a building caused by negligent design or workmanship, the cause of action accrued when the damage came into existence,²² and was not to be postponed until the date of discovery or reasonable discoverability. In his judgment Lord Fraser expressly stated that the House in *Anns* did not approve the discoverability test in *Sparham-Souter*, but had been primarily concerned with the question whether a duty was incumbent on a local authority. The court recognized the potential hardship to plaintiffs against whom time might run out before they could have realized that their building was damaged, but was of the view that the only solution to this problem was a statutory one.²³

In *Robert Simpson* the trial judge was of the view²⁴ that the damage was done when the inadequate anchors were incorporated into the building.

¹⁹ Final Report on Limitation of Actions (1977), Cmnd. 6923. See also the detailed examination of this question in the Law Reform Committee Consultative Document on Latent Damage (July, 1981).

²⁰ Though see *Eames London Estates Ltd and others v. North Herts D.C. and others* (1981), 259 E.G. 991 and *Crump and another v. Torfaen U.D.C.* (1982), 261 E.G. 678 for the view that the *Sparham-Souter* test was approved in *Anns*, though doubts expressed by the Court of Appeal in *Dennis v. Charnwood B.C.*, [1982] 3 All E.R. 486.

²¹ [1983] 1 All. E.R. 65.

²² Thereby endorsing the preference of the Law Reform Committee in the 1977 Report.

²³ See (1982), 132 N.L.J. 835 for a canvassing of the possible statutory solutions.

²⁴ (1982), 34 O.R. (2d) 1.

As he, unlike the Court of Appeal, did not consider that the *Sparham-Souter* had been adopted in Ontario, he found for the defendants. The *Pirelli* test would support such a conclusion. Ultimately a legislative solution may be the only way to effect a fair balance between the interests of plaintiffs and defendants in cases involving questions of limitation where there has been latent damage. If this is to be the case, it is important to note the need for sufficient certainty of starting as well as finishing date, for to have time running, as in *Pirelli*, from the date of the damage begs the very difficult question of when the damage has occurred. A fixed, and sufficiently lengthy period from the date of the event leading to the claim may be the least undesirable solution.

The court in *Robert Simpson* limited the application of the reasonable discoverability test to cases "where there is no contractual relationship between the parties and the plaintiff's claim is based upon work negligently performed and covered up".²⁵ Such would not be the test in a case involving a claim arising out of a contract for personal services requiring the exercise of the particular skill or training of the defendant's calling.²⁶ This might lead to the singular conclusion that the client of a negligent architect would have six years to sue from the date of the breach of contract, whereas a purchaser from that client would have six years from the date of reasonable discoverability, but many may consider this to be less of an affront to common sense than the very real risk of time-barring in a number of cases, be they founded on contract or tort, of an innocent victim of latent damage, which will be a consequence of *Pirelli*.

The defendant's argument against the decision of the trial judge that the statement of claim disclosed a cause of action was that the nature of the damages claimed by the plaintiffs was not recoverable in a tort action. This argument was based on the reasoning of the majority of the Supreme Court of Canada in *Rivtow Marine Ltd v. Washington Iron Works et al.*²⁷ to the effect that damages representing the cost of repairs could not be awarded in a negligence claim. The defendants argued that in claiming for the cost of re-suspending the new plaster ceiling by attaching new wires to new and more substantial anchors, the plaintiffs were seeking compensation for a direct loss which, according to *Rivtow*, was irrecoverable.

However, Cory J.A., who delivered the judgment of the court, held that, since the plaintiffs' claim was largely based upon negligent misrepresentations of the defendants, liability could be imposed on the basis of *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*²⁸ In that case it was held that pure economic loss could be recovered in an action for negligent

²⁵ *Supra*, footnote 1, at pp. 108-109.

²⁶ *Ibid.*, at p. 108.

²⁷ [1974] S.C.R. 1189.

²⁸ [1964] A.C. 465.

misrepresentation, and *Rivtow* did not alter this, as it was not concerned with negligent misrepresentation. Thus the court was able to avoid the murky waters of liability for pure economic loss consequential upon a negligent act, though since the decision of the House of Lords in *Junior Books Ltd v. Veitchi Co. Ltd*²⁹ a strong case can be made for liability in a case such as *Robert Simpson* even if the basis of liability were said to be an act rather than a statement.

DAVID K. ALLEN*

* * *

CIVIL PROCEDURE—INTERLOCUTORY REMEDIES—MAREVA INJUNCTION—CANADIAN DEVELOPMENTS.—“The Mareva injunction is here and here to stay and properly so, but it is not the rule—it is the exception to the rule.” This statement of MacKinnon A.C.J.O. in *Chitel et al. v. Rothbart et al.*¹ puts in a nutshell current Canadian law regarding the plaintiff’s new interlocutory remedy, the Mareva injunction. Within two weeks of the *Chitel* decision, the Courts of Appeal in Manitoba and British Columbia issued judgments that have made it clear that the Mareva injunction,² a remedy largely fashioned by Lord Denning M.R. and now enshrined in statute in England,³ has a secure place in Canada. To be sure, each province has its own variations on the theme,⁴ but Canadian courts have come a long way in catching up to the English jurisprudence.⁵ What remains now is to develop procedural techniques, particularly for discovery, and adequate means for protecting innocent third parties. This has

²⁹ [1982] 3 All E.R. 201.

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¹ (1982), 39 O.R. (2d) 513, at p. 534, 141 D.L.R. (3d) 268, at p. 290 (C.A.); Arnup and Goodman J.J.A. concurring.

² See *Feigelman et al. v. Aetna Financial Services Limited et al.* (1982), 143 D.L.R. (3d) 715, [1983] 2 W.W.R. 97 (Man. C.A.); *Sekui House Kabushiki Kaisha v. Nagashima et al.* (1982), 33 C.P.C. 42, 17 A.C.W.S. (2d) 409 (B.C.C.A.).

³ See Supreme Court Act, 1981, c. 54, s. 37(3), which states: “The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within the jurisdiction shall be exercisable in cases where the party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.”

⁴ See also, *Buraglia v. Humphreys* (1982), 39 N.B.R. (2d) 674, 103 A.P.R. 674 (N.B.C.A.), which was decided on April 13th, 1982.

⁵ A short summary of U.K. and Canadian case-law on Mareva injunctions, as at December 1981, can be found in Brian MacLeod Rogers and George W. Hatley, Q.C., *Getting the Pre-Trial Injunction* (1982), 60 Can. Bar Rev. 1, at pp. 27-35. See also, Debra M. McAllister, *Mareva Injunctions* (1983), 28 C.P.C. 1.

been the direction of recent English case-law and is already underway in Canada, with the British Columbia Court of Appeal's decision in *Seksuui House v. Nagashima et al.*⁶

A Mareva injunction serves to tie up a defendant's assets prior to trial where a plaintiff can show that there is a risk of these assets being removed or dissipated so as to defeat any judgment that may be obtained. In a real sense, the court is acting to preserve its practical, as well as legal, jurisdiction and to ensure that its judgment will not be stultified. It is a potent interlocutory weapon that can greatly interfere with a defendant's business dealings.⁷ The proceedings in *Chitel* illustrate the inherent dangers of such an injunction, which necessarily must usually be granted on an *ex parte* basis.^{7a}

Chitel was an action for the recovery of certain securities alleged to have been misappropriated by the defendants. The plaintiff, Leona Chitel, was granted a Mareva injunction *ex parte* on January 29th, 1982 on the basis of her own affidavit and two attached exhibits. The order restrained the defendants from disposing of any property owned or controlled by them. This injunction, with an amendment to permit the main defendant, Dr. Rothbart, to dispose of his own professional earnings,^{7b} continued until December 2nd, 1982 when the Court of Appeal released its decision and refused to continue the injunction. The case only reached the Court of Appeal, which rarely considers interlocutory injunctions, because Anderson J.⁸ referred it directly to the court⁹ in light of his critical appraisal of the province's unsettled law.

By the time the Court of Appeal considered the case, the facts appeared to be very different from those stated or implied on the original application. From the material on the *ex parte* application, it appeared that Mrs. Chitel had been taken advantage of by her personal physician, whom she entrusted with her financial affairs and who was leaving the country the next day for an indefinite period. Through cross-examination and further affidavits, it eventually emerged that she was, in fact, a very experienced stock trader who had her own Swiss company and carried out various sophisticated transactions with Dr. Rothbart and that his departure from the

⁶ *Supra*, footnote 2.

⁷ See *Van Brugge v. Arthur Frommer Int. Ltd* (1982), 35 O.R. (2d) 333 (H.Ct).

^{7a} Fortunately, in most jurisdictions, *ex parte* orders are only granted for a limited period of time and may be set aside on short notice. See Rogers and Hately, *op. cit.*, footnote 5, at p. 6.

^{7b} This accords with the usual rule of permitting a defendant sufficient funds to meet his debts and living expenses. See *PCW (Underwriting Agencies) Ltd v. Dixon et al.*, [1983] 2 All E.R. 158 (Q.B.).

⁸ *Chitel v. Rothbart et al.* (1982), 36 O.R. (2d) 124 (H.Ct).

⁹ This was pursuant to subsection 34(1) of the Judicature Act, R.S.O. 1980, c. 223.

country was for a planned vacation from his long-standing hospital staff position to which he had since returned.

MacKinnon A.C.J.O. was very critical of the overly protective position taken by the plaintiff's counsel during the cross-examination of his client¹⁰ and found that the original affidavit of Mrs. Chitel failed to make the necessary full and frank disclosure of all the relevant facts or of the defendants' expected position, as required on an *ex parte* application. For that reason alone, MacKinnon A.C.J.O. held that the court would not exercise its discretion to order continuance of the injunction. Further, he noted that the more complete facts would not have warranted the granting of a Mareva injunction in the first place. Since the application was dismissed on this preliminary basis, the court's observations on Mareva injunctions are only *obiter*. They were included out of deference to the request of Anderson J. but should be of considerable help in guiding motions judges in the future.

The court found that Mareva injunctions were a legitimate exercise of the court's discretion under subsection 19(1) of the Judicature Act.¹¹ Their availability was not limited by the nature of the proceedings or by the location of the defendant. *O.S.F. Industries Ltd v. Marc-Jay Investments Inc.*,¹² an early case that held that Mareva injunctions were not available in Ontario, was explicitly overruled.¹³

While acknowledging the Mareva injunction's rightful place, the court made it clear that this remedy remains only an exception to the general rule as set out in *Lister & Co. v. Stubbs*.¹⁴ This case held that an injunction would not be granted to tie up a defendant's assets *pendente lite* just because the plaintiff feared there would be nothing from which to

¹⁰ MacKinnon A.C.J.O. made it clear that counsel, as officers of the court, should not treat cross-examination on an affidavit differently than that of a witness at trial. Counsel should not answer questions themselves initially or attempt to repair a damaging answer, nor interrupt or prevent proper questions from being answered. This is particularly true where *ex parte* injunctions have been granted; the matter is one of urgency, and there is not time for motions to compel answers to relevant questions. See *supra*, footnote 1, at pp. 517-518 (O.R.), 272-274 (D.L.R.).

¹¹ *Supra*, footnote 9.

¹² (1978), 20 O.R. (2d) 566, 88 D.L.R. (3d) 446 (H.Ct.).

¹³ Another early case, *Mills and Mills v. Petrovic* (1980), 30 O.R. (2d) 238, 118 D.L.R. (3d) 367 (H.Ct.), was not dealt with so clearly. In that case, Galligan J. awarded what amounted to a Mareva injunction but did not refer to any of the Mareva authorities. In very short reasons, he simply chose to extend equity to a worthy plaintiff alleging to have been defrauded. Anderson J. criticized the decision when referring *Chitel* to the Court of Appeal. Although he acknowledged that the order may have been justified by the facts, MacKinnon A.C.J.O. agreed that there was "no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause". See, *supra*, footnote 1, at pp. 534 (O.R.), 290 (D.L.R.).

¹⁴ (1890), 45 Ch.D. 1.

collect his judgment if he should be successful. The court recognized that Mareva injunctions could lead to "some sorry abuse"¹⁵ and set out conditions limiting their availability.

First and foremost, MacKinnon A.C.J.O. found that a strong *prima facie* case was required. The lower standard of *American Cyanamid Co. v. Ethicon Ltd.*,¹⁶ adopted in Ontario by *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd et al.*,¹⁷ was rejected. The test of a "good arguable case", adopted in English case-law on Mareva injunctions, was not sufficient. This was not only because of the remedy's potency, but also because a court here can make a better preliminary assessment of the merits of an action than in England where cross-examination on affidavits does not normally take place. While such cross-examination cannot help an *ex parte* judge, it can be of critical importance on a motion to continue or set aside a Mareva injunction. By insisting on a strong *prima facie* case, the court avoids the prospect of a plaintiff with a relatively weak legal case taking advantage of a defendant's financial circumstances in order to help himself to a quick and unduly generous settlement.

MacKinnon A.C.J.O. reviewed the significant English decisions and adopted the guidelines established by Lord Denning M.R. in *Third Chandris Shipping Corp. et al. v. Unimarine S.A.*¹⁸ These require the plaintiff to provide:

- (i) full and frank disclosure of all material facts within his knowledge,
- (ii) particulars of his claim against the defendant, including the amount and the grounds, and a fair statement of the defendant's position against it,
- (iii) grounds for believing that the defendant has assets within the jurisdiction,
- (iv) grounds for believing that there is a risk that the assets will be removed before judgment is satisfied, and
- (v) an undertaking in damages; if the claim fails or the injunction turns out to be unjustified.

He noted that items (i), (ii) and (v) are required as a matter of course in the usual applications for an interlocutory injunction in Ontario. In fact, on

¹⁵ As quoted from *Canadian Pacific Airlines Ltd v. Hind* (1981), 32 O.R. (2d) 591 (H.C.L.), at p. 596, 122 D.L.R. (3d) 498, at p. 503, per Grange J. (as he then was).

¹⁶ [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.).

¹⁷ (1977), 17 O.R. (2d) 505 (Div. Ct). MacKinnon A.C.J.O. acknowledged that *American Cyanamid* has been followed in Ontario but emphasized the need to take a flexible approach in order to meet a variety of situations, as was stated by the Divisional Court in *Yule Inc.*

¹⁸ [1979] Q.B. 645, [1979] 3 W.L.R. 122, [1979] 2 All E.R. 972 (C.A.).

ex parte applications items (i) and (ii) are given even greater emphasis since only the applicant's material is before the court. On a Mareva application, as mentioned above, he held that the material under (i) and (ii) must persuade the court that the plaintiff has a strong *prima facie* case on the merits.

The material under (iii) should set out the assets as specifically as possible. Although MacKinnon A.C.J.O. acknowledged that a plaintiff may have no knowledge of any of the defendant's assets or their precise location, he did not suggest any procedures to provide this information. Nevertheless, a Mareva injunction should always be directed towards particular assets or bank accounts if at all possible. Unhappily, he made no mention of the advisability of setting a monetary limit on the assets affected; this is the usual English practice¹⁹ and ensures that no more than the amount required for an eventual judgment is frozen.

In regard to item (iv), MacKinnon A.C.J.O. summed up the gist of a Mareva injunction under Ontario law:²⁰

The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

This statement is much more helpful than the lengthy pronouncements of the English Court of Appeal when one is faced with the most difficult type of Mareva application—where a resident defendant's assets are being disposed of within the jurisdiction. In such cases, the emphasis should properly be on the unusual nature of the transactions and on the difficulty of tracing the assets should it later prove necessary.²¹ A further proviso, not mentioned by MacKinnon A.C.J.O., is that there should be a distinct danger of default if the assets in question are disposed of and the anticipated judgment obtained.²² A transaction, or series of transactions, that leaves sufficient assets available to meet any judgment should not be impugned. This accords with the essential purpose of a Mareva injunction, namely to avoid having a barren judgment that cannot be enforced.

The court closes its judgment with an admonition:²³

The courts must be careful to ensure that the "new" Mareva injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable

¹⁹ See Rogers and Hately, *op. cit.*, footnote 5, at p. 29.

²⁰ *Supra*, footnote 1, at pp. 532-533 (O.R.), 289 (D.L.R.).

²¹ The unusual nature of such dispositions as set out in the case-law was emphasized by Saunders J. in *Bank of Montreal v. James Main Holdings Ltd* (1982), 26 C.P.C. 266 (Ont. H.Ct.).

²² See *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190, at pp. 195 (Ch.D.), per Megarry V.-C., as quoted in *Chitel, supra*, footnote 1, at pp. 530 (O.R.), 296 (D.L.R.).

²³ *Supra*, footnote 1, at pp. 533 (O.R.), 290 (D.L.R.).

settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial.

Although it may be implied from this statement, nowhere does the court explicitly refer to the balance of convenience, which is the major test proposed in *American Cyanamid*. In Mareva cases, this test largely means weighing the risk of the assets disappearing and a judgement being defeated, as against the harm that might be incurred by the defendant whose assets are being tied up. The balance of convenience is specifically relied on by the Manitoba Court of Appeal in *Feigelman et al. v. Aetna Financial Services Limited et al.*²⁴

In that case, the basic question was whether a Canadian company of some substance should be prevented from moving all the funds it had in Manitoba to Quebec, where its head office was located. The company had no office in Manitoba at the time. Since Quebec was not a reciprocating jurisdiction for the enforcement of judgments, the plaintiffs might be forced to sue on any judgment in that province, unless a Mareva injunction was granted. Alternatively, the company would be forced to keep in Manitoba \$250,000.00, which it very much needed to meet its ongoing business needs, or arrange for satisfactory security in that amount. All this arose in the context of an action over a receiver who was said by the plaintiffs to be wrongly appointed; this was hotly disputed by the defendants.

In a judgment released on December 7th, 1982, Matas J.A., for himself and Freedman C.J.M., found that the defendant company would be prejudiced to a lesser degree than the plaintiffs on the balance of "inconvenience" and that the Mareva injunction should stand. In the course of his judgment, Matas J.A. held that Mareva injunctions comprise a limited exception to the general rule set out in *Lister & Co.*²⁵ and that the guidelines and principles contained in the English cases,²⁶ including those of *Third Chandris Shipping Corp.* set out above, should apply.

The only significant difference from the decision in *Chitel* lies with the burden imposed on a plaintiff in proving the merits of its case. Matas J.A. also rejected the "good arguable case" test established by the English case-law as insufficient but held that the usual test for interlocutory injunctions in Manitoba should be applied. This, he held, required a *prima facie* case to be established.²⁷ Although he could not reach any "definite

²⁴ *Supra*, footnote 2.

²⁵ *Supra*, footnote 14.

²⁶ In addition to *Third Chandris Shipping Corp.*, Matas J.A. referred to *Prince Abdul Rahman Bin Turki Al Sudiary v. Abu-Taha et al.*, [1980] 3 All E.R. 409 (C.A.) and, *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190 (Ch. D.).

²⁷ Matas J.A. referred to *Lambair Ltd v. Aero Trades (Western) Ltd*, [1978] 4 W.W.R. 297, 87 D.L.R. (3d) 500 (Man. C.A.); which rejected the *American Cyanamid* approach. However, that case does not actually require a *prima facie* case to be proven, but rather relies on a more amorphous approach with all the factors considered together in an

conclusion on the question of either liability or quantum of damages'' based on the affidavit material, he was satisfied that a *prima facie* case had been made out by the plaintiffs. The difference between a ''*prima facie*'' case and a ''strong *prima facie*'' case remains undefined, and perhaps all it means is a little more room for the exercise of judicial discretion.

Huband J.A. dissented, holding that:²⁸

A Mareva injunction should be issued . . . only where a strong case has been made out that it is necessary to do so to prevent an imminent injustice.

He referred to other statutory remedies available in Manitoba²⁹ and held that a Mareva injunction should only be granted where none of these remedies was available and, even then, only cautiously. He pointed out that the defendant was a responsible company with substantial assets and that it was not secreting its assets out of the jurisdiction for the purpose of avoiding its creditors. He found that the success of the action was far from certain and emphasized that Quebec was not ''some far away jurisdiction whose legal system militates against successful pursuit of one of its corporate citizens''.³⁰ As a result, Huband J.A. would have granted the appeal and ended the injunction.

With the substance of this dissent in mind, it is not at all clear that a Mareva injunction would have been permitted under the Ontario test set by *Chitel*. The Manitoba Court of Appeal seems to have largely relied on balance of convenience considerations, without giving great weight to the traditional *Lister & Co.* rule. Under the *Chitel* approach, the court may not have found that a strong *prima facie* case existed, nor that the assets were being removed so as to defeat a judgment. Since Canada is a federal country with provincial legal jurisdictions, the prospect exists for companies based in one part of the country to have their activities in another part hamstrung by reason of unrelated litigation and an accompanying Mareva injunction. Matas J.A. properly stressed the importance of reciprocal enforcement of judgments as a factor in such circumstances. Hopefully, cases such as *Feigelman* will encourage an even more comprehensive scheme for enforcing judgments across Canada.

undefined way, as suggested by the English Court of Appeal in *Hubbard v. Vosper*, [1972] 2 Q.B. 84, [1972] 1 All E.R. 1023.

²⁸ *Supra*, footnote 2, at pp. 119-120 (W.W.R.), 734 (D.L.R.).

²⁹ In addition to the Fraudulent Conveyances Act, R.S.M. 1970, c. F-160, and prejudgment garnishment procedures, Huband J.A. referred to Manitoba Queen's Bench Rules 581, 582 and 583, which permit an order of attachment to be issued prior to judgment under certain circumstances. Such rules are also available in some jurisdictions in the United States. An even broader remedy is available in Nova Scotia under Civil Procedure Rule 49, but this has recently been held not to bar Mareva applications: *Parmar Fisheries Ltd v. Parceria Maritime Esperanca L. DA. et al.* (1982), 141 D.L.R. (3d) 498 (N.S.S.C.).

³⁰ *Supra*, footnote 2, at pp. 116 (W.W.R.), 731 (D.L.R.).

This point was not even considered by the New Brunswick Court of Appeal in *Buraglia v. Humphreys*,³¹ where an appeal of a Mareva injunction was dismissed. In an action claiming \$10,000.00, the plaintiff succeeded in having the sale of a particular property enjoined until trial³² after the defendant apparently left the province to live in Vancouver, British Columbia. After reviewing the Mareva case-law, the court adopted the English position, including the *Third Chandris Shipping Corp.* guidelines, *holus-bolus*.³³ Although the affidavit material failed to comply even with the requirements of the English courts, the injunction was permitted to remain in place out of deference to the motions judge's discretion. No mention was made of the fact that British Columbia is a reciprocating state to New Brunswick in regard to the enforcement of judgments.³⁴ In fairness, it should be pointed out that no one appeared before the Court of Appeal on behalf of the appellant, a factor which understandably may have undermined his credibility in the eyes of the court.

In *Seksu House Kabushiki Kaisha v. Nagashima et al.*,³⁵ the British Columbia Court of Appeal did not have to consider directly the validity of the Mareva injunction that had been granted.³⁶ However, the court did order a form of discovery in aid of the Mareva injunction, overruling the motions judge, and in so doing, gave clear approval to Mareva proceedings, subject to the guidelines set out in *Third Chandris Shipping Corp.*

While the defendants admitted having assets in the jurisdiction, the plaintiffs had no knowledge of the amounts or whereabouts of them; therefore, the Mareva injunction was expressed in the most general terms.³⁷ The Court of Appeal observed that this made the order impossible to enforce and put third parties in an untenable position. As a result, Nemetz C.J.B.C. held that:³⁸

³¹ *Supra*, footnote 4.

³² The court order did refer to an undertaking by the plaintiff to consent to dissolving the injunction and permitting the sale, provided a sufficient portion of the proceeds were put into an interest-bearing trust account pending trial: *supra*, footnote 4, at p. 692.

³³ The court also mentioned that New Brunswick's Civil Procedure Rules Revision Committee has recommended the adoption of a rule of court specifically providing for Mareva injunctions: *supra*, footnote 4, at p. 691.

³⁴ See Court Order Enforcement Act, R.S.B.C. 1979, c. 75, part 2; B.C. Reg. 442/59.

³⁵ *Supra*, footnote 2; decided Dec. 15th, 1982, per Nemetz C.J.B.C., Carrothers and Craig J.J.A. concurring.

³⁶ The injunction had been obtained *ex parte*; but the plaintiff was required to post security in the amount of \$38,000.00 in respect of its undertaking as to damages. This amount had to be paid into court. Further, application could be made to rescind or vary the order on 24 hours notice, *supra*, footnote 2, at p. 44 (C.P.C.).

³⁷ The order provided that the defendants "are hereby restrained from, directly or indirectly, removing or taking any steps to remove, or otherwise dispose of, any of his or their assets within the jurisdiction of the Court, including assets of any company in which either or both has or have an interest", *supra*, footnote 2, at p. 44 (C.P.C.).

³⁸ *Supra*, footnote 2, at p. 47 (C.P.C.).

In my view, to order a general examination at this time would be premature. However, in order to breathe some life into the injunction, I would order that a list of assets and their location as of the date of the injunction be set out in affidavit form by the defendants and delivered to counsel for the plaintiff forthwith. In the event that the affidavit is unsatisfactory, the plaintiff may apply to a trial judge in Chambers for an order for cross-examination on the affidavit.

This accords with previous English decisions³⁹ and points the way to the aspects of Mareva procedures that have yet to be developed in Canada.

In particular, recent English reported cases have been concerned with the rights of innocent third parties who may be affected by a Mareva injunction. The English Court of Appeal has made it clear that an application for a Mareva injunction should be expected to provide an undertaking to third parties to indemnify them for lost income and all reasonable costs incurred by them as a result of a Mareva injunction,⁴⁰ including the full legal costs of having the injunction varied.⁴¹ Even so, the court has also held that an indemnity will not suffice where a third party's general freedom of action and freedom to trade is substantially affected, and an injunction will be discharged in such circumstances.⁴² In *Z Ltd v. A et al.*,⁴³ the English Court of Appeal detailed the considerations that should apply to third parties, such as banks, when they are faced with a Mareva injunction. As one English commercial court judge has put it:⁴⁴

It is, I believe, now generally recognized that the Mareva jurisdiction has filled a gap in the court's powers which badly needed to be filled. In the Commercial Court, certainly, a very large number of these injunctions are granted each year. But care must be taken to ensure that such injunctions are only given for the purpose for which they are intended, viz to prevent the possible abuse of the defendant removing assets in order to prevent the satisfaction of a judgment in pending proceedings; and likewise care must be taken to ensure that such injunctions do not bear harshly on innocent third parties. If these principles are not observed, a weapon which was forged to prevent abuse may become an instrument of oppression.

Now that the Mareva injunction is "here and here to stay" in Canadian jurisdictions, these are the concerns that must be met to ensure that this powerful remedy remains a truly effective and yet equitable procedure, and one adapted to our federal system.

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³⁹ See *A.J. Bekhor & Co. Ltd v. Bilton*, [1981] 2 All E.R. 565 (C.A.).

⁴⁰ *Galaxia Maritime S.A. v. Mineralimportexport, The Eleftherios*, [1982] 1 All E.R. 796 (C.A.). See also *Searose Ltd v. Seatrain (UK) Ltd*, [1981] 1 All E.R. 806 (Q.B.).

⁴¹ *Project Development Co. Ltd S.A. v. KMK Securities Ltd et al.*, [1983] 1 All E.R. 465 (Q.B.).

⁴² See *supra*, footnote 40.

⁴³ [1982] 1 All E.R. 556 (C.A.). See also *Oceanica Castelana Armadora S.A. v. Mineralimportexport*, [1983] 2 All E.R. 65 (Q.B.).

⁴⁴ *Searose Ltd v. Seatrain (UK) Ltd*, *supra*, footnote 40, at p. 808, per Robert Goff J.

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