CONDOMINIUMS—PROHIBITIONS ON OCCUPATION BY CHILDREN.—One of the manifestations of the increasingly fragmented housing market has been the development of adults-only condominiums. In Ontario, as in other provinces with condominium legislation, units in such buildings are usually subject to restrictions prohibiting their sale to purchasers with young children. These restrictions are generally inserted in the condominium's Declaration, one of the two documents required in Ontario by the Condominium Act (the "Act")[1] to create and constitute a condominium. Such provisions in a Declaration were challenged and upheld in Ontario in the case of *York Condominium Corp. No. 216* v. *Borsodi et al.* (the "*Borsodi*" case),[2] wherein Allen Co. Ct. J. granted a mandatory injunction requiring the defendant unit owners to comply with them.

It is the argument of this comment that, with all due respect to the learned County Court Judge, such provisions are in fact *ultra vires* the condominium corporation and the Act. The Act contains no provisions specifically authorizing such restrictions on the use, occupation or sale of units, and in their absence, the restrictions are void. In addition, such restrictions are contrary to established and accepted grounds of public policy, and so should be struck down by the courts. And, whatever their legal status, they are unenforceable by injunction. Attempts in the Declaration to restrict the sale of units to childless persons may in Ontario also be in violation of the Human Rights Code, 1981 (The "Code");[3] and, to the extent that any provisions of the Act may be said to authorize such restrictions on sale, they will be invalidated by the Code. Finally, it is suggested that such restrictions may be rendered unenforceable with the coming into effect of section 15 of the Canadian Charter of Rights and Freedoms (the "Charter")[4] in April 1985.

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[1] R.S.O. 1980, c. 84. The other document is the Description: see s. 2(2), (4).

[2] (1983), 148 D.L.R. (3d) 290, 42 O.R. (2d) 99 (Ont. Co. Ct.).

[3] S.O. 1981, c. 53.

[4] Constitution Act, 1982, Part I.

The 'Borsodi' Case

The plaintiff was a condominium corporation of a large complex comprising three towers. Of the three, one, the North tower, was designated an adult building, to be occupied only by persons fourteen years of age and older. The corporation's Declaration contained a clause setting out the nature and scope of the designation, the relevant portions of which are set out below:[5]

> 18(a) To the intent that the owners of the units . . . [in the North tower] shall be permitted to make use of such units . . . and the common elements, without unreasonable interference in their use and enjoyment thereof because of noise and disturbance caused by children, and to the intent that the said building and the said units shall be for the use of adults only, no owner or occupant of such units shall use them or permit them to be used or shall sell or permit them to be sold except for residential purposes for adults and persons 14 years of age and older, and no children under the age of 14 years shall be permitted by the owners and occupants of the said units to occupy or reside in the said units; provided however, that this paragraph shall not be construed so as to prevent reasonable visits (including overnight visits) by relatives, friends, and their children under the age of 14 years. . . .
>
> (b) In the event that any unit owner or occupant is in breach of the provisions of this paragraph, the Board of Directors shall forthwith commence legal proceedings against such person and shall apply for an order directing compliance with this section and an injunction preventing such person from continuing the offence. . . .

The North tower had been advertised as an adult building in both the promotional literature and local newspapers. The defendants, a married couple, purchased and moved into a two-bedroom unit in the North tower in July 1976. In May, 1978 a child was born to them. By the fall of 1980 the property managers of the condominium corporation had become aware not only of the defendant's child, but of children under the age of fourteen residing in thirteen of the North tower's 231 units. The property managers provided the offending unit owners until June, and then September, 1981 to make "alternate arrangements". By the time of the trial in April 1983, the defendants were the only owners who had failed to make such arrangements. (Whether the other owners had complied by moving out or, through the effluxion of time, having their children turn fourteen, was not mentioned.)

The plaintiff corporation sought a mandatory injunction requiring the defendants to comply with paragraph 18 of the Declaration. At trial, three other unit owners testified on behalf of the plaintiff to the effect that they had purchased their units as retirement residences, and had relied upon the "adults-only" designation to provide a quiet, serene atmosphere. One testified that she had noticed children playing in the halls and creating noise, though she was unable to say whether the children lived in the North tower, or in one of the other two towers (which did permit children).

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[5] *Supra*, footnote 2, at pp. 292 (D.L.R.), 101 (O.R.).

His Honour Judge Allen granted the plaintiff a mandatory injunction requiring the defendants to comply with the Act, particularly section 31 thereof (which provides that each owner "is bound by and shall comply with . . . the declaration"[6]), and with paragraph 18 of the Declaration. In coming to his decision he rejected the submission of the defendants, who represented themselves, that the Declaration violated section 15 of the Charter. He quite rightly observed that the section was not yet in force. He went on to note that the Code, in establishing "age" as a prohibited ground of discrimination, defined it to be "an age that is eighteen years or more".[7] Accordingly, even if a violation of section 15 of the Charter were involved, it was one that could be demonstrably justified in a free and democratic society under section 1.[8]

The defendants also submitted that clause 18 of the Declaration was *ultra vires* the Act. While the Act permitted a Declaration to contain "provisions respecting the occupation and use of the units",[9] this authority did not, they argued, extend to prohibiting the occupancy of persons under the age of fourteen. His Honour Judge Allen rejected that argument as well:[10]

> With all due respect, a power to create 'provisions respecting the occupation and use of the units' surely includes a power to prohibit certain occupations or uses, including occupation and use by children under the age of 14 years.

In coming to his decision Allen Co. Ct. J. also relied on American caselaw respecting condominiums, finding it "helpful and persuasive".[11] In particular, he cited *Hidden Harbour Estates* v. *Basso et al.*,[12] apparently for the proposition that restrictions in a Declaration "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed". His Honour Judge Allen described this *rationale* as "of assistance and applicable" to the case before him.[13] He also relied on *Riley et al.* v. *Stoves et al.*,[14] wherein the restrictions were to be upheld if they were "a reasonable means to accomplish the private objective".

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[6] Condominium Act, *supra*, footnote 1, s. 31(1).

[7] Human Rights Code, *supra*, footnote 3, s. 9(a).

[8] *Supra*, footnote 2, at pp. 296 (D.L.R.), 105 (O.R.).

[9] Condominium Act, *supra*, footnote 1, s. 3(3)(b).

[10] *Supra*, footnote 2, at pp. 297 (D.L.R.), 106 (O.R.).

[11] *Ibid.*, at pp. 298 (D.L.R.), 107 (O.R.).

[12] 393 So. 2d 637, at pp. 636-640 (Fla. Dist. Ct., 1981); cited in *Borsodi*, *supra*, footnote 2, at pp. 298 (D.L.R.), 107 (O.R.).

[13] *Borsodi*, *ibid.*

[14] 526 P. 2d 747 (Ariz. C.A., 1974), cited in *Borsodi*, *ibid.*, at pp. 299 (D.L.R.), 108 (O.R.).

In granting the mandatory injunction, Allen Co. Ct. J. did not specifically elaborate on what would be required of the defendants. In summary, paragraph 18 of the Declaration provides that no unit owner shall:

(1) use it, except for residential purposes for adults and persons fourteen years of age and older;

(2) sell it, except for residential purposes for adults and persons fourteen years of age and older; or

(3) permit children under the age of fourteen years to occupy or reside in the unit.

In the circumstances of the *Borsodi* case, compliance with the Declaration would *prima facie* appear to require the defendants to give up the custody of their child to someone not residing in the unit. Since this seems rather unlikely, *effective* compliance would require the defendants to move out of the unit. But it should be noted here that this latter option is not one that could be directly ordered by a court under section 31 of the Act, since nothing in the Act authorizes the creation of a power in a condominium corporation to evict a unit owner, or of a duty in the owner to move out should compliance with a Declaration prove impossible. We will return to this point.

Validity of the Declaration

In determining the validity of the Declaration one must look to the Act and the Act alone. The Declaration is not a contract. Its existence and character are mandated and regulated by the Act.[15] Any provisions inconsistent with the Act are deemed amended accordingly.[16] It is the Act, and the Act alone, that makes the Declaration binding on the unit owners.[17] And neither the owner nor the condominium corporation can contract out of the Act.[18] As Galligan J. observed in *Re Peel Condominium Corp. No. 11 and Caroe*,[19]

> A declaration under the *Condominium Act* is a creature of that statute and is therefore prescribed by it. In my view, a declaration may only restrict rights and impose duties if the statute authorizes it to do so.

The fact that the unit owner might have had notice, either actual or constructive, of the restrictions contained in the Declaration is irrelevant.

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[15] Condominium Act, *supra*, footnote 1, ss. 2, 3.

[16] *Ibid.*, s. 3(5).

[17] *Ibid.*, ss. 31, 49.

[18] *Ibid.*, s. 61.

[19] (1974), 48 D.L.R. (3d) 503, at p. 505, 4 O.R. (2d) 543, at p. 545 (Ont. H.C.); for similar comments, see *Re York Condominium Corp. No. 42 and Melanson* (1975), 59 D.L.R. (3d) 524, at p. 526, 9 O.R. (2d) 116, at p. 118 (Ont. C.A.), and *Re Basmadjian and York Condominium Corp. No. 52* (1981), 122 D.L.R. (3d) 117, at p. 119, 32 O.R. (2d) 523, at p. 525 (Ont. H.C.).

Notice cannot make binding in law that which is illegal or of no effect. A court will neither specifically enforce, nor grant damages for the breach of, an illegal contract, notwithstanding the fact that the parties agreed to the terms for valuable consideration.[20] *A fortiori* then, the court will not enforce a provision that is *ultra vires* the legislation which authorizes its existence (particularly where it affects property rights) simply because a party took property with notice of the provision.[21] Similarly, the issue of reasonableness is irrelevant to any determination of the validity of the Declaration. An owner is bound by the Act and the Declaration, and by the By-Laws and Rules of the condominium corporation.[22] But while both the By-Laws and the Rules are expressly made subject to a reasonableness test,[23] the only requirement imposed on the Declaration is that it be consistent with the Act.[24] Thus the wording of the Act itself strongly suggests that the Legislature intended to exclude reasonableness as a test for the validity of a Declaration.

In looking to the Act for the Declaration's authority, the Act must be strictly construed.[25] A unit is, after all, "real property for all purposes".[26] It is one of the canons of statutory construction that private rights are not to be taken away by implication. Any authority to affect adversely private rights must be direct and specific, "and if there is any ambiguity the construction which is in favour of the individual should be adopted".[27]

There are only two sections of the Act upon which the *Borsodi* restrictions could conceivably be grounded. Sub-sections (3)(b) and (3)(c) of section 3 provides as follows:

> In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,
>
> (b) provisions respecting the occupation and use of the units and common elements;
>
> (c) provisions restricting gifts, leases and sales of the units and common interests. . .

Subsection (3)(b) appears relevant to conditions (1) and (3) of the *Borsodi* Declaration,[28] while subsection (3)(c) appears relevant to condition (2).

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[20] *Rees* v. *Marquis of Bute*, [1916] 2 Ch. 64 (Ch.D.).

[21] Thus the court in *Caroe, supra*, footnote 19, and the Court of Appeal in *Melanson, ibid.*, struck down *ultra vires* provisions in, respectively, a Declaration and a By-Law of condominium corporations without even raising the issue of notice.

[22] Condominium Act, *supra*, footnote 1, s. 31(1).

[23] *Ibid.*, s. 28(4) and s. 29(2), respectively.

[24] *Ibid.*, s. 3(5).

[25] *Re Peel Condominium Corp. No. 11 and Caroe, supra*, footnote 19, at pp. 505 (D.L.R.), 545 (O.R.); *Winnipeg Condominium Corp. No. 1* v. *Stechley*, [1978] 6 W.W.R. 491, at p. 495 (Man. Q.B.).

[26] Condominium Act, *supra*, footnote 1, s. 6(1).

[27] Maxwell on the Interpretation of Statutes (12th ed., 1969), pp. 251-252; and see Craies on Statute Law (7th ed., 1971), pp. 118-121.

[28] As set out, *supra*, at

We will leave the latter to one side for the moment, since our focus here will be on the question of whether the Act authorizes the restriction of the occupation and use of the unit to those above a certain age.

Turning then to section 3(3)(b) of the Act, we are left with the problem of its intended scope. Are "provisions respecting occupation and use" intended to comprehend simply restrictions providing for single-family occupancy or non-commercial use only?[29] Or is a broader scope intended, one designed to limit who and what kind of occupants are to be permitted to occupy the units? *Prima facie,* given the generality of the word "respecting" and given that the Act uses the more specific word "restricting" in section 3(3)(c), one would have thought that the latter construction was not intended.

It is submitted that it is more likely that the legislature intended by section 3(3)(b) to provide for the *regulation* of the occupation and use of units, rather than *the prohibition* of certain kinds of persons from occupying them. Since an owner's ownership and use is subject to the Declaration,[30] the Act by implication must intend to regulate the owner's occupation and use. But it is one thing to regulate an occupation or use; another to prohibit them altogether. The courts have long held that a statutory power to regulate and govern does not comprehend a power to prohibit.[31] In *Merritt* v. *City of Toronto,*[32] for example, the city of Toronto had attempted to use its power to govern and regulate auctioneers to refuse licenses to all persons with "bad characters". The Ontario Court of Appeal quashed this attempt to exclude from the regulated class such persons as being *ultra vires* the enabling legislation. Maclennan J.A. noted that:[33]

> The words "govern and regulate" are no doubt very large words, but in themselves they cannot . . . when applied to a class of persons, extend to giving power to exclude from the class to be regulated and governed. What the municipality is authorized to do is to regulate and govern a certain class of persons. To exclude a person from that class is one thing; to regulate and govern is another, and different thing".

By analogy to the *Merritt* case, one can say that the power to regulate a class of people (unit owners) in their occupation and use of units does not extend to a power to exclude from that class particular persons (parents with young children).

It might be objected that an owner's use and occupation is not being prohibited absolutely; that only one of many uses is being prohibited. The

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[29] As was suggested in *Re Peel Condominium Corp. No. 11 and Caroe, supra,* footnote 19, at pp. 506 (D.L.R.), 546 (O.R.); *Re York Condominium Corp. No. 42 and Melanson, ibid.,* at pp. 530 (D.L.R.), 122 (O.R.).

[30] Condominium Act, *supra,* footnote 1, s. 6(2).

[31] *City of Toronto* v. *Virgo,* [1896] A.C. 88 (P.C.); *The Corporation of the City of Prince George* v. *Payne,* [1978] 1 S.C.R. 458, (1977), 75 D.L.R. (3d) 1, [1977] 4 W.W.R. 275.

[32] (1895), 22 O.A.R. 205 (Ont. C.A.).

[33] *Ibid.,* at p. 213, Hagarty C.J.O. and Burton J.A. concurring.

objection is, however, disingenuous. For the use in question is one that is coterminous with the owner's civil status: it is not something that can be "stopped". For example, a provision that prohibits the use of a unit as a bakery does not preclude an owner who happens to be a baker from using and occupying it for other purposes. But as a rule, the activity of parenting is carried on in the parents' residence. Thus to prohibit children is to require the parents to move out, giving up the occupation and use of their unit for *all* purposes.

There is another argument in favour of a construction of section 3(3)(b) of the Act that stops short of comprehending a power to prohibit a unit's occupation and use by parents with young children: such restrictions are contrary to public policy. It is well established at common law that a condition attached to the use and enjoyment of property which "operates to restrain or forbid a man from doing his duty" is bad and will be held invalid by the courts.[34] Thus conditions attached to gifts of real property to married women that made them revocable should they continue to live with their husbands are void, inasmuch as they require "a married woman to disregard her matrimonial obligations".[35] Conditions on gifts of property to children, or in contracts with parents, that interfered with the parents' duty respecting the religious instruction of their children are also void.[36] Similarly, conditions tending to produce the separation of a parent and his or her child are void.[37] Surely, then, the Declaration in the *Borsodi* case, which in express terms seeks to forbid a parent from doing his or her duty and to require, by implication, the separation of the parent and child, would be void on these grounds.

There is a third reason for construing section 3(3)(b) of the Act narrowly: it is to avoid the anomaly wherein unit owners in condominiums could be "evicted" on becoming parents, while tenants in the same circumstances could not. It is true that in Ontario a landlord may refuse to rent an apartment to a parent with a child, where the building is for adults only.[38] However, it is unlikely that a landlord could evict a childless tenant who subsequently became a parent. The Landlord and Tenant Act[39] creates a fixed number of specific grounds for eviction; having children is not one

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[34] *Re Sandbrook*, [1912] 2 Ch. 471, at p. 477 (Ch.D.); *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181, at p. 189, 24 E.R. 347, at p. 350 (K.B.).

[35] *Re Nurse* (1921), 20 O.W.N. 428, at p. 429 (Ont. H.C.), per Middleton J.; and see *Wilkinson* v. *Wilkinson* (1871), 24 L.T. (N.S.) 314 (V.C.).

[36] *Re Borwick*, [1933] 1 Ch. 657 (Ch.D.); *Re Agar-Ellis* (1878), 10 Ch.D. 49 (C.A.).

[37] *Re Boulter*, [1922] 1 Ch. 75 (Ch.D.); *Re Piper*, [1946] 2 All E.R. 503 (Ch.D.); *Clarke* v. *Darraugh* (1884), 5 O.R. 140 (Ont. Ch.); *Re Sandbrook*, *supra*, footnote 34.

[38] This is the effect of s. 20(4) of the Human Rights Code, *supra*, footnote 3, which exempts such buildings from the right established under s. 2 to freedom from discrimination because of "family status" in the occupancy of accommodation.

[39] R.S.O. 1980, c. 232.

of them.[40] That being the case, to read section 3(3)(b) of the Act as authorizing an adult-only designation and thus the eviction of an owner who becomes a parent, creates an anomaly wherein the owner of real property may be required to move out, while a tenant may not be. Yet the relative position and rights of a unit owner *vis a vis* other unit owners is no different from that of a tenant *vis a vis* other tenants. There being no reason for treating unit owners differently from tenants in this regard, section 3(3)(b) of the Act should be construed so as not to create such an anomaly. Indeed, since there is no direct authorization in the Act whereby a duty to vacate may be imposed on a unit owner (as opposed to a duty not to use the unit in a prohibited manner), one would have expected a court not to be quick to create such a duty by indirection.

So far we have focussed our attention on section 3(3)(b) of the Act and on the restrictions in the Declaration on the occupation and use of the unit. It will be recalled, however, that the Declaration in the *Borsodi* case also contained a prohibition on the sale of the unit, except for residential purposes for adults and persons fourteen years of age and older. Section 3(3)(c) of the Act would *prima facie* appear to be authority for such a prohibition, inasmuch as it permits the inclusion of "provisions restricting gifts, leases and sales of the units". But here again, the same principles of statutory construction discussed with respect to section 3(3)(b) make it probable that by "restricting" the Legislature did not mean "prohibiting". Indeed, the courts have held that the Act does not authorize an absolute prohibition of the power to lease a unit.[41] Moreover, there is reason to believe that a broad interpretation of section 3(3)(c), such as to authorize the *Borsodi* Declaration, would bring it into conflict with the Code; and that, as a result, a narrower construction is to be preferred.

Section 3 of the Code provides that "every person having legal capacity has a right to contract on equal terms without discrimination because of . . . family status". "Family status" is defined by section 9(d) to mean "the status of being in a parent and child relationship". Section 7 provides every person with "a right . . . to refuse to infringe a right of another person under this Act [the Code], without reprisal or threat of reprisal for so doing". Finally, section 46(2) provides that where "a provision in an Act . . . purports to . . . authorize conduct that is a contravention of Part I [which sets out the rights protected under the Code] . . . [the Code] applies and prevails unless the Act . . . specifically provides that it is to apply notwithstanding . . . [the Code]".[42]

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[40] See, *ibid.*, ss. 108, 109 and 110(3), for an enumeration of the grounds for eviction.

[41] See *Re Peel Condominium Corp. No. 11 and Caroe*, *supra*, footnote 19; *Winnipeg Condominium Corp. No. 1* v. *Stechley*, *supra*, footnote 25.

[42] It should be noted here that s. 46(2) did not come into effect until June 15, 1984: s. 46(3). But prior to that date there is nothing that says that a court has to construe another statute so as necessarily to come into conflict with the Code, particularly where, as in the case of the Act, the provision to be construed is ambiguous as to its scope.

It would appear then that if section 3(3) of the Act were construed to authorize the prohibition of a contract for the purchase and sale of a condominium unit to a parent, then a person who refused to sell a unit in such circumstances would be in contravention of the Code. It might of course be argued that there would be no intention to discriminate on the basis of family status, since one could sell it to a parent with a child so long as they (or at least the child) did not intend to occupy the unit. But the definition of "family status" in the Code emphasizes the status of being in a relationship; and it is surely an integral part of the parent/child relationship that the two live together. Since, at least in the *Borsodi* case, the Declaration required the unit to be sold only for residential purposes, the only ground for refusing to sell a unit to a person would be because that person was involved in a parent/child relationship—a prohibited ground. As well, the Declaration itself would arguably be unenforceable against an owner who wanted to sell his unit to a parent with a young child, in virtue of the protection afforded him by section 7 of the Code.[43]

It is accordingly submitted that section (3)(c) of the Act should not be construed so widely as to authorize the prohibition of sale to a parent with a young child. But if one cannot properly prohibit the sale of a unit to such a purchaser, how can one prohibit the occupation and use of that unit by him? Thus a narrow construction of section 3(3)(c) reinforces a similarly narrow one of section 3(3)(b).

Enforcement by Injunction

Even if a Declaration which prohibits occupation and use by children is *intra vires* the Act, there is a serious question as to whether or not it could be specifically enforced by injunction. Before granting an injunction, a court is required to inquire into whether damages are an adequate remedy. As Lindley L.J. once observed, "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy".[44]

It is obvious that the plaintiff condominium corporation in the *Borsodi* case would have faced a difficult problem regarding damages. It will be recalled that the plaintiff corporation could not even prove that the defendants' child (or indeed, any child living in the North tower) was causing any noise or physical damage. Even if such interference with the other owners' use and enjoyment of their property could have been proved and laid at the defendants' doorstep, how many of the tower's 231 unit owners were affected by it? Only three testified in the *Borsodi* case, and the evidence was at best sketchy. Indeed, they appeared to be concerned more with the principle of the building being for adults only, than with any

[43] This statement is, of course, premised on the considerations raised in footnote 42.

[44] *London and Blackwell Railway Company* v. *Cross* (1886), 31 Ch.D. 354, at p. 369 (C.A.).

serious interference in their own use and enjoyment caused by children under the age of fourteen. Finally, one would have thought that pecuniary damages would have more than adequately compensated any aggrieved owners for any interference they did sustain, which in all likelihood was both intermittent and minor. (Pecuniary damages would also no doubt have acted as a spur to the offending parents to keep a closer rein on their children, which surely is the real object behind the creation of adult buildings.)

Even when damages is not an adequate remedy, a court will not issue an injunction where it would impose "an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful".[45] Surely such obligations, or at least those couched in the form of the *Borsodi* Declaration, are impossible, unlawful and unenforceable. What court would require a parent to cease to permit his or her child to reside with him or her in the unit? Nor can the objection be met by saying that the parent could comply with the Declaration, and still reside with his or her child, by moving out of the unit. For the Declaration imposes no duty or obligation on an owner who becomes a parent to move out of the unit. The court's jurisdiction under the Act is only to direct performance of "a duty imposed by . . . the declaration".[46] If a court cannot order the parent to move out, since the Declaration imposes no duty to do so, its only option is to order the parent to cease permitting the child to reside with him or her: yet this it will not do.

The Charter

Given that the Declaration, although created by private interests, is a creature of a public statute, adult-only restrictions may, even if otherwise valid, run afoul of section 15 of the Charter when it comes into effect in April, 1985.[47] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[45] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese*, [1953] 1 Ch. 149, at p. 181, [1953] 1 All E.R. 179, at p. 198 (C.A.), per Sir R. Evershed M.R.

[46] Condominium Act, *supra*, footnote 1, s. 49(1), (2). It is true that s. 49(2) provides that the Court in making such an order "may include in the order any provisions that the court considers appropriate in the circumstances". It is submitted, however, that such provisions could not amount to a new and distinct duty, but would rather relate to how and when the existing duty should be performed.

[47] A number of courts have accepted the argument that where private rights which are described in the Charter are determined and circumscribed by a public act, then the Charter may be invoked: *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.); *Black et al.* v. *Law Society of Alberta* (1983), 144 D.L.R. (3d) 439, [1983] 3 W.W.R. 7 (Alta. Q.B.).

"Age" is thus a prohibited ground of discrimination under the Charter, equal in status to such traditionally prohibited grounds as "race" or "colour". *Prima facie*, a child of a unit owner whose unit is subject to an adults-only restriction would have grounds for a complaint that his or her rights under the Charter had been violated. However, such rights would be subject to section 1, which provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There are two observations to be made. First, the *prima facie* violation of the child's section 15 rights would place the burden of proving that the restriction was demonstrably justified on the condominium corporation.[48] Second, to meet this burden it might not be sufficient to point to the Code, where "age" is defined to mean eighteen years or more;[49] or to the expectations of the other unit owners in the building, as was done, for example, in the *Borsodi* case.[50] This second observation requires some elaboration.

With respect to the Code's definition of age, it should be noted that the Code itself, as provincial legislation, is subject to the Charter.[51] The fact then that the Code exempts from its ambit age discrimination below a certain age may itself have to be demonstrably justified as a reasonable limit on section 15 rights. Even if it can be justified, the considerations that would justify such an exemption within the complex and broad structure established by the Code would not necessarily apply to the question of whether or not an adults-only designation under an act regulating a particular form of private property is justified under section 1 of the Charter.

With regard to the expectations of the other unit owners, one surely cannot justify a particular form of discrimination on the grounds that certain people believe in it and wish to use it as an organizing principle for their activities. If it is to be justified, it must rather be on some wider grounds established by a balancing of social needs. United States courts, in dealing with challenges to age restrictions in condominiums based on the Fourteenth Amendment,[52] have developed a reasonableness test that looks

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[48] *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (Ont. Div. Ct.); (1984), 5 D.L.R. (4th) 766 (Ont. C.A.), leave to appeal to Supreme Court of Canada (1984), 5 D.L.R. (4th) 766n.

[49] Human Rights Code, *supra*, footnote 3, s. 9(a).

[50] *Supra*, footnote 2, at pp. 296-297 (D.L.R.), 105-106 (O.R.).

[51] *Supra*, footnote 4, ss. 32(1), 52(1).

[52] In the United States, age restrictions in condominium declarations are challenged on constitutional grounds on the basis that court enforcement of such restrictions would amount to "state action" within the meaning of the 14th Amendment; and United States courts will neither specifically enforce, nor grant damages for the breach of, a private covenant that, while legal in and of itself, offends the spirit of the Constitution: *Shelley* v. *Kraemer* 334 U.S. 1 (1948); *Barrows et al.* v. *Jackson* 346 U.S. 249 (1953).

not to the other unit owners alone, but also considers social needs as well. In *White Egret Condominium Inc.* v. *Franklin*[53] the Supreme Court of Florida stated:

> In our view, age restrictions are a reasonable means to identify and categorize the varying desires of our population . . . We do recognize, however, that these age restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing. Whenever an age restriction is attacked on due process or equal protection grounds, we find that the test is:
> (1) whether the restriction under the particular circumstances of the case is reasonable, and
> (2) whether it is discriminatory, arbitrary, or oppressive in its application.

In determining whether or not the restriction met the first condition, the court looked to whether or not the units had been specifically designed to meet the needs of particular categories of occupants. The test was met where the units for young adults were generally one-bedroom, with extensive recreational facilities; for families were generally two- to four-bedroom, with recreational facilities designed for children; and for senior citizens were one- or two-bedroom with no recreational facilities but with extra wide doorways and halls (to accommodate wheelchairs).[54] In *Riley* v. *Stoves*,[55] the court also upheld such restrictions, where there was no evidence of a shortage of housing in the area, or of a desperate need for family housing.

It is submitted that if the physical structure of the units in question is such that families could be accommodated, and if there are child-oriented facilities in the building *or in the immediate neighbourhood*, then some form of the *Riley* v. *Stoves* test would have to be met by the condominium corporation. This requirement would be necessary to prevent condominium developers from bootstrapping themselves into a "reasonable limit" by refusing to build recreational facilities suitable for children in buildings whose units were otherwise suitable for families.

Policy

It may be that the argument advanced in this comment will be accused of missing the substance in the form of the argument. After all, do not retired couples have a right to quiet, serene surroundings? And would not high-rise buildings, were they full of children, be subject to all the hectic noise that the owners had hoped to avoid in the first place by moving into an adults-only building? These may be valid concerns, but they must be balanced against the interests of an owner who has become a parent (and undoubtedly, of society as well) in being able to raise his or her child in his or her place of residence. It is submitted, however, that as the Act now

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[53] 379 So. 2d 346, at p. 351 (Fla. S.C., 1979).

[54] *Ibid.*

[55] *Supra*, footnote 14, at p. 752.

stands the balancing of these interests can have no proper part to play in its interpretation. It is important to remember that in the *Borsodi* case the policy objection may be coloured by the fact that the case involved high-rise buildings. Yet the Act itself is indifferent to the kind or mix of buildings that are brought within its regime. Units could take the form of townhouses, duplexes, or triplexes, or low- or high-rise buildings, or any mix of these. They could be cramped or spacious; situated in a farmer's field on the outskirts of a city, or in the heart of an already dense and well-developed urban neighbourhood. All of these factors would surely have a part to play in an evaluation of the merits of an "adults-only" designation. One supposes that in some case, such a designation would be reasonable; in others, not. But, as has already been discussed above, there is no reasonableness test imposed by the Act on a Declaration. Thus to read the Act as authorizing an adults-only designation because, on the facts of the particular case, it might seem reasonable, opens the door to its authorizing such designations where it would clearly be unreasonable.

The answer to the policy objection then has to be that if condominium developers are to be permitted to create adult buildings, it must be within the context of the needs of the surrounding community. There should be some negotiation or consultation with officials representing that community, to ensure a proper mix of housing types, and to ensure that no unreasonable burden is placed on the community through the creation of adult buildings. No statutory mechanism to secure such consultation now exists in the Act, but in its absence the courts are not the proper forum for such discussions.

GUS RICHARDSON*

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TORT—CIVIL LIABILITY FOR BREACH OF STATUTORY DUTY ABOLISHED.—In *The Queen in Right of Canada* v. *Saskatchewan Wheat Pool*,[1] the Supreme Court of Canada has effected a major change in the law governing civil remedies for breaches of penal statutes. No longer will such violations provide an independent cause of action to a plaintiff injured by the unlawful conduct. Instead, breach of a statute will be relevant only as evidence of negligence. The tort of breach of statutory duty is thus abolished in Canada. While already foreshadowed in *Board of Governors of the Seneca College Applied Arts and Technology* v. *Bhadauria*,[2] this outcome is nonetheless

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[1] [1983] 1 S.C.R. 205, (1983), 143 D.L.R. (3d) 9, [1983] 3 W.W.R. 97.

[2] [1981] 2 S.C.R. 191, (1981), 124 D.L.R. (3d) 193.

surprising, inasmuch as the court has taken a position on the procedural effect of a breach that is shared by only a small minority of American states and that contradicts its earlier pronouncements in *Sterling Trusts Corporation* v. *Postma*.[3] The one clear result of the latter case was that a safety statute displaces the common-law standard of care in a civil trial. Although the court in *Postma* vacillated as to whether breach of such a statute rendered the defendant strictly liable for damages or liable only in the absence of an excuse for non-compliance, it clearly rejected the view that the statutory standard was subordinate to the discretionary one of the trier-of-fact.[4] Yet in *Saskatchewan Wheat Pool*, the court ruled that breach of a safety statute will be only "evidence of negligence", which is to say that the common-law standard is supreme. Many commentators will perhaps welcome this departure as a simplification of a hitherto chaotic area of tort law and as an abandonment of the search for a fictitious legislative intention to determine whether penal statutes are applicable in civil suits. No doubt these gains are important. Nevertheless, the decision is lamentable for two reasons. First, by submerging statutory tort in the law of negligence, the court has disarmed itself of a means by which to extend common-law duties in the face of obsolete precedents without subjecting defendants to unfair surprise. Secondly, by opting for the evidence-of-negligence rule, it has not only surrendered the advantages of precise and uniform standards of care; it has also adopted a principle antithetical to the sovereignty of law. In what follows, I shall attempt to substantiate these criticisms as well as to show that the gains of simplicity and clarity could have been achieved with much less sacrifice to the orderly functioning of the legal process.

The Decision

The Canadian Wheat Board, as agent of the federal Crown, stores wheat in the Pool's elevators at Thunder Bay. At the direction of the Board, the Pool loaded a quantity of wheat onto the vessel "Frankliffe Hall". Unknown to representatives of the Pool, the wheat in one of its elevators was infested with rusty grain beetle larvae, and this infested grain was loaded into two of the ship's holds. On discovering the infestation from samples taken during loading, the Canada Grain Commission ordered the Board to fumigate 237,569 bushels of wheat. The vessel, which by this time was already en route to its destination, was diverted by the Board to Kingston, where the grain was unloaded, fumigated, and reloaded at a cost of $98,261.55. The board sued the Pool for this amount, alleging a breach of the Canada Grain Act.[5] The latter makes it an offence to "receive into or discharge from the elevator any grain . . . that is infested or contaminated

[3] [1965] S.C.R. 324, (1964), 48 D.L.R. (2d) 423.

[4] *Ibid.*, at pp. 330 (S.C.R.), 429 (D.L.R.).

[5] R.S.C. 1970, c. G-16.

or that may reasonably be regarded [as such]".[6] The Act imposes penalties for breach of its provisions but is silent with respect to civil liability. No negligence was alleged by the plaintiff, and none was found by the court.

According to the well-known rules governing statutory tort, civil liability is incurred through breach of a penal statute if the legislature "intended" the statute to confer a civil right of action. Such an intent is imputed if the plaintiff is a member of a particular class for whose benefit the statute was designed,[7] if his injury is of the type that the legislature sought to prevent,[8] and if the statute does not already provide for a civil remedy.[9] In the trial division of the Federal Court, Collier J. applied these rules and held for the plaintiff.[10] He concluded that the Canada Grain Act was designed to benefit the class of grain producers by ensuring a dependable commodity for market, and that, therefore, the legislature had intended to confer a private right of action to enforce the statutory duty. The fact that the plaintiff was not a member of the benefited class seems to have made no impression on the trial judge although the traditional rules clearly require this. Moreover, having imputed a legislative intention to impose civil liability for a breach of the statute, Collier J. manufactured a further intent to impose liability even in the absence of fault. "To ensure", he said, "that grain is, indeed, a dependable commodity for domestic and export markets, an absolute prohibition against discharging infested grain has, in my view, been imposed by the legislators".[11]

On appeal to the Federal Court of Appeal, the decision of the trial judge was reversed.[12] Heald J. reasoned that the Canada Grain Act was enacted in the public interest rather than for the benefit of any particular class, and that, in any event, the plaintiff was neither a member nor an agent of the class of grain producers. The Court of Appeal thus proceeded wholly within the framework of the traditional rules, merely arguing that the trial judge had reached the wrong conclusion.

On further appeal, the Supreme Court of Canada took the opportunity of conducting a thoroughgoing re-examination of the law regarding statutory tort. Writing the judgment for a unanimous court, Dickson J. discerned two basic approaches from which a choice had to be made: the

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[6] *Ibid.*, s. 86(c).

[7] *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, [1895-9] All E.R. Rep. 147 (C.A.); *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*, [1923] 2 K.B. 832, [1923] All E.R. Rep. 127 (C.A.).

[8] *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125.

[9] *Board of Governors of Seneca College* v. *Bhadauria*, *supra*, footnote 2.

[10] *The Queen* v. *Saskatchewan Wheat Pool* (1979), 104 D.L.R. (3d) 392, [1979] 6 W.W.R. 16 (F.C.T.D.).

[11] *Ibid.*, at pp. 401 (D.L.R.), 28 (W.W.R.).

[12] *The Queen* v. *Saskatchewan Wheat Pool* (1980), 117 D.L.R. (3d) 70, [1981] F.C. 212 (F.C.A.).

English one, which views breach of statutory duty as a separate tort impliedly created in certain circumstances as an adjunct to criminal enforcement of the statute; and the American one, which "has assimilated civil responsibility for statutory breach into the general law of negligence".[13] Following Professor Fleming,[14] Dickson J. preferred the American approach for its forthright recognition that the common law rather than the legislature creates the civil cause of action, and that the statute thus becomes relevant only because courts, in deference to the legislature, choose to adopt its standard of care. Yet not even the majority American position fully satisfied the court. For in treating the unexcused breach of a safety statute as negligence *per se*, American courts have been unable to break away completely from an inquiry into whether the legislature intended the statutory standard to be controlling in a particular case. In the belief that this quest for the legislature's intent has merely served to camouflage an unprincipled exercise of judicial discretion, Dickson J. opted for what he thought to be the one solution that rendered such an inquiry unnecessary. Breach of statutory duty is henceforth a simple negligence action in which the statutory standard of conduct is a "useful" means of determining whether the defendant has conformed to the standard of care of the reasonable man. Since the cause of action is negligence, and since the authoritative standard of care continues to be the common law one of the reasonable man, the court is creating no new liabilities for which it would have to fabricate legislative authorization. Only one exception is permitted to withstand this overhaul. The violation of industrial safety legislation will continue to be treated as negligence *per se*, owing to the historically entrenched policy of the courts to favour strict liability for industrial accidents.[15] However, since compensation for industrial accidents is, with minor exceptions, no longer the business of Canadian courts, this reservation seems quite insignificant.

Critique

Let us now examine the implications of the new approach and question whether it is in fact necessitated by a rejection of the intention theory.

In subsuming breach of statutory duty to the law of negligence, the court has, in effect, announced that it will henceforth use statutes only to guide the trier-of-fact in determining whether the defendant's conduct conformed to the required standard of care. This is, no doubt, one of the valuable services which statutes can perform for the common law, but it is certainly not the only one. Whatever the flaws and inconsistencies in the traditional approach, it has in the past allowed courts to use statutes to extend civil duties in ways which, while consistent with underlying com-

[13] *Supra*, footnote 1, at pp. 218 (S.C.R.), 19 (D.L.R.), 109 (W.W.R.).

[14] The Law of Torts (5th ed., 1977), p. 124.

[15] *Supra*, footnote 1, at pp. 223 (S.C.R.), 22 (D.L.R.), 113 (W.W.R.).

mon law principles, are nonetheless blocked by an encrustation of precedent. Consider the case of *National Capital Commission* v. *Pugliese*.[16] There the plaintiffs claimed to have suffered damage to their homes as a result of the defendant's extraction of underground water in excess of the statutory maximum. At common law, the plaintiff's right of action in nuisance had been limited by a cluster of English decisions affirming an absolute right of a landowner to extract percolating water beneath his property.[17] The Supreme Court held, however, that the statute had taken away that right, and that an illegal extraction of water causing subsidence to land was now actionable in nuisance. Here, it must be noted, the court was not simply using the statutory standard of reasonable user in a common-law nuisance action, for at common law no such action existed. Rather, the court was using the statute to *elaborate* the common law of nuisance in the face of a harsh and anachronistic rule. Although alternative judicially-created approaches were available from the United States and Australia,[18] the court chose to base recovery on the statutory violation, since this was the only technique that did not subject the defendant to an *ex post facto* duty.

The courts' use of statutory tort to reinforce pre-existing civil rights has been particularly prominent in situations where the plaintiff's recovery has been barred at common law by the immunity from liability for omissions. In *Monk* v. *Warbey*,[19] for example, the plaintiff was injured by the negligent driving of someone whom the owner of the vehicle had failed, contrary to statute, to insure against public liability. Alleging breach of statutory duty, he sued the owner for his damages and succeeded. Absent the statute, the plaintiff's claim would have been frustrated by the rule precluding recovery for nonfeasance. Yet the court recognized that the common law right to security against tortious conduct was empty without a sure remedy for its invasion, and that this right therefore implied, in these confined circumstances, a civil duty of affirmative action.

In other cases, the courts have invoked the authority of statutes to expand the definition of misfeasance in the face of an accumulation of precedent unfavourable to recovery. Prior to statutory intervention, for example, a motor vehicle driver owed no duty to stop and render aid to someone whom he had innocently incapacitated. A long line of American cases had held that failure to do so was an instance of nonfeasance.[20]

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[16] [1979] 2 S.C.R. 104, (1979) 97 D.L.R. (3d) 631.

[17] *Acton* v. *Blundell* (1843), 12 M.&W. 324, 152 E.R. 1223 (Ex. Ch.); *Chasemore* v. *Richards* (1859), 7 H.L.C. 349, 11 E.R. 140; *Popplewell* v. *Hodkinson* (1869), L.R. 4 Exch. 248; *Mayor etc. of Bradford* v. *Pickles*, [1895] A.C. 587 (H.L.).

[18] See *Pugliese* v. *National Capital Commission* (1977), 79 D.L.R. (3d) 592, 17 O.R. (2d) 129 (Ont. C.A.).

[19] [1935] 1 K.B. 75, [1934] All E.R. Rep. 373 (C.A.).

[20] *Union Pacific* v. *Cappier*, 66 Kan. 649, 72 P. 281 (Kan. S.C., 1903); *Turbeville* v. *Mobile Light & R. Co.*, 121 Ala. 91, 127 So. 519 (Ala. S.C., 1930).

However, in *Langenstein* v. *Reynaud*,[21] American courts began to circumvent this tradition by founding a civil duty on criminal legislation.[22] Such initiatives have, to be sure, drawn vehement criticism from academic commentators, many of whom have viewed them as involving supplemental enforcement of a statutory policy and hence as judicial forays into the field of pure legislation.[23] Indeed, in *Saskatchewan Wheat Pool*, Dickson J. embraces this view of the function of statutory tort, for he sees it as evolving from the desire of the English judiciary to advance the policy behind nineteenth-century industrial safety legislation.[24] Yet this, I believe, is to misunderstand the fundamental nature of the action upon the statute. The latter is not primarily a means by which courts have sought to lend additional enforcement to legislative innovations, but is rather a means by which they have sought to develop the common law in the face of anachronistic precedents without subjecting defendants to retroactive duties. It can be argued, for example, that the failure to render aid to someone whom one has faultlessly injured is at bottom a case of misfeasance rather than of nonfeasance since the reservation of one's liberty in such circumstances gives the original creation of risk all the marks of a tortious subjection of another to one's arbitrary will.[25] Yet given the weight of precedent to the contrary, this expansion of the notion of misfeasance required the intervention of a statute in order to avoid unfair surprise to defendants. That this is indeed the prime function of statutory tort is shown by the fact that, when courts have been invited to enforce civilly public duties having no private law foundation, they have generally refused to do so.[26]

One further example drawn from the sphere of landlord-tenant law will suffice to show the extent to which the Supreme Court has, by abolishing the action upon the statute, deprived itself of an invaluable instrument for the orderly development of the common law. In *Cunningham* v. *Moore*,[27] the plaintiff tenants suffered injuries as a result of the

[21] 13 La. App. 272, 127 So. 764 (La. C.A., 1930).

[22] See A. Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25, at pp. 49-52.

[23] See, for example, C. Lowndes, Civil Liability Created by Criminal Legislation (1932), 16 Minn. L. Rev. 361; G. Williams, The Effect of Penal Legislation in the Law of Tort (1960), 23 Mod. L. Rev. 233; Fleming, *op. cit.*, footnote 14, p. 133. This view of the nature of statutory tort was also advanced by Lord Wright in *London Passenger Transport Board* v. *Upson*, [1949] A.C. 155, [1949] 1 All E.R. 60 (H.L.).

[24] *Supra*, footnote 1, at pp. 213 (S.C.R.), 15 (D.L.R.), 104 (W.W.R.).

[25] See J.R.S. Prichard and A. Brudner, Tort Liability for Breach of Statute: A Natural Rights Perspective (1983), 2 Law and Philosophy 89, at pp. 103-104.

[26] See *Atkinson* v. *Newcastle and Gateshead Waterworks* (1877), 2 Ex. D. 441 (C.A.); *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387 (H.L.); *Orpen* v. *Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101; *Cutler* v. *Wandsworth Stadium*, [1949] A.C. 398, [1949] 1 All E.R. 544 (H.L.); *Canadian Pacific Airlines Ltd.* v. *The Queen*, [1979] 1 F.C. 39, (1978), 87 D.L.R. (3d) 511 (F.C.A.).

[27] (1972), 28 D.L.R. (3d) 277, [1972] 3 O.R. 369 (Ont. Co. Ct.).

landlord's failure to make repairs to the rented premises. At common law the only basis for a landlord's duty to repair is a contractual one, since the duty is seen as one of affirmative action. The question for the court was whether, in the absence of a lease provision requiring the landlord to make necessary repairs, a civil duty could be founded on the landlord's statutory obligation under the Landlord and Tenant Act.[28] The Ontario High Court held that it could. To be sure, Holland J. employed the language of the intention theory to arrive at this result, thereby creating the impression that he was giving gratuitous supplemental enforcement to a legislative innovation. Yet the landlord-tenant relationship is surely analogous to those already recognized by the common law as creating exceptions to the general immunity from liability for nonfeasance. Like an employer,[29] a boat operator,[30] or a host,[31] a landlord induces another to surrender to him control over the instruments affecting the other's well-being. Such an inducement to dependence is compatible with respect for the other's freedom only if one submits to a duty to protect the other in the relevant contingencies, at least to the extent that one can do so without subjecting one's own safety to the pleasure of the person in peril. Again, therefore, the tort of breach of statutory duty permitted the court to elaborate common law principles in a way that avoided unfair surprise to the defendant.

It might be objected that, whether the law develops on a common law or on a statutory basis, there must always be an element of surprise for the defendant. For while the statute affords the defendant fair warning of his duty, it positively misleads him regarding sanctions if that duty is civilly enforced. Having calculated on a fine, the defendant is now saddled with much heavier pecuniary losses. The answer to this objection may be shortly stated. While the defendant who makes the cost-benefit calculus may be surprised by the imposition of unannounced costs, he can be regarded as having been *unfairly* surprised only on the assumption that fines are taxes on permissible conduct rather than punishments for prohibited conduct. They are, of course, the latter.

It might be further objected that the abolition of statutory tort will not have the consequences predicted here, because it remains open to the courts to advance the common law by invoking the public policy embodied in statutes. Yet in *Bhadauria* the Supreme Court explicitly denied the distinction between these two uses of statutes. "There is", said Laskin C.J.C., "a narrow line between founding a civil cause of action directly upon a breach of statute . . . and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the

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[28] R.S.O. 1980, c. 232.

[29] *Harris* v. *Pennsylvania Railroad Co.*, 50 F. 2d 866 (C.A. 4 Cir., 1931).

[30] *Horsley* v. *MacLaren*, [1972] S.C.R. 441, (1971), 22 D.L.R. (3d) 545.

[31] *Ayres and Co.* v. *Hicks*, 40 N.E. 2d 334 (Ind. S.C., 1942).

statute''.[32] Accordingly, in *Bhadauria* the court decined to find a common law right against discrimination on the basis of the policy embedded in the Ontario Human Rights Code[33] for the same reason that it denied a civil right of action for breach of the statute: the latter had already created a comprehensive administrative framework for private remedies. Of course, it does not follow from these dicta in *Bhadauria* that the abolition of statutory tort entails a corresponding demise for the public policy doctrine. For if the reason for the former is to avoid arbitrary judicial legislation, then this can have no relevance to a use of statutes that is self-consciously aimed at elaborating pre-existing common-law principles.[34] Nevertheless, the combined effect of *Bhadauria* and *Saskatchewan Wheat Pool* is certainly to render precarious the role of penal statutes in the civil process.

This result could have been avoided. A rejection of the intention theory of statutory tort does not necessitate a rejection of the independent tort of breach of statutory duty. As we have seen, for all their talk of legislative intent, the courts have proceeded on a sound intuition in deciding when statutes should confer a civil right of action. Implicit in the cases is a distinction between statutes that effectuate antecedent private rights either fully (as in negligence) or inchoately recognized by the common law, and statutes that embody policy innovations aimed at maximizing aggregate welfare. The former have been held to confer a civil right of action, while the latter generally have not. Thus, for example, statutes designed to protect persons from nuisances or from exposure to unreasonable risk have been held to confer a right of action whether or not a specific class is the intended beneficiary of the legislation.[35] Conversely, statutes that impose duties on municipal authorities or public utilities, or that confer economic benefits on a segment of the public have been held to be unenforceable by private action even though ascertainable persons are benefited.[36] The distinction, then, between statutes that develop common law private rights and those that create new public law rights was one upon which the court could have founded a coherent law of statutory tort. It was also a distinction that could have satisfactorily decided the case at hand, for inasmuch as section 86(c) of the Canada Grain Act prescribes no standard of safety, it

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[32] *Supra*, footnote 2, at pp. 188 (S.C.R.), 199 (D.L.R.). Laskin C.J.C. also noted at pp. 192 (S.C.R.), 202 (D.L.R.) the conflicting views on the validity of the public policy doctrine in *Re Drummond Wren*, [1945] 4 D.L.R. 674, [1945] O.R. 778 (Ont. H.C.). and *Re Noble and Wolf*, [1949] 4 D.L.R. 375, [1949] O.R. 503 (Ont. C.A.).

[33] R.S.O. 1980, c. 340.

[34] The same argument applies to save the use of statutes to ground the tort of intentional interference with economic advantage by illegal means; see *International Brotherhood of Teamsters* v. *Therien*, [1960] S.C.R. 265, (1960), 22 D.L.R. (2d) 1; *Gagnon* v. *Foundation Maritime Ltd.*, [1961] S.C.R. 435, (1961), 28 D.L.R. (2d) 174.

[35] See for example, *Solomons* v. *Gertzenstein*, [1954] 2 Q.B. 243, [1954] 2 All E.R. 625 (C.A.); *Pugliese* v. *National Capital Commission*, *supra*, footnote 16.

[36] See *supra*, footnote 26.

crystallizes no civil duty of care, nor does it make explicit any other discernible private law right. It is, as Heald J. noted in the Court of Appeal, a public welfare provision, which, because it embodies no private law rights, should be unenforceable by private action.[36a] Instead, however, of making the broad concept of private rights the touchstone for the civil enforceability of statutes, the court chose to restrict the civil relevance of statutes to that subclass of invasions of private rights involving negligence. Why did the court opt for such a narrow foundation?

Dickson J. offers two principal reasons. First, legislatures are increasingly stipulating private remedies for breaches of statutes dealing with consumer protection, landlord-tenant relations, business organization, and securities regulation.[37] Dickson J. does not expand on the relevance of this observation, but presumably His Lordship means that the legislature's silence must now be taken to indicate an intention not to create civil liability. If so, the argument involves a reversion to the intention theory of statutory tort, a theory rendered superfluous by the court's frank recognition of the common law basis of the action upon the statute. Clearly a common law cause of action cannot be excluded by the legislature's silence. The second argument is that the assimilation of statutory tort to the law of negligence will have minimal impact on the availability of compensation for injuries. This is so, according to Dickson J., partly because "the role of tort liability in the compensation and allocation of loss is of less and less importance", and partly because the theory of negligence has so pervaded tort law as to constitute virtually a "general theory of civil responsibility".[38] This argument greatly underestimates the extent of the lacuna in tort compensation created by the court. The only area in which tort liability has been displaced in all provinces of Canada is that of industrial accidents, paradoxically the one area in which the action upon the statute has been left intact. Secondly, no matter how expansive negligence becomes, it will never exhaust the means by which one individual may invade the security of another. The plaintiffs in neither *Monk* v. *Warbey*[39] nor *Conningham* v. *Moore*[40] could have succeeded in negligence, nor will a safety statute ever permit a court to elaborate a civil right to privacy.[41]

[36a] Observe that this approach avoids the constitutional law problems involved in a theory which imputes a parliamentary intention to enforce the criminal law with civil sanctions. See *Transport Oil Ltd.* v. *Imperial Oil Ltd.*, [1935] 2 D.L.R. 500, [1935] O.R. 215 (Ont. C.A.), and *Direct Lumber Co. Ltd.* v. *Western Plywood Co. Ltd.*, [1962] S.C.R. 646, (1962), 35 D.L.R. (2d) 1.

[37] *Supra*, footnote 1, at pp. 223 (S.C.R.), 22 (D.L.R.), 113 (W.W.R.).

[38] *Ibid.*, at pp. 224 (S.C.R.), 22-23 (D.L.R.), 113-114 (W.W.R.).

[39] *Supra*, footnote 19.

[40] *Supra*, footnote 27.

[41] The elaboration from a statute of a civil right of privacy was attempted in *Re MacIssac and Beretanos* (1971), 25 D.L.R. (3d) 610 (B.C. Prov. Ct.).

Non-Compliance with a Statute and Negligence

Having chosen to assimilate statutory tort to the law of negligence, the Supreme Court had to decide what effect a statutory violation was to have in a negligence action. Three different approaches have traditionally been taken. According to one, the standard of care is determined in the ordinary way by the trier-of-fact, which uses the statutory standard as an aid but not as an authority. Here breach of a safety statute is merely some evidence of negligence, to be measured against what the reasonable man would have done in the circumstances. Until now, only a few American states have adopted this approach. At the other extreme is the position in England, where breach of a safety statute is negligence *per se*. The decision as to what constitutes an unreasonable risk is deemed to have been removed from the discretion of the jury and to have been authoritatively settled by Parliament. Since no relaxation of the statutory standard is permitted, this approach effectively imposes strict liability for injuries caused by unlawful conduct. Between these extremes is the approach favoured by a majority of American states and by the Second Restatement of Torts.[42] According to this view, the unexcused breach of a safety statute is conclusive of negligence. Here the statutory standard is authoritative for the trier-of-fact, which may, however, consider whether compliance was possible in the circumstances. Reference is often made to a fourth alternative, one which, however, collapses into either the evidence-of-negligence rule or the negligence *per se* rule depending on how it is formulated. According to this approach, breach of a safety statute raises a presumption of negligence and places the onus on the defendant to prove exculpatory circumstances. If the plaintiff can exonerate himself only by showing that he took all reasonable steps to comply with the law, then this test is no different from that of the Second Restatement. If, on the other hand, he may excuse himself by a showing that, notwithstanding the violation, he took reasonable care, then the test differs from the evidence-of-negligence rule only in reversing the onus.

The Supreme Court decided in favour of the evidence-of-negligence rule. The fact that it thereby preferred a position adopted in only a small minority of American states would not, of course, matter in itself. However, the majority view was directly inspired by an article written for he Harvard Law Review by E.R. Thayer, one in which the author brilliantly exposed the fatal flaw in the some-evidence rule.[43] Thayer argued that the courts' treatment of breaches of safety statutes as merely evidence of negligence constituted a judicial affront to the legislature. For it implied that, even where the legislature has spoken on the matter, the reasonable man remains the arbiter of what constitutes due care in the circumstances, so that breaking the law is in principle justified. The evidence-of-

[42] Restatement, Torts (2d) (1965), s. 288B(1).

[43] E.R. Thayer, Public Wrong and Private Action (1914), 27 Harv. Law Rev. 317.

negligence rule is thus incompatible with the sovereignty of law. Furthermore, it deprives the legal process of the obvious advantages inherent in uniform, predictable, and informed standards of care, as well as in restricting jury discretion to matters of fact.

Given these well-known objections (of which Dickson J. takes note) to the some-evidence rule, why did the court see fit to adopt it? Dickson J.'s reasons are contained in the following passage:[44]

> The major criticism of the negligence *per se* approach has been the inflexible application of the legislature's criminal standard of conduct to a civil case. I agree with this criticism. The defendant in a civil case does not benefit from the technical defences or protection offered by the criminal law; the civil consequences may easily outweigh any penal consequences attaching to the breach of statute; and finally the purposes served by the imposition of criminal as opposed to civil liability are radically different. The compensatory aspect of tort liability has won out over the deterrent and punitive aspect; the perceptible evolution in the use of civil liability as a mechanism of loss shifting to that of loss distribution has only accentuated this change.

The first argument—that the negligence *per se* rule involves an inflexible application of the criminal standard to a civil case—applies only to the English version of the rule. It has no force against the majority American position, which recognizes the possibility of such excusing conditions as the actor's incapacity, his understandable ignorance of the occasion for compliance, and his having taken reasonable steps to conform to the law.[45] Accordingly, it was not necessary to abandon entirely the supremacy of the legislative standard in order to avoid strict liability for heavy losses.

What of the argument that "the civil consequences may easily outweigh any penal consequences attaching to the breach of statute"? This fact would indeed be disturbing if the purpose of adding civil liability were to supplement the criminal penalty for breaking the law. For in that case the judiciary would be legislating an indeterminate penalty for a violation to which the legislature has already attached the specific sanction it deemed appropriate. As mentioned, however, the purpose of imposing civil liability for breach of a statute is not to lend additional enforcement to the penal law but rather to vindicate a civil right of the plaintiff. The action upon the statute has a tort law purpose rather than a criminal law purpose. We need not be concerned, therefore, that the civil consequences of a breach will outweigh the penal ones, since objective responsibility in tort has always necessitated an asymmetry between the degree of blameworthiness of the defendant and the compensation owed to the plaintiff. Nor need we be concerned that "the compensatory aspect of tort liability has won out over the deterrent and punitive aspect". The purpose of adding civil to criminal liability is not to deter violations of the statute, but precisely to compensate plaintiffs.

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[44] *Supra*, footnote 1, at pp. 221-222 (S.C.R.), 21 (D.L.R.), 112 (W.W.R.).

[45] Restatement, Torts (2d), *supra*, footnote 42, s. 288A(2).

Conclusion

After reviewing the state of the law regarding private actions for breach of statute, Lord Evershed M.R. once remarked: "a lay mind might not unjustifiably be tempted to think that there was not much rhyme or reason in it all and that a spin of a coin was as good a forecast as any of the result of a case".[46] Nowhere was this unpredictability greater than in Canada. Prior to *Saskatchewan Wheat Pool*, the legal position on the procedural effect of a breach of a safety statute defied encapsulation. Exceeding the speed limit had generally been conclusive of negligence, whereas the breach of other highway safety rules had been regarded only as *prima facie* proof of negligence.[47] A violation of safety regulations for gas appliances had been held to be negligence *per se*, while a breach of automobile equipment regulations had usually raised only a presumption of negligence.[48] In *Sterling Trusts* v. *Postma*,[49] the Supreme Court equivocated on the issue, holding at one time that a breach of a tail-light regulation constituted *prima facie* proof of negligence, but then declining to decide "whether the statutory duty to have the tail-light lighted was an absolute one or, if it be not absolute . . . the extent of the burden cast upon [the defendant]".[50]

The clarification of the law in *Saskatchewan Wheat Pool* is certainly welcome. Also to be applauded is the court's firm rejection of the legislative intention theory of statutory tort, a theory which, more than anything else, has impeded the development of rational criteria for imposing civil liability for breach of a penal statute. It is regrettable, however, that the Supreme Court failed to elaborate such criteria, and that it chose instead to submerge breach of statute into the common law of negligence; for it thereby deprived the legal process both of fixed and uniform standards of care as well as of a means for the orderly development of civil duties. Henceforth the burden for such development will fall on the doctrine of public policy as embodied in statutes. It is to be hoped that, the dicta in *Bhadauria* notwithstanding, this doctrine at least is secure.

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[46] Lord Evershed, M.R., The Impact of Statute on the Law of England, in Proceedings of the British Academy, Vol. 42, p. 259.

[47] *Findlay* v. *Saskatchewan Motor Co.*, [1940] 4 D.L.R. 760, [1940] 3 W.W.R. 29 (Sask. K.B.); *Sterling Trusts* v. *Postma, supra*, footnote 3.

[48] *Ostash* v. *Sonnenberg* (1968), 67 D.L.R. (2d) 311, 63 W.W.R. 257 (Alta. C.A.); *Rintoul* v. *X-Ray and Radium Industries*, [1956] S.C.R. 674; *Aubrey* v. *Harris* (1957), 7 D.L.R. (2d) 545, [1957] O.W.N., 133 (Ont. C.A.).

[49] *Supra*, footnote 3.

[50] *Ibid.*, at pp. 330 (S.C.R.), 429 (D.L.R.).

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PRESCRIPTION—LES ARTICLES 1688 ET 2259 DU CODE CIVIL. — Dans l'affaire *La Fabrique de la Paroisse De St-Philippe d'Arivida* c. *Desgagne*,[1] la fabrique poursuivait en dommages-intérêts l'architecte, les ingénieurs et l'entrepreneur responsables de la construction de l'église paroissiale. L'église avait été livrée en 1964 et l'action de la fabrique fut intentée en 1971 quelques mois avant qu'une ordonnance émise par le Ministère du travail interdît définitivement l'accès de l'église au public. Les défendeurs ont invoqué les articles 1688 et 2259 du Code Civil. Les articles s'énoncent comme suit:

> Article 1688: Si l'édifice périt en tout ou en partie dans les cinq ans, par le vice de la construction ou même par le vice du sol, l'architecte qui surveille l'ouvrage et l'entrepreneur sont responsables de la perte conjointement et solidairement.
>
> Article 2259: L'action en indemnité en vertu de l'article 1688 doit être introduite dans les cinq ans de la perte.
>
> Si cependant le vice en est un qui se manifeste graduellement, la prescription commence à courir à l'expiration des cinq années mentionnées dans l'article 1688.

En première instance, la Cour supérieure[2] conclut que la perte de l'édifice au sens de l'article 1688, avait eu lieu à l'automne 1964. Appliquant le premier alinéa de l'article 2259, elle déclara l'action prescrite contre les trois défendeurs. La Cour d'appel[3] convint également que, compte tenu des preuves adminstrées par les parties, la perte de l'édifice était devenue manifeste dès la première année. L'architecte, les ingénieurs et l'entrepreneur furent donc déchargés de la garantie quinquennale puisque l'action avait été intentée plus de cinq ans après la perte. Cependant la Cour d'appel reconnut majoritairement que la perte du recours fondé sur l'article 1688 n'affectait en rien le recours de droit commun fondé sur la responsabilité contractuelle prescriptible par trente ans.[4] Elle estima que l'architecte s'était rendu coupable de fautes contractuelles dans la préparation des plans et le choix des matériaux et qu'il devait assumer la totalité des dommages subis par la fabrique.

La Cour suprême jugea que le recours de la fabrique fondé sur l'article 1688 n'était pas prescrit. Dans tous les cas où un vice de construction se manifeste graduellement, c'est le second alinéa de l'article 2259 qui doit s'appliquer même lorsque la perte totale ou partielle de l'édifice est constatée dans les cinq années qui ont suivi l'acceptation des travaux.

Le point de départ du délai de l'action en garantie quinquennale

Les difficultés d'interprétation de l'article 2259 sont historiques. Lors de la codification, l'article 1688 rendait l'architecte qui surveille les

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[1] [1984] N.R. 241 (C.S.C.). Le jugement est rendu par le juge Beetz auquel ont souscrit les juges Estey, McIntyre, Chouinard et Lamer.

[2] C.S. (Chicoutimi) no. 42-515, (1976).

[3] [1979] C.A. 198.

[4] Opinion des juges Bélanger et Bernier. M. le juge Monet dissident aurait confirmé le jugement de la C.S. et rejeté le pourvoi.

travaux et l'entrepreneur solidairement responsables de la perte dans les dix ans. L'article 2259 prévoyait alors qu'après dix ans les architectes et entrepreneurs étaient déchargés de la garantie des ouvrages qu'ils avaient faits ou dirigés. Dès l'origine, l'interprétation de ces articles suscita des controverses. Le législateur avait-il voulu inclure dans un délai unique de dix ans à partir de la livraison la responsabilité solidaire des architectes et entrepreneurs et l'action en garantie de telle sorte qu'après dix ans l'architecte et l'entrepreneur étaient déchargés de toute garantie pour le passé comme pour l'avenir?[5] Ou bien est-ce que l'article 2259 concernait seulement la garantie dans les autres cas que ceux visés à l'article 1688? Tel que l'exprime Walton dans son étude sur l'interprétation du Code civil,[6] le meilleur guide pour trouver le sens d'un article dont la signification est douteuse est le code lui-même. En confrontant et en rapprochant les deux articles, la Cour d'appel devait décider en 1903, dans l'arrêt *Archambault* c. *Curé et Fabrique de la paroisse de St-Charles de Lachenaie*,[7] que la généralité des termes de l'article 2259 devait être limitée en fonction de l'article 1688. Ce dernier article ne fixe aucun délai de prescription à l'action. Par conséquent, une telle action est sujette aux règles de prescription du droit commun, soit trente années à partir de la date de l'apparition des vices, pourvu que ces vices se manifestent dans les dix ans.

Dès 1907, le législateur devait amender l'article 2259 pour lui donner la forme qui a cours présentement sauf que la durée de la garantie légale demeura fixée à dix ans et ne fut réduite à cinq ans qu'en 1927.[8] L'article 2259 est devenu une règle de prescription. Le législateur a limité le temps alloué pour l'exercice de l'action en indemnité du propriétaire, en vertu de l'article 1688, de telle façon que jamais plus de dix ans ne s'écoulent entre la fin des travaux et le moment où cette action est intentée judiciairement. Il ne s'agit toutefois pas d'une prescription décennale car le délai de prescription est invariablement de cinq ans à partir du jour de la perte ou, lorsque le vice en est un qui se manifeste graduellement, du jour de l'expiration des cinq années qui suivent la fin des travaux.[9]

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[5] Ce fut la position adoptée par les tribunaux français au sujet des articles correspondants 1792 et 2270 du Code Napoléon: Cass. Chambres réunies, 2 août 1882, D. 81-15.

[6] F.P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (1907, Introduction et traduction par M. Tancelin, 1980), p. 100.

[7] (1902), 12 B.R. 349.

[8] S.Q. 1907, c. 55; S.Q. 1927, c. 68.

[9] Il est important de déterminer le point de départ de la garantie quinquennale car la prescription se compte par jour. La détermination de ce point de départ ne semble pas avoir soulevé en jurisprudence de difficultés réelles. En l'absence de clauses conventionnelles (réception provisoire ou réception définitive) déterminant le point de départ de la garantie, la jurisprudence reconnaît généralement que la responsabilité solidaire, découlant de l'article 1688 est encourue dès la fin des travaux lors de la prise de possession de l'ouvrage. Cf. *Warren* c. *Warren* (1927), 66 C.S. 61; *Mailloux* c. *Guay*, [1973] C.S. 149; *Brassard* c. *United Fruit and Produce Terminal Ltd.*, [1981] C.A. 567; *Roger Charbonneau Ltée* c. *Magny Construction Ltée*, C.A. (Que) no 200-09-000672-789, 24 juillet 1983; *Office*

Ce jour où le législateur présume que la perte est devenue certaine ne doit-il être le point de départ de l'action en garantie quinquennale que dans les cas où les vices de sol ou de construction invoqués n'ont manifestement pas produit la perte de l'édifice pendant la durée de la garantie quinquennale? L'on sait en effet que le champ d'application de cette garantie n'est pas restreint aux désordres qui entraînent la ruine effective des ouvrages dans les cinq ans.[10] Il suffit pour engager la responsabilité solidaire des entrepreneurs, ingénieurs et architectes que les vices susceptibles de mettre en péril la solidité ou la stabilité de l'édifice ou de ses composantes essentielles se manifestent dans les cinq ans[11] même s'ils n'entraînent effectivement la perte que plus tard. La règle qui fixe le point de départ de la prescription au temps de la perte peut alors devenir inapplicable car le délai de prescription ne doit pas être étendu à plus de dix ans.

Comme le mentionne le juge Beetz, la doctrine et la jurisprudence de façon générale ne paraissent pas avoir clairement entrevu la possibilité d'un conflit entre le premier et le deuxième alinéa de l'article 2259.[12] Mignault, interprétant ces deux alinéas à l'époque où la responsabilité édictée par l'article 1688 était encore de dix ans, dit simplement:[13]

> La prescription dans ce cas est de dix ans et non de trente ans comme l'avait jugé la Cour d'appel, et le point de départ de cette prescription est le temps de la perte. Si cependant ce vice est tel qu'il se manifeste graduellement, de sorte qu'il serait difficile de déterminer le temps où il a pu être découvert d'abord, le point de départ de la prescription est l'expiration des dix années à compter de la fin des travaux.

Challies[14] et Rodys[15] sont d'accord. Rodys remarque que les points de départ de la prescription sont fixés "au temps de la perte ou à l'expiration des cinq années depuis la fin des travaux selon que la perte a pu être

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municipal d'habitation de la Ville de Jonquière c. *Construction Lavoie et Duchesne*, [1982] C.S. 528.

[10] De telles hypothèses sont peu fréquentes. Cf. *Canadian Electric Light Co.* c. *Pringle* (1920), 29 B.R. 26 (destruction d'une jetée); *Constant Malterre* c. *Godard*, [1976] C.S. 1728 (effondrement d'un immeuble); *Hendler* c. *Drabick*, [1958] C.S. 504 (effondrement d'un mur); *Lalonde* c. *Corporation de St-Basile-le-Grand et Lakeshore Construction*, C.A. (Mtl) no 09-000389-73, 25 novembre 1976 (affaissement d'un barrage); *Treitel* c. *Standard Structural Ltd.*, [1982] C.S. 1075 (effondrement d'un toit).

[11] Cf. entre autres: *Audet* c. *Guérard et Guérin* (1912), 42 C.S. 14; *Hill-Clarke Francis Ltd.* c. *Northland Groceries Ltd.*, [1941] R.C.S. 437; *Laverdière* c. *Dorval*, [1955] B.R. 367; *Donolo Inc.* c. *St.-Michel Realties Inc.*, [1971] C.A. 536; *Gauthier* c. *Séguin*, [1969] B.R. 913; *Brunet* c. *Lesage*, [1973] R.P. 409 (C.P.); *Construction St-Hilaire* c. *Michaud*, [1975] C.S. 651, appel rejeté 1980/03/21 C.A. (Qué) 200-09-000224-775; *Corporation de la paroisse de St-Philippe de Néri* c. *Lagacé*, C.A. (Qué) no. 09-000379-75, 28 juin 1977; *Desrosiers* c. *Poirier*, [1979] C.S. 205; *Gareau* c. *Habitations Beaupré Inc.*, [1981] R.L. 410 (C.S.); *Corp. mun. de Villeneuve* c. *Gauthier*, [1982] C.S. 199.

[12] *Supra*, note 1, à la p. 261.

[13] P.B. Mignault, Le Droit civil canadien, t. 9 (1916), p. 516.

[14] G. Challies, The responsability of the Architect, Engineer and Builder (1962), 5 C. de D. (no. 2), à la p. 14.

[15] N. Rodys, Traité de droit civil du Québec, t. 15 (1958).

constatée d'un seul coup, ou que les vices de construction ou du sol ne se sont manifestés que graduellement de sorte qu'il serait difficile d'en déterminer le temps''.[16] D'autres auteurs, dont Johnson,[17] distinguent toutefois plus spécifiquement l'hypothèse où la perte est survenue dans les cinq ans de la fin des travaux, auquel cas l'action doit être intentée dans les cinq ans à partir de la perte et l'hypothèse où le vice a commencé à se manifester dans les cinq ans, mais ne s'est finalement révélé comme pouvant causer la perte que dans les cinq ans qui suivent la fin de la période de garantie, auquel cas le point de départ de la prescription est l'expiration de cette période de garantie.

En jurisprudence, les tribunaux appelés à interpréter l'article 2259 ont reconnu que l'alinéa 2 de cet article trouvait sûrement son application lorsque des vices susceptibles d'entraîner la perte commencent à se manifester graduellement dans la période de cinq ans, tout en n'étant pas considérés encore, durant cette période, comme pouvant causer la perte.[18] Cet alinéa peut-il aussi trouver son application lorsque les vices qui se manifestent graduellement ont pour conséquence un constat de perte totale ou partielle de l'ouvrage dans les cinq ans qui suivent la livraison?

La question comme telle ne semble jamais, avant cette affaire de la *Fabrique de la paroisse de St-Philippe d'Arvida*, avoir fait l'objet d'une formulation explicite devant les tribunaux.[19] En répondant par l'affirma-

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[16] *Ibid.*, p. 336.

[17] W.S. Johnson, The Joint and Several Responability of Architects, Engineers and Builders (1955), pp. 190-191. Voir également: P. Martineau, La Prescription (1977), p. 278.

[18] *Laverdière* c. *Dorval, supra,* note 11; *Construction St-Hilaire* c. *Michaud, supra,* note 11; *Gauthier* c. *Séguin, supra,* note 11 (demande incidente après l'expiration du délai de garantie); *Brunet* c. *Lesage, supra,* note 11.

[19] Dans beaucoup d'arrêts où les juges ont évoqué le deuxième alinéa de l'article 2259, lorsque la perte était manifeste dans les cinq ans qui suivent la fin des travaux, l'action en justice avait été intentée dans ce délai de cinq ans. L'action ne pouvait donc être prescrite. Le deuxième alinéa de 2259 était alors invoqué pour appuyer une définition large du mot perte, celle-ci pouvant provenir d'une manifestation progressive du vice. Cf. *Hill-Clarke-Francis Ltd.* c. *Northland Groceries, supra,* note 11; *Donolo Inc.* c. *St.-Michel Realties, supra,* note 11; *Gauthier* c. *Séguin, supra,* note 11 (action principale); *Alta Construction (1964) Ltée* c. *Metro-Mix Ltée,* [1977] C.S. 927; *Office municipal d'Habitation de la Ville de Jonquière* c. *Construction Lavoie et Duchesne, supra,* note 9. Le seul arrêt où un précédent semble pouvoir être recherché est l'arrêt: *Hôpital Laval* c. *Roberge,* [1942] C.S. 166. Dans cette affaire la caution d'un entrepreneur était poursuivie par le propriétaire. L'ouvrage avait été terminé et reçu en novembre 1931. En 1933, les premiers vices de construction s'étaient manifestés. L'entrepreneur, mis en demeure de réparer, avait fait certains travaux et le propriétaire avait dû lui-même effectuer des travaux additionnels pour une somme d'environ $1,500.00. En mai 1936, les mêmes vices se manifestent de nouveau et le propriétaire effectue en 1936 et 1937 des travaux pour une somme de $83,000.00. L'action en remboursement de ces deux montants est intentée en janvier 1941. La caution soulève que le montant de $1,500.00 est prescrit car l'action est intentée plus de 5 ans après la perte et que le 2e montant de $83,000.00 l'est également car la loi ne la rend pas responsable pour les vices découverts après 1936. Le juge Prévost rejette les prétentions de

tive à cette question, la Cour suprême donne une interprétation inédite du deuxième alinéa de l'article 2259. Le juge Beetz justifie cette solution par l'analyse littérale du texte même du deuxième alinéa et conclut que "les termes [de l'article 2259] sont clairs et ne comportent aucune ambiguité. C'est une erreur d'avoir recours à l'interprétation pour s'écarter de sa lettre".[20]

Cette attitude qui consiste à s'en tenir le plus possible à la phase préliminaire et à décider, chaque fois que cela est possible, que le texte est clair et ne donne pas lieu à interprétation est courante en jurisprudence.[21] Même si cette attitude n'est pas toujours justifiable en droit civil,[22] car le Code civil ne saurait être interprété de la même façon que le sont les statuts de common law,[23] on doit néanmoins admettre "que la première et la plus importante de toutes les règles d'interprétation est que si le code est clair et ne présente pas d'ambiguité sur le point en litige, on ne peut l'expliciter ou l'écarter en se référant à une autre source quelle qu'elle soit".[24] En droit civil, la conception de l'interprétation stricte de la loi a une origine historique. Elle provient de l'influence persistante des méthodes exégétiques très rigoureuses qui avaient cours au 19e siècle au moment de l'adoption du code.[25] Dans l'interprétation exégétique, si l'on part du

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la caution en ces termes (à la p. 176): "Si la perte s'était arrêtée là, il aurait raison; mais au mois de mai 1936 (par conséquent dans le délai de l'art. 1688), les mêmes vices de construction se sont manifestés par de nouvelles pertes, qui ont nécessité des réparations additionnelles en 1936 et 1937, augmentant ainsi les dommages de la demanderesse. Celle-ci ne pouvait exercer plusieurs actions en indemnité. La loi ne lui en donne qu'une, mais elle prévoit que si les vices se manifestent graduellement, le délai de la prescription ne se computera pas à compter de la perte mais à compter de l'expiration du délai de l'art. 1688." Malgré l'usage du mot perte pour les premiers vices découverts en 1933, ne peut-on pas présumer, en raison du faible montant dépensé pour les réparer, que ces vices ne pouvaient être considérés comme pouvant entrainer la perte à cette époque et que ce n'est qu'en 1936 et 1937 que celle-ci est devenue manifeste. L'application de 2259 al. 2 trouvait sûrement son application.

[20] *Supra*, note 1, à la p. 270.

[21] Cf. *Lemarier* c. *Corporation de Ste-Angèle* (1920), 26 R.J. 317 (C. De Rev.); *Governor and Co. of Gentlemen Adventurers* c. *Vaillancourt*, [1923] R.C.S. 414; *Regent Taxi* c. *Congregation des Frères de Marie*, [1929] R.C.S. 650; *Mussens* c. *Côté*, [1973] R.C.S. 621; *Greenshields* c. *La Reine*, [1959] R.C.S. 216; *Hôpital Notre Dame* c. *Patry*, [1975] R.C.S. 388; *Duquet* c. *Ville de Ste-Agathe*, [1977] 2 R.C.S. 1132; *Conseil prov. de la C.B.* c. *B.C. Packers Ltd.*, [1978] 2 R.C.S. 97.

[22] Cf. le juge Pratte dans l'arrêt *General Motors Products of Canada* c. *Kravitz*, [1979] 1 R.C.S. 790, à la p. 813: "une interprétation littérale et rigoriste des textes, si elle peut être acceptable en droit fiscal, n'a certes pas sa place en matière de droit civil".

[23] F.P. Walton, *op. cit.*, note 6, Introduction par M. Tancelin, p. 17; J.L. Baudouin, L'interprétation du Code civil québécois par la Cour suprême du Canada (1975), 53 Rev. du Bar. can., aux pp. 715-716; P.B. Mignault, Le Code civil de la province de Québec et son interprétation, (1935-36), 1 U. of T.L.J. 104.

[24] Walton, *ibid.*, p. 87.

[25] Cf. A.-F. Bisson, L'interaction des techniques de rédaction et des techniques d'interprétation des lois (1980), 21 C. de D., à la p. 515.

texte, ce n'est que pour rechercher ce qu'a voulu le législateur. Comme l'exprimait Geny:[26]

> . . . il me paraît assez vain d'opposer . . . l'interprétation grammaticale à l'interprétation logique . . . S'agissant de diagnostiquer une volonté, la recherche d'intention prédomine nécessairement; mais le texte intervient comme manifestation authentique et solennelle de l'esprit, inséparable de celui-ci, qu'il a pour objet de faire apparaître.

Il faut veiller à ce que la méthode exégétique selon laquelle tout est dans la loi n'entraîne à la longue à ne considérer que la lettre de la loi. Dans la recherche de l'intention du législateur, l'approche littérale peut ne pas être suffisante. Elle ne permet "de tenir compte que de la partie expresse de la communication légale: la partie implicite, celle qui se dégage du contexte global de l'énonciation légale, doit également être prise en considération".[27] Le Code civil n'édicte-t-il pas d'ailleurs aux articles 1013 et 1018 que l'intention des parties ou du législateur "doit être déterminée par interprétation plutôt que par le sens littéral des termes" et que toutes les clauses et dispositions "s'interprètent les unes par les autres en donnant à chacune le sens qui résulte de l'acte entier". Comme le note le juge Pigeon:[28]

> C'est précisément à cause de cette règle qu'il faut être si systématique dans l'emploi du même mot pour dire la même chose et également systématique pour éviter d'employer le même mot dans des sens différents. En effet le sens dans lequel n'importe quel mot est employé n'importe où dans la loi, est un facteur dont il faut tenir compte pour interpréter ce mot chaque fois.

Or, en limitant à l'article 2259, alinéa 1, le sens du mot perte à une perte subite que rien ne laissait présager ou à une perte causée par une manifestation unique d'un vice de sol ou de construction qui se répète ensuite périodiquement,[29] ne restreint-on pas le sens du mot perte tel qu'on l'entend généralement en vertu de l'article 1688? Nos tribunaux n'ont en effet pas appliqué l'article 1688 à la lettre. Ils ont reconnu que les termes "périt en tout ou en partie" ne sont pas limitatifs et comprennent les vices compromettant la solidité de l'édifice et les défectuosités graves qui entraînent des dommages sérieux.[30] Le jugement de la cause *Gauthier* c. *Séguin*[31] repris avec approbation totale par le juge Pigeon dans la cause *Leclerc* c. *J.N. Massie et Fils Ltée*,[32] traduit bien l'état de la jurisprudence:

> Dans l'expression: "Si l'édifice périt en tout ou en partie" que l'on trouve à l'article 1688 du Code civil, le terme "périr" doit être interprété de manière à comprendre

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[26] F. Geny, Méthode d'interprétation et sources en droit positif, t. 1 (2e ed., 1954), p. 276.

[27] P.A. Coté, Interprétation des lois (1982), p. 230.

[28] L.P. Pigeon, Rédaction et interprétation des lois (1965), p. 35.

[29] La distinction entre vices progressifs et vices périodiques n'est pas facile à établir. Cf. *Gingras* c. *Cité de Québec*, [1948] B.R. 171, *Paroisse Notre-Dame de l'Assomption* c. *F.R. Bourgeois Ltée*, [1978] C.S. 543.

[30] Cf. arrêts cités sous la note 11.

[31] *Supra*, note 11.

[32] [1971] R.C.S. 377, à la p. 383.

> tout dommage sérieux aux gros ouvrages de celui-ci et non pas, dans le cas de perte partielle, être interprétée comme ne pouvant vouloir dire autre chose qu'une partie d'un édifice s'est écroulée, a été détruite d'une façon quelconque ou ne peut servir aux fins auxquelles il était destiné; autrement, la protection que l'article précité est destiné à accorder au propriétaire serait le plus souvent illusoire.

Dès lors que les vices de la construction ou que les vices du sol sont suffisamment graves pour causer des dommages sérieux aux gros ouvrages, que ces vices se soient manifestés subitement, périodiquement ou graduellement, le propriétaire peut considérer qu'il y a perte de l'ouvrage. La loi lui donne alors un droit d'action en vertu de l'article 1688 et prévoit que ce droit doit'être exercé dans les cinq ans de la perte.

L'interprétation selon laquelle le second alinéa de l'article 2259 ne viserait que l'hypothèse où le propriétaire, en raison d'une manifestation graduelle des vices, n'a pu constater la perte qu'après l'expiration du délai de cinq ans de l'article 1688 apparaît alors logique. Cette interprétation est-elle complète? La Cour suprême refuse de considérer le second alinéa comme une exception à la règle de l'alinéa premier. Le second alinéa serait une règle autonome pour tous les vices se manifestant graduellement sans égard au jour où la perte devient certaine puisque le texte ne comporte aucune distinction à cet effet.

La décision de la Cour suprême a le mérite d'alléger, pour le propriétaire profane, le fardeau de la preuve. Il n'a plus a déterminer avec précision le moment où le vice qui a commencé à se manifester graduellement s'est finalement soldé par une perte. La décision a aussi le mérite, grâce à la très grande qualité de l'argumentation juridique du juge Beetz, de donner une interprétation claire, équitable et définitive de l'article 2259. À l'instar des décisions récentes rendues en matière de privilège des constructeurs,[33] cette décision témoigne du souci de la Cour suprême de donner, des textes du Code civil, une interprétation qui se veut littérale, sans doute, mais en même temps la plus libérale et équitable possible.

En rappelant l'obligation qu'a le propriétaire de minimiser les dommages, la Cour limite les effets drastiques de la décision à l'égard des constructeurs qui se verront dorénavant tenus, dans un très grand nombre de cas, à une véritable garantie décennale. Le propriétaire qui peut bénéficier du délai de dix ans ne pourra néanmoins tarder à prendre son action en indemnité. Il devra toujours continuer à agir avec diligence, en principe dès que le vice se manifeste, sans attendre que la ruine de l'édifice ne se produise. Sinon, sa négligence sera sanctionnée par une réduction du quantum des dommages[34] ou même en certains cas par le rejet de l'action

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[33] Cf. *Lumberland* c. *Nineteen Hundred Tower Ltd.*, [1977] 1 R.C.S. 581; *Armor Ascenseur Québec* c. *Caisse de dépôt et placement du Québec*, [1981] 1 R.C.S. 12.

[34] La Cour suprême agrée sur ce point avec les conclusions de la Cour d'appel voulant qu'il n'y ait pas lieu d'ajouter à l'estimation de certains dommages l'augemtnation des prix survenue avant le jugement puisque l'appelante aurait pu agir avec plus de diligence. Voir

faute de lien de causalité entre la perte et les actes de l'architecte, de l'ingénieur ou de l'entrepreneur.[35]

À la suite de cette décision, deux grandes questions restent toujours sans solution définitive de la part de la Cour suprême. La responsabilité quinquennale des architectes, ingénieurs et entrepreneurs est-elle une responsabilité exclusivement légale? Les dispositions spéciales des articles 1688 et 2259 empêchent-elles la mise en jeu de la responsabilité contractuelle de droit commun en vertu des articles 1065 et 2242?

Le juge Beetz dans l'arrêt commenté ici rappelle la nature légale de la responsabilité quinquennale:[36]

> . . . la responsabilité imposée par les articles 1688 et 1689 à l'ingénieur est une responsabilité établie par la loi et qui ne dépend aucunement d'un contrat. Pour que la responsabilité de l'ingénieur soit engagée, il faut mais il suffit qu'il ait effectivement agi comme ingénieur, abstraction faite de tout contrat. . .

L'obligation de bien construire et la responsabilité qui en résulte découlent en effet, en vertu des lois de Bas-Canada, du rôle qu'assume l'architecte, l'ingénieur ou l'entrepreneur dans la construction de l'ouvrage:

> The liability of the Appellant for the damages caused by the sinking of the Tower was not taken to have been created by the contract into which he had entered; but it was held that, by the law of *Lower Canada*, this liability was imposed upon him in his capacity of the Builder of the edifice that he undertook to erect, and that the Contract into which he had entered had neither excluded nor qualified the application of the rule of law.[37]

La reconnaissance du caractère légal de la responsabilité imposée par les articles 1688 et 1689 doit-elle constituer un obstacle à la reconnaissance simultanée de son caractère contractuel? Tant que la Cour suprême ne se sera pas prononcée, on peut soutenir, suite aux nombreuses décisions de la Cour d'appel,[38] que le régime légal de la responsabilité quinquennale ne couvre qu'une partie du domaine de la responsabilité des constructeurs et s'ajoute au régime de la responsabilité contractuelle de droit commun dont il ne diffère que par le fardeau de la preuve et le délai de la prescription.

THÉRÈSE ROUSSEAU-HOULE*

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dans le même sens: *Corp. mun. de Villeneuve* c. *Gauthier*, *supra*, note 11; *Office municipal d'Habitation de la Ville de Jonquière* c. *Construction Lavoie et Duchesne Ltée*, *supra*, note 9; *Denis Roy Inc.* c. *Schami*, C.A. (Mtl), no. 09-000209-802, 2 août 1983.

[35] *Mégantic* c. *Mignault*, [1928] 3 D.L.R. 389 (C.S.C.); *Lapointe* c. *Perkins* (1927), 43 B.R. 168; *Gravel* c. *Déziel*, [1965] C.S. 257.

[36] *Supra*, note 1, à la p. 276.

[37] *Wardle* c. *Bethune* (1872), L.R. 4 P.C. 33, à la p. 51, 16 L.C.J. 85, à la p. 89.

[38] *Barnabé et Fils* c. *Roy*, [1947] B.R. 737; *Turcotte* c. *Lavoie*, [1950] B.R. 161; *Laverdière* c. *Dorval*, *supra*, note 11; *Fabrique de la paroisse de St-Philippe d'Arvida* c. *Desgagne*, *supra*, note 3; *Brassard* c. *United Trust and Produce Terminal Ltd.*, *supra*, note 9; *Roger Charbonneau Ltée* c. *Magny Construction Ltée*, *supra*, note 9.

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SECURITIES REGULATION—FOLLOW-UP BIDS—SECURITIES ACT, R.S.O. 1980, c. 466,s. 91.—Since mid 1981 the Ontario Securities Act[1] (''the Act'') has been embroiled in a drawn out test of the most controversial provision in Ontario's securities law. Section 91 (1) of the Act requires that a follow-up offer be made to minority shareholders following a take-over bid by private agreement. This provision was first introduced in 1978,[2] it was the first of its kind, and it remains unique in North America. Briefly, the obligation imposed by the section arises when there has been a take-over bid by private agreement for publicly traded securities for a consideration that exceeds the market value of the securities by more than fifteen per cent. If a take-over bid made on this basis succeeds, the offeror is obliged to make an offer to purchase the securities of the remaining shareholders in the company for a consideration equal in value to that paid under the private agreement.[3] The problems that arose following the purchase by Turbo Resources Limited (''Turbo'') of a controlling interest in Merland Exploration Limited (''Merland'') raised virtually every possible issue that could arise about the operation of section 91 (1) from, on the one hand, whether a take-over bid had been made, to, on the other, the method to be used to value the follow-up offer to the minority shareholders. The facts also gave rise to fundamental questions about the scope of the jurisdiction of the Ontario Securities Commission (the ''Commission'').

The Facts

The facts in the Turbo/Merland affair are fairly straightforward, although the implications to be drawn from them are not as clear.[4] Turbo is a Calgary based company incorporated under the laws of Alberta, with its common shares traded on the Toronto and Montreal Stock Exchanges. Merland, also a Calgary based company, is incorporated under the Canada Business Corporations Act.[5] Merland has both common and convertible preferred shares, and they too are traded on the Toronto and Montreal Exchanges.

In June 1981 Turbo negotiated the purchase of the shares of Merland Holdings Limited whose only asset was 27.7 per cent of the outstanding common shares of Merland. Merland Holdings Limited is located in the Bahamas, and all of its shares were owned by Mr. R.J. Adams, also resident in the Bahamas. The agreement of June 24 between Turbo and

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[1] R.S.O. 1980, c. 466.

[2] An Act to revise the Securities Act, S.O. 1978, c. 47, s. 91.

[3] For a comprehensive article on all aspects of the private agreement and follow up offer see B. Bailey and P. Crawford, The Take-Over Bid by Private Agreement: The Follow-Up Offer Obligation (1983), 7 Dal. L.J. 93.

[4] The facts are taken primarily from one of the decisions of the Commission: *In the Matter of the Securities Act and In the Matter of Turbo Resources Ltd. et. al.* (1983), 3 O.S.C.B. 67C.

[5] S.C. 1974-75, c. 33, as amended.

Adams was for the purchase of shares for $13.13 per share, in cash, to be closed on July 3.

On June 27, Turbo made an offer to purchase five million common shares of Merland at a price of $13 ⅛ net of commissions, through the Toronto and Montreal Exchanges (the "exchange bid"). Contrary to the opinions of Toronto Exchange officials, the Commission was of the view that the exchange bid violated section 23.02(8)[6] of the Toronto Exchange's by-laws, and hence was not exempt under section 88(2)(a) of the Securities Act. The difference of opinion stemmed from the perceived date of the acquisition of the Adams shares. The Exchange felt the acquisition was made June 24 while the Commission was of the view that July 3 was the relevant date. If the July 3 date was the relevant one then Turbo violated section 23.02(8) of the Exchange by-laws by purchasing shares of the offeree company after the acceptance by the Exchange of the notice of the exchange bid on June 27 and prior to the announcement of the total number of shares acquired by Turbo pursuant to the bid. Whether the bid was exempt under section 88(2)(a) could have had significance in deciding whether section 91(3) of the Act applied to the follow-up offer that was subsequently made.

A hearing on July 9 of the Commission permitted Turbo to proceed with the exchange bid on the basis of Turbo's unequivocal undertaking "to make a follow-up offer analogous to a follow-up offer under section 91(1)".[7] The exchange bid was completed successfully. The five million shares taken up represented forty-two per cent of those tendered under the offer. This gave Turbo approximately fifty-one per cent of the outstanding voting securities of Merland, with the Adams shares included.

Following an extension of the time limit for making the follow-up offer[8] it was finally announced on January 26, 1982. The offer was a package deal made by Bankeno Mines Limited ("Bankeno"). Turbo owned seventy-two per cent of Bankeno and caused it to make the offer in satisfaction of Turbo's obligation. Merland shareholders were offered 1.3 Bankeno shares plus one warrant, in exchange for each common or convertible preferred share of Merland. The warrant allowed the holder to buy one Bankeno share at $10 at any time in the subsequent four year period. It also entitled the holder to require Turbo to purchase the warrant for $2.75 during the thirty day period commencing one year after the offer terminated.

The minority shareholders of Merland were far from satisfied, being convinced that the package was not worth the $13.13 paid for the shares

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[6] 23.02(8): The offeror, its insiders, associates and affiliates shall not make any purchases of listed voting shares of the offeree company from the acceptance by the Exchange of the notice until the announcement referred to in section 23.08(2) is made.

[7] *Supra*, footnote 4, at p. 76C. Cf. (1982), 3 O.S.C.B. 65C.

[8] (1982), 3 O.S.C.B. 14B.

purchased earlier by Turbo. Their crusade was led by Dommik Dlouhy, Chairman of Maison Placements Canada Inc. On the minority shareholders' application, the Commission commenced a hearing on February 15 to look into the value of the offer. On February 16, Turbo successfully applied to the Ontario High Court for an *ex parte* order of prohibition against the continuation of the hearing on the basis of lack of jurisdiction. On February 17, Van Camp J. of the Divisional Court denied an application to continue the prohibition. The Commission then continued the hearing and ruled that the offer was not sufficient. In subsequently published reasons for its decision,[9] the Commission stated that in its view there had been a take-over bid, and that Turbo was therefore subject to section 91(1).

Due to the uncertainty caused by the Commission's decision, the Bankeno offer was extended until March 1. On February 26, Bankeno announced an amended offer. The share swap was increased from 1.3 to 1.4 Bankeno shares and the "put" price on the warrant was lowered to $9. Bankeno also applied at that time for a further extension of the time period. The date for acceptance was extended until March 11, and Bankeno's obligation to take up and pay for the shares until March 17.

The Merland minority shareholders were still not satisfied, and the Commission held another hearing on March 9 to determine the value of the amended offer. Again, the Commission held that the bid fell "substantially short of meeting Turbo's obligation".[10] In support of its decision, the Commission successfully sought a compliance order from the Ontario Supreme Court ordering Turbo to comply with its obligation to make an equivalent value follow-up offer. Turbo appealed the Commission's decision and the compliance order. The Divisional Court[11] held that the compliance order had been properly made, and the Court of Appeal refused Turbo's application for leave to appeal.

As all avenues of escape had been closed off, Turbo again commenced negotiations with the minority shareholders of Merland, and a settlement was finally reached in the summer of 1983. The agreement called for Turbo to sell its interest in Bankeno, with proceeds in the amount of $4.70 per share, in cash, being distributed to the minority shareholders. This was a somewhat ironic solution in view of the fact that Turbo had transferred the interest it had purchased in Merland to Bankeno in 1982. The offer was accepted by seventy-seven per cent of the Merland minority, and the settlement was approved by the Ontario Stock Exchange at a hearing held in early November.[12] However, Turbo will not be formally released from its obligation until the sale of Turbo's interest in Bankeno is completed, and

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[9] *Supra*, footnote 4.

[10] (1982), 3 O.S.C.B. 57C, at p. 64C.

[11] (1982), 4 O.S.C.B. 229C.

[12] Globe and Mail (Toronto), Report on Business, November 9, 1983, p. B1.

the proceeds are in the hands of a trustee acting on behalf of the minority shareholders.

For the Merland minority the settlement was jeopardized by the recent actions of two trust companies. Canada Trustco Mortgage Company and Guaranty Trust Company, unsecured creditors of Turbo in the amount of $25 million, took action to be awarded part of the proceeds from the sale of Bankeno and were awarded summary judgment for $25 million plus interest on October 25, 1983.[13] More importantly Turbo was indebted to the Canadian Imperial Bank of Commerce in the amount of $133 million which had to be paid off from the sale of Bankeno prior to the Merland minority receiving any share of the proceeds.

Following further delays and extensions, Turbo finally announced in June of 1984[14] that a deal had been struck with North Canadian Oils Ltd. (''North Canadian'') for the sale of Bankeno. Unfortunately for the Merland minority the sale price agreed upon was only $125 million, leaving no excess after payment to the Bank for their topping-up settlement with Turbo. Any benefit to the Merland minority for their three year struggle will have to flow from an increase in the value of their shares due to being controlled by the more financially stable North Canadian.

The deal with North Canadian represents $4.74 for each Bankeno common share plus $0.39 for each warrant which has the right to purchase one common share for $9. This is just slightly higher than the value of Turbo's topping-up obligation. Thus, if a minority shareholder in Merland had accepted the amended follow-up offer, being the 1.4 Bankeno shares plus 1 warrant exercisable at $9, such shareholder could now tender to the follow-up offer North Canadian intends to make and walk away with cash of $7.03,[15] a far cry from the $13.13 they were entitled to 3 years ago.

The deal with North Canadian is scheduled to close on September 28, 1984 at which time Turbo will seek a release from the Commission of its obligations to the Merland minority.

Section 91(1)

Three basic conditions must be fulfilled in order to trigger the obligation to make a follow-up offer under section 91(1). They are:

(1) a take-over bid made in reliance on a private agreement exemption;

(2) a ''published market'' for the target securities; and,

(3) a price paid for the securities under the private agreement in excess of the ''market price''.

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[13] Globe and Mail (Toronto), Report on Business, October 26, 1983, p. B1.

[14] Globe and Mail (Toronto), Report on Business, June 20, 1984, p. B19.

[15] $4.74 × 1.4 + $0.39 = $7.03.

The first condition rests on the existence of a take-over bid made in reliance on a private agreement. "Take-over bid" is defined in section 88(1)(k) of the Act. This requires, *inter alia*, that, if the take-over bid were successful, the offeror would own more than twenty per cent of the outstanding voting securities of the company. Nowhere in the definition of take-over bid, or indeed anywhere in section 91(1), is there a reference to the acquisiton or sale of control. The ownership of more than twenty per cent of the voting securities may or may not represent effective control. However, even if control is not acquired, an acquisition may nonetheless be a take-over bid under the Act, and the offeror will be required to make the follow-up offer, unless an exemption can be obtained. Conversely, if control is acquired but the offeror's aggregate ownership remains below twenty per cent, no follow-up offer is required. Thus there may be a sale of control at a premium, but no follow-up offer will be required. The application of section 91(1) does not therefore turn on the acquisition of control, and the Act does not appear to have addressed the specific concerns stemming from the sale of control blocks that initiated the enactment of the section.

Given that there is a take-over bid it must be made in reliance on the exemption in clause (c) of section 88(2). This is the private agreement exemption, which covers agreements to purchase securities from fewer than fifteen shareholders. Under the old Act, if a take-over bid was made by private agreement, the offeror was exempt from the take-over provisions generally and no follow-up offer was required. Under the present Act, the offeror is still exempt from the requirements of Part XIX (dealing with take-over bids), but is subject to section 91(1).

The second condition necessary to trigger the follow-up offer obligation is the existence of a published market for the securities as defined in section 88(1)(j) of the Act.

The final prerequisite is that the value of the consideration paid for any of the securities exceed the market price of those securities at the date of the private agreement, plus reasonable brokerage fees or other commissions. Market price is defined in section 88(1)(e) of the Act and section 162(3) of the governing regulation.[16] An allowable premium of fifteen per cent has been built into the definition and it is only when a premium in excess of fifteen per cent is paid that the follow-up offer is required. The Committee To Review the Provision of the Act Regulating Take-Over Bids ("Review Committee") commented on this in its interim report:[17]

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[16] Reg. 163(3): For the purposes of subsection 91(1) of the Act, "market price" of a class of securities on a particular date is an amount 15 per cent in excess of the simple average of the closing price of securities of that class for each day on which there was a closing price and falling not more than ten business days before the relevant date.

[17] (1981), 2 O.S.C.B. 213A, at p. 235A.

> . . . this arbitrariness is a feature of the existing follow-up offer obligation which disturbs us. It is inconsistent to consider that a transaction at 115% of market price is not abusive to the other shareholders, but to conclude that 115.1% is abusive . . .

The crucial question with respect to Turbo's acquisition was whether the first of the three conditions had been satisfied. The Commission found that Turbo did make such a take-over bid. Van Camp J. of the Divisional Court, in her decision of February 18 to send the value issue back to the Commission, merely stated:[18]

> The applicants [Turbo] have satisfied me that section 91(1) is not applicable as certain conditions thereunder have not been met.

Her Ladyship did not elaborate on what conditions had not been met. It is submitted, however, that it could only have been that the take-over bid had not been made in reliance on a private agreement exemption. The other preconditions were clearly fulfilled. The Merland shares were trading on the Toronto and Montreal Exchanges, and thus there clearly was a published market for the securities purchased. The Adam shares were purchased for a price of $13.13 per share and those under the exchange bid, 13⅛ (net) or $13.125 per share. This price was in excess of 115% of the established market price for Merland shares at that time so an excess premium was paid by Turbo.[19]

Whether the take-over bid condition had been met or not depends on whether the two purchases made by Turbo were to be treated as two transactions or as a single transaction. One interpretation is to view them as two distinct purchases. The purchase of the Adams shares alone would not fall within the definition of a take-over bid in section 88(1)(k), as Adams and Merland Holdings Ltd. were resident in the Bahamas and not in Ontario. There being no take-over bid under the Act, there could be no reliance on the private agreement exemption in section 88(2)(c). Thus Turbo would not legally be bound by the section 91(1) follow-up offer. The exchange bid would be a take-over bid under the Act. The exemption for it, however, would be based on section 88(2)(a) so, again, section 91(1) would not be triggered. Even if the section 88(2)(a) exemption were denied on the basis that the bid contravened the Toronto Stock Exchange by-laws, this would still not bring the company within section 91(1). On this view of the two transactions, Turbo would have no legal obligation to make a follow-up offer.

The Commission, however, did not take such a distinct view of the two transactions. As Turbo's stated purpose in the exchange bid was to acquire effective control of Merland through the two purchases, the Commission viewed them as simply two steps in a single transaction. They were made contemporaneously with a single objective. "The interlocking of the two purchases indicate[d] that they can properly be regarded as one

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[18] (1982), 3 O.S.C.B. 55C, at p. 56C (Ont. Div. Ct.).

[19] *Supra*, footnote 4, at p. 85C.

take-over bid''.[20] Furthermore, they were made ''without compliance with section 89 and in purported reliance on the exemptions in paragraphs (a) and (c) of section 88(2)''.[21]

The Commission, in effect, merged the two transactions. It appears to have pooled together the individuals who sold Merland shares to Turbo. Some shareholders (Merland Holdings Ltd.) sold by private agreement and some were resident in Ontario (in the exchange bid). Therefore, the Commission reasoned, there was a take-over bid and reliance on a private agreement exemption triggering section 91(1).

However, contrary to the situation in *Re Atco Limited, IV International Corporation and Canadian Utilities Limited*,[22] neither of the transactions by Turbo were dependent on the success of the other. Both purchases were independent, and if Turbo had carried the transactions out at different times neither of them would have triggered section 91(1). It appears that the primary basis for the Commission's decision is the fact that they were carried out contemporaneously. In the decision of the Divisional Court on the appeal from the compliance order, Southey J. declined to express any view on whether the Commission was correct in its opinion that section 91(1) was applicable to the Turbo take-over bid.[23]

The Commission's reference to ''the interlocking of the two purchases''[24] suggests that the Commission has applied Policy 9.3B[25] on linked transactions. This policy was adopted following a notice by the Commission that ''it may be contrary to the public interest for an offeror to acquire all of the holdings of certain shareholders through private contracts and thereafter in a linked transaction to offer for only part of the publicly-held shares''.[26] On the basis of this concern, the Policy states:[27]

> 3. It is also recognized that an offeror will commonly purchase securities pursuant to a private agreement or private agreements prior to making the actual take-over bid. If such private agreements constitute a take-over bid exempted from the requirements of Part XIX by section 88(2)(c) and a follow-up offer is required pursuant to section 91(1), there appears to be no problem. But where the private agreements do not constitute a take-over bid or where it is exempted under section 88(2)(c) and no follow-up offer is required to be made, the Commission is concerned for the equal treatment of the remaining shareholders during a subsequent take-over bid. It is the view of the Commission that when such private agreements are entered into by a purchaser with the intention of making a take-over bid at a later date, they should be considered in determining whether the same consideration is being offered to all holders of the same class of securities for the purpose of section 91(3). For this

[20] *Ibid.*, at p. 82C.

[21] *Ibid.*

[22] (1980), 2 O.S.C.B. 412.

[23] *Supra*, footnote 11, at p. 239C.

[24] *Supra*, footnote 20, at p. 82C.

[25] (1982), 4 O.S.C.B. 551E.

[26] (1981), 1 O.S.C.B. 6A.

[27] *Supra*, footnote 25, at p. 552E, para. 3.

> purpose, the Commission will presume that this intention existed at the time of the private agreement where the announcement of the take-over bid is made within 180 days of the date of the private agreement. This presumption may be rebutted upon an application under section 99.

This policy specifically states that it is applicable "for the purpose of 91(3)". It was so applied in *Re Trans Mountain Pipeline Company Ltd.*,[28] in which the Commission applied section 91(3) notwithstanding that the private agreement was with shareholders outside Ontario. The Commission found that the private agreement was linked with the subsequent take-over bid and required the Company to make the offer under the take-over bid at least equal in value to that paid under the private agreement. However, with respect to Turbo, the Commission has extended Policy 9.3B for purposes of section 91(1).

The application of section 91(1) to Turbo also raises the issue of whether the Commission is attempting to regulate a transaction which was concluded outside Ontario, between parties neither of which were Ontario residents. International law clearly imposes a territorial limit on the scope of legislative power. The Commission could not require Turbo to make a follow-up offer solely on the basis of the Adams purchase as the offeree's address on the books was outside Ontario; thus there was no "take-over bid" made under the Act. Nor could the Commission require Turbo to make the follow-up offer solely on the basis of the exchange bid as it did not bring the Company within the preconditions in section 91(1). However, the Commission sought to impose the follow-up offer obligation as there had been a private agreement at a premium and there were remaining minority shareholders in Ontario. The Commission imposed the obligation (aside from Turbo's acquiescence) through the linked bid policy or interlocking of the bids, thus effectively regulating the extraterritorial purchase of the Adams shares.

The extraterritorial application of the Act was before the court in *Re Ontario Securities Commission and Electra Investments (Canada) Ltd.*,[29] but Southey J. declined to decide the matter. In that case, the Commission was seeking a compliance order to require Electra to comply with the take-over provisions of the Ontario Act by making an offer to Ontario shareholders of Energy & Precious Metals Inc., based on a purchase of shares by Electra on the Montreal Stock Exchange. Southey J. held that, as a general rule, an application for compliance should not be made until any appeal from the decision of the Commission has been disposed of, or the time for appealing has passed. In the *Electra* case there was an appeal pending.

It was further held that "the doctrine of *res judicata* prevents a party against whom the Commission has found a failure to comply with the Act

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[28] (1982), 4 O.S.C.B. 552C.

[29] (1984), 45 O.R. (2d) 246 (Ont. H.C.).

from re-litigating on a motion under section 122 the question of whether there has been a failure to comply with the Act''.[30] Thus the Court refused to interfere with the Commission's determination that ''the take-over provisions of the Ontario Act should be construed as applying to transactions in the province of Quebec, and that those provisions are valid when so construed''.[31]

The differentiating factor between the *Turbo* and the *Electra* cases is the subsequent exchange bid by Turbo on the Toronto Stock Exchange which the Commission used in order to acquire jurisdiction. However, given that neither purchase alone was sufficient to bestow jurisdiction on the Commission under section 91(1), it is difficult to see that together they do. The policies of the Commission do not have the force of law (though a court may be loath to interfere) and can not be used to impose legal obligations and preconditions that the legislature did not instill in section 91(1).

Alternatives to Section 91(1)

A finding that Turbo was not legally bound by section 91(1), would not necessarily have ended Turbo's problems. There were two other grounds on which the Commission might have been able to assert jurisdiction.

First, the Commission was of the opinion that section 91(3) applied to the offer which Bankeno made, even if it were not legally bound to make the follow-up offer.

If the exchange bid were an exempt bid, then section 91(3) would not apply to the subsequent offer made to the remaining shareholders of Merland. Section 88(2) clearly implies that an exempt take-over bid is not subject to subsection (3) of section 91. However, the position would be different if it were found that the Toronto Stock Exchange by-laws had been violated by the exchange bid in that the purchase date for the Adams shares, July 3, fell during the period of the exchange bid contrary to section 23.02(8) of the Exchange by-laws, and thereby rendering it a non-exempt bid. In this case, where a non-exempt take-over bid is followed by a general offer to the remaining shareholders, it is likely that section 91(3) would apply to the transaction, and all shareholders would have to be offered the same consideration.

It is submitted that a court would uphold the Toronto Stock Exchange officials' position on the relevant date of the Adams purchase (i.e. June 24)

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[30] *Ibid.*, at p. 253.

[31] *Ibid.*, at p. 254. Cf. *Re Humboldt Energy Corporation* (1983), 5 O.S.C.B. 8C, where the Commission denied jurisdiction to order a follow-up offer on the grounds that the offeree corporation's address on the books was outside Ontario.

although the law on this point is not settled.[32] The Exchange by-law refers to "purchases"; thus the issue is to determine on which date Turbo purchased the Adams shares. Though the time for performance was delayed until July 3, it is submitted that the agreement was concluded and a purchase effectively made on June 24. Given the uncertainty in this area if the matter were decided judicially it would likely turn on the intention of the Exchange by-laws which should be to prevent offerors from entering into such binding contracts. Otherwise the by-law could be avoided by simply postponing the closing until after the exchange bid was complete, thus allowing binding contracts for the purchase of shares to be entered into during the exchange bid.[33]

While Turbo appears to have taken the position at the July 9 hearing that the exchange bid and subsequent follow-up offer were simply two stages in an integrated transaction to treat all the Merland shareholders equally[34] this should not change the legal obligation of the company to make the equivalent value follow-up offer.

Second, even if Turbo was not bound by section 91(1) or 91(3), it had given an unconditional undertaking to make an equal value follow-up offer. The legal effect of that offer turned in part on the exact nature of the undertaking. The exchange bid clearly stated Turbo's intention to make some form of offer to the remaining Merland shareholders. It is not clear however, whether the undertaking was simply that made in the exchange bid or whether it was to make an offer under section 91(1).

The exchange bid stated that Turbo would,[35]

> . . . effect *or cause to be effected*, a transaction . . . whether by way of a take-over bid . . . or *in some other manner*, which will provide . . . *the opportunity* to receive a consideration per common share of the Company (as presently constituted) at least equal in value . . .

Such an undertaking has subtle but distinct differences from the section 91(1) follow-up offer, and the company denied throughout all proceedings that the offer was made pursuant to section 91(1).[36] However, the issue

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[32] It should be noted; notwithstanding that the issue concerns a by-law of the T.S.E., the Commission has the supervisory authority to rule on it; under section 22(2) of the Securities Act. This section gives the Commission authority to "make any decision . . . with respect to any by-law, ruling, instruction or regulation" of the T.S.E.

[33] It might also be worth noting that the Securities Exchange Act, 15 U.S.C. 78a-78ii, as amended, s. 3(13) defines a purchase so as to include a contract to purchase.

[34] *Supra*, footnote 4, at p. 74C, Turbo's submission to the Commission on the July 9, 1981 hearing:

> It is simply structured to permit a purchaser who has acquired an initial block of shares by direct contract, to make an unconditional and equivalent offer to all of the remaining shareholders in a two-stage integrated transaction within 180 days of the initial purchase.

[35] *Supra*, footnote 4, at pp. 71C, 72C. (Emphasis added).

[36] Such a denial was made in the June 27 exchange bid and again following the December 21 hearing in which the Commission granted Turbo an extension of the initial

seems to have been specifically put to the Company by the Commission at the July 9 hearing. Counsel for Turbo clearly stated that the Company was "attorning to the jurisdiction of Ontario" with respect to section 91.[37] Furthermore, the time period used throughout, commencing with the December 29 deadline, was the 180 days found in section 91(1). Thus it appears that there is a strong case for establishing that at the July 9 hearing Turbo did undertake to submit itself to the Commission's jurisdiction under section 91(1). Turbo may not have made the offer, "pursuant to section 91(1)". It appears, however, that the offer was made on the undertaking that it would meet all the requirements of a section 91(1) follow-up offer.

The other, more difficult, question is the legal effect of the undertaking. Given that the Commission has no legal jurisdiction over the offer if there is no legal obligation to make it, can the parties agree to enlarge the Commission's jurisdiction? If it is found that Turbo did submit to the application of section 91(1), then the Commission's jurisdiction to administer the Act found in section 2(1) might give it the jurisdiction required. It might also be argued that Turbo is estopped from denying jurisdiction, having submitted to it until the hearing of February 17.

The Equal Value Offer

Turbo's problems began when the minority shareholders of Merland disputed that the value of the offer(s) made by Bankeno was equal to $13.13 per share. Under section 91(1) the follow-up offer must be "for a consideration per security at least equal in value to the greatest consideration paid" under any private agreements.

One of the issues raised by Turbo was the Commission's jurisdiction to determine the value of the offer.[38] The jurisdiction required appears to be found in section 99(c) of the Act. That provision authorizes the Commission to determine if a consideration "proposed to be offered" is at least equal in value to the consideration of the earlier agreements. This jurisdiction may be limited by the phrase "proposed to be offered". Read literally, this wording limits applications to a preclearance of the equivalency of the offer. Once the offer has been made the Commission loses jurisdiction under this section, although a statement made by Boland J. in *Ontario*

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deadline for the follow-up offer. The Commission indicated that the order was made on Turbo's application under section 99(e) to extend the time within which Turbo was required to make a section 91(1) follow-up offer. Turbo subsequently wrote to the Commission insisting that the application had been made pursuant to the exchange bid and not under any section 91(1) obligation. However, Southey J. of the Ontario Divisional Court ((1982), 4 O.S.C.B. 229C) stated that Turbo had lost the right to object in this instance as it took no formal action to appeal the decision.

[37] *Supra*, footnote 4, at p. 76C.

[38] See Globe and Mail (Toronto), Report on Business Feb. 3, 1982, p. B1. The President of Turbo Resources Ltd., Robert Brown, questions the O.S.C.'s jurisdiction to rule on the valuation.

Securities Commission v. *McLaughlin*[39] would seem to dispute this interpretation. However even if the Commission does lose jurisdiction under section 99(c) once an offer has been made it could always assert jurisdiction under its general powers in section 2(1). The wording in subsection 2(1) may not be as clear as that used in creating other administrative bodies; it states simply that the Commission "is responsible for the administration of this Act". Spartan though this language may be, it was surely the legislature's intention to create a body to deal with precisely the kind of issue being raised here. The Commission is a specialized tribunal with expertise in the application of provisions such as section 91(1) and 91(3), and it is probable that a court would find that the Commission had general jurisdiction to entertain the equal value issue, subject to the applicant's right to appeal the Commission's decision.

With respect to the issue of how the value of the follow-up is to be determined, it should first be stated that it is not necessary for the offer to be identical in form to that paid under the private agreement. Thus, in itself it was irrelevant that Turbo had paid cash for the Adams shares, and that the Bankeno offer consisted of the package of shares and warrants. The crucial question was whether that package was equal in value to the cash paid for the Adams shares.

To date, the Commission has not issued a policy statement on how it intends to determine value under section 91(1). The Turbo case was the first to raise directly and in detail the issue of valuation. There were basically four approaches to determinng value put forth in the February 19 hearing. These were: (1) the net asset value approach; (2) the market value approach on a discount basis; (3) the market value approach on a cash flow basis; and (4) the market approach, overall trading price estimate.

The net asset value approach involves determining the total asset value of the company less its liabilities, divided by the number of outstanding shares. The number of outstanding shares would be calculated assuming full acceptance of the Bankeno offer. This approach will not always lead to the same valuation. There will always be variations resulting from the different accounting procedures used.

The market value approach on a discount basis is primarily used in valuing minority shares. The net asset value of the share is simply discounted by some appropriate figure. The appropriateness of the approach lies in the inability of the minority shareholders to control the assets of the corporation. Thus the shares are worth "something" less than the full net asset value. The discount figure used is largely an arbitrary decision and will vary between companies. However, there are some factors which should be considered. Perhaps the main one is any provisions in the company's articles and by-laws which limit the rights of minority sharehol-

[39] (1982), 3 O.S.C.B. C1, at p. C8 (Ont. H.C.).

ders. Another is the presence of an absolute majority shareholder rather than one with only effective control. The right to cumulative voting in the election of the directors may also bear on the position of the minority shareholders in the company.

To make a valuation on the cash flow basis, the estimated cash flow per share for the year is multiplied by a cash flow multiple. Cash flow is approximately equivalent to income from operations plus depreciation, depletion and other expenses that have no effect on working capital. The cash flow multiple is an arbitrary figure that varies with the industry.

The fourth approach, the overall trading price estimate, is simply an estimate of what shareholders could get if they sold their shares on the market. Assuming the market has relatively perfect information, the difference in value between the discounted basis and the estimated trading value should be minimal. The trading price should reflect the market's estimate of the appropriate discount factor.

The Commission clearly stated that the market price of the follow-up offer securities was the appropriate way to determine the value of the offer, and that approach was in due course approved in the Divisional Court.[40] The Commission stated:[41]

> The Commission can come to no other conclusion in the present case but that the conversion of the value of the securities into dollars can only be effected by determining what the market price of those securities would be at the date of the offer.

It was necessary to determine the "market price" of the Bankeno Units in the absence of them having yet been traded. The Commission noted that with respect to the investment dealer witnesses:[42]

> Their approach to determination of "market price" was the same in each instance. "Market price" would be some lesser amount than "net asset value" of New Bankeno determined by applying an appropriate discount.

Thus while there is no clear statement as to which of the three market value approaches was adopted it would appear that the discount basis was favoured in the circumstances where there was no existing trading market that accurately reflected the offeror issuer after the acquisition was completed.

In Re Harlequin Enterprises Ltd. and Torstar Corp.,[43] decided under section 91(3), the value of the share and warrant package was based on market value and no other approach appears to have been suggested. The emphasis was, however, on the estimated trading value as there was no

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[40] (1982), 4 O.S.C.B. 245C, at p. 246C (Ont. Div. Ct.).

[41] *Supra*, footnote 4, at p. 85C.

[42] *Ibid.*, at p. 86C. It should be noted that New Bankeno refers to Bankeno after the latter's assets had been consolidated with assets acquired from Turbo and Merland.

[43] (1981),1 O.S.C.B. 62C.

discussion of the appropriate discount factor. In the *Turbo* case it was stated:[44]

> There was a common understanding however that the market price would be the price paid in a 'normal' market, being one in which there is neither any undue selling pressure nor undue buying demand distorting the 'market price' of the securities.

The only other point to be noted on the market value issue is the relevant date for the determination. As was noted in the passage quoted earlier[45] from the Commission's decision, the Commission was concerned with the value of the offer on the date it was made and not with the realization of the equal value consideration over a period of time. This might give further weight to favouring the estimated trading value approach if it and the discount basis gave values very close to the amount required to be offered.

Once the basic question of the approach to valuation was settled, two ancillary, though nonetheless important issues, remained. First, how was the warrant in the Bankeno offer to be valued. Generally the parties were agreed that the "put" price should be discounted to its present value as it could not be realized for a year after the offer terminated. Only the representatives from Nesbitt Thomson Securities Ltd. attempted to argue that the "market value" of the warrant following completion of the offer should be used. He estimated this to be $3.75 as against the $2.75 "put" price. Aside from figures presented by Nesbitt Thomson, this higher value for the warrant would still not have brought the value of the package up to the $13.13, although the upper limit of the Pitfield Mackay Ross range would have been close to (13.10). While most of the dealers apparently rejected the approach to valuing the warrant put forth by Nesbitt Thompson Securities Ltd. it would seem to be a consistent method of determining the market value on the day the offer was made. However, it seems the Commission preferred to be on the conservative side of this issue as the "put" price, even at present value, was a relatively identifiable amount while the market value of the warrant was more subjective.

The second ancillary question was whether some allowance should be made for inflation over the six months or so that had elapsed since the original offerees received their cash. The Commission made no ruling on the issue as they found the offer, without subtracting a further amount for inflation, "substantially less than the take-over price".[46]

However, the Commission did make reference to Boland J.'s comments on the issue in *Ontario Securities Commission* v. *McLaughlin*.[47] The court there stated that interest should be taken into account as the shareholders who had already been paid would probably have reinvested the

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[44] *Supra*, footnote 4, at p. 86C.

[45] *Supra*, footnote 41.

[46] *Supra*, footnote 4, at p. 86C.

[47] *Supra*, footnote 39.

proceeds of the sale, and that inflation, tax implications and fluctuations in the market are also factors to be considered. Moreover, the Commission itself has published one notice concerning the determination of equal value under section 91(1). The notice stated that the Commission would consider a variation between the price paid under a private agreement and that proposed in a follow-up offer when the variation derives from economic vicissitudes between the two dates.[48]

One of the reasons that has been given[49] for the follow-up offer(s) not being equal in value to $13.13 per share was the deterioration in the market generally and in the oil and gas market in particular, following the 1981 growth craze. Many companies, including Turbo, now have to service enormous debt charges, resulting in a general decline in performance. However, despite the reference to Boland J.'s judgment and its own notice, the issue of any deficiency in Bankeno's offer due to the general decline in the market does not appear to have been addressed by the Commission in either the February 19 or the March 9 hearings.

The equal value issue can cause particular problems for minority shareholders when the follow-up offer is not in a form identical to the original offer. With respect to Turbo, the decision that Bankeno's offer was not good enough was announced on a Friday and the time for acceptance of the offer was to terminate the following Monday. The dilemma for the offerees was whether to accept the Bankeno offer as it was, or refuse to accept it in the hope that the Commission would win the long-run legal battle to force Bankeno to make a better offer. It appears that under the Act a minority shareholder can not hedge his bets. A shareholder whose shares are tendered and taken up within the time periods set out has no legal right to participate in any sweetened deal. Section 90(4) only applies to a variation in the terms of a bid before the expiration of the bid. There is no corresponding section requiring an increase in consideration made subsequent to the expiration of the offer to be paid to offerees whose securities have already been taken up.

Conclusion

The primary conclusion to be drawn from the Turbo-Merland saga is that on the facts Turbo was not required, under the Act, to make a follow-up offer as Turbo did not make a take-over bid in reliance on the private agreement exemption. Neither the Adams purchase nor the exchange bid brought Turbo within the parameters of section 91(1). The difficulties Turbo subsequently encountered flowed in large measure from its undertaking to make the follow-up offer.

The other observation that may be made about the case is that broad interpretations were given to both the Act and the transactions in an effort to

[48] (1981), 2 O.S.C.B. 23A.

[49] Globe and Mail (Toronto), Report on Business, March 10, 1982, p. B3.

protect minority shareholders from perceived abuse. In fact, it appears from the Commission's actions that a private agreement at a premium, by definition, abuses the rights of minority shareholders.

With respect to section 91(1), it remains unique in the North American securities markets. When the Ontario Legislature enacted the follow-up offer provision in 1978 it was hoped, if not anticipated, that other provinces would follow suit, particularly those western provinces which had hitherto been uniform act provinces. However, these changes have not come about. Manitoba has enacted a new Securities Act which does contain follow-up offer provisions, but the Act has not yet been proclaimed in force.[50] Alberta also has a new Act,[51] modeled on Ontario's; however, it does not contain the follow-up offer obligation. Quebec brought in a new Act[52] in 1983 containing no follow-up offer obligation but a restricted private agreement exemption.[53]

In September of 1983 the Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids[54] was released (the "Practitioners Report"). This committee, appointed by Henry Knowles, Peter Dey's predecessor as Chairman of the Commission, was made up of three Toronto securities law practitioners. With respect to fundamental principles the Committee reports:[55]

> In addition, we believe that shareholders of an offeree issuer and public investors generally should be confident that transactions which may affect the *de facto* control of public security issuers will be made as a matter of principle, on a basis which requires identical treatment of holders of the same class of securities and that all such shareholders will have an equal opportunity to participate in the benefits which may accompany a change of effective control of public issuers.

With respect to the existing follow-up offer obligation the Committee concludes that it is neither cost effective nor practical. The report identifies three major concerns with the existing provision. The first stems from the difference in timing between the exempt private transaction with the major shareholder and the subsequent general follow-up offer. During the time between the two transactions intervening events may substantially alter economic circumstances, thus preventing an equivalent offer from being made to the minority shareholders. This would certainly seem to have been a factor in the Turbo case as such intervening events included the general economy falling into a recession with an attendant rise in interest rates. The

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[50] S.M. 1980, c. 50.

[51] S.A. 1981, c. S-6.1.

[52] S.Q. 1982, c. 48.

[53] *Ibid.*, s. 116(2). Exemption only for private agreements with less than 15 holders at a price not exceeding 115 per cent of market.

[54] Report of the Committee to Review The Provisions of The Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids, September 23, 1983.

[55] *Ibid.*, p. 1.

oil companies were particularly hard hit having large amounts of debts due to the prior flurry of acquisitons in the industry.

The second major problem with the existing follow-up offer obligation cited in the Practitioners Report "is that it has forced the Commission and the courts to become involved in extensive and costly hearings to determine, in light of conflicting expert evidence, difficult issues of fact, without any necessary assurance of tangible benefits for minority security holders".[56] The numerous court and Commission hearings held in relation to the Turbo affair are a prime example of this problem and the minority shareholders will never receive even a dollar from Turbo.

The third major problem is a general concern about the effect the follow-up offer obligation has on investment opportunities available to Canadian investors. The Committee states:[57]

> All else being equal, the follow-up offer obligation leads to more Canadian companies becoming wholly-owned subsidiaries of other companies . . .

Flowing from these concerns and the resulting conclusion as to the inappropriateness of the follow-up offer obligation the Committee proposed that the obligation be abolished. In substitution therefore the Committee proposed a prohibition on private agreements at greater than 115 per cent of the average trading price plus reasonable brokerage fees or commissions actually paid, unless the purchaser holds greater than 50 per cent of the outstanding voting rights.

The Committee did propose some relief from this general prohibition, suggesting that an exemption should be permitted where the purchaser makes a contemporaneous topping-up cash deposit for the benefit of the minority shareholders. In *Turbo* the Merland minority eventually accepted a topping-up offer although the payment was contingent upon sufficient proceeds being generated from the sale of Bankeno. Turbo could simply not afford a cash deposit.

In addition to the prohibition on the private agreement exemption the Practitioners Report also introduces the concept of integration. The draft legislation in the Report[58] requires that where an offeror has acquired any voting securities of the offeree issuer through a private agreement within 180 days of a general take-over bid other than an exempt bid, the consideration paid under the take-over bid must be at least equal to the highest consideration paid under the private agreement and the offeror must acquire the same percentage of securities from those who tender under the take-over bid as he acquired from the private agreement vendor. The draft also contains post-bid integration provisions which mirror that for the pre-bid.[59]

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[56] *Ibid.*, p. 16.

[57] *Ibid.*, p. 16.

[58] *Ibid.*, p. 33, s. 91 (1).

[59] *Ibid.*, p. 34, s. 91(4).

In *Turbo* the Commission linked the Adams purchase and the exchange bid on the basis of Turbo's intention to acquire control. The Practitioner's draft provisions would apply regardless of intention. They would not however have affected the outcome in *Turbo*. The private agreement prohibition would still not have impinged upon the Adams purchase as that offer was not "made to any person or company who is in Ontario, or made to or accepted by any holder in Ontario of the issuer".[60] The integration provisions would not have affected the exchange bid as it was an exempt bid. However, the Commission could still rely on Turbo's undertaking. Perhaps the undertaking would not have been given in the absence of the existing follow-up offer obligation, but one has to question why it was given under any circumstances.

The Practitioners Report was followed in November 1983 by the Report of the Securities Industry Committee on Take-Over Bids[61] (the "Industry Report"). After an extensive review of the history of the follow-up offer and all theories relating to it, the Industry Report concluded that the restricted private agreement exemption or *pro rata* model, similar to that found in the Quebec Securities Act,[62] was the best solution.[63] Under this model the private agreement exemption is available if the purchase is from five or fewer persons and the premium paid does not exceed 120 per cent of the average trading price. If an offeror cannot fit himself within these conditions then he must make a formal offer to all shareholders for all shares or for less than all on a *pro rata*[64] basis. Unlike the Practitioners Report the Industry Report concludes that the principal criterion is the existence of a substantial premium and not whether control has changed. Thus there is no automatic exemption provided for the shareholder who already has legal control.[65]

Again the impact of these provisions on Turbo would hinge on the Commission's jurisdiction over the Adams purchase which simply does not exist.

Major amendments to the Securities Act of Ontario have been proposed following the reports discussed above and a general concern for updating the Act. The latest draft of the proposed amendments was released[66] in August 1984, following a meeting held in July among the various provincial securities commissioners and the Director under the

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[60] *Ibid.*, p. 33, s. 90.

[61] The Regulation of Take-Over Bids in Canada: Private Agreement Transactions, Report of the Securities Industry Committee on Take-Over Bids, November 1983.

[62] *Supra*, footnote 54.

[63] *Supra*, footnote 61, p. 42.

[64] *Ibid.*, p. 41.

[65] *Ibid.*, pp. 41-42.

[66] (1984), 7 O.S.C.B. 3419.

Canada Business Corporations Act.[67] This latest draft substantially amends the existing law, and adopts provisions similar to those in the Industry Report.

The follow-up offer obligation is deleted and the private agreement exemption is restricted to agreements with not more than five persons or companies, including persons outside of Ontario, where the premium paid does not exceed 115 per cent of the average trading price calculated on a twenty day trading basis. As in the Industry Report no exemption is provided for the shareholder with legal control. There is also no exemption provided for a "topping-up" offer, though such an exemption would be considered if it has the approval of the minority shareholders as it did in *Turbo*.

Although earlier drafts of the Ontario Act amendments did contain provisions regulating pre-bid integration this latest draft does not. The definition of take-over bid has been amended to include an offer made to "any person or company who is in Ontario or any holder in Ontario of the offeree issuer".[68] This would still not encompass the Adams purchase as neither Merland Holdings Limited nor Mr. Adams were in Ontario or had any connection with Ontario. Under this latest draft legislation, in order to protect the Merland minority, the Commission would still have to link the Adams purchase and the exchange bid, and attempt to have the exchange bid regarded as a bid for all.

Thus it appears that none of the proposed amendments to the Act would have provided the Merland minority shareholders with a happier ending. However the proposed amendments will serve to tighten up the existing system and restrict the degree of administrative discretion. Unfortunately, many of the issues arising in the *Turbo* case will never come before the courts for final determination. Thought doubtlessly the Commission has the practical authority to enforce its view of a transaction by effectively cutting off a company's access to the Ontario capital market, it is clear from the *Turbo* case that such authority cannot be an effective or efficient substitute for the application of clearly worded, definitive legislation.

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[67] S.C. 1974-75-76, c. 33, as amended.

[68] *Ibid.*, p. 373, s. 88(1)(s).

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