Case Comments

Commentaires d'arrêt

AGENCY—AGENT ACTING BEYOND ACTUAL AUTHORITY—LIABILITY OF UNDISCLOSED PRINCIPALS—THE DEMISE OF *WATTEAU* V. *FENWICK*: *Sign-O-Lite Plastics Ltd.* v. *Metropolitan Life Insurance Co.*

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Introduction

In the law of agency the most difficult and controversial decision is that of Wills J. in *Watteau* v. *Fenwick*.[1] It has been criticised by commentators[2] and distinguished or not followed by judges.[3] Several years ago an English judge described the case as puzzling, the argument for the plaintiff as fallacious, and the doctrine of the case as one that courts should be wary about following.[4]

The case concerned the liability of an undisclosed principal for unauthorised contracts entered into by the principal's agent. The agent was the manager of a beer house. The principal was a firm of brewers that employed the agent in this capacity. On the license over the door of the premises only the manager's name appeared. This indicated to the world at large that the licensee was not an agent but the owner and therefore the principal to any contract into which he entered. The brewers forbade the manager to buy certain articles for the business of the beer house, although the purchase of such articles was normal and usual on the part of those who managed or ran such a business. The brewers undertook

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[1] [1983] 1 Q.B. 346 (Q.B.D.).

[2] F.M.B. Reynolds, Bowstead on Agency (15th ed., 1985), pp. 95-97, 317-320; G.H.L. Fridman, Law of Agency (6th ed., 1990), pp. 61-66; R. Powell, Law of Agency (2d ed., 1961), pp. 75-78; S.J. Stoljar, Law of Agency (6th ed., 1990), pp. 60-66; A.L. Goodhart and C.J. Hamson, Undisclosed Principals in Contract (1932), 4 Camb. L.J. 320; J.A. Hornby, The Usual Authority of An Agent, [1961] Camb. L.J. 239.

[3] *Miles* v. *McIlwraith* (1883), 9 App. Cas. 120 (P.C.); *Becherer* v. *Asher* (1896), 23 O.A.R. 202 (Ont. C.A.); *McLaughlin* v. *Gentles* (1919), 51 D.L.R. 383, 46 O.L.R. 477 (Ont. App. Div.); *Massey Harris Co. Ltd.* v. *Bond*, [1930] 2 D.L.R. 57, [1930] 1 W.W.R. 72 (Alta. S.C.). See also *Johnston* v. *Reading* (1893), 9 T.L.R. 200 (Q.B.D.); *Lloyd's Bank* v. *Suisse Bankverein* (1912), 107 L.T. (K.B.D.), aff'd (1913), 108 L.T. 143 (C.A.); *Jerome* v. *Bentley*, [1952] 2 All E.R. 114 (Q.B.D.); *International Paper Co.* v. *Spicer* (1906), 4 Com. L.R. 739 (Aust. H.C.).

[4] *Rhodian River Shipping Co. SA.* v. *Halla Maritime Corp.*, [1984] 1 Lloyds Rep. 373, at pp. 378-379 (Q.B.D.), per Bingham J. Curiously, this case was not referred to in the British Columbia decision that is now under discussion.

to provide the articles in question themselves. In contravention of these instructions, the manager ordered such articles from the plaintiff, who later discovered the existence of the brewers and their relationship with the manager. In an action against the brewers for the price of the articles the plaintiff succeeded. The basis of this successful action was that once the brewers had put the manager in the position of appearing to be the owner of the business the firm of brewers were liable, as an undisclosed principal, for all contractual liabilities entered into by the manager within the usual course of such an agent's authority. In effect, the brewers were estopped from denying the manager's authority, even though (a) he was not held out as an agent, but as a principal, and (b) he had acted outside the actual authority given to him and against his express instructions. The violation by the manager of the limitations placed upon his authority made no difference. Since the plaintiff was unaware of such limitations, the plaintiff could not be affected by them.

The problem with this case is the logical one of saying that someone who is not known to be an agent can be regarded as having been held out by a principal as having an apparent authority, culled from what was usual or customary in the business in which the agent was engaged,[5] to contract in the way he did, although he lacked any actual authority to do so.[6] Since the doctrine of apparent authority is based upon a principal's holding out someone as his agent with authority to act on his, that is, the principal's behalf,[7] it is difficult to conceive of a case of undisclosed agency as involving the application of the doctrine of apparent authority. One who is not apparently an agent cannot logically be said to have been held out as having any authority at all, whether based on custom, what is usual, or otherwise. The only logical way in which such a conclusion can be reached is by starting from the premise that anyone who employs an agent and does not disclose that he is an agent, inferentially accepts liability for any and every transaction into which the undisclosed agent enters as long as such transaction has a connection with the business or other activity which has been entrusted to the undisclosed agent. The difficulty about this, however, from a practical, if not a logical point of view, is that it would expose the undisclosed principal to a potentially very wide, almost limitless liability for what the agent does. This might protect third parties transacting with the agent. It would mean that the principal has accepted a very great risk by employing an agent and allowing him to appear to be the principal.[8]

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[5] Bowstead, *op. cit.*, footnote 2, pp. 93-97, 111-118; Fridman, *op. cit.*, footnote 2, pp. 60-69, 107-114.

[6] On actual authority see Bowstead, *ibid.*, pp. 92-93; Fridman, *ibid.*, pp. 53-55.

[7] See the authorities cited, *supra*, footnote 5.

[8] It also seems to be rejected by the decision of the House of Lords in *Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240, on which see Bowstead, *op. cit.*, footnote 2, pp. 57-58; Fridman, *op. cit.*, footnote 2, pp. 78-79.

Not surprisingly other decisions have taken a contrary view of such a situation. They have held that the act of an undisclosed agent would not make an undisclosed principal liable, even where the act or acts in question related to the authority which, unknown to the third party, had been given to the agent.[9] These decisions hold that, if there has been a limitation placed on the agent's authority by the undisclosed principal, this will bind the third party dealing with the agent, even though the third party was unaware that he was dealing with an agent, and, therefore, was necessarily ignorant of any such limitations. What is surprising, however, is that no decision has firmly and decisively held that *Watteau* v. *Fenwick* was wrong and should be discredited. Such a decision can now be found in the judgment of the British Columbia Court of Appeal in *Sign-O-Lite Plastics Ltd.* v. *Metropolitan Life Insurance Co.*[10]

Sign-O-Lite Plastics Ltd. v. Metropolitan Life Insurance Co.

The facts in this case were as follows. In 1978 the plaintiff contracted with Calbax Properties Ltd. for the renting of an electronic sign to be installed and maintained by the plaintiff at the Market Mall shopping centre in Calgary. This rental agreement was to last for 61 months. It contained a clause providing for automatic renewal for a further term of 60 months in the event that neither party communicated a contrary intention to the other, in writing, more than 30 days before the end of the first term. By virtue of that clause the agreement was renewed in 1984. Prior to that date, however, the defendant, in two stages, acquired ownership of the company which owned and controlled the shopping mall in which the sign was displayed. As part of this transaction the defendants agreed to assume the 1978 rental agreement between Calbax Properties Ltd. and the plaintiff. When the defendant acquired ownership of the mall it was agreed with The Baxter Group Ltd. that the latter should manage the mall as agent for the defendant. For that purpose the Baxter Group Ltd. was given limited authority to enter into contracts on behalf of its principal, the defendants. The plaintiff knew nothing of the change of ownership of the mall. In other words the plaintiff was unaware of the existence of an undisclosed principal of The Baxter Group Ltd. In 1985, after the automatic renewal of the rental agreement in accordance with the original terms of 1978, The Baxter Group Ltd. entered into a new rental agreement with the plaintiff intended by both parties to replace the original agreement. At that time the plaintiff believed, as it had every reason to believe, that it was dealing with a different corporate form of the same owner with which the plaintiff had originally contracted in 1978. This new agreement was one which The Baxter Group Ltd. had not authority to contract. This

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[9] See, *e.g.*, *McLaughlin* v. *Gentles*, *supra*, footnote 3: *cf. Keighley Maxsted & Co.* v. *Durant*, *supra*, footnote 8.

[10] (1990), 73 D.L.R. (4th) 541, 49 B.C.L.R. (2d) 183 (B.C.C.A.).

was because (a) it did not disclose that The Baxter Group Ltd. was acting as agent for the defendant, and (b) it did not provide for cancellation on 60 days' notice. As a result of various later transactions, which are not relevant to the problem in this case, the plaintiff eventually sued the defendant for damages for breach of contract, that is, the contract entered into in 1985 (not the original contract of 1978). At the trial the plaintiff was unsuccessful in establishing liability under the 1985 agreement, and was awarded damages on the 1978 contract. The defendant appealed and the plaintiff cross-appealed.

Two issues were before the court. The first was whether the defendant could be liable, as an undisclosed principal. This raised directly the question whether *Watteau* v. *Fenwick* was good law and was part of the law in British Columbia. After considering the language of Wills J. in *Watteau* v. *Fenwick* and the subsequent case-law in which that decision had been rejected in Ontario[11] (as well as in Alberta[12]), Wood J.A., delivering the judgment of the court, declared that the reports he had researched were "bereft of any hint that *Watteau v. Fenwick* should be considered good law".[13] In view of the decisions to which reference has been made earlier, it is hardly a matter for surprise that Wood J.A. should have reached that conclusion.

Wills J. had said in 1883 that once it was established that a defendant was a real principal, the ordinary doctrine as to principal and agent applied—that the principal was liable for all the acts of the agent that were within the authority usually confided to an agent of that character, notwithstanding limitations as between the principal and agent upon that authority.[14] In 1919 in *McLaughlin* v. *Gentles*,[15] Hodgins J.A. of the Ontario Court of Appeal said:

> It seems to me to be straining the doctrine of ostensible agency or holding out to apply it in a case where the fact of agency and the holding out were unknown to the person dealing with the so-called agent at the time, and to permit that person, when he discovered that his purchaser was only an agent, to recover against the principal, on the theory that the latter was estopped from denying that he authorized the purchase. It appears to me that the fact that there was a limitation of authority is at least as important as the fact that the purchaser was an agent.

For reasons previously mentioned, the opinion of Hodgins J.A. is undoubtedly preferable to that of Wills J. But, as Wood J.A. said in the *Sign-O-Lite* case:[16]

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[11] *McLaughlin* v. *Gentles*, *supra*, footnote 3; *Massey Harris Co. Ltd.* v. *Bond*, *supra*, footnote 3.

[12] *Massey Harris Co. Ltd.* v. *Bond*, *ibid.*

[13] *Supra*, footnote 10, at pp. 548 (D.L.R.), 191 (B.C.L.R.).

[14] *Watteau* v. *Fenwick*, *supra*, footnote 1, at pp. 348-349.

[15] *Supra*, footnote 3, at pp. 394-395 (D.L.R.), 490 (O.L.R.).

[16] *Supra*, footnote 10, at pp. 548 (D.L.R.), 191 (B.C.L.R.).

> It is astonishing that, after all these years, an authority of such doubtful origin, and of such unanimously unfavourable reputation, should still be exhibiting signs of life and disturbing the peace of mind of trial judges.

It was time to end any uncertainty that might linger as to its proper place in the law of agency. He had no difficulty in concluding that the doctrine set out in *Watteau* v. *Fenwick* was not part of the law of British Columbia. On that ground the plaintiff's cross-appeal failed: the defendant was not liable as an undisclosed principal on the 1985 contract.

Although this case dealt only with the law of British Columbia, it does not appear unreasonable to conclude, in light of this decision and the earlier Ontario cases referred to therein, that in common law Canada generally, whatever the state of the law in England, the doctrine of *Watteau* v. *Fenwick* is defunct. It is to be hoped that the same will ultimately prove to be the situation in England. There is every indication that when the time comes for a court to do so, it will give the same short shrift to the decision of Wills J. as it has now received at the hands of the British Columbia Court of Appeal.

The other issue related to the defendant's appeal against the decision that it was liable on the 1978 rental agreement. This question turned on the problem of determining what was the effect of a later agreement upon a earlier one where (a) the earlier agreement bound the defendant, but (b) the second agreement did not. This is a matter which has arisen before in connection with the effect of a second contract between the same parties when that contract was unforceable, for example, because it failed to satisfy the requirements of the Statute of Frauds or the Sale of Goods Act, and the second contract affected the first contract between the parties where that contract was enforceable.[17] The issue in this case was different. The second contract was not enforceable by reason of the decision that it could not bind the defendant since the agent who entered into the second contract lacked authority to do so. However the agent in this case did have authority to enter into a contract of the type in issue on behalf of the defendant: the contract actually entered into was unenforceable, in the view of the court, because the agent exceeded its authority, in that the contract failed to include a term providing for cancellation on 60 days' notice.[18] The court equated a contract that was "unenforceable" by reason of the agency doctrine in question with a contract that was unenforceable by virtue of the Statute of Frauds or some other statute that insisted on certain formalities. The cases relevant to the latter situation had held that the second unenforceable contract could nevertheless be effective to determine the earlier contract, without successfully replacing it by the second contract,

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[17] M.P. Furmston, Cheshire, Fifoot and Furmston's Law of Contract (11th ed., 1986), pp. 545-547; S.M. Waddams, Law of Contracts (2d ed., 1984), pp. 178, 236; G.H.L. Fridman, Law of Contract in Canada (2d ed., 1986), pp. 210, 517.

[18] *Supra*, footnote 10, at pp. 550 (D.L.R.), 194 (B.C.L.R.).

as long as the second contract evinced the parties' intentions to determine the earlier contract.[19] Hence the question for the court to determine was whether in the instant case the second, 1985, contract evidenced the parties' intentions to get rid of the earlier 1978 contract. The court held that it did. There was an express intention on the part of the parties to the 1985 agreement to enter into a completely new agreement, exemplified by the fact that the 1985 agreement required the plaintiff to upgrade the sign. Secondly, the 1985 agreement called for a seven year term renewable for the same period in the absence of timely disclaimer (instead of a 61 months' term renewable for a further term of 60 months). The second agreement was complete in the sense that it alone could be sued upon since it provided that the agreement contained and expressed the whole agreement made between the parties. Hence the effect of the 1985 agreement was to determine the defendant's liability on the 1978 agreement.[20] Therefore the defendant's appeal was allowed.

The criticism that might be made of this decision is founded on the equation of the non-effective attempt by the agent to bind the undisclosed principal with an "unenforceable" contract. In the view of the present writer it might have been more appropriate to have concluded that the contract made by the agent was not so much unenforceable as invalid, inoperative, ineffective. An unenforceable contract is one that is valid in every respect, except that it cannot be enforced by action under certain circumstances and by a certain party. Where an agent enters into a contract that does not bind his principal, then, it is suggested, *vis-a-vis* the principal the contract is not merely unenforceable: it is a legal nullity. This is unquestionably the case with an unauthorised, unratified contract made by an agent for a principal.[21] On this reasoning, it is suggested, the cases dealing with the effect of unenforceable contracts upon earlier unenforceable contracts were not strictly relevant, and ought not to have been cited in support of the decision of the court. If that is accepted, then it would have followed that the first agreement was still effective and bound the defendant, whose appeal should therefore have been dismissed.

The decision of the British Columbia Court of Appeal in respect of *Watteau* v. *Fenwick* is therefore welcomed. Its decision on the other point is not.

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[19] *Morris* v. *Baron and Co.*, [1918] A.C. 1 (H.L.); *United Dominions Corp. (Jamaica)* v. *Shoucair*, [1969] 1 A.C. 340, [1968] 2 All E.R. 904 (P.C.); *Emerald Resources Ltd.* v. *Sterling Oil Properties Management Ltd.* (1969), 3 D.L.R. (3d) 630 (Alta. App. Div.).

[20] *Supra*, footnote 10, at pp. 550 (D.L.R.), 194 (B.C.L.R.).

[21] *Watson* v. *Davies*, [1931] 1 Ch. 455 (Ch. D.); Fridman, *op. cit.*, footnote 1, p. 89.

HUMAN RIGHTS—DISCRIMINATION IN EMPLOYMENT—REASONABLE ACCOMMODATION REVISITED: *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool.*

Béatrice Vizkelety*

Introduction

In 1990 the Royal Canadian Mounted Police issued a public statement declaring that Sikhs who wished to join the RCMP would receive an exemption from certain uniform requirements and be allowed to wear turbans. The policy, which balanced competing claims between religious and institutional interests, is but one example of how religious minorities can be given the opportunity to integrate and to participate in the activities of society without necessarily being forced to abandon their religious obligations. The accommodation of differences is a recurring question in a pluralistic society,[1] often raised in the context of the right to equality, and it is of interest to see how the law grapples with this issue.

In September 1990, the Supreme Court of Canada delivered a judgment in *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool*,[2] involving an individual who had been dismissed from his employment because he refused to work on a religious holy day. The case may not have aroused wide public attention but it did raise the same question as the RCMP policy: does the right to nondiscrimination in employment[3] imply a corresponding duty to accommodate religious obligations?[4]

The *Dairy Pool* decision is a welcome addition to the case law in the area of discrimination not only because it reaffirms the existence of a duty to accommodate, which was first recognized in *Ontario Human*

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[1] The ideal of multiculturalism is constitutionally entrenched in section 27 of the Canadian Charter of Rights and Freedoms, Part I of Constitution Act, Schedule B of Canada Act 1982, c. 11 (U.K.), which reads as follows:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[2] [1990] 2 S.C.R. 489, (1990), 72 D.L.R. (4th) 417.

[3] The duty to accommodate may apply to a variety of activities including employment, housing, education, goods and services that are customarily offered to the public, *etc.* In this commentary, references are confined to employment but the principles apply to other forms of activity as well.

[4] The duty to accommodate is not limited to matters involving religious discrimination; it is also of special significance for the disabled and is a means of enhancing their right to equal access to public services and equal opportunity in employment. In general, see the report of the special Parliamentary Committee on the Disabled and the Handicapped, Obstacles (1981), and Marcia H. Rioux, Labelled Disabled and Wanting to Work, in Research Studies of the Commission on Equality in Employment (1985).

Rights Commission and O'Malley v. *Simpsons-Sears Ltd.*,[5] but also because it dissipates the confusion created by the highly controversial ruling delivered some five years ago in *Bhinder* v. *Canadian National Railway Co.*[6] However, the *Dairy Pool* case also carries with it the potential for confusion. The most obvious source of difficulty stems from the fact that, in separate decisions, Wilson J.[7] and Sopinka J.[8] arrive at the same conclusion but by a "different route". At first, the disagreements between the two judges appear fundamental indeed. Wilson J. develops a theoretical framework in which important distinctions are made between the concepts of "direct discrimination" and "adverse effect discrimination".[9] The duty to accommodate is strictly part of a judicially defined defence to a case of adverse effect discrimination. Sopinka J., on the other hand, eschews all distinctions

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The duty to accommodate has also been applied to other grounds of discrimination, for instance pregnancy and language, albeit with less frequency than to matters involving religion and disability. The following cases illustrate the broad spectrum of activities affected by the concept: *Rand* v. *Sealy Eastern Ltd., Upholstery Div.* (1982), 3 C.H.R.R. D/938 (Ont. Bd. Inq.) (Sabbatarian dismissed because of refusal to take a Saturday training course); *Singh* v. *Security and Investigation Services Ltd.*, unreported decision of an Ontario Board of Inquiry (1977), and *Singh* v. *Royal Canadian Legion, Jasper Place (Alta.), Branch No. 255* (1990), 11 C.H.R.R. D/357 (Alta. Bd. Inq.) (both involving dress codes that penalized Sikhs required to wear turbans); *Pandori and Ontario Human Rights Commission* v. *Peel Board of Education* (1990), 12 C.H.R.R. D/364 (Ont. Bd. Inq.) (school regulation prohibiting students and teaching personnel from carrying knives, including kirpans worn by practising Sikhs); *Huck* v. *Canadian Odeon Theatres Ltd.* (1981), 2 C.H.R.R. D/351 (Sask. Bd. Inq.), aff'd by (1981), 122 D.L.R. (3d) 381 (Sask. Q.B.) (seating arrangements in a theatre inadequate for disabled persons in wheelchairs); *Youth Bowling Council of Ontario* v. *McLeod*, Ont. Div. Ct., unreported judgment dated October 31, 1990 (bowling tournament regulations excluding the use of a ramp by a person with cerebral palsy); *Dhaliwal* v. *B.C. Timber Ltd.* (1983), 4 C.H.R.R. D/1520 and (1984), 6 C.H.R.R. D/2532 (B.C. Bd. Inq.) (refusal to allow a recent immigrant with only a limited knowledge of English to rely on a fellow employee to act occasionally as an interpreter); *Pattison* v. *Fort Frances (Town) Commissioners of Police* (1989), 10 C.H.R.R. D/5831 (Ont. Div. Ct.) (modification of uniform requirements requested by female police officer when she became pregnant).

Where the duty to accommodate is expressly defined in legislation, the tendency has also been towards a non-limitative approach. See, for example, the terms used in section 9(1)(d) of the Manitoba Human Rights Code, C.C.S.M., c. H175, and s. 10(2) of the Ontario Human Rights Code, S.O. 1981, c. 53, as amended by 1986, c. 64, s. 18. But, section 7 of the Yukon Territory Human Rights Act, S.Y. 1987, c. 3, refers to a duty to provide for special needs arising specifically from a physical disability.

[5] [1985] 2 S.C.R. 536, (1985), 23 D.L.R. (4th) 321.

[6] [1985] 2 S.C.R. 561, (1985), 23 D.L.R. (4th) 481.

[7] With Dickson C.J.C., L'Heureux-Dubé and Cory JJ. concurring.

[8] With La Forest and McLachlin JJ. concurring.

[9] "Direct discrimination" refers to a practice or rule which on its face makes a distinction based on a prohibited ground, such as colour, religion or gender. "Adverse effect discrimination" concerns a practice or rule which is facially neutral and equally applicable to all, but which excludes or penalizes the members of one group but not others. These two forms of discrimination are described by McIntyre J. in the *O'Malley* case, *supra*, footnote 5, at pp. 551 (S.C.R.), 332 (D.L.R.).

of this nature and holds that the duty to accommodate can be part of the statutory "*bona fide* occupational qualification" defence, which may apply to matters involving direct and adverse effect discrimination alike.

This commentary will attempt to demonstrate that, despite initial impressions, the two judges agree on numerous key issues which provide the basis for a coherent approach to the narrow issue of reasonable accommodaton. However, the fact that after all is said and done reasonable accommodation is indeed a narrow issue, is not readily apparent from this decision. While there is no doubt that the duty to accommodate represents an important feature in the development of discrimination law, it is also true that the vast majority of discrimination cases do not raise the issue of reasonable accommodation, particularly where more effective remedies are available. Interestingly, neither Wilson J. nor Sopinka J. provide much guidance concerning the proper function of reasonable accommodation and the value of this remedy compared to others in discrimination law.

The Facts

Jim Christie was an employee at the respondent's milk processing plant, operating in Wetaskiwin, Alberta, when he became interested in the World Wide Church of God. Adherents must refrain from work on the Sabbath, from sunset on Fridays to sunset on Saturdays, and also during approximately ten other religious holy days scattered throughout the year. Although he had succeeded in reaching an agreement with his employer concerning Friday schedules and one religious holy day, Mr. Christie's request for unpaid leave for a religious holy day which fell on a Monday was denied on the ground that Mondays were especially busy days at the plant. An impasse developed and Mr. Christie was dismissed after more than two and a half years of service.

Lower Court Decisions

An Alberta Board of Inquiry[10] upheld Mr. Christie's complaint of discrimination, finding that the employer should have accommodated its employee's religious obligations. The Alberta Court of Queen's Bench[11] disagreed and reversed on appeal, holding that attendance during usual working hours was a valid occupational requirement. Even if the employer had the duty to accommodate—which the court denied—this duty, it said, had been amply met. The Alberta Court of Appeal[12] also decided in favour of the employer concluding laconically that, in light of the Supreme Court of Canada judgment in *Bhinder*, the employer simply had no duty to accommodate.

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[10] (1985), 6 C.H.R.R. D/2488.

[11] (1986), 29 D.L.R. (4th) 154, [1986] 5 W.W.R. 35.

[12] (1988), 56 D.L.R. (4th) 192n, [1989] 1 W.W.R. 78.

The Issue

The elements of proof required to establish religious discrimination were discussed by the Board of Inquiry in first instance,[13] but the only issue before the Supreme Court of Canada[14] was whether or not the respondent employer had violated the Alberta Individual's Rights Protection Act[15] by denying Mr. Christie's request for a leave of absence on the Monday in question and by refusing to accommodate the complainant's religious obligations.

The Dairy Pool Test

(1) *The First Consensus: The Bhinder Test Revisited*

The Supreme Court of Canada first addressed the issue of reasonable accommodation in 1985 in *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*,[16] a case involving a sales clerk at Simpsons-Sears whose religious beliefs prevented her from working on Friday evenings and Saturdays. In this seminal judgment on the definition of discrimination, the court held that while the work schedule was neutral in appearance and clearly not meant to single out a religious group for differential treatment, it did in fact force the complainant to choose between her duties at work and her religious obligations and, as such, it was discriminatory. In arriving at these conclusions, the court held that it was necessary to place emphasis on the discriminatory effect of an action rather than on intent.[17] This approach undoubtedly paved the way for the court to further recognize the duty to accommodate as a means of reducing or eliminating the discriminatory consequences of an action. It did so in these terms:[18]

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[13] According to the Board Chairman, a *prima facie* case of discrimination requires that the complainant prove: (a) the existence of a *bona fide* religion with a genuine commitment to it; (b) adequate notice of the employee's religious requirements to the employer; and (c) an effort on the part of the employee to accommodate the employer as far as possible without being required to compromise his beliefs: *supra*, footnote 10, at p. 2493. It has however been suggested that the definition of religious discrimination is less concerned with the religious beliefs themselves than with the "sincerity" of the applicant's beliefs: Ivan F. Ivankovich, The 'Religious' Employee and Reasonable Accommodation Requirements (1986-87), 13 Canadian Business L.J. 313, at pp. 323-325.

[14] There was some debate regarding the extent of Mr. Christie's obligations as a prospective member of the Church, but the court refused to entertain this line of argument because the respondent had failed to question the sincerity of Mr. Christie's beliefs at any earlier stage of the proceedings.

[15] R.S.A. 1980, c. I-2, ss. 7(1), (3).

[16] *Supra*, footnote 5.

[17] "If ... [the action] does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.": *ibid.*, at pp. 547 (S.C.R.), 329 (D.L.R.).

[18] *Ibid.*, at pp. 553 (S.C.R.), 333-334 (D.L.R.).

> The reasonable standard ... and the duty to accommodate ... provide that where it is shown that a working rule has caused discrimination it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business.

But engaging in an awkward judicial minuet, the court decided on the very same day in *Bhinder* v. *Canadian National Railway Co.*,[19] to take one step back: the duty to accommodate which was implicit under the Ontario Human Rights Code[20] did not exist, or barely existed under the Canadian Human Rights Act,[21] and the right to accommodation enjoyed by Ms. O'Malley did not extend to Mr. Bhinder, a practising Sikh who had lost his job as an electrician at Canadian National when he refused to wear a hard hat required by safety regulations instead of his turban. The very least that one can say about the *Bhinder* decision is, as Wilson J. remarks, that it did not go "uncriticized".[22] In the days that followed the judgment, the Chairman of the Canadian Human Rights Commission, Gordon Fairweather, publicly expressed dismay at the ruling,[23] most other jurisdictions engaged in hair-splitting distinctions in order to dissociate their legislation from the Canadian Act, and, at yet another level, those who were able to ignore anti-discrimination law by arguing other legal principles, for instance unfair dismissal, simply did so in order to circumvent the *Bhinder* decision.[24]

One is tempted to speculate about the reasons that lay behind the *Bhinder* decision and whether it was simply a reaction to the particular facts of the case, which not only raised the issue of reasonable accom-

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[19] *Supra*, footnote 6.

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

[21] S.C. 1976-77, c. 33.

[22] *Supra*, footnote 2, at pp. 512 (S.C.R.), 432 (D.L.R.).

[23] The Commission also prepared a report on The Effects of the Bhinder Decision on the Canadian Human Rights Commission: A Special Report to Parliament, dated February 1986, in which it stated that "the effect of the Bhinder decision is to ... put the Commission's ability to achieve its legislatively-defined objective in doubt": quoted by Wilson J., *supra*, footnote 2, at pp. 512 (S.C.R.), 432 (D.L.R.).

[24] A case which illustrates the ingenuity required by legal counsel to escape the effects of *Bhinder*, is *Canadian Pacific Limited* v. *Brotherhood of Maintenance of Way Employees*, C.S.M. 500-05-010751-897, unreported Quebec Superior Court judgment dated January 8, 1990, concerning a decision by Canadian Pacific to transfer an insulin-dependent employee from his regular job to a less desirable position. There is some irony to be found in the decision when it is remembered that this was a quintessential case of discrimination based on physicial disability and failure to consider reasonable accommodation. According to Forget J., at p. 20:

> Selon le procureur de la mise en cause, monsieur Henderson aurait été traité injustement.... Il ne revendique pas la protection de la *Loi canadienne sur les droits de la personne*, mais celle de la convention collective. La notion de "justice" est beaucoup plus large que celle de "discrimination", puisque la discrimination n'est qu'une des formes de l'injustice. La politique d'embauche de C.P. n'est peut-être pas discriminatoire, mais telle n'est pas la question en cause.

modation but also contained the ingredients for a conflict between the value of equal employment opportunity and that of safety in the workplace. But the court did not directly examine this aspect of the case. Rather, it relied on textual differences between the Ontario and Federal statutes, and particularly the presence of a "*bona fide* occupational requirement" (BFOR) defence in the latter, to deny the right to individual accommodation:[25]

> The words of the Statute speak of an "occupational requirement". This must refer to a requirement for the occupation, not a requirement limited to an individual.... The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application.

The outcome of this decision was to provide employers with an absolute defence where the legislation contained a BFOR defence. Once it was established that in its general application the contested rule, for instance the duty to wear a hard hat, was objectively related to the occupation, there simply was no further duty to accommodate.[26]

The *Dairy Pool* case reexamines two essential aspects of the *Bhinder* test regarding, first, the effect of a BFOR defence on the existence of a duty to accommodate and, second, the relevance of individual assessments.

(a) *The presence of a BFOQ or BFOR defence and the duty to accommodate*

The presence of a "*bona fide* occupational qualification" (BFOQ)[27] defence under the Alberta Individual's Rights Protection Act[28] did not prevent the *Dairy Pool* court from holding that the employer had an implicit duty to accommodate. Wilson J. bypasses the BFOQ defence altogether on the grounds that it applies only to cases involving direct discrimination. In this instance, a matter of adverse effect discrimination, she states that "we need only be concerned ... with the criteria for establishing the defence of accommodation".[29] In contrast to this approach, Sopinka J. places the duty to accommodate squarely within the BFOQ defence, where it exists:[30]

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[25] *Supra*, footnote 6, at pp. 588 (S.C.R.), 500 (D.L.R.).

[26] The effects of this case are discussed in Milton Woodard, A Qualification on the Duty of Employers to Accommodate Religious Practices: K.S. Bhinder and the Canadian Human Rights Commission v. The Canadian National Railway Company (1987), 21 U.B.C. Law Rev. 471, and also in Ivankovich, *loc. cit.*, footnote 13.

[27] According to Wilson J., BFOQ and BFOR defences are interchangeable, *supra*, footnote 2, at pp. 502 (S.C.R.), 425 (D.L.R.). Similarly, see *Brossard (Town)* v. *Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, (1988), 53 D.L.R. (4th) 609.

[28] Subsection 7(3) of the Act provides that "[s]ubsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide occupational qualification*". (Emphasis added).

[29] *Supra*, footnote 2, at pp. 519-520 (S.C.R.), 438 (D.L.R.).

[30] *Ibid.*, at pp. 527 (S.C.R.), 444 (D.L.R.) . (Emphasis on "only" in the original; otherwise emphasis added).

> By virtue of *O'Malley*, there is a duty to accommodate in religious discrimination cases by reason of the general intent and spirit of the Code. In a case such as *O'Malley*, in which a duty to accommodate arises but the statute contains no BFOQ, the employer can discharge the duty *only* by showing that all reasonable efforts have been made to accommodate individual employees short of creating undue hardship for the employer. *This does not change because of the addition of a statutory defence of BFOQ. The addition of the defence is relevant to the discharge of the duty but not to its existence.*

The differences in these two approaches are, however, less significant than the following point on which the two judges agree: the presence of a statutory defence (BFOQ or BFOR) does not foreclose the duty to accommodate short of undue hardship.

In *Dairy Pool* the Supreme Court of Canada therefore adopts an approach which is fundamentally different from the one developed by the majority in the *Bhinder* case and, in doing so, the court implicitely corrects the failings that had plagued its earlier ruling. For instance by deciding, as it had in the *Bhinder* case, that employers were at liberty to do as they pleased once they had established that the rule was justified in its general application and by relieving them of the burden of giving some factual explanation for their refusal to accommodate, or even to consider accommodation, the court seriously weakened the effectiveness of human rights legislation. It is one thing to refuse to accommodate on the basis of administrative or economic necessity, which will rarely be considered a violation of human rights legislation, but quite another to refuse to accommodate religious obligations because it is inconvenient for employers to do so, or because they prefer to treat all their employees "equally", irrespective of the consequences of the rule or policy. Indeed, on other occasions the Supreme Court of Canada has rejected arguments based on "administrative convenience" where the protection of fundamental rights are in issue. In *Singh* v. *Minister of Employment and Immigration*,[31] Wilson J. stated that "the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so". As for arguments associated with "equal treatment", there has been a growing tendency to recognize that the interests of real equality sometimes require that we take into account relevant differences, not that we ignore them: "[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment."[32]

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[31] [1985] 1 S.C.R. 177, at p. 218, (1985), 17 D.L.R. (4th) 422, at p. 469. Similarly, see *R.* v. *Askov*, [1990] 2 S.C.R. 1199, at pp. 1224-1225, (1990), 74 D.L.R. (4th) 355, at pp. 398-400.

[32] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347, (1985), 18 D.L.R. (4th) 321, at p. 362. In a similar vein, see *Attorney General of Quebec* v. *Forget*, [1988] 2 S.C.R. 90; *Ford* v. *Attorney General of Quebec*, [1988] 2 S.C.R. 712, at p. 787, (1988), 54 D.L.R. (4th) 577, at p. 634; *R.* v. *Edward Books*, [1986] 2 S.C.R. 713, at pp. 752-768, (1986), 35 D.L.R. (4th) 1, at pp. 29-41.

Moreover, it is not unreasonable to believe that employers, including large corporations, will sometimes "bend" their rules,[33] provide exemptions or adapt to the special needs of employees in certain circumstances,[34] and yet there was little in light of the *Bhinder* case to prevent employers from arbitrarily refusing to accommodate employee needs when it came to religious obligations. This inevitably opened the gates to decisions based on whim and arbitrariness, even in matters where a *prima facie* case of discrimination could be made out, and created a situation which appeared quite contrary to the interpretive guidelines established by the Supreme Court of Canada in matters involving anti-discrimination legislation where it has been said that "[w]e should not search for ways and means to minimize those rights and to enfeeble their proper impact".[35]

(b) *The Relevance of Individual Assessment*

The *Dairy Pool* case further brings into question the validity of the test developed in *Bhinder* by reaffirming the relevance of evidence regarding individual circumstances when deciding a question of reasonable accommodation.

In the years that followed the *Bhinder* case, where the court had disallowed evidence pertaining to the individual complainant, lower courts took this as authority for making hard and fast distinctions between cases that require a group-based analysis and those that require individual assessment. For example, the Federal Court of Appeal extended this rigid approach to matters involving direct discrimination. In *Canadian Pacific Ltd.* v. *Canadian Human Rights Commision and Mahon*,[36] a case concerning the refusal to hire an individual because he was an insulin-dependent diabetic, it held that it was not relevant to consider the individual circumstances and abilities of the complainant in deciding whether the refusal was justified. It is difficult to grasp the teleological foundations of a decision which absolutely excluded individual-based evidence in a case of direct discrimination, since the philosophical underpinnings of this concept require that persons be treated on the basis of individual merit rather than on the basis of stereotypes and preconceived judgments regarding the attributes of the group to which those persons belong (for example, a group identified

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[33] Sometimes for reasons that appear rather frivolous. In one instance, a meeting hall allowed exemptions to headdress requirements to accommodate Mardi Gras festivities but did not allow entry on another occasion to a Sikh who wore a turban: *Singh* v. *Royal Canadian Legion, Jasper Place (Alta.), Branch No. 255*, *supra*, footnote 4.

[34] A determining factor in the *Dairy Pool* case was that the employer could cope with absences due to illness or employees being away on vacation.

[35] *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, (1987), 40 D.L.R. (4th) 193, at p. 206.

[36] [1988] 1 F.C. 209 (F.C.A.).

by religion, race or gender).[37] Fortunately, the Supreme Court of Canada discouraged such efforts to compartmentalize group-related evidence and held that evidence concerning the individual complainant could also be relevant in *The City of Saskatoon* v. *The Saskatchewan Human Rights Commission and Craig*,[38] an approach which is further supported by the *Dairy Pool* case.[39]

In conclusion, although the two judges differ in the extent to which they are prepared to criticize the *Bhinder* decision, it is suggested that the *Dairy Pool* case fundamentally alters the test developed in *Bhinder*, particularly in so far as the duty to accommodate is concerned.

(2) *The Second Consensus: The Duty to Accommodate is in the Nature of a Defence, the Burden of which Rests on the Defendant*

There is further agreement between the two judges regarding the nature of the duty to accommodate. It arises once it has been shown that the contested rule or policy has a discriminatory effect and it is part of the employer's defence. According to Sopinka J.,[40] "the duty is more in the nature of an exception from liability than an additional obligation".[41] Viewed in this way, as part of a defence of justification, it is not surprising that the burden of proving an inability to accommodate short of undue hardship should rest with the employer, a point on which the two judges also agree.[42] There are also practical reasons for alloting the burden of proof in this manner. In *Ontario Human Rights Commission and O'Malley* v. *Simpsons-*

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[37] In general, where discrimination results from generalizations concerning a person's abilities to perform a job based on the attributes of the group to which the person belongs, employers must show the validity of the generalization *vis-à-vis* the entire group in order to justify the exclusion. But, as is often the case, this rule is not absolute and where, for instance, the group in question is not homogeneous as in matters involving disability, then it certainly makes more sense to hear evidence concerning the abilities or limitations of the individual, rather than to refer to an ill-defined group with a multitude of characteristics and a wide range of abilities.

[38] [1989] 2 S.C.R. 1297, at pp. 1313-1314, (1989), 65 D.L.R. (4th) 481, at p. 492. Similarly, see the statement made in *obiter* by Wilson J. in the *Dairy Pool* case, *supra*, footnote 2, at pp. 513 (S.C.R.), 433 (D.L.R.). Also, see *Hines* v. *The Registrar of Motor Vehicles* (1991), 13 C.H.R.R. D/154 (N.S.T.D.), regarding the right of an insulin-dependent diabetic to have his abilities assessed on an individual basis in order to determine whether he is eligible for a special driver's permit.

[39] In most cases involving reasonable accommodation, the initial determination regarding discrimination is likely to be group-based. For instance a rule which adversely affects one Sabbatarian is likely to penalize other similarly situated Sabbatarians as well. But accommodation is usually requested when only one or a few individuals are negatively affected by the rule, and the possibility of obtaining a modification or exemption from the rule will generally depend on the specific circumstances of the individual.

[40] For Wilson J., see *supra*, footnote 29 and accompanying text.

[41] *Supra*, footnote 2, at pp. 523 (S.C.R.), 441 (D.L.R.).

[42] *Ibid.*, Wilson J., at pp. 520 (S.C.R.), 439 (D.L.R.), Sopinka J., at pp. 528 (S.C.R.), 444 (D.L.R.).

Sear Ltd.,[43] McIntyre J. pointed out that "it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence".

Opponents of the duty to accommodate sometimes argue that this obligation is merely an attempt on the part of the legislator to regulate business activities and little more than an unjustified interference with management prerogatives. This line of reasoning tends to portray the employer as a victim of social legislation and to overshadow the interests of complainants who, in the debate, become the invisible victims. But such arguments are usually based on the false premise that the duty to accommodate exists in a legal vacuum, when in reality its purpose is to reduce or eliminate the discriminatory effect of employment practices.[44] The *Dairy Pool* test is a reminder that the statutory duty to accommodate should not be understood to mean that "*unless* an employer provides accommodation, *then* he has violated the human rights legislation". Rather the appropriate syllogism is that "*if* it is shown that a rule or policy directly or indirectly discriminates, *and unless* the respondent is able to justify the rule by showing, for instance, that accommodation would amount to undue hardship, *then* there is violation of the law". Thus, in assessing the extent of an employer's duty to accommodate, it is necessary to adopt a balanced approach which requires courts to weigh the employer's rights to run its business in an efficient manner not in isolation, but in relation to the right of an employee to equal employment opportunity.

Employers may avoid costly and time-consuming litigation,[45] or enhance their chances of success should a complaint be lodged against

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[43] *Supra*, footnote 5, at pp. 559 (S.C.R.), 328 (D.L.R.).

[44] Criticism of the duty to accommodate is also often based on a narrow definition of discrimination concerned only with ill-will and prejudice rather than effect. See, for example, John Mooney, L'Obligation de l'employeur dans les cas de discrimination par suite d'un effet préjudiciable suite aux arrêts Bhinder et Commission ontarienne des droits de la personne (1986), 46 Rev. du Barreau 551. In his concluding remarks, at pp. 555-556, the author says:

> Il faudrait aussi se demander si la population québécoise désire vraiment se voir imposer une obligation d'accommodement.... Une accusation de discrimination ne revêtira plus ce caractère odieux maintenant que discriminer signifie également ne pas accommoder. Nous sommes peut-être en train de banaliser le phénomène de la discrimination. Je crois, pour ma part, qu'avec l'obligation d'accommodement nous risquons de vider la notion de discrimination de tout son sens.

But see, *supra*, footnotes 17 and 32 and accompanying texts.

[45] It is not only in the interest of private business but also that of governments to find alternatives to court litigation. Indeed, government and legislative action may also be subject to the duty to accommodate as a result of the Section 15 "Equality Rights" provisions of the Canadian Charter of Rights and Freedoms, *supra*, footnote 1. To this effect, see Dale Gibson, The Law of the Charter: Equality Rights (1990), pp. 133-137; the Boyer Report, entitled Equality for All: Report of the Parliamentary Committee on Equality Rights (1985). Also, see Edward Ratushny, Implementing Equality Rights: Standards of Reasonable Accommodation with Legislative Force, in Lynn Smith (ed.), Righting the

them, by taking preventive measures.[46] For instance, an employer may adopt a general "policy with respect to the accommodation of the religious beliefs of its employees".[47] Employers can also implement "universal" requirements rather than requirements which are implicitly modelled on the needs of the majority and which tend to favour them in an undue manner while creating a disadvantage for minority group members. For example, rather than expect that the religious holidays of employees will necessarily coincide with statutory holidays, such as Christmas day, Good Friday or Easter Monday, an employer may choose to allow also for a certain number of "floating statutory holidays" to be taken as elected by an employee at the time of employment.[48] At worst, and failing such preventive action of a general nature, the duty to accommodate merely requires employers to consider the religious practices of their employees, on a case-by-case basis if necessary, and to demonstrate flexibility with respect to the special needs of their personnel whenever the issue arises.

(3) *The Third Consensus: The Duty to Accommodate is Not an Absolute Duty*

Both Wilson and Sopinka JJ. also agree that the duty to accommodate is not absolute. The test proposed by Sopinka J., which has the advantage of simplicity, turns on the question of "alternatives": if there exists a non-discriminatory alternative to the contested rule, then the employer must provide accommodation according to that alternative. In the words of Sopinka J.:[49]

> The question, however, is how the BFOQ is established having regard to the duty to accommodate. I have referred above to the principle that in general a prerequisite to a successful BFOQ defence is a showing that there was no reasonable alternative to a rule that does not take into account the individual circumstances of those to whom it applies. An employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rules was considered, and that there was no reasonable alternative short of undue hardship to the employer.

Balance: Canada's New Equality Rights, (1986), pp. 255 ff., a commentary on accessibility standards in the area of the public transportation of disabled and elderly persons by air, in which the author suggests that in this area regulations are preferable to statutory amendment procedures as a means of ensuring a flexible and adaptable mechanism for establishing rules for reasonable accommodation.

[46] *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 96, (1987), 40 D.L.R. (4th) 577, at p. 585.

[47] Per Sopinka J., *supra*, footnote 2, at pp. 529 (S.C.R.), 445 (D.L.R.).

[48] This was one of the recommendations made by the Boyer Committee, *op. cit.*, footnote 45, p. 74. In a similar vein, a grievance on behalf of the teachers who had requested leave to celebrate "Yom Kippur", with pay, was upheld in *Syndicat de l'enseignement de Champlain* v. *Commission scolaire régionale de Chambly*, S.A.E.: 5110-85-4313; application for evocation to the Quebec Superior Court, C.S.M. 500-05-003544-879, denied by Steinberg J. in an unreported judgment dated May 26, 1987 (on appeal).

[49] *Supra*, footnote 2, at pp. 528 (S.C.R.), 444 (D.L.R.).

Sopinka J. does not elucidate on the extent to which the employer must go in search for reasonable accommodation. "What is reasonable in these terms is a question of fact."[50] However, since the duty is to be assessed in the context of the BFOQ defence, we may presume that for Sopinka J. the duty to accommodate short of undue hardship is subject to the standards enunciated in *Ontario Human Rights Commission* v. *Etobicoke*[51]—which remains the leading case on BFOQ defences—and that it will be assessed in light of that which is "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public".

Wilson J. does not "find it necessary to provide a comprehensive definition of what constitutes undue hardship";[52] nevertheless, she is more explicit than Sopinka J. in this regard:[53]

> I believe it may be helpful to list some of the factors that may be relevant to such an appraisal ... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

Two of the standards proposed create bewilderment. While it is possible for the "disruption of the collective agreement" to be of such a magnitude as to cause undue hardship, it would be dangerous to interpret Wilson J.'s words as suggesting that disruption is in itself an undue hardship. Collective agreements may harbour discrimination and to give them immunity from judicial scrutiny is to ignore the principle that parties are not entitled to agree to discriminate. Moreover, such an approach fails to consider that where unions refuse to allow reasonable accommodation without justification they can be held accountable for their actions in much the same manner as employers.[54]

A second factor, according to which it may be relevant to consider the morale of other employees, similarly raises interesting questions. If applied without qualification, this factor would make it possible to establish undue hardship on the basis of the subjective opinions and a pressure to conform on the part of co-employees who are in the majority, which is precisely what the concept of reasonable accommodation seeks to avoid. There is a necessary distinction to be made between morale problems woven

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[50] *Ibid.*

[51] *Ontario Human Rights Commission* v. *Etobicoke*, [1982] 1 S.C.R. 202, at p. 208, (1982), 132 D.L.R. (3d) 14, at p. 20.

[52] *Supra*, footnote 2, at pp. 520 (S.C.R.), 439 (D.L.R.).

[53] *Ibid.*, at pp. 520-521 (S.C.R.), 439 (D.L.R.).

[54] *Roosma* v. *Ford Motor Co.* (1988), 9 C.H.R.R. D/4743, aff'd (1988), 66 O.R. (2d) 18, 10 C.H.R.R. D/5761 (Ont. Div. Ct.), and *Gohm* v. *Domtar Inc.* (1990), 12 C.H.R.R. D/161 (Ont. Bd. Inq.) (on appeal).

from intolerance and resentment towards minority group members, on the one hand, and co-employee grievances that are objectively justified, on the other. Thus where special accommodation would create, for instance, an unfair advantage in favour of the individual or group because of its minority status,[55] this would be relevant in establishing undue hardship. It is also worth bearing in mind that, as a rule, co-employee disgruntlement is not considered a legitimate defence to discrimination.[56]

One is struck by important similarities between the factors retained by Wilson J. and the restrictive standards established by American courts in relation to reasonable accommodation, and in particular by the United States Supreme Court in *Trans World Airlines Inc.* v. *Hardison*.[57] But there is a danger in following the American lead in this area.[58] The development of the concept of reasonable accommodation in the United States has been considerably influenced by statutory and constitutional requirements which do not necessarily apply to Canadian law. For example, the *Hardison* test was purposely formulated in narrow terms in order to avoid a conflict between the Civil Rights Act of 1964,[59] supporting the right of individuals to practise their religion, and the First Admendment to the American Bill of Rights which forbids the State from advancing a particular religious practice and declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...".[60] The *Hardison* court was also mindful of the fact that seniority arrangements negotiated by collective agreement enjoy a special protection under anti-discrimination legislation in the United States. Lastly, the United States Supreme Court feared that by showing excessive leniency towards complainants' requests for accommodation, or "special treatment", it would invite "reverse discrimination" challenges by co-employees.[61] It is suggested

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[55] See *Youth Bowling Council of Ontario* v. *McLeod*, *supra*, footnote 4.

[56] See cases discussed in Béatrice Vizkelety, Proving Discrimination in Canada (1987), pp. 214-216.

[57] 432 U.S. 63 (1977).

[58] On the United States Supreme Court's tendency to read the "undue" out of the principle of "undue hardship", see Ivankovich, *loc. cit.*, footnote 13, at pp. 342 ff; similarly, see *Gohm* v. *Domtar Inc.*, *supra*, footnote 54.

[59] 42 U.S.C., para. 2000 e ff.

[60] For instance, see *Estate of Thornton* v. *Caldor Inc.*, 472 U.S. 703 (1985). However, the Canadian Constitution has not only omitted an "Establishment Clause" similar to that contained in the First Amendment of the American Bill of Rights, but it even provides a measure of protection to certain denominations in section 93 of the Constitution Act, 1867. Also, see the approach developed by the Supreme Court of Canada in *Caldwell* v. *St. Thomas Aquinas High School*, [1984] 2 S.C.R. 603, (1984), 15 D.L.R. (4th) 1.

[61] "Reverse discrimination" challenges cannot be given the same weight in Canada in light of the constitutional legitimacy conferred on affirmative action programmes by virtue of section 15(2) of the Canadian Charter of Rights and Freedoms, *supra*, footnote 1. See also, *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*, *supra*, footnote 35.

that none of these criteria can be imported into Canadian law without fundamental distinctions having to be made and, therefore, there are good reasons for Canadian courts to distance themselves from American developments, as they have on other occasions,[62] and to develop standards for undue hardship that are consistent with Canadian law.[63]

An Unfinished Agenda: The Question of Appropriate Remedies

The courts will undoubtedly have the occasion to develop further the rules regarding the duty to accommodate and to clarify such related issues as the standards and limits of undue hardship and the constitutional implications of reasonable accommodation.[64] However, a pressing concern in the development of effective human rights legislation is the absence of clear guidelines on the question of appropriate remedies. *When* is it appropriate for a party to seek accommodation, that is an exemption, substitution or adaptation of an occupational requirement, and *when* should the complainant or a group of complainants simply seek to have the contested requirement struck down?

On the facts, the *Dairy Pool* test is relevant to matters in which an employer is able to demonstrate that the contested rule is "rationally connected" to the employment or that it is a legitimate "occupational requirement". In such instances the rule is maintained in its general application but accommodation may be sought according to the circumstances of the case.[65]

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[62] For example, *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, (1989), 56 D.L.R. (4th) 1; *Brooks* v. *Canada Safeway Limited*, [1989] 1 S.C.R. 1219, (1989), 59 D.L.R. (4th) 321; *R.* v. *Keegstra*, unreported judgment of the Supreme Court of Canada, dated December 13, 1990.

[63] For instance, section 10(2) of the Ontario Human Rights Code, *supra*, footnote 4, states that undue hardship is assessed "considering the cost, outside sources of funding, if any, and health and safety requirements, if any". Also, see the document prepared by the Ontario Human Rights Commission, Guidelines for Assessing Accommodation Requirements for Persons With Disabilities (1989).

In 1985 the Canadian Human Rights Commission issued an "Interim Policy" indicating that there was a duty to avoid the discriminatory effect of a policy or practice unless it would: 1) alter the fundamental nature of the job in question; 2) make unreasonable demands on co-workers; 3) cause significant organizational inconvenience to the employer; or 4) cause a significant loss in the employer's capacity to earn revenues; as quoted in Equality for All, *op. cit.*, footnote 45, p. 72.

In general, see: Walter Surma Tarnopolsky and William F. Pentney, Discrimination Law in Canada (revised ed., 1985); Vizkelety, *op. cit.*, footnote 56; Marc L. Berlin, Reasonable Accommodation: A Positive Duty to Ensure Equal Opportunity, in William Pentney and Daniel Proulx (eds.), Canadian Human Rights Yearbook (1985), pp. 137 ff.; Ivankovich, *loc. cit.*, footnote 13.

[64] *Supra*, footnote 45.

[65] Where it is found that there is a duty to accommodate, the possible forms of redress are varied. For example, in *Pandori and Ontario Human Rights Commission* v. *Peel Board of Education*, *supra*, footnote 4, the accommodation was made subject to a list of conditions;

Logically one would presume that the criteria developed in *Dairy Pool*, and indeed the entire issue of reasonable accommodation, are of little relevance to cases where there is no rational connection between the contested rule and the occupation. Unfortunately, there is the danger that lower courts will make excessive use of the duty to accommodate and develop remedies in discrimination law, particularly in matters involving adverse effect discrimination, through the narrow prism of accommodation and undue hardship. It is the reasoning developed by Wilson J. that sows the seeds for confusion:[66]

> ... the appropriate remedy depends upon the type of discrimination involved.

And later in her judgment she states:[67]

> ... where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

If these words are to be understood as support for the proposition that in matters involving adverse effect discrimination the contested rule is *always* upheld and the only appropriate remedy is accommodation, then remedies would become unduly restrictive and inefficient in discrimination law. Indeed, the leading cases in this area, for instance *Canadian National Railway Co.* v. *Canada*[68] and *Griggs* v. *Duke Power Corp.*[69] in the United States, would have had little or no significance had the remedies been confined to case-by-case solutions based on individual accommodation rather than having the offending requirements, for instance the discriminatory aptitude tests, simply set aside.

Although the decision by Sopinka J. is silent on the matter, it also leaves room for ambiguity. In failing to distinguish between situations where there is evidence of a non-discriminatory alternative to the occupational

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in *Youth Bowling Council of Ontario* v. *McLeod*, *supra*, footnote 4, the order referred to a specific form of accommodation; in *Gohm* v. *Domtar Inc.*, *supra*, footnote 54, the Board of Inquiry ordered the employer to examine the options that would permit a general policy for the accommodation of the religious obligations of Sabbatarians.

[66] *Supra*, footnote 2, at pp. 515 (S.C.R.), 435 (D.L.R.).

[67] *Ibid.*, at pp. 517 (S.C.R.), 436 (D.L.R.). The remarks made by McIntyre J. in *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, *supra*, footnote 5, at pp. 555 (S.C.R.), 335 (D.L.R.), on which Wilson J. appears to rely in formulating this view, are less absolute. Although McIntyre J. does suggest that in some cases of adverse effect discrimination the rule will not be struck down, he qualifies this statement: "Where there is adverse effect discrimination on account of creed the offending order or rule *will not necessarily* be struck down." And further, "the rule, *if rationally connected to the employment*, needs no justification; what is required is some measure of accommodation". (Emphasis added).

[68] *Supra*, footnote 35. See, in particular, the Tribunal decision (1984), 5 C.H.R.R. D/2327.

[69] 401 U.S. 424 (1971). See also the well-known commentary by Alfred W. Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Corp.* and the Concept of Employment Discrimination (1972), 71 Michigan L. Rev. 59, at p. 62.

requirement itself, and situations where the evidence merely establishes a non-discriminatory alternative for the specific needs of the individual complainant, the Sopinka test obscures the fact that there are two relevant levels of enquiry within the "alternatives" approach and not only one. The distinction is not without consequence in terms of redress for it may be appropriate to request the abolition of the rule in the first instance, and the maintenance of the rule but with individual accommodation in the second.

Such a two-step approach is not without basis and one finds support for it in the reasoning developed by Dickson C.J.C. in *Bhinder* v. *Canadian National Railway Co.*[70] Although the statements were made in dissent, this may ironically be considered the "better" view today:[71]

> The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged.

He continued in his judgment:[72]

> Once it is established that a requirement is "occupational", however, it must further be established that it is "*bona fide*". A requirement which is *prima facie* discriminatory against an individual, even if it is in fact "occupational", is not *bona fide* for the purpose of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual.

It may even be argued that Wilson J. did not entirely exclude such a two-step analysis:[73]

> ... we need only be concerned in this case with the criteria for establishing the defence of accommodation. Was the rule rationally connected to the performance of the job and, if so, did the respondent employer accommodate the employee up to the point of undue hardship?

In light of the above, it is suggested that the question of remedies may be addressed in the following manner: the appropriate remedy depends on whether or not the requirement is rationally connected to the occupation or, to put it more simply, job-related. If it is not, then it must be struck down. If it is, then there must be an assessment of the alternatives available for purposes of accommodation.

Conclusion

If there has not been much emphasis in the preceding pages on the pros and cons of the separate analytical standards respectively proposed by Wilson J. and Sopinka J. in applying the concept of reasonable accommodation, it is because these differences take on a secondary importance once one has identified the many basic criteria on which there

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[70] *Supra*, footnote 6.

[71] *Ibid.*, at pp. 571 (S.C.R.), 487-488 (D.L.R.).

[72] *Ibid.*, at pp. 571 (S.C.R.), 488 (D.L.R.).

[73] *Supra*, footnote 2, at pp. 519-520 (S.C.R.), 438 (D.L.R.).

is agreement or, at least, the expression of compatible views between the two judges.

It should however be remembered that matters involving reasonable accommodation will, as one author put it, often entail "compromise and conciliation",[74] and therefore it may be expected that the issue will frequently be resolved on the basis of standards related to "reasonableness", subjective "good faith", and "flexibility", in short, on a case-by-case approach. Discrimination law attempts to deal with a vast array of matters including the situation of disadvantaged groups (for instance, women, visible minorities and native people) who are frequently victims of systemic forms of discrimination. Members of these groups are often deprived of job opportunities because of rules that are not necessarily job related but which exclude them in disproportionately large numbers compared to other group members. In these areas it is reasonable to expect that the courts will rely on objective standards of necessity in assessing whether a discriminatory employment rule is justified and that they will not hesitate to strike down rules which do not meet these standards. Needless to say, while the duty to accommodate is a necessary and useful concept in the battle against discrimination, the standards developed in relation to this narrow concept can never fulfill the broad array of expectations of anti-discrimination legislation.

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LAWYERS—LEGAL ETHICS—CHANGE OF FIRM BY LAWYER—STANDARD FOR DISQUALIFICATION OF LAW FIRM TO ACT IN LITIGATION: *MacDonald Estate* v. *Martin*.

H. Patrick Glenn*

In *MacDonald Estate* v. *Martin*[1] a junior associate changed firms in the course of litigation between the parties in Manitoba. She had been actively involved in preparation of the defence. On moving to the plaintiff's firm she had no further contact with the case and eventually swore an affidavit that she had not discussed the case with members of the plaintiff's firm and would not engage in any such discussion in the future. Senior members of the plaintiff's firm swore similar affidavits. No other measures were taken by the plaintiff's firm, however, to prevent communication between

[74] Ivankovich, *loc. cit.*, footnote 13.

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[1] [1991] 1 W.W.R. 705, (1990), 77 D.L.R. (4th) 249 (reference hereafter 70 W.W.R. only), (S.C.C.).

the junior associate and counsel acting for the plaintiff. The defendant sought an order that the plaintiff's firm be removed as solicitors of record. The order was granted by Hanssen J. at first instance, but set aside by the Manitoba Court of Appeal (Huband and Philp JJ. A., Monnin C.J.M. dissenting). In the Supreme Court of Canada the original order was restored, striking the plaintiff's firm as solicitors of record, in a unanimous decision of the seven member court. Separate reasons were given by Sopinka J. (concurred in by Dickson C.J.C. and La Forest and Gonthier JJ.) and by Cory J. (concurred in by L'Heureux-Dubé and Wilson JJ.). While all members of the court agreed on application of a more rigorous ethical standard than was previously thought to exist, the two judgments differ, in extensive *obiter*, as to the range of circumstances which may justify disqualification of firms.

Sopinka J. describes the case as involving three "competing values": (1) maintaining high standards of the legal profession and the integrity of the system of justice, (2) not depriving litigants of counsel of their choice without good cause, and (3) permitting reasonable mobility in the legal profession. No priority is suggested amongst these considerations and all are described as "basic".[2] While the development of large firm practice is said to be "reflected in changes to ethical practices of the profession", the idea that law firm mergers and the movement of lawyers should generate a "slackening" of ethical standards in matters of conflict of interest is rejected.[3] The reason for so doing is that "[w]hen the management and size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved".[4]

The major part of the judgment of Sopinka J. consists of an extensive review of English, United States, Australian, New Zealand and Canadian authority on the standard to be applied in such cases. While English decisions are found to have adopted a test of a "probability of real mischief" having to exist before a firm can be disqualified,[5] a stricter test of a simple "possibility of real mischief" is found to be predominant in United States case law. Such a "possibility of real mischief" will exist whenever it can be shown that a "substantial relationship" existed between the matter out of which

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[2] *Ibid.*, at p. 711.

[3] *Ibid.*, at p. 712. On the relation between practice structures and legal ethics, see the present author, Professional Structures and Professional Ethics (1990), 35 McGill L.J. 424.

[4] P. 7. *Cf.*, the recent statement of U.S. legal historian R. Gordon, A Perspective from the United States, in C. Wilton (ed.), Beyond the Law: Lawyers and Business in Canada, 1830 to 1930, The Osgoode Society (1990), p. 425 at 428, that "... Canadian lawyers [have] tried to keep their options flexible by having it both ways: they threw themselves into business and politics without relinquishing a core conception of the 'lawyer's traditional role'. The role was there to fall back on... ".

[5] See *Rakusen* v. *Ellis, Munday & Clarke*, [1912] 1 Ch. D. 831 (C.A.).

confidential information arose and the matter at hand.[6] In such cases it is irrebuttably presumed that the lawyer has received confidential information and presumed, in a manner which may however be rebutted (by such devices as Chinese Walls and cones of silence),[7] that such confidential information will be imparted to members of the new firm. In the view of Sopinka J. the test of a simple "possibility of mischief" is the appropriate one. He articulates, however, two important qualifications to the test as it appears to have developed in the United States.

In the first place, he states that the United States test is too rigid in creating an irrebuttable presumption that confidential information has been acquired by a lawyer simply by virtue of prior association with a matter substantially related to the matter at hand. There may be cases in which it is established beyond any reasonable doubt that there was no disclosure of confidential information relevant to the current matter, as where the applicant client admits on cross-examination that this is the case.[8] While the burden would be a difficult one to discharge, "the door should not be shut completely" on a lawyer showing that no relevant information was imparted.[9]

In the second place, the United States practice of allowing the use of Chinese Walls and cones of silence to rebut the presumption of acquisition of knowledge by members of the new firm is not accepted *simpliciter*. While such devices could be accepted in "exceptional circumstances", normally "the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession".[10] Undertakings and conclusory statements in affidavits without more are thus not acceptable.[11]

It will be recalled that in the circumstances of the case the matter out of which confidential information arose was the same as the matter at hand, and that no measures such as the creation of a Chinese Wall or cone of silence had been taken. The solicitor clearly had received confidential information and little had been done to protect it, other than the swearing of an affidavit at some point after the solicitor's joining the

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[6] *Supra*, footnote 1, at p. 715. See *Analytica, Inc.* v. *NDP Research, Inc.*, 708 F. 2d 1263 (7th Cir., 1983).

[7] A Chinese Wall is defined by Sopinka J., *ibid.*, as "effective 'screening' to prevent communication between the tainted lawyer and other members of the firm", while a "cone of silence" is described as "achieved by means of a solemn undertaking not to disclose by the tainted solicitor".

[8] *Ibid.*, at pp. 724-725.

[9] *Ibid.*, at p. 725.

[10] *Ibid.*, at p. 726.

[11] *Ibid.*, at p. 727.

new firm. In the result, for Sopinka J. and the members of the court concurring with him, disqualification in the present case was necessary, though in other cases the judges were of the view that "the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur".[12]

The judgment of Cory J. is expressly stated to adopt a "stricter duty" than that proposed by Sopinka J.[13] For Cory J., "[n]either the merger of law firms nor the mobility of lawyers can be permitted to adversely affect the public's confidence in the judicial system".[14] Of the "competing values" cited by Sopinka J., the most important and compelling is stated to be "the preservation and integrity of our system of justice", though "[r]easonable mobility may well be important to lawyers".[15] At a time when the work of courts affects more and more significantly the lives of Canadians, and when lawyers are an integral and vitally important part of the system of justice, there could be no proper functioning of the system "if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed".[16]

As a result of these general considerations, Cory J. concludes that in cases in which "a lawyer who has received confidential information joins a firm that is acting for those opposing the interests of the former client . . .", there should be an irrebuttable presumption that "lawyers who work together share each other's confidences", and that this presumption applies to members of the new firm.[17] Commentary 12 to Chapter V of the Canadian Bar Association Code of Professional Conduct is cited in support of this proposition, to the effect that "the term 'client' includes a client of the law firm of which the lawyer is a partner or associate whether or not he handles the client's work".[18] Information must thus be presumed to circulate amongst lawyers who are all to be seen as working, in the solicitor's new firm, for each individual client of the firm. That this is too demanding a standard in the large or "mega-firm" is expressly denied, given the innumerable occasions for transmission of information, "[w]hether at partners' meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom . . .",[19] and the likelihood that disclosure of confidential information would never be

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[12] *Ibid.*

[13] *Ibid.*, at p. 728.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*, at p. 729.

[17] *Ibid.*

[18] *Ibid.*, at p. 730.

[19] *Ibid.*

discovered.[20] Neither Chinese Walls nor cones of silence would "reduce the opportunities for the private exchange of confidential information" nor "change the public's perception of unfairness".[21]

The judgment of Cory J. is thus more limited than that of Sopinka J. in dealing only with the situation, represented by the facts of the case, in which it is clear the solicitor has acquired confidential information relating to the matter at hand through actual involvement with it while acting for an opposing party. The judgment leaves expressly open the case of the solicitor who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client,[22] and leaves open by implication the case of the solicitor who has been originally involved in a matter "substantially related" to the matter at hand. However, the extension of the irrebuttable presumption of knowledge is clearly contemplated by Cory J. in both types of case; in the view of Sopinka J. such an extension (of what should be only a rebuttable presumption) would be possible only in the event the matters were "substantially related".

While the judgment of Cory J. is limited to the precise circumstances of the case in terms of when confidential information can be said to have been acquired, it is, like that of Sopinka J., broader in terms of whether protection of such information is possible within the solicitor's new firm. While no measures beyond a later affidavit were taken in the actual case, Cory J. would preclude the use of *any* measure currently contemplated in practice, as a result of the irrebuttable presumption of knowledge.

Cory J. then turns his attention to the *personae* involved in such disputes. Acknowledging the "current rage for mergers", he concludes that neither large firms nor the lawyers associated with them should dictate the course of legal ethics, and cites statistics to the effect that in Ontario lawyers in firms of more than seventy-five lawyers constitute only 15.8% of the profession.[23] While large firms may thus be the "movers and shakers on Bay Street, they do not represent the majority of lawyers soldiering on in the cause of justice".[24] While clients of disqualified firms would be prejudiced by the disqualification, no special benefit or privilege should be granted to such clients of large firms in recognizing the "professional responsibility owed by lawyers to the litigation process".[25] In concluding his judgment, Cory J. suggests that a procedure is thereby necessary to prevent conflicts arising from merger of firms or transfer of lawyers (and a price fixed for any files having to be transferred to other firms).[26]

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[20] *Ibid.*

[21] *Ibid.*, at p. 731.

[22] *Ibid.*, at p. 733.

[23] *Ibid.*, at pp. 731-732.

[24] *Ibid.*, at p. 732.

[25] *Ibid.*

[26] *Ibid.*, at p. 733.

Comment

The decision establishes that where a lawyer involved in a litigious matter moves to a firm acting for the opposing side in that same matter, and no measures are taken at the time of transfer to prevent disclosure of information to members of the new firm, the new firm must be disqualified. As to other situations, none of which were before the court, the court expressed divergent views. It was not necessary for this to be done, but it informs debate within the profession as to these questions, without providing clear rules. Other situations remain the object of ethical debate, and it is in the nature of ethical debate that clear and precise rules are avoided. This is evidently related to the propositon that ethical standards, as such, are meant to be voluntarily assumed, and hence cannot be imposed in the form of precise rules.

What should inform our ethical debate as to whether other situations require disqualification of firms? The judgment of Sopinka J. suggests the three undifferentiated values listed above, and states that different emphasis has been placed on these values "at different times and by different judges".[27] Even given such undifferentiated values, however, it is clear from the judgment of Sopinka J. that further disqualifications can be avoided only by extraordinary efforts undertaken by the profession to ensure confidentiality. Protecting the mobility of the profession and the continuity of counsel can only occur through creation of fail-safe mechanisms which guarantee the confidentiality necessary for the integrity of the justice system. There may therefore be less difference between the judgments of Sopinka J. and Cory J. than appears on first reading. This becomes evident, however, only through interpretation of the judgment of Sopinka J. and in spite of his declared neutrality as to basic values.

The judgment of Cory J. is much more explicit as to the factors which should inform the ethical debate. The primary factor is maintaining the integrity of the system of justice, but this factor is itself largely determined by the role of lawyers as "an integral and vitally important part" of the system.[28] Cory J. and Sopinka J. thus appear to be very close to one another on the fundamental importance of the integrity of the judicial system, and this then becomes largely a question of the role of lawyers within it. It appears ultimately to be the adversary system which should inform our debate, both because of the responsibilities it assigns to lawyers and because of the consequences to it and the judicial system if lawyers do not fulfill their responsibilities. What further can be said about the importance of the adversary system for the question of disqualification of firms?

The adversary system does not exist because it is the best method for establishing the truth. It exists for historical reasons, chief of which

[27] *Ibid.*, at p. 711.

[28] *Ibid.*, at p. 729.

was the limited role assigned to the common law judge in early common law procedures. The judge ensured that the question to be put to the jury fell within the terms of the chosen writ. It was for counsel to "plead to issue", to demonstrate the fit between question and writ. Truth was the concern of neither judge nor counsel; the members of the jury already knew the truth and all turned on what could be asked of them. With the invention of the witness the role of the judge did not change; adherence to the contours of the chosen writ remained necessary until the nineteenth century. The lawyers continued to plead to issue and to this fundamental task was added the production of proof, but the judge remained sublimely above almost all questions of veracity. All of this changed radically in the nineteenth century with the creation of the right of action, the demise of the jury, and the generalization of fact pleading. Judges now became responsible for applying a pre-existing law (which had to be miraculously discovered in the old writs or borrowed from the civilians) and for discovering the true facts to which it should be applied. In short, the historical reasons for what we know as the adversarial system disappeared. The common law judge now *is* interested in establishing the truth and is in a position to do something about it. If the adversary system is to be retained, it can only be because of its theoretical advantages over other systems, and for most of the world these are far from evident. It is elsewhere referred to as "accusatorial" (the flip side of the common law designation of continental investigative systems as "inquisitorial"), and is thought of as wildly inefficient and outrageously expensive. So it is, and the theoretical argument for it looks much thinner by way of justification in the twentieth century than did the historical necessities of earlier times.

Entrusting adversarial procedure to the English barrister meant entrusting it in large measure to an officer of the court. The English barrister was and is immune from suit (for courtroom activity at least), precluded (and likely to remain so in the future) from obligations of partnership and even direct relations with lay clients, and deprived of the joys of Discovery which never ends. Entrusting adversarial procedure to members of a unified profession (this is not quite the case in Canada but close to it) who work in large partnerships in which the contract of employment is authorized, is another question entirely.[29] The system is predicated on the idea of loyalty to the client, by virtue of which great latitude is conferred in conduct of litigation, yet the existence of loyalties to one's firm is a burden on the loyalty owed to the client and represents a major flaw in the theory of the adversarial system. Salaried associate lawyers now work according to norms of productivity and it is impossible to state that everything they do is controlled exclusively by considerations of client interest. *MacDonald Estate* v. *Martin* put a further question: is the dilution

[29] For the debate on authorization of employment contracts for lawyers in the current reform of the profession in France, see the remarks of Batonnier Ph. Lafarge, Avocats salariés, G.P. 14-16 (October 1990), p. 17.

of client loyalty to continue still further to permit lawyers to be associated, serially, with both sides of a case (however actively or inactively) through successive law firm affiliation? The Supreme Court has said no, on the facts presented to it, and the decision represents a major effort to establish ethical limits in the face of economic pressure.

If the adversarial system is now shorn of its historical justifications and is entirely dependent on a notion of client loyalty already diluted by the existence of firm loyalties, can one realistically contemplate any further weakening of client loyalty? The court, in its entirety, chose to analyze the problem consequentially, in terms of the danger of release of confidential information created by lawyer transfers. It was not necessary to do so. Another ground exists in the notion of conflict of loyalties, which is found in Commentary 11 to Chapter V of the Canadian Bar Association Code of Professional Conduct.[30] Commentary 11 states both that it is improper to place oneself in a position where there may be disclosure of confidential information and also that it is improper to act against a former client. Acting against a former client is not limited to the taking of formal measures against him or her. It may include assumption of an obligation of loyalty to a former client's opponent. In many jurisdictions it is this obligation of loyalty which would preclude continuance in circumstances such as *MacDonald Estate* v. *Martin*, and which precludes even subsequent action in a different matter against a former client whose file has been closed.[31]

The obligation of client loyalty should therefore prevent re-opening of the *MacDonald Estate* v. *Martin* situation with a view to construction of Chinese Walls and cones of silence authorized and policed by the governing bodies. There could be in any event no assurance that they would work, and even if they did they should not be adopted. Adjusting to *MacDonald Estate* v. *Martin* should not, however, be that onerous. Lawyers should not move to firms against which they are currently litigating; conflicts searching systems should extend to involved opposing counsel;[32] and mergers should involve the abandonment of conflicting files. Where in spite of such measures discontinuance becomes necessary, the burden

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[30] The Canadian Bar Association, Code of Professional Conduct (1974), p. 19.

[31] See, for the German principle of loyalty which draws no distinction between simultaneous and successive representation, D. Luban, The Sources of Legal Ethics—A German-American Comparison of Lawyers' Professional Duties, RabelsZ 1984.245, at pp. 272-279.

[32] For the development of conflicts searching software based no longer on the soundex system of initial letter recognition and individual consonant sounds but on a "phonics" system which also recognizes vowel sounds so as to eliminate much extraneous information, see The National Law Journal (December 3, 1990), p. 17 (already extending to client name, alternate client name, adverse and non-adverse parties, client-contact persons, opposing party name, opposing party attorney, associate counsel and matter name).

should not fall entirely on the client of the discontinued firm.[33] Assumption of these ethical obligations may mean that the adversary system can tolerate transfer, between opposing firms, of solicitors who have not been involved in any way with the client on the matter in issue.

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MORTGAGES—ACTION ON COVENANT TO PAY—NOVATION, ASSUMPTION AND RENEWAL: *National Trust Company* v. *Mead.*

E. Mirth*

The past ten years have yielded a plethora of cases discussing mortgage renewals. While *National Trust Company* v. *Mead*[1] did not involve mortgage renewals *per se*, the Supreme Court of Canada's decision ranges widely over the matter of mortgage covenants in the circumstances of covenant alteration, whether by assumption agreement or by renewal. In doing so, it helps greatly to sort out mootable issues from prior cases, although it leaves some points still to be resolved.

Facts

The case involved a suit by a mortgagee on the personal covenant of a party who assumed the mortgage. The issue primarily was the impact of remedy limitations under the Saskatchewan Limitation of Civil Rights Act[2] (the "Act").

The respondent Remai Construction (1981) Inc. ("Remai") granted a mortgage for $40,725 to the appellant National Trust Company ("National Trust") as security for a condominium construction loan. The Act restricted the recovery of National Trust to the land itself and rendered the personal covenant unenforceable. Waiver of that limitation by corporate mortgagors was permitted, however, and Remai in fact waived.

Subsequently, the individual respondent ("Mead") bought the mortgaged property and executed an assumption agreement in favour of National Trust. The assumption agreement contained a covenant by Mead to pay the loan.

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[33] In Quebec the Superior Court has already held that where a firm must be discontinued in such circumstances the discontinued firm should adjust its account so as to reflect the fact that its former client will be incurring additional expenses as a result of the discontinuance: *Entreprises Laszczewski Ltée* c. *Betteridge Smith Ltée*, J.E. 1990.1756.

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[1] [1990] 2 S.C.R. 410, (1990), 71 D.L.R. (4th) 488.

[2] R.S.S. 1978, c. L-16, ss. 2, am. 1983-84, c. 44, s. 2, 40.

Some two years later, the loan being in default, National Trust sued Remai and Mead jointly and severally for the debt. Remai defended, claiming release of its covenant by the assumption agreement, or novation and consequent discharge. The action against Remai was discontinued.

Mead entered no defence. When National Trust applied for an *order nisi* for sale and for personal judgment against Mead, the *order nisi* was granted but the personal judgment was refused. The Saskatchewan Court of Appeal dismissed National Trust's appeal. The Supreme Court dismissed the further appeal by National Trust.

The assumption agreement was in a fairly common form, containing a promise to pay and perform the mortgage, and added to such promise:

> ... and that he ... [the purchaser Mead] will be bound by each and all of the terms and covenants, conditions and obligations of the said mortgage as though it had been originally made, executed and delivered by him as Mortgagor.

The assumption agreement went on to say that its provisions "shall have effect notwithstanding any statute to the contrary", and that the assumption was not to prejudice prior covenants.

The Legislation

Section 2(1) of the Act provides that where land is mortgaged for the purpose of securing the price or part of the price for purchase of the land, the mortgagee's right to recover the unpaid balance shall be restricted to the land mortgaged and foreclosure or sale of the land, and "no action shall lie on the covenant for payment contained in" the mortgage. The section applies whether or not the mortgagee is the vendor of the land;[3] and applies to the personal covenant in a mortgage extension or mortgage assumption.[4]

Section 40 prohibits waiver of the Act's requirements, but in subsection (2) permits waiver by a corporation and renders such waiver "binding upon the corporate body, its successors and assigns". The Act thus allows for what will be referred to as "corporate exceptions".

The Courts Below

The trial judge gave no recorded reasons. The Court of Appeal disposed of the case on the basis of the words in the assumption agreement that the purchaser was bound as if the mortgage had originally been made by him. Cameron J.A. said:[5]

> The meaning of these words is clear. And if taken literally, so too is their effect. Had Mr. Mead been the original mortgagor he would have been entitled to the

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[3] *Ibid.*, s. 2(1.1).

[4] *Ibid.*, s. 2(2).

[5] (1988), 52 D.L.R. (4th) 159, at pp. 165-166, [1988] 5 W.W.R. 365, at p. 372 (Sask. C.A.).

> benefit of s. 2 of the Act, and would have been disabled by s. 40 from agreeing otherwise. Thus the effect of the words is to extend to him the benefit of the statute and, in turn, to limit National Trust to its remedy against the land. Even if this were uncertain, the result would not change, because the agreement falls to be construed *contra proferentem*—against the one who drew it and in favour of the one who made it. Hence the words have to be given the meaning most favourable to Mr. Mead.

The court also found the circumstances to amount to a novation of the mortgage with Mead. National Trust had discharged Remai, as evidenced by its discontinuance against him, and had accepted the new arrangement with Mead in satisfaction and substitution of the old one with Remai.

The Issues

The issues raised on the appeal before the Supreme Court were:[6]

A. Does the general protection extended to individuals under s. 2(1) of the Act prevail over the exception contained in s. 40(2) for corporations and their successors or assigns?

B. Does the particular wording of the Assumption Agreement release Mead from liability on the personal covenant?

C. Does the Assumption Agreement effect a novation?

The Supreme Court Decision

On the statutory interpretation issue, the Supreme Court concluded that Mead did not fall within the phrase "successors and assigns" in section 40 of the Act. It noted that Mead was clearly not a successor to Remai. In looking at the word "assigns", it drew a distinction between assignment where the mortgagee consents to the assignment and one where it does not. The latter would leave the individual bound; the former would render him not bound by the corporate waiver.

The court said that where a statute expressly invalidates a waiver of its provisions any exception to that protection should be construed as narrowly as possible. Wilson J., speaking for herself and Lamer C.J.C., La Forest, L'Heureux-Dubé, Gonthier and Cory JJ., cited a passage[7] from a decision of Malone J. in *Disney Farms Ltd.* v. *Canadian Imperial Bank of Commerce*,[8] where a broad statement of the intent underlying corporate exceptions was given in these terms:

> In my opinion, the purpose of these provisions is to facilitate corporate financing that otherwise may not be available if lenders could not realize upon their security on default by a corporate borrower. I am also of the opinion that the provisions of the Limitation of Civil Rights Act were primarily intended to benefit and protect individuals, as distinct from limited companies, who usually are more sophisticated in the management of their affairs and require larger amounts of capital to maintain their operations.

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[6] *Supra*, footnote 1, at pp. 419 (S.C.R.), 495 (D.L.R.).

[7] *Ibid.*, at pp. 422 (S.C.R.), 497 (D.L.R.).

[8] [1984] 5 W.W.R. 285, at pp. 287-288 (Sask. Q.B.).

Wilson J. agreed that "the policy concerns animating the protection of individuals from personal liabilities for mortgage deficiencies are not particularly compelling when applied to corporations".[9] She stated that the meaning to be attributed to the provisions of the Act should reflect these policy concerns and concluded with the statement: "Thus, any exception to the principle in s. 2 that individual mortgagors be insulated from personal liability should be construed as narrowly as possible."[10]

The Supreme Court also upheld the Saskatchewan Court of Appeal's interpretation and treatment of the assumption agreement. The words "as though it had been originally made, executed and delivered by him as Mortgagor" were viewed by the Supreme Court as being fatal to the position of National Trust so far as personal recourse against the purchaser, Mead, was concerned. The Supreme Court reached that conclusion without the need to resort to the *contra proferentem* rule.

Contrary to the decision in the Court of Appeal, however, the Supreme Court of Canada did not feel that the assumption agreement with the purchaser amounted to a novation. In light of its ruling on the operation of the Act and the interpretation of the assumption agreement, the court's discussion of novation is *obiter*. It is nonetheless important as it outlines the court's opinions on prior divergent opinions in lower court rulings across Canada.

The Saskatchewan Court of Appeal, in addressing novation, had applied a test for novation which included four requirements. The fourth requirement was that the new contract must be made with the consent of the old debtor. Finding that form of consent in many mortgage renewal, assumption or other arrangements could be a difficult task, but the Court of Appeal found it in Remai's consent to the assumption of the mortgage debt by Mead as primary debtor.[11]

The Supreme Court recognized that the fourth test might apply in some cases but clearly rejected it as a requirement in the context of mortgage renewals. It described the general operation of a novation in the following terms:[12]

> A novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. Indeed, for an agreement to effect a valid novation the appropriate consideration is the discharge of the original debt in return for a promise to perform some obligation. The assent of the beneficiary (the creditor or mortgagee) of those obligations to the discharge and substitution is crucial. This is because the effect of novation is that the creditor may no longer look to the original party if the obligations under the substituted contract are not subsequently met as promised.

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[9] *Supra*, footnote 1, at pp. 423 (S.C.R.), 497 (D.L.R.).

[10] *Ibid.*

[11] *Supra*, footnote 5, at pp. 167 (D.L.R.), 374 (W.W.R.).

[12] *Supra*, footnote 1, at pp. 427 (S.C.R.), 500-501 (D.L.R.).

> Because assent is the crux of novation, it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. The courts have established a three part test for determining if novation has occurred. It is set out in *Polson* v. *Wulffsohn* (1890), 2 BCR 39 as follows:
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> 1. The new debtor must assume the complete liability;
> 2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
> 3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

The court noted that those three factors are not the only ones necessarily to be considered. In determining whether or not there is a novation, Wilson J. said: "The courts are usually confronted with an amalgam from which they must distil their finding of fact as to whether novation has occurred or not."[13]

The court then reviewed a number of cases and went through the matter of mortgage renewals at some length. One of the cases clearly referred to with approval was the British Columbia Court of Appeal decision in *Canada Permanent Trust Company* v. *Neumann*.[14] There a renewal by a subsequent purchaser was found to be a novation. That ruling was based on the fact that the renewal (called a modification agreement in the case) had altered the mortgage in several respects. Carrothers J.A., speaking for the court, said:[15]

> There cannot be two contracts of mortgage and two methods of calculating the mortgage debt existing in respect of the same mortgage at the same time. This is legally repugnant and can only be construed as a novation and an acceptance on the part of the trust company of the Mas [the purchasers who made the renewal] exclusively as principal debtors, thus releasing the Neumanns [the original mortgagors] of their obligation. These circumstances are, in my view, consistent with novation.

Wilson J. noted that different results had been reached in other decisions, and that the reliability of those other decisions must now be regarded as doubtful. After discussing the Nova Scotia decision in *Central*

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[13] *Ibid.*, at pp. 428 (S.C.R.), 501 (D.L.R.).

[14] (1986), 8 B.C.L.R. (2d) 318 (B.C.C.A.). While the court seems to reject or at least qualifies *Neumann*'s discussion of a fourth requirement for novation on mortgages, as mentioned below the two decisions are not really at odds.

[15] *Ibid.*, at p. 321. This same concept was applied the other way in *Eaton Bay Trust Co.* v. *Ling* (1987), 45 D.L.R. (4th) 1, 19 B.C.L.R. (2d) 245 (B.C.C.A.), to hold an original mortgagor liable only for the unamended terms applying prior to subsequent renewal by a new owner. See, further, the text at footnote 22.

Trust Company v. *Bartlett*,[16] where novation was found not to have occurred, Wilson J. stated:[17]

> In my view, significant changes in the terms of a mortgage effected without the consent of the original mortgagor constitute very strong evidence of novation. It is not necessary, of course, for a different contract to be brought into existence for a novation to take place. The essence of novation is the substitution of debtors. However, where significant changes in terms occur and the creditor has not applied to the original mortgagor for its consent, I believe this is a strong indication that the creditor is no longer looking to the mortgagor for payment.

Accordingly, in Wilson J.'s view a renewal with a new property owner materially altering terms would likely be a novation.

The question of whether or not an assumption agreement could amount to a novation was also addressed by the court. Wilson J. concluded that execution of an assumption agreement does not *per se* effect a novation. Novation is a question of fact and it would be wrong to hold that execution of an assumption document by itself would satisfy the doctrine. She went on to add, however, that this did not mean that the document might not carry significant weight in determining whether or not a novation has taken place. She stated:[18]

> Indeed, if the parties have directed their minds to setting out the terms of the debt relationship in writing, it seems to me that the terms of that agreement should conclude what the parties intended their relationship to be. In other words, in the absence of a written agreement or clear contractual language, the conduct of the parties may take on greater significance in elucidating the intent of the parties than when such an agreement has in fact been executed and is clear. Thus, the language of assumption agreements is deserving of careful scrutiny even although the subsequent conduct of the parties may also be factored into the Court's determination.

Wilson J. then considered "no prejudice" clauses that are commonly found in assumption agreements (that is, the clause in Mead's assumption agreement that stated that the assumption was without prejudice to rights against the original mortgagor and that Mead's covenant remained enforceable notwithstanding release of the original mortgagor). Such clauses were held not to be determinative, particularly where they are contained in the assumption document and the original mortgagor does not sign that document. The conduct of the parties may still work to bring about a novation, notwithstanding the without prejudice provision in the assumption agreement.

Two British Columbia decisions, *Re Bank of Nova Scotia and Vancouver Island Renovating Inc.*[19] and *Re Prospect Mortgage Investments*

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[16] (1983), 30 R.P.R. 267 (N.S.C.A.). While the court here found no novation it limited the prior mortgagor to liability on the terms (12 3/4% interest rate) he had contracted to meet, not the more onerous terms (18 3/4%) of the renewal made subsequent to his ownership.

[17] *Supra*, footnote 1, at pp. 430 (S.C.R.), 503 (D.L.R.).

[18] *Ibid.*, at pp. 433 (S.C.R.), 505 (D.L.R.).

[19] (1986), 31 D.L.R. (4th) 560, 6 B.C.L.R. (2d) 250 (B.C.C.A.).

Corp. and Van-5 Dev. Ltd.,[20] were referred to on this point. In *Vancouver Island*, the circumstances that the court felt overrode the "no prejudice" language were described as follows:[21]

> The third question is whether the creditor bank must be taken to have accepted the new contract in full satisfaction and in substitution for the old contract. On that matter it is to be observed that the bank approached Van Isle with an offer to renew the mortgage. It offered a new one-year term. It offered a new principal amount, a new and higher interest rate, a new and higher monthly payment and it obtained the covenant of Van Isle to pay the debt. The bank did not look to the Pearsons with respect to this transaction, that is, it did not send the Pearsons copies of the documents or ask that they sign as a party to the documents. The intention of the bank appears to have been to deal with Van Isle alone. I think that the bank must have taken in all the circumstances of this case to have accepted the new contract in substitution for the old contract, particularly when regard is had to the fact that Van Isle is referred to as the mortgagor in the renewal agreement.

Material alterations without resort to the prior covenantor for approval of them were sufficient circumstances to override the written contract.

A contrarily-leaning decision is *Eaton Bay Trust Company* v. *Ling*.[22] In that case the original mortgage itself had a form of "no prejudice" clause which the British Columbia Court of Appeal had held avoided novation on the subsequent renewal by a new owner. It was taken to indicate an "in futuro" consent on the part of the original mortgagor to the kind of alterations that were contained in the subsequent renewal with a subsequent purchaser. Wilson J. expressed general agreement with the decisions in *Vancouver Island* and *Prospect Mortgage* and expressed uneasiness with the *Ling* decision. She said:[23]

> It seems to me that the notion of *in futuro* consent may work considerable inequities in some circumstances. Given the conduct of the mortgagee in that case, I would have been inclined to hold that a novation had been effected.

However, Wilson J. then considered the effect of a statement in Remai's original mortgage that the mortgagor was bound to the mortgage obligations notwithstanding future renewals. She noted that the assumption agreement signed by Mead stated that National Trust could release the original mortgagor without affecting Mead's obligations and that the original mortgage itself contained a provision that said no extension of time or

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[20] (1985), 23 D.L.R. (4th) 349, 68 B.C.L.R. 12 (B.C.C.A.). In this case the court directed that the case be remitted for trial on the issue of novation. In so doing, however, the court approved the ruling against novation in *Eaton Bay Trust Co.* v. *Pollen* (1983), 30 R.P.R. 254 (B.C.S.C.).

[21] *Supra*, footnote 19, at pp. 566 (D.L.R.), 256 (B.C.L.R.). Such circumstances are typical on mortgage renewals. Indeed, resort back to prior covenantors in any manner is uncommon in practice.

[22] *Supra*, footnote 15.

[23] *Supra*, footnote 1, at pp. 436 (S.C.R.), 507 (D.L.R.). It is difficult to assess what Wilson J. intended by approving of *Vancouver Island* and *Prospect Mortgage*, since the former readily found novation in surrounding circumstances and the latter, while directing an issue, suggested that it is unlikely that a renewal would be found to be a novation.

other dealing with the owner of the property would release the mortgagor. With the combination of those clauses, she felt that the assumption agreement itself in this case did not amount to a novation. As a result, the court answered issues A and B "yes", and issue C "no".[24] The first two answers dismissed the appeal.

McLachlin J. agreed with Wilson J.'s conclusions and reasons subject to one comment. She viewed sections 2(2)(d) and 49(2) of the Act as being in "facial conflict",[25] and resolved that conflict by recourse to the intention of the legislature to benefit the non-corporate borrower.

Commentary

A number of points warrant some comment in the context of prior decisions.

(1) *Corporate Exceptions*

At one time prohibitions like that found in section 2(1) of the Act appear to have been narrowly construed. Dealing with a somewhat similar Alberta mortgage remedy limitation[26] the Supreme Court of Canada in 1962 in *Krook* v. *Yewchuk*[27] described the limitation as a departure from common law rules and therefore subject to a narrow construction. One might have thought that a corollary of that primary principle would be that exceptions to such departure from the common law should be broadly interpreted. Such thought clearly cannot be supported in the light of *Mead.*

The Supreme Court's perspective appears to be founded in a modern-day trend to adopt a broad and non-literal purposive construction of legislation as a primary rule of interpretation, an approach which Wilson J. embraced in her earlier judgment on mortgage renewals in *Royal Trust Corporation* v. *Potash.*[28] This approach is also anticipated, in the specific context of mortgage remedy limitations, in recent Alberta decisions: *Chateau Developments Ltd.* v. *Steele,*[29] *Collingwood Investments Ltd.* v. *Bank of America Mortgage Corp.*[30] and *Paramount Life Insurance Co.* v. *Torgerson*

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[24] For a statement of the issues see the text, *supra,* footnote 6.

[25] *Supra,* footnote 1, at pp. 439 (S.C.R.), 509 (D.L.R.).

[26] Judicature Act, R.S.A. 1970, c. J-1, s. 17 (34), since carried forward as s. 41(1) of the Law of Property Act, R.S.A. 1980, c. L-8.

[27] [1962] S.C.R. 535, at p. 540, (1962), 39 W.W.R. (N.S.) 13, at p. 18.

[28] [1986] 2 S.C.R. 351, at pp. 367-368, (1986), 31 D.L.R. (4th) 321, at p. 332, citing Laskin C.J.C. in *United Trust Co.* v. *Dom. Stores Ltd.*, [1977] 2 S.C.R. 915, at p. 937, (1976), 71 D.L.R. (3d) 72, at p. 87.

[29] [1983] 6 W.W.R. 15, (1983), 27 Alta. L.R. (2d) 112, (Alta. C.A.), leave denied by S.C.C., [1984] 1 W.W.R. 1ii, 31 Alta. L.R. (2d) xl.

[30] [1988] 3 W.W.R. 673, (1988), 58 Alta. L.R. (2d) 1 (Alta. C.A.). Insofar as this decision supports a broad construction of the corporate exceptions and a narrow construction to exceptions to the corporate exceptions it is probably now no longer valid.

Development Corp. (Alta.) Ltd.[31] In *Potash* the Supreme Court applied a purposive construction to read into section 10(1) of the Interest Act[32] the words "as amended" so as to secure lock-in of a mortgage renewal. In *Chateau* the corporate exception to remedy limitation was narrowly confined through the exclusion of mortgages executed by both a corporation and an individual. In *Paramount Life* an individual who assumed and renewed a corporate mortgage was protected by the purposive construction of the remedy limitation; and in this case too (and also in *Collingwood*, both cases relying on *Potash*) the court read into the remedy limitation provision in Alberta[33] the same words "as amended".

The Supreme Court did some imaginative work on the meaning of the words "successors and assigns" in the Saskatchewan Act.[34] On the question of the meaning of "assigns" the court noted that a broad reading of that word would include both individuals and corporations. Assigns were bound by corporate waivers "notwithstanding anything in this act" under the language of section 40(2) of the Act. Accordingly, individual assigns of corporate mortgagors, it seemed, were caught. But the court went on to limit the scope of the word "assigns":[35]

> It is my view, however, that the purpose of this exception is to protect mortgagees who extend mortgages to corporations on condition that the latter provide a personal covenant and who then find that the corporation has unilterally (and without the mortgagee's consent) assigned the mortgage to an individual on whom the personal covenant would not otherwise be binding under the Act. It is those "assigns" who must be bound by the personal covenant of the original corporate mortgagor if the mortgagee is to have the protection contemplated by the section. This situation would arise where there is an assignment of the mortgage from a corporate mortgagor to an individual without an assumption agreement between the original mortgagor and the mortgagee.
>
> Where the mortgagee (in this case National Trust) has entered into an assumption agreement with the new mortgagor, however, the concern about the mortgagee's rights being unfairly defeated simply does not arise. National Trust was completely free in the present case to decide whether or not to let Mead assume the mortgage from Remai. If it saw itself as exposed to an undue risk if it could not sue on the personal covenant to recover a deficiency on the mortgage debt, it was at liberty to refuse to enter into the Assumption Agreement with Mead. It is noteworthy that while ss. 2(2)(a) - (d) extend the protection of the Act to circumstances of assignment, extension or assumption of a mortgage, s. 40(2) only binds successors and assigns to a waiver by a corporate body. There is no evidence on the record indicating whether Ramai assigned its mortgage to Mead. Even if it had, however, the fact that Mead also assumed the mortgage by way of an Assumption Agreement with National Trust entitles him to the benefit of s. 2(2)(d) which in turn is not subject to the waiver exception under s. 40(2). Remai's exercise of its waiver under s. 40 of the Act does not therefore bind Mead.

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[31] [1988] 3 W.W.R. 685, (1988), 58 Alta. L.R. (2d) 13 (Alta. C.A.).

[32] R.S.C. 1985, c. I-15.

[33] Law of Property Act, *supra*, footnote 26, s. 41(1).

[34] Limitation of Civil Rights, *supra*, footnote 2, s. 40(2).

[35] *Supra*, footnote 1, at pp. 424-425 (S.C.R.), 498-499 (D.L.R.).

It is difficult to find in the plain and ordinary meaning of the words "successors and assigns" any such qualifications as the court describes above. Effectively the broad, purposive approach to construction led to a judicial restructuring of otherwise understandable and standard language.

Such judicial amendment may be practically manageable in the case of owner-occupied residential and farm properties. However, when the principles are carried over to other varieties of loans, including those on commercial properties made with corporations and subsequently assumed by individuals, they could defeat the purpose of the corporate exception of securing financing supported by a personal covenant on a solid practical basis. Particularly with the convoluted structure of some remedy-limitation statutes like Alberta's,[36] the carry-over of principles intended to protect homeowners and farmers to commercial properties is a real possibility.[37] The practical consequence can be non-assumability of corporate commercial mortgages by anyone other than corporations,[38] and partial defeasance of the sound commercial reasons for creation of the corporate exceptions.

If broad and liberal construction is to be a primary rule of statute interpretation what is the rationale for its exclusion in the case of plainly stated statutory exceptions? Is it solely the fact that the main prohibition is expressly not waivable? That seems hardly a sufficient basis. In *Mead* the rationale, whatever its nature, overrode the express provision in section 40(2) of the Act that the corporate exception applied "notwithstanding anything in this Act".

In Alberta the corporate exception began in 1948 as an important exclusion of corporate debentures[39] and was expanded in 1964 to exclude all mortgages granted by corporations.[40] There was a clear broad policy aim of ensuring that commercial transactions are not caught by the remedy limitations. A broad and liberal construction of such exception is needed to avoid defeasance of the legislative intent. Similar considerations probably apply to Saskatchewan's corporate exception and to the corporate exception in section 10 of the Interest Act.[41]

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[36] See particularly ss. 43ff of the Law of Property Act, *supra*, footnote 26, am. S.A. 1983, c. 97, s. 3 and S.A. 1984, c. 24, s. 4.

[37] As it was on the commercial loan renewal in *Pioneer Trust Co.* v. *Patrick* (1988), 61 Alta. L.R. (2d) 312 (Alta. C.A.).

[38] This would be so particularly if an assumption by an individual with consent of the original corporate mortagor (for example, in a tripartite agreement) were treated as a joint corporate and individual loan and triggered the application of the *Chateau Developments* case, *supra*, footnote 29. Such treatment would militate broad non-acceptability of individual purchasers from the lender's point of view. The treatment of the novation issue also bears on portability of mortgages, but even more widely, as discussed below.

[39] S.A. 1948, c. 38, s. 1.

[40] S.A. 1964, c. 40, s. 4.

[41] *Supra*, footnote 32.

(2) *Novation*

It is the novation point on which the *Mead* decision has the greatest potential impact. Prior rulings had been widely divergent in their views of novation, as Wilson J.'s reflections on a few of them illustrate. In dealing with mortgage renewals in *Royal Trust Corporation* v. *Potash*[42] Wilson J. did not need to resolve those conflicts. The point was avoided, too, in the subsequent trilogy of Alberta Court of Appeal cases[43] that expanded upon the *Potash* ruling. The majority of decisions reported across Canada prior to *Potash* appeared disinclined to find a novation in most renewal situations,[44] and such disinclination extended at least equally to mere assumption situations.[45] The absence of identifiable consent to the renewals by prior mortgagors did not change the result.

The one clear and persuasive exception was *Canada Permanent Trust Company* v. *Neumann*,[46] although there were others.[47] *Mead* raises the *Neumann* perspective into prominence. Any "unconsented" renewal with significant changes in the loan arrangement is likely (unless the written

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[42] *Supra*, footnote 28, at pp. 371 (S.C.R.), 335 (D.L.R.).

[43] *Collingwood Investments Ltd.* v. *Bank of America Mortgage Corp.*, *supra*, footnote 30; *Paramount Life Insurance Co.* v. *Torgerson Development Corp. (Alta.) Ltd.*, *supra*, footnote 31; *Pioneer Trust Co.* v. *Patrick*, *supra*, footnote 37.

[44] *Standard Trust Co.* v. *Reid* (1986), 44 Alta. L.R. (2d) 418 (Alta. Q.B.); *Eaton Bay Trust Co.* v. *Ling*, *supra*, footnote 15; *Credit Foncier Franco-Canadien* v. *253171 Alberta Ltd.* (1984), 57 A.R. 241 (Alta. Q.B.); *Credit Foncier Trust Co.* v. *Sharp* (1984), 32 R.P.R. 261 (B.C.S.C.); *Montreal Trust Co.* v. *Sinclair* (1984), 32 R.P.R. 265 (B.C.S.C.); *Killips* v. *Leroda Mgt. Ltd.* (1985), 38 Alta. L.R. (2d) 238 (Alta. Q.B.); *First City Trust Co.* v. *Farrell* (1985), 40 Alta. L.R. (2d) 423 (Alta. M.C.); *Canada Permanent Trust Co.* v. *Carlyle* (1983), 30 R.P.R. 244 (B.C.S.C.); *Eaton Bay Trust Co.* v. *Pollon*, *supra*, footnote 20; *Bank of Montreal* v. *Miendema* (1983), 30 R.P.R. 264 (B.C.S.C.); *Central Trust* v. *Bartlett*, *supra*, footnote 16; *Canada Life Assur. Co.* v. *Young* (1921), 65 D.L.R. 776, [1921] 1 W.W.R. 915 (Alta. S.C.); *Investors Mortgage Sec. Co.* v. *McDonald*, [1927] 1 W.W.R. 671 (Sask. K.B.); *Turner* v. *Royal Trust Corp.* (1985), 23 D.L.R. (4th) 746, [1986] 2 W.W.R. 655 (B.C.C.A.); *First City Trust Co.* v. *Matias* (1986), 68 A.R. 327 (Alta. M.C.); *Malaviya* v. *Lankin* (1985), 23 D.L.R. (4th) 245, 53 O.R. (2d) 1 (Ont. C.A.); *cf. Financeamerica Realty Ltd.* v. *Holloway* (1985), 23 D.L.R. (4th) 256, 53 O.R. (2d) 3 (Ont. H.C.).

[45] *Central & Eastern Trust Co.* v. *Rosebowl Holdings Ltd.* (1981), 34 N.B.R. (2d) 308 (N.B.C.A.); *Bank of Montreal* v. *Michaud*, unreported, Alta. C.A., May 22, 1984, 16920; *Saskatchewan Trust* v. *Ross* (1985), 41 Sask. R. 121 (Sask. Q.B.); *Central Trust Co.* v. *Milchem* (1986), 72 A.R. 321 (Alta. M.C.), aff'd (1986), 47 Alta. L.R. (2d) 272, 77 A.R. 324 (Alta. Q.B.). See *contra*: *Lang* v. *Montreal Trust Co.* (1988), 33 B.C.L.R. (2d) 326 (B.C. Co. Ct.); *Royal Bank of Canada* v. *Paget*, [1990] 3 W.W.R. 88 (Sask. Q.B.).

[46] *Supra*, footnote 14.

[47] *Re Bank of Nova Scotia and Vancouver Island Renovating Inc.*, *supra*, footnote 19; *Crown Trust Co.* v. *Brickett* (1986), 5 B.C.L.R. (2d) 228 (B.C.S.C.); and see also, *Re Prospect Mortgage Investment Corp. and Van-5 Developments Ltd.*, *supra*, footnote 20.

documents and circumstances both work plainly to the contrary) to amount to a novation. Even an assumption in some circumstances may qualify.

Clearly the reticence towards this treatment in cases like *Collingwood Investments Ltd.* v. *Bank of America Mortgage Corp.*[48] and *Paramount Life Insurance Co.* v. *Torgerson Development Corp. (Alta.) Ltd.*[49] in Alberta, where renewals occurred after change of ownership and creation of new covenants, should no longer be warranted. Even where new direct covenants have not come into play in conjunction with renewals, the Supreme Court's ruling suggests that significant changes will likely yield novation.[50]

The two key emphases, from Wilson J.'s analysis, are the making of material changes and the absence of consent on the part of the original mortgagor to such changes. She opens her discussion in this area by reference to basic contract principles:[51]

> The common law has long recognized that while one may be free to assign contractual benefits to a third party, the same cannot be said of contractual obligations. This principle results from the fusion of two fundamental principles of contract law: 1) that parties are able to make bargains with the parties of their own choice (freedom of contract); and 2) that parties do not have to discharge contractual obligations that they had no part in creating (privity of contract). Our law does, however, recognize that contractual obligations which a party has freely assumed may be extinguished in certain circumstances and the doctrine of novation provides one way of achieving this.

It is after saying that, and making a preliminary review of this issue in the context of *Neumann* and the contrary decision in *Central Trust Co.* v. *Bartlett*,[52] that Wilson J. makes her initial firm statement that significant changes without consent are a strong indication of novation. Later she refers to the situation where a prior covenantor consents to changes and she adds the following, repeating her initial thought:[53]

> It seems to me that if the original mortgagor consents to the mortgage being assumed by his assignee on different terms, this would indicate rather that he considers himself to be bound despite the assignment. Consent to changed terms, in other words, does not indicate novation but rather continuing liability. On the other hand, when changes in the terms have been effected without the knowledge or consent of the original mortgagor, that will be a strong indication in favour of novation.

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[48] *Supra*, footnote 30. Prowse J.A. describes the "debate" over novation; see pp. 679-680 (W.W.R.), 8-9 (Alta. L.R.). *Mead* should put an end to the debate.

[49] *Supra*, footnote 31, although *Paramount Life* avoided the novation question and proceeded on the assumption that there was no novation; see pp. 687 (W.W.R.), 15 (Alta. L.R.).

[50] *Eaton Bay Trust* v. *Ling*, *supra*, footnote 15, was a case in which the purchaser did not enter into a direct covenant to pay with the lender, and that appears to have been a factor (albeit not the decisive one) in the British Columbia court's deciding there was not a novation. Wilson J. doubts the decision, and suggests that there was a novation in *Ling*; *supra*, footnote 1, at pp. 436 (S.C.R.), 507 (D.L.R.). Absence of a clear covenant directly with the lender is not determinative accordingly.

[51] *Supra*, footnote 1, at pp. 426-427 (S.C.R.), 500 (D.L.R.).

[52] *Supra*, footnote 16.

[53] *Supra*, footnote 1, at pp. 432 (S.C.R.), 504 (D.L.R.).

The *Mead* judgment lends credence to the probability that simple debt (including mortgage debt) contracts may more easily be the subject of novation than contracts with two-way flows of ongoing obligations. In *Neumann*,[54] Lambert J.A., in a passage Wilson J. quoted,[55] stated that the fourth requirement for novation—consent of the original debtor to the contract alteration—does not apply in debt situations. Wilson J. doubted this statement, saying:[56]

> In my view, if Lambert J.A. meant to suggest in this passage that the consent of the original debtor is required for a novation in cases where there have been significant changes in the original mortgage terms, I think he must be in error.

In fact, she says much the same thing as Lambert J.A. He was merely saying that consent to the changes is not required for novation in debt situations. Indeed, Wilson J. goes further and states that if there is consent by the original debtor to the change there is not likely to be a novation. An *absence* of consent is the indicia of novation.

The fourth requirement, accordingly, does not apply in situations where the creditor amends the contract with a new debtor.[57] This position may not be limited to debt or mortgage situations, but certainly applies to them.

Indeed, given the focus in *Mead* on significant alteration and absence of consent, one might even conclude that in any situation of contract alteration by an assignment there are only two tests—is an amendment made with an assignee and is there an absence of consent? That would be over-simplifying the position; but renewals by new mortgagors will not easily be found to fall outside novation in the absence of clear consent by the prior mortgagor.

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[54] *Supra*, footnote 14, at pp. 322-323.

[55] *Supra*, footnote 1, at pp. 431 (S.C.R.), 504 (D.L.R.).

[56] *Ibid.*, at pp. 431-432 (S.C.R.), 504 (D.L.R.).

[57] Esson J.A., in *Re Prospect Mortgage Investments Corp. and Van-5 Dev. Ltd.*, *supra*, footnote 20, at pp. 364-365 (D.L.R.), 27-29 (B.C.L.R.), expressed doubt as to the validity or at least the operation of the "fourth principle" in more general terms. He referred to *Bank of B.C.* v. *Firm Holdings* (1984), 57 B.C.L.R. 1 (B.C.C.A.), where the fourth principle was addressed by Lambert J.A. He stated that the facts in *Firm Holdings* did not raise an issue with respect to that fourth principle. In *Re Bank of Nova Scotia and Vancouver Island Renovating Inc.*, *supra*, footnote 19, at pp. 568-569 (D.L.R.), 258 (B.C.L.R.), Lambert J.A. stated that what was said in *Firm Holdings* was consistent with what was said in *Prospect Mortgage*, but that a more precise delineation of when consent to a novation by all parties is required must await an appeal where relevant facts are raised. It was after referring to these prior discussions that Lambert J.A. in *Neumann* made the statement about consent with which Wilson J. argued in the passage quoted in the text, *supra*, footnote 56. In *Eaton Bay Trust Co.* v. *Ling*, *supra*, footnote 15, the B.C. Court of Appeal avoided the operation of the fourth principle by ruling that it did not apply where the original mortgage contained a "no prejudice" clause. *Ling* was doubted in *Mead*. In any event, from the conclusions reached by Wilson J., in *Mead* the need for consent to a subsequent mortgagor's renewal is clearly *not* required for novation.

In so saying one need not necessarily conclude that if novation is found then all of the implications of security registration and priority loss might result. It should be remembered that in *Royal Trust Corporation* v. *Potash*[58] Wilson J. recognized that the security in the land may remain the same (the old security) even though a new loan is the result of a renewal. The renewal may be a novation without affecting the continuation of the security for that new loan contract.[59]

It is doubtful, however, whether this rationale will hold up over time. There has to be some potential for the perspective to change in a case where third party interests intervene. If the mortgage security is the servant of the promise to pay in a mortgage (which it surely must be in most cases)[60] can one truly have a new loan agreement and at the same time have a "servant" of an old (now extinct) loan, the mortgage security, operate for that new agreement? The logical possibility of answering "yes" to that question is perhaps easy to follow where one considers the matter strictly between the parties to the mortgage contract;[61] but the position of intervening claimants who take no part in the renewal process would be more difficult to rationalize.[62]

Some Practical Considerations

What are some of the practical implications of the *Mead* rulings? These might be discussed in two general contexts, the operation of statutory interpretation rules and the operation of the novation.

(1) *Consequence for Statutory Interpretation*

The general implication to be drawn from *Mead* (and similar opinions in *Paramount Life Insurance Co.* v. *Torgerson Development Corp. (Alta.)*

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[58] *Supra*, footnote 28; see particularly pp. 359-360 and 371 (S.C.R.), 327 and 335 (D.L.R.).

[59] Further, in *Mead*, *supra*, footnote 1, at pp. 430 (S.C.R.), 503 (D.L.R.), Wilson J. notes that a novated contract is not necessarily a different contract; although query, as discussed below, what she meant by that statement.

[60] Particularly for those mortgages, like the mortgages under Land Titles Acts, that are mere charges. See, for example, Land Titles Act, R.S.A. 1980, c. L-5, s. 105. See also the discussion of the irreconcilability of the concept of two different covenants for payment in one debt contract, in *Canada Permanent Trust Company* v. *Neumann*, *supra*, footnote 14, at p. 321. See also *Canada Trustco Mortgage Co.* v. *Park Plaza Country Club Holdings Inc.*, [1988] 6 W.W.R. 348, 28 B.C.L.R. (2d) 98 (B.C.S.C.); see further, *infra*, footnote 62.

[61] As was the case in *Royal Trust Corporation* v. *Potash*, *supra*, footnote 28.

[62] The position *vis-à-vis* third parties was clearly left open in *Potash*: *ibid.*, at pp. 359-360 (S.C.R.), 327 (D.L.R.). The possibility of a third party successfully claiming novation is evident from *Canada Trustco Mort. Co.* v. *Park Plaza Country Club Holdings Inc.*, *supra*, footnote 60; see also application to settle minutes of judgment, [1989] 1 W.W.R. 768 (B.C.S.C.).

Ltd.[63] and *Pioneer Trust Co.* v. *Patrick*[64]) is that it is likely that in all but the clearest cases of qualification under the corporate exception, the remedy limitation provisions will be applied to the protection of individuals who sign agreements with or otherwise become direct covenantors with mortgagees. Assumption of corporate mortgages by individual mortgagors, whatever the nature of the mortgaged property, especially if combined with material alteration of the loan terms, risks loss of the corporate character. This offers some difficulty for the previously uncomplicated treatment of mortgage assumptions. It certainly will impede the "portability" of corporate commercial loans, a fact that will in the long run do a disservice to both lenders and borrowers. Some of the specific questions that may arise include the following.

First, the preparation and obtaining of an assumption agreement itself becomes a serious (not a routinely simple) act: it can change the application of the non-recourse provisions in the statute. This ties into some of the things that were said in *Collingwood Investments Ltd.* v. *Bank of America Mortgage Corp.*[65] and *Paramount Life Insurance Co.* v. *Torgerson Development Corp. (Alta.) Ltd.*[66] in the context of renewals where the courts emphasized the relevance of a new covenant to pay in a renewal. With the *Mead* decision, it is possible that the comments made in those Alberta decisions on mortgage renewals by a new owner might equally be applied to assumption agreements by individuals under remedy limitation legislation. Questions may also arise about the operation of implied covenant assumption under statutes like the Alberta Land Titles Act[67] that create by statute a direct covenant between the mortgagee and a transferee who takes title subject to the mortgage. Is it possible that on such assumptions the mortgage covenant comes under the protection of the remedy limitations, particularly where the mortgagee expressly or tacitly consents to the transfer and assumption? Such a treatment would entail quite a stretch of the statute, and be difficult to reconcile with cases decided before *Royal Trust Corporation* v. *Potash*;[68] but the position is now certainly arguable.

[63] *Supra*, footnote 31.

[64] *Supra*, footnote 37.

[65] *Supra*, footnote 30.

[66] *Supra*, footnote 31.

[67] *Supra*, footnote 60, s. 62.

[68] *Supra*, footnote 28. See, for example, in Alberta, *Elmwood Holdings* v. *Sinclair* (1986), 44 Alta. L.R. (2d) 128 (Alta. C.A.), application for re-hearing refused, (1986), 45 Alta. L.R. (2d) 404, 71 A.R. 22 (Alta. C.A.), leave to appeal refused by S.C.C., 47 Alta. L.R. (2d) xliv. This decision was recognized in *Paramount Life*, *supra*, footnote 31, and *Pioneer Trust*, *supra*, footnote 37, as still valid, after *Potash*, but its reach did not extend to renewals. *Mead* may limit its operation even further. In *Pioneer Trust*, *ibid.*, at p. 317, the Alberta Court of Appeal suggested that a mere assumption under s. 62 of the Land Titles Act, *supra*, footnote 60, would be caught by s. 41(1) of the Law of Property Act, *supra*, footnote 26, where the original mortgage contemplated a renewal. This suggestion is rendered doubtful by *Mead* and probably cannot be squared with even the preceding *Potash* decision (see *infra*, footnote 70).

Second, it seems somewhat arbitrary and strained to confine the word "assigns" to those with whom the lender is not involved in some approval process. Furthermore, when the court spoke of a consent factor in this context it spoke (as quoted above) of assignment by the mortgagor of his obligations under the mortgage. Of course, mortgage obligations cannot be assigned by the mortgagor. Title can be transferred to and the mortgage liability assumed by the transferee. The assumption may or may not be the subject of a consent by the mortgagee. The obligations of the original mortgagor remain with or without such consent, unless the mortgagee's consent is part of some form of release (as it would if the assumption plus consent amounted to a novation). In *Mead*, the court held that the assumption was not a novation. The Act therefore would probably have left the corporate mortgagor still liable. In the circumstances, the rationale for interpolation of the existence or absence of consent as critical to the meaning of "assigns" is difficult to perceive. Be that as it may, the *Mead* decision affords some practical problems in dealing with transfers in Saskatchewan:

(i) The mortgagee will typically be asked for an assumption statement. In a sense unless he objects he tacitly consents to "assignment" of the property and the mortgage obligation, at least by the time he has received and processed a few payments by the purchaser. Is that a sufficient consent? Particularly in those mortgages where the lender has the expressed right to call the mortgage due on sale, the moment the mortgagee accepts the purchaser's payments and carries on with the purchaser as being an acceptable one he must surely "consent" by doing so. Would that in Saskatchewan produce the result that the purchaser, if an individual, is not subject to the waiver? If so, then the "due-on-sale" provision in mortgages could actually work against a lender rather than in his favour.[69] More to the point, the lender may well want to be much firmer about refusing to consent to transfer to an individual precisely because it may change the character of his mortgage with an enforceable personal covenant to one without an enforceable covenant against the current owner.

(ii) Does the court misconceive the lender's "liberty to refuse to enter into the assumption agreement"? Even where lenders hold "due-on-sale" rights, such rights are difficult to enforce, both legally and practically. Lenders are really not freely at liberty to say no to assumption.[70] Properties tend

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[69] Indeed, "due-on-sale" provisions have been cited as evidence of novation intent: see *Crown Trust* v. *Brickett*, *supra*, footnote 47. The consent to sale was there one of three factual indications of novation.

[70] For example, in *Bigam* v. *Milne* (1983), 25 Alta. L.R. (2d) 179 (Alta. Q.B.), the court applied provisions in the Judicature Act, *supra*, footnote 26, s. 18(1), to say that a mortgagee may only enforce a "due-on-sale" provision if it has reasonable grounds to do so. See also *Royal Bank of Canada* v. *Freeborn* (1974), 22 Alta. L.R. (2d) 279 (Alta. T.D.).

as a result to travel from owner to owner rather freely.[71] On the other hand, if consent or obtaining of assumptions will change the personal recourse available to mortgagees, and lenders get tough on "due-on-sale" provisions, it will in practice seriously impede the transportability of some mortgage financing.

(iii) Would a lender actually be better served if he did not take an assumption agreement from an individual purchaser, and would the same consideration in terms of limiting the operation of the word "assigns" apply to a corporate purchaser (as opposed to a corporate successor)? The answer to the first part of this question is probably yes. The answer to the second is probably no if one recognizes that the reason given by Wilson J. for qualifying the word "assigns" is to give effect to the broad policy expectation of protection of individual mortgagors.

Third, for purposes of practice in Alberta, where what secures recourse on the personal covenant is the nature of the covenantor as a corporation, does the taking of an assumption agreement from an individual, coupled with significant changes in the loan terms, result in there being no recourse against that individual? In light of the foregoing conclusions from this decision, and the conclusions expressed in the Alberta renewal cases, it seems likely that that would be the result.

In Alberta, rental residential unit purchasers who take title subject to corporate-granted mortgages have previously been subject to full personal recourse under the Law of Property Act[72] corporate exception. In many situations applicable to such loans the assumption includes significant changes in the terms of the loan (for example, conversion of the interim construction loan interest rate and payment rate to fixed-term i.p.t. terms). Those now would likely be treated as being subject to the statutory remedy restrictions. Certainly that would be the result for subsequent renewals by the purchaser without the consent of the corporate original mortgagor.

Fourth, does the rule requiring narrow construction of exceptions to the general remedy limitation apply to other exceptions as well? In Alberta, for example, the Law of Property Act[73] contains a second important exception, in section 43(2), for mortgages "given to secure a loan under the National Housing Act." Is such exception capable now[74] of being limited

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[71] Particularly in provinces like Alberta where transfer and assumption of mortgages are facilitated by provisions like s. 62 of the Land Titles Act, *supra*, footnote 60.

[72] *Central Trust Co.* v. *Milchem*, *supra*, footnote 45; *Elmwood Holdings* v. *Sinclair*, *supra*, footnote 68.

[73] R.S.A. 1980, c. L-8.

[74] Before *Mead*, the Alberta courts held that the exception includes insured loans: *National Victoria & Grey Trust Co.* v. *Trofimenkoff* (1990), 104 A.R. 299 (Alta. Q.B.); *Thijssen* v. *Falusha* (1985), 59 A.R. 138 (Alta. Q.B.). The question is only raised here; and the answer warrants detailed analysis of the legislative history and other judicial reflections. That exercise is beyond the scope of this comment.

to direct Canada Mortgage and Housing Corporation mortgages only and to the exclusion of insured loans?

(2) *Consequence of Novation Treatment*

Clearly, every mortgage renewal that imports substantial change to the mortgage terms affords some risk of treatment as a novated loan. Even a renewal by the original borrower in *Royal Trust Corporation* v. *Potash*[75] was treated as a new loan for term lock-in purposes, although it was not a completely new contract as no new parties were involved and the land security instrument was carried forward.

Wilson J. stated that it is not necessary for a different contract to come into existence for novation. She added that "the essence of novation is the substitution of debtors".[76] These two statements taken in the context of Wilson J.'s rulings in *Potash* might be taken to detract from the concept of "novation" as a replacement of one contract by a new contract. They should not be so taken. Even with mere debtor substitution a novation is a new contract, one that the creditor accepts in full satisfaction and substitution of the old contract.

The various factual situations that the court addressed in its discussion of mortgage renewals were in fact more than mere debtor substitution. A new debtor (subsequent owner) renewed the loan on significantly altered terms. The significant alteration of terms, as stated above, was a critical element in and led to the identification of a novation.

In *Potash*[77] Wilson J. drew a distinction between a renewal that extended the mortgage term without a deemed re-dating of the original mortgage and one that contained such a provision. The former was not a "mortgage as amended" for purposes of section 10 of the Interest Act,[78]

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[75] *Supra*, footnote 28.

[76] *Supra*, footnote 1, at pp. 430 (S.C.R.), 503 (D.L.R.).

[77] See particularly, *supra*, footnote 28, at: (1) pp. 360 (S.C.R.), 328 (D.L.R.), where Wilson J. described a mortgage re-dating clause as a "crucial amendment"; (2) pp. 363-364 (S.C.R.), 330 (D.L.R.), where she accepts as valid the decisions in *Deeth* v. *Standard Trust Co.* (1980), 12 R.P.R. 157n (Ont. Div. Ct.), and *Re Lynch and Citadel Life Assurance Co.* (1983), 149 D.L.R. (3d) 316, 46 B.C.L.R. 354 (B.C.S.C.), because there was in those cases no attempt to re-date the mortgage; (3) pp. 364-366 (S.C.R.), 330-332 (D.L.R.), where she approves (in result even adopts) the rulings in *Kaltenback* v. *Royal Trust Co.* (1983), 48 B.C.L.R. 350, 30 R.P.R. 69 (B.C.S.C.), and particularly *Butcher* v. *Royal Trust Co.* (1984), 33 Sask. R. 11, 33 R.P.R. 178 (Sask. Q.B.), where the renewals did have re-dating clauses; and (4) pp. 374-375 (S.C.R.), 337-338 (D.L.R.), where Wilson J. stated her conclusions. The court in *Potash*, as mentioned above, avoided the issue of novation. A subsequent decision in the British Columbia County Court, *Lang* v. *Montreal Trust Co.*, *supra*, footnote 45, found novation in a mortgage assumption of the *Mead* kind (purchaser assuming as if he were an original mortgagor) where the payment terms were amended on the assumption; and went on to apply the Interest Act, *supra*, footnote 32, s. 10, to subsequent renewals by the same purchaser because the renewals lacked a re-dating provision. *Potash*'s distinction of the two renewal varieties was applied.

[78] *Supra*, footnote 32.

whereas the latter was. The latter was treated in a sense—for the purpose of section 10—as a *new loan*, albeit on the security of the old mortgage. In *Collingwood Investments Ltd.* v. *Bank of America Mortgage Corp.*[79] and *Paramount Life Insurance Co.* v. *Torgerson Development Corp. (Alta.) Ltd.*[80] the Alberta Court of Appeal extended this "new loan for some purposes" reasoning to a renewal made (without a re-dating provision) by a subsequent owner-mortgagor. In none of these decisions was novation found to apply, as the courts were able to get the results desired without resort to novation. However, the decisions accepted as valid the requirement for novation that "the creditor must accept the new contract in full satisfaction and substitution for the old contract".[81] Accordingly, novation *where found* is not merely a matter of old debtor release, it entails some form of contract replacement.

As discussed above, this "new loan" concept has significant implications for personal covenant recourse in provinces like Alberta and Saskatchewan. When the "new loan" is found to be a novation it also has potentially serious implications in other areas.

One is the impact of prior covenant release. If a strong covenant is released and a new, weaker, covenant takes its place, the lender's position can be seriously affected. This is important not only for the operation of statutory remedy limitations. If a strong corporate covenantor is discharged on renewal by a weaker corporate covenantor's renewal (for example, renewal by a shell company), the altered circumstances are a concern not only in Alberta and Saskatchewan but also in provinces that lack their statutory remedy limitations. Indeed, a loss of strong individual covenantor A and his replacement by a weak individual covenantor B could likewise involve a serious alteration of the quality of a loan. Particularly if the covenantor's financial strength is critical to the ability to service the loan, renewal with a new owner becomes a process requiring as much care in administration as placement of an original loan. Again the "portability" of mortgages becomes adversely effected, in this context on a national scale.

A second implication is the capacity of lenders to accept renewals. This point is also relevant more widely in Canada. While equivalents to the prairie provinces' remedies limitations do not exist elsewhere, limitations

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[79] *Supra*, footnote 30.

[80] *Supra*, footnote 31.

[81] Begbie C.J. in *Polson* v. *Wulffsohn* (1890), 2 B.C.R. 39 (B.C.S.C.), and cited by Wilson J. in *Mead*, *supra*, footnote 1, at pp. 427 (S.C.R.), 501 (D.L.R.). The concept of contract replacement was put beyond doubt by his adding, immediately after the words quoted in the text (at p. 43):

> ... one consequence of which [the satisfaction and substitution] is that the original debtor is discharged, there being no longer any contract to which he is a party, or by which he can be bound.

on the ability of institutions to invest in mortgages are widespread.[82] If a trust company loan made to A begins as a seventy-five per cent loan (that is, seventy-five per cent of the security value), as required by the trust company's governing legislation, it no doubt remains a valid loan even after mere assumption of the mortgage by B. However, if a subsequent renewal (or even an assumption materially changing the terms of the loan) by B is a novation that includes discharge of A and amounts to a new contract of loan, and if at the time of the renewal property values are down materially, can it safely be said that the renewal is within the trust company's capacity? Is it an "investment" or "loan" made at a level exceeding seventy-five per cent of the security value?

It goes without saying that treatment of the renewal in such circumstances as subject to the seventy-five per cent rule would do a disservice to both lender and borrower. The former would have to call in, or call for payment down of, the loan. The latter would have to refinance on a high-ratio basis or make a cash infusion. Neither party is served, and foreclosures are a likely result.

Is it possible to avoid the novation consequence through express language in the mortgage documents? It seems likely that "no prejudice" clauses in mortgage renewals alone will not do the job, unless the original mortgagor also joins in the renewal.[83] Clearly stated "no prejudice" clauses in both the mortgage and the renewal documents may do the trick.[84] However, in any situations where material alterations in the mortgage terms occur without the prior mortgagor's consent, very clear language is needed to overcome the strong presumption of novation expressed by the court in *Mead*, or the treatment of circumstances as overriding express language in *Canada Permanent Trust Company* v. *Neumann*.[85] Statements in both the mortgage and the renewal cannot be guaranteed to succeed; language in both ends of the paper is not an inevitable assurance because the conduct of the parties can negative the paper statements.[86]

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[82] See, for example, the Trust Companies Act, R.S.A. 1980, c. T-9, s. 122, which sets a 75% limit. This section specifically refers to "investment" or "loan" of monies, and this language may imply that the value limit requirement applies only on placement of the loan. See also the Canadian and British Insurance Companies Act, R.S.C. 1985, c. 1-12, s. 86(o), which speaks of the amount "paid" for a mortgage.

[83] See Wilson J. in *Mead, supra*, footnote 1, at pp. 432-436 (S.C.R.), 505-507 (D.L.R.).

[84] *Ibid.*, at pp. 436-437 (S.C.R.), 507-508 (D.L.R.).

[85] *Supra*, footnote 14.

[86] *Supra*, footnote 1, at pp. 438 (S.C.R.), 508 (D.L.R.). Wilson J. indicates that the language of the written agreements is generally stronger than the surrounding circumstances; *ibid.*, at pp. 433 (S.C.R.), 505 (D.L.R.). This, however, is watered down by her subsequent statement (*ibid.*, at pp. 436 (S.C.R.), 507 (D.L.R.) that *in futuro* clauses should not be largely operative, and her approval of *Re Bank of Nova Scotia and Vancouver Island Renovating Inc.*, *supra*, footnote 19, in its adoption of *Vancouver Island*'s treatment of surrounding circumstances as overriding "no prejudice" language. Query where the parol evidence rule fits into all this.

Further, if the original mortgagor's undertaking amounts to a covenant to pay a future "new" loan with a new owner, is it in substance a guarantee of that new loan and therefore subject to the host of special defences that exist for guarantee liabilities?[87]

The only safe and reasonably sure course would be not only to have such language in the original mortgage and the renewal (or assumption), but to have prior covenantors join in each renewal (assumption) to affirm the continuance of their obligations. This will not often be practical, however, and in the case of corporate mortgages assumed and then renewed by individuals could lead in Alberta to application of *Chateau Developments Ltd.* v. *Steele*[88] if special care is not taken.

One point that neither *Royal Trust Corporation* v. *Potash*[89] nor *Mead* address is the question of release of prior covenants by guarantors through renewals or assumptions with material changes in terms. Clearly renewals that amount to novations will discharge prior direct covenantors: that is part and parcel of novation. It seems likely that guarantors would similarly be discharged.[90] It must surely take very explicit language (if indeed it is possible at all[91]) for a guarantee of a loan to A to be treated as being

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[87] Including, in Alberta in particular, the Guarantees Acknowledgement Act, R.S.A. 1980, c. G-12 (although this particular statute would only be relevant for non-corporate loans that are personally recourseable, such as loans under the National Housing Act, R.S.C. 1985, c. N-11). See, for example, *Alberta Financial Consultants Ltd.* v. *Cuthbert* (1984), 55 A.R. 147 (Alta. Q.B.), although this decision is not cited as a persuasive authority; see E. Mirth, Mortgage Renewals (1985), 23 Alta. L. Rev. 405, at pp. 430-431.

[88] *Supra*, footnote 29.

[89] *Supra*, footnote 28.

[90] See *Holland—Canada Mtge. Corp.* v. *Hutchings*, [1936] S.C.R. 165, [1936] 2 D.L.R. 481; *Burnes* v. *Trade Credits Ltd.*, [1981] 1 W.L.R. 805, [1981] 2 All E.R. 122 (P.C.); *Royal Trust Corp.* v. *Reid* (1984), 20 D.L.R. (4th) 223, 160 A.P.R. 301 (P.E.I.C.A.); *Massey Ferguson Ind. Ltd.* v. *Bond* (1986), 42 Man. R. (2d) 4 (Man. C.A.); *Doe* v. *Canadian Surety Co.*, [1937] S.C.R. 19; *Pioneer Trust Co.* v. *220263 Alberta Ltd.* (1989), 94 A.R. 86 (Alta. Q.B.), affirmed March 21, 1991 (unreported Alta. C.A.). See *contra, National Bank of Canada* v. *Sharma* (1985), 40 Alta. L.R. (2d) 286, *sub nom National Bank of Canada* v. *Rosario* (1985), 67 A.R. 314 (Alta. C.A.); *Standard Trust Co.* v. *Bodrug* (1988), 90 A.R. 249 (Alta. Q.B.); *Alberta Opportunity Co.* v. *Moulton* (Indexed *sub nom Alta Opportunity Co.* v. *Schinnour*), [1991] 2 W.W.R. 624 (Alta. C.A.). *Cf. Canada Permanent Trust Co.* v. *King Art Dev. Ltd.* (1984), 32 Alta. L.R. 1, at p. 53 (Alta. C.A.); and *cf. Moschi* v. *Lep Air Services Ltd.*, [1973] A.C. 331 (H.L.) and other references cited in *King Art*, at p. 53. The release of guarantors by extensions of time or alteration of the loan terms does not found itself in novation, and can occur without it. Indeed, there is no new contract in the guarantee itself. It is usual, however, to find a guarantee operating as a collateral agreement to an identified contract; and if that contract becomes discharged through novation its collateral guarantee ceases to have a reference point.

[91] As Laycraft J.A. (as he then was) said in another context in *Canada Permanent Trust Co.* v. *King Art Dev. Ltd.*, *supra*, footnote 90, at p. 54, whether or not "the ingenuity of legal draftsmen can or will be equal to the task of keeping the surety liable" remains for another day in another case. See also *Style Properties Ltd.* v. *220293 Developments Ltd.* (1986), 43 Alta. L.R. (2d) 71 (Alta. C.A.).

intended to operate as a guarantee of a new loan, a novated loan, with B. Re-examination of mortgage guarantee forms to cover such renewals is clearly warranted by the *Mead* decision; although it may be difficult to achieve a guarantee that will readily be treated by the courts as operative for future replacement contracts with unknown future parties.

Finally, the decision leaves yet to be addressed (at the Supreme Court level, at least[92]) the operation of a renewal, or a materially-altering assumption, upon intervening registrations. If a renewal is a novated mortgage, does it rank fully behind a previously registered second mortgage? *Royal Trust Corporation* v. *Potash*[93] would offer some basis for the mortgage security remaining unchanged in its priority, but it is difficult to see how materially altered terms of a renewal loan that is a "new" loan could affect the second mortgagee who does not consent to the alterations. Indeed, some risk that even the entire renewal loan ranks behind the second mortgage seems within the realm of possibility. From the practice perspective it becomes important on all renewals both to register the renewal (where appropriate, as with Torrens land systems) and to secure postponements or subordinations of all intervening instruments.

In sum, *Mead* does clear up some of the moot points surrounding mortgage renewals. It does, however, open avenues for new points of issue of serious practical consequence in future decisions. The cornucopia of mortgage renewal cases may continue to spill out abundant fruit.

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[92] Wilson J. in *Royal Trust Corporation* v. *Potash*, *supra*, footnote 28, at pp. 359-360, 370-371 (S.C.R.), 328-329, 335 (D.L.R.), seems to imply that renewal loans carry the priority of the original mortgage. If so, it is an *obiter* statement. There were no competing third party interests in issue, and in fact the court was able to side-step the novation issue in the circumstances. However, a number of decisions on priorities have occurred at lower levels. Most say that the renewal will not carry the original mortgage's priority. See *Caisse Populaire de Maillardville Credit Union* v. *Butt* (1985), 19 D.L.R. (4th) 188, 63 B.C.L.R. 176 (B.C.C.A.); *Central Financial Corp.* v. *Skalbania Enterprises Ltd.* (1985), 68 B.C.L.R. 96 (B.C.C.A.); *Vancouver City Savings Credit Union* v. *McKinnon* (1983), 50 B.C.L.R. 35 (B.C.S.C.); *Canada Trust Mtg. Corp.* v. *Park Plaza Country Club Holdings Inc.*, [1988] 6 W.W.R. 348 (B.C.S.C.); *Re CIBC* (1984), 14 D.L.R. (4th) 282 (B.C.C.A.); *Canada Permanent Mtge. Corp.* v. *Halet Enterprises Ltd.* (1983), 48 B.C.L.R. 206, 30 R.P.R. 240 (B.C.S.C.). *Contra*, see *Credit Foncier Franco-Canadien* v. *253171 Alberta Ltd.*, *supra*, footnote 41. Priority over writs of execution may be otherwise: *Fraser Valley Credit Union* v. *Carlson* (1984), 50 B.C.L.R. 39, 31 R.P.R. 102 (B.C.S.C.). Some cases have held that a renewal contemplated in the original mortgage might take priority over subsequent mortgages: *Canada Trust Co.* v. *Hart* (1983), 27 R.P.R. 37 (B.C.S.C.); *Sherwood Credit Union Ltd.* v. *Ward*, unreported, 11 July 1983, J.D. Regina, 2254 (Sask. Q.B.); *McDonald* v. *Royal Trust Corp.* (1988), 46 D.L.R. (4th) 759, [1988] 2 W.W.R. 377, (1988), 86 A.R. 235, (Alta. Q.B.).

[93] *Supra*, footnote 28.

TORTS—NEGLIGENT MISSTATEMENT—RECOVERY FOR PURELY ECONOMIC LOSS: *Caparo Industries p.l.c.* v. *Dickman*; *Fletcher* v. *Manitoba Public Insurance Co.*

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Introduction

Questions as to the circumstances in which it is appropriate for purely economic loss to be recoverable in the tort of negligence continue to bedevil the courts. In this context, the major focus of attention in recent years has lain on negligent acts causing financial loss. The driving force behind an initial expansion of liability in this area was Lord Wilberforce's famous (or perhaps now infamous) *prima facie* duty of care test from *Anns* v. *Merton London Borough Council*.[1] According to that test, in order to find a duty of care, it was not necessary for a court to fit the facts of the case within those of some recognized situation where such a duty had been held to exist. Instead, a judge had to address the following two questions:[2]

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise....

The first leg of Lord Wilberforce's test is of course very similar to the formulation of Lord Atkin in *Donoghue* v. *Stevenson*[3] when dealing with liability for physical damage and it is not surprising that *Donoghue* was one of the central decisions relied upon by Lord Wilberforce in framing his own test. The application of the *Anns* criteria led, in part, to decisions like *Ross* v. *Caunters*,[4] where a solicitor who negligently executed a will was held to owe a duty of care to a disappointed beneficiary, and *Junior Books Ltd.* v. *Veitchi Co. Ltd.*,[5] where a sub-contractor was held to owe a duty of care to the owner of a plant for laying a floor that was defective but not dangerous in any way.

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[1] [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

[2] *Ibid.*, at pp. 751-752 (A.C.), 498 (All E.R.).

[3] [1932] A.C. 562, at p. 580 (H.L.).

[4] [1980] 1 Ch. 297, [1979] 3 All E.R. 580 (Ch. D.).

[5] [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.Sc.).

Since these developments, however, the *Anns* test has lost its lustre, at least in the United Kingdom. It has been criticized for not making it clear that liability in negligence, especially in the context of purely economic loss, encompasses much more than a simple determination of whether the injury suffered by the plaintiff was reasonably foreseeable.[6] Fuelled by fears of imposing liability "in an indeterminate amount for an indeterminate time to an indeterminate class"[7] and of undermining settled principles of contract law, the courts in the United Kingdom have retrenched. Thus, in *Leigh and Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd.*,[8] for example, the House of Lords affirmed the principle underlying *Cattle* v. *Stockton Waterworks Co.*[9] and rejected a claim in negligence for losses incurred as a result of damage to goods against which the plaintiff could assert neither ownership nor a possessory title, but merely a contractual interest. In *D. and F. Estates Ltd.* v. *Church Commissioners for England*,[10] the same court denied an action brought against the builder by the lessee of an apartment for the cost of remedial work already done and to be done to prevent plaster falling from the ceiling. It was held that such economic losses could not be recovered from the builder in tort by a remote party because, to allow such a claim would be to recognize the existence of a contractual warranty, despite the absence of privity of contract, between a manufacturer and the ultimate consumer. Finally, in *Murphy* v. *Brentwood District Council*,[11] the House of Lords actually overruled *Anns* and held that a local authority owed no duty of care to a subsequent purchaser of land in respect of defective foundations which had been negligently approved. Once the problem had been discovered, the plaintiff's loss was simply the diminution in the value of the property and thus was seen as purely economic. Since such loss was not recoverable from the builder, such a claim could not lie successfully against a local authority whose only fault lay in failing to prevent the builder from inflicting such loss on the plaintiff.

In Canada, the status of the *Anns* test is more in doubt. It certainly retains its vitality in the context of the tortious liability of public authorities where it was applied recently at the highest level.[12] Indeed, in this area, the Canadian courts seem committed to forging their own path and, unlike

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[6] See, most recently, *Murphy* v. *Brentwood District Council*, [1990] 2 All E.R. 908 (H.L.).

[7] *Ultramares Corp.* v. *Touche*, 174 N.E. 441, at p. 444 (N.Y. Ct. Apps., 1931), per Cardozo C.J.

[8] [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.). See also *Candlewood Navigation Corp. Ltd.* v. *Mitsui O.S.K. Lines Ltd.*, [1986] A.C. 1, [1985] 2 All E.R. 935 (P.C.).

[9] (1875), L.R. 10 Q.B. 453.

[10] [1989] A.C. 177, [1988] 2 All E.R. 992 (H.L.).

[11] *Supra*, footnote 6.

[12] *Rothfield* v. *Manolakos*, [1989] 2 S.C.R. 1259, (1989), 63 D.L.R. (4th) 449; *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228, (1989), 64 D.L.R. (4th) 689.

their counterparts in the United Kingdom, not to be too concerned about the nature of the plaintiff's loss,[13] at least where the negligence arises out of the performance of statutory functions concerned generally with health and safety.[14] In other areas, the Canadian courts have, however, shown a reluctance to use a broad view of *Anns* to extend liability to cases of purely economic loss. Recently, for example, in *Kamahap Enterprises Ltd.* v. *Chu's Central Market Ltd.*,[15] the British Columbia Court of Appeal stressed the fact that foreseeability of economic loss, while an essential condition to the existence of a duty of care, was not sufficient in itself to give rise to such a duty. Taylor J.A. pointed out the problems that would follow from casting the net of liability so broadly. He said:[16]

> ... there has ... emerged a realization that the infliction of foreseeable pure economic loss must necessarily result from very many acts and omissions which take place routinely in the course of everyday business activities under our economic system, and that any law imposing a general duty of care to avoid the infliction of such loss would greatly hamper the conduct of commercial and private business, and would probably interfere fundamentally with the operation of that economic system.

A decision in favour of recovery has normally been based upon the existence of a peculiarly proximate relationship between the parties, although such a relationship has defied concrete definition. Thus, in *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co. Ltd.*,[17] the Federal Court of Appeal was faced with the question of whether one party could recover in the tort of negligence purely economic losses incurred as a result of property damage suffered by a third party. In that case a barge being negligently towed by the defendant's tug had collided with a railway bridge spanning the Fraser River in British Columbia. The bridge was owned by the Canadian Government. Its principal user, however, was the Canadian National Railway ("C.N.R.") which accounted for some eighty-five per cent of the traffic across the bridge and which also owned the tracks on either side of the structure. The C.N.R. was licensed to use the bridge on payment of certain tolls. As part of that agreement, the C.N.R. also undertook to provide services with respect to the repair, maintenance and inspection of the bridge. As a result of the damage to the bridge, the C.N.R. was compelled to reroute its trains while the bridge was being repaired. The court held that the C.N.R. could recover its additional costs of operation from the defendant. MacGuigan J.A., giving the leading judgment, decided that there was a sufficient relationship of proximity between the parties such that a duty of care was owed by the defendant

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[13] *Rothfield* v. *Manolakos*, *ibid.*; *City of Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641.

[14] *Wirth* v. *City of Vancouver* (1990), 71 D.L.R. (4th) 745, [1990] 6 W.W.R. 225 (B.C.C.A.).

[15] (1989), 64 D.L.R. (4th) 167, [1990] 1 W.W.R. 632 (B.C.C.A.).

[16] *Ibid.*, at pp. 171 (D.L.R.), 637 (W.W.R.).

[17] [1990] 3 F.C. 114, (1990), 65 D.L.R. (4th) 321 (Fed. C.A.).

to the C.N.R. He was influenced by the fact that the plaintiff's property, in the form of its railway tracks, was in close physical proximity to the bridge and that those tracks could not be used without the essential link of the bridge. Moreover, the plaintiff was the preponderant user of the bridge and supplied services for its maintenance. He concluded that the plaintiff "was so closely assimilated to the position of ... [the owner] that it was very much within the reasonable ambit of risk of the ... [defendant] at the time of the accident".[18]

The Canadian courts have also exhibited the concern that tort liability should not upset contractual relationships and contractual allocations of risk. This fear very much underlay the decision of the majority of the Supreme Court in *Rivtow Marine Ltd.* v. *Washington Iron Works*[19] that a manufacturer was not liable, on the basis of negligent manufacturing, for the cost of repairing a defective crane nor for the loss of profits incurred while the crane was out of service.

This comment will concentrate upon two important recent cases dealing with negligent statements, rather than negligent acts, causing purely financial loss, the first, *Caparo Industries p.l.c.* v. *Dickman*,[20] decided by the House of Lords and the second, *Fletcher* v. *Manitoba Public Insurance Co.*,[21] decided by the Supreme Court of Canada. It was in this context that liability in negligence for purely economic loss was first generally recognized with the decision of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[22] Over the years, attempts have been made to incorporate *Hedley Byrne* into the general proximity principle. Indeed, it also formed a cornerstone of Lord Wilberforce's judgment in *Anns*.[23] In light of the recent developments outlined above with respect to liability for negligent acts, however, it remains the one constant area in which the recovery of economic loss is accepted.

The Caparo Decision

Caparo Industries p.l.c. v. *Dickman*[24] was concerned in the main with the question as to whom the maker of a statement owes a duty of care. The plaintiff, Caparo, began purchasing shares in a public company, Fidelity p.l.c., in reliance on audited statements of the company's accounts prepared by one of the defendants, Touche Ross. Following receipt of the audited statements in its capacity as a shareholder, Caparo purchased more shares

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[18] *Ibid.*, at pp. 167 (F.C.), 361 (D.L.R.).

[19] [1974] S.C.R. 1189, (1973), 40 D.L.R. (3d) 530. See recently, *District of Logan Lake* v. *Rivtow Industries Ltd.* (1990), 71 D.L.R. (4th) 333, [1990] 5 W.W.R. 525 (B.C.C.A.).

[20] [1990] 1 All E.R. 568 (H.L.).

[21] (1990), 74 D.L.R. (4th) 636 (S.C.C.).

[22] [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[23] *Supra*, footnote 1.

[24] *Supra*, footnote 20.

and ultimately took over the company. The plaintiff then alleged that Fidelity's accounts were inaccurate and misleading and that the auditors had been negligent in carrying out the audit. The case went to the House of Lords on the preliminary issue of whether the auditors owed Caparo a duty of care either as a potential investor in, or as an existing shareholder of, Fidelity.

Their Lordships unanimously rejected Caparo's claim. Lord Bridge refused to countenance a liability based merely on a foreseeable reliance by the plaintiff. Such a conclusion would expose the defendant to an indeterminate liability and would confer on members of the general public an ability to appropriate for their own benefit advice for which (inferentially) they had not paid. He, therefore, determined that, in order to succeed, a plaintiff would have to establish:[25]

> ... that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter on that transaction or on a transaction of that kind.

In formulating his test, Lord Bridge relied heavily on the dissenting judgment of Denning L.J. in *Candler* v. *Crane, Christmas & Co.*,[26] where he had said:

> ... to whom do these professional people owe this duty? ... They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some further action on them. But I do not think, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. ...
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> ...
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> ... to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required ... the duty only extends to the very transaction in mind at the time. ...

Lord Bridge then held that his test had not been satisfied and that the auditors owed no duty of care to the plaintiff either as a potential investor in Fidelity or as an existing shareholder. To extend the duty of care to all who might foreseeably rely on the accuracy of accounts,[27] such as potential investors, would impose too great of a burden upon the auditors. Moreover, it made no difference, even if true, that the auditors should

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[25] *Ibid.*, at p. 576.

[26] [1951] 2 K.B. 164, at pp. 180-183, [1951] 1 All E.R. 426, at pp. 434-435 (C.A.).

[27] This test had been suggested by Woolf J. in *J.E.B. Fasteners Ltd.* v. *Marks Bloom & Co. (a firm)*, [1981] 3 All E.R. 289 (Q.B.D.), aff'd, [1983] 1 All E.R. 583 (C.A.) and his reasoning was rejected in *Caparo*. The action was in fact dismissed on the ground that the plaintiff had failed to prove that it had relied upon the misstatements to any material degree.

have foreseen that Fidelity was vulnerable to a take-over bid and that a person, such as Caparo, might well rely upon the accounts for the purpose of launching such a bid. In this regard, Lord Bridge relied upon Richmond P.'s dissenting judgment in *Scott Group Ltd.* v. *McFarlane*,[28] in which he had denied that a duty of care was owed by auditors of a public company to a successful take-over bidder, rather than upon the majority view of Woodhouse and Cooke JJ.[29] Richmond P. held that it was essential that "the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and relied on by a particular person or a class of persons for the purposes of a particular transaction or type of transaction".[30]

Lord Bridge also saw shareholders of Fidelity, relying on the audited statements to invest further in the company, as standing in no different position from that of any other investing member of the general public. While it was true that the auditors were under a statutory duty to report to the shareholders,[31] the purpose of that requirement was not to provide investment advice to the membership of the company. Rather, it was to enable the shareholders to exercise their collective powers to ensure the proper management of the company.

The other leading judgment was given by Lord Oliver. He propounded a very similar test to that of Lord Bridge. He said:[32]

> ... the necessary relationship between the maker of a statement or giver of advice (the adviser) and the recipient who acts in reliance on it (the advisee) may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given, (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose, (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry and (4) it is so acted on by the advisee to his detriment.

By applying this test, Lord Oliver was, for the same reasons as Lord Bridge, in no doubt that the auditors owed no duty of care to the plaintiff as an investor or as a shareholder.

In reaching their conclusion, their Lordships were of the view that there was little to be gained by applying some single general test, whether of the *Anns* variety or of some modification thereof. They determined that the proper approach was to work by analogy from existing categories

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[28] [1978] 1 N.Z.L.R. 553 (C.A.).

[29] Cooke J., in fact, denied the plaintiff's claim on the ground that it had failed to establish any recoverable loss.

[30] *Supra*, footnote 28, at p. 566.

[31] Pursuant to part VII of the Companies Act 1985, 1985, c. 6.

[32] *Supra*, footnote 20, at p. 589.

of negligence. In particular, they drew support from the following words of Brennan J. in *Sutherland Shire Council* v. *Heyman*:[33]

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".

The concept of proximity was seen as "no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists".[34] Thus, it is clear that the House of Lords was not in favour of the tripartite test supplied by the majority of the Court of Appeal in *Caparo*[35] for determining the existence of a duty of care, namely that the loss be reasonably foreseeable, that there be a sufficient relationship of proximity between the parties and that it be just and reasonable to impose a duty of care.[36] In applying that test, the majority had concluded that the auditors did owe a duty of care to Caparo as an existing shareholder given their statutory obligation to report.

In working by analogy, the House of Lords restricted its consideration to cases of economic loss suffered directly by a recipient of a statement through his or her reliance upon it. In this endeavour the court examined in detail *Candler*,[37] *Hedley Byrne*[38] and the recent decision of the House of Lords in the two cases of *Smith* v. *Eric S. Bush (a firm)* and *Harris* v. *Wyre Forest District Council*.[39] In that decision, the House of Lords had determined that a surveyor, in the first case hired by the mortgagee and in the second an employee of the mortgagee, owed a duty of care to the prospective purchaser of a house who had relied upon the survey in deciding to purchase the property. Those cases were considered to lie at the outer edge of the *Hedley Byrne* principle and were justified on the ground that, although the report of the surveyor was not prepared for the would-be purchaser, the surveyor knew that the overwhelming probability was that the purchaser would rely upon the report, without commissioning an independent valuation, in deciding whether to purchase the house in question. There was the added fact that, in both cases, the

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[33] (1985), 157 C.L.R. 424, at p. 481 (Aust. H.C.).

[34] *Supra*, footnote 20, at p. 585, per Lord Oliver.

[35] [1989] 1 All E.R. 798 (C.A.).

[36] It is interesting to note that this test was applied by Huddart J. in *Dixon* v. *Deacon Morgan McEwan Easson* (1989), 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (B.C.S.C.) to reach the conclusion that auditors of a company's accounts owed no duty of care to a potential investor in the company.

[37] *Supra*, footnote 26.

[38] *Supra*, footnote 22.

[39] [1990] 1 A.C. 831, [1989] 2 All E.R. 514 (H.L.).

purchaser had paid the surveyor's fees and the liability was seen as inherently circumscribed since it would not extend to subsequent purchasers.

As a final point, it is interesting to note that there was little support in *Caparo* for grounding the duty of care on a voluntary assumption of responsibility,[40] despite the dicta in *Hedley Byrne*[41] that such was the basis for a duty of care in respect of statements. In many cases the basis of the duty of care will be relevant only where the defendant purports to disclaim any assumption of responsibility, as in *Hedley Byrne* itself. The disclaimer there precluded any duty from arising because the defendant "never undertook any duty to exercise care".[42] In England, but not in Canada, that reasoning has been upset by the passing of the Unfair Contract Terms Act 1977[43] whereby such disclaimers, even when purporting to prevent a duty of care from arising, are subjected to a test of reasonableness.[44]

The Impact of Caparo

The decision of the House of Lords in *Caparo* is part of the present conservative trend being exhibited generally by the courts in the United Kingdom. At the moment, it is difficult to see where, outside of *Hedley Byrne* liability as interpreted by *Caparo*, purely economic loss will be recoverable in the tort of negligence. In particular, it is not clear whether the *Ross* v. *Caunters*[45] type of case—where one party makes a negligent misstatement to another that induces that other to act in such a way as to cause economic loss to a third party—will withstand the test of time.[46] In both *Caparo*[47] and *Murphy* v. *Brentwood District Council*,[48] Lord Oliver indicated some support for *Ross*, although he did say in *Caparo* that it gave rise to "certain difficulties of analysis".[49] It should be pointed out that, before *Caparo*, *Junior Books*[50] had already been distinguished out

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[40] See especially Lords Roskill and Oliver, *supra*, footnote 20, at pp. 582 and 589 respectively. Equally, in *Smith* v. *Eric S. Bush*, *ibid.*, at pp. 862 (A.C.), 534 (All E.R.), Lord Griffiths indicated his preference for the view that the duty was imposed rather than assumed.

[41] *E.g.*, *supra*, footnote 22, at pp. 483 (A.C.), 581 (All E.R.), per Lord Reid.

[42] *Ibid.*, at pp. 493 (A.C.), 587 (All E.R.), per Lord Reid. See also *Carman Construction Ltd.* v. *Canadian Pacific Railway*, [1982] 1 S.C.R. 958, at p. 972, (1982), 136 D.L.R. (3d) 193, at p. 203, per Martland J.

[43] 1977, c. 50.

[44] See now *Smith* v. *Eric S. Bush (a firm)*, *supra*, footnote 39.

[45] *Supra*, footnote 4.

[46] See also *Ministry of Housing and Local Government* v. *Sharp*, [1970] 2 Q.B. 223, [1970] 1 All E.R. 1009 (C.A.); *Lawton* v. *B.O.C. Transhield Ltd.*, [1987] 2 All E.R. 608 (Q.B.D.); *Modern Paving Ltd.* v. *Morgan* (1989), 34 C.L.R. 109 (Nfld. S.C.).

[47] *Supra*, footnote 20, at p. 588.

[48] *Supra*, footnote 6, at p. 934.

[49] *Supra*, footnote 20, at p. 588.

[50] *Supra*, footnote 5.

of existence. In *D. and F. Estates*[51] Lord Bridge had said that it could "not be regarded as laying down any principle of general application in the law of tort". At times, it has been regarded as an application of the *Hedley Byrne* principle,[52] but that rationalization is difficult to reconcile with the actual facts of the case.[53]

It remains to be seen how the actual test propounded in *Caparo* will be interpreted. There are bound to be disputes as to such matters as how specific the knowledge must be of the transaction in respect of which the advice was used, what is comprehended by the concept of "inferential" knowledge, and whether it is sufficient for the adviser to know merely that it is *likely* that the advice will be communicated to the plaintiff.[54] Such cases as have been decided to date suggest that *Caparo* will not be given an expansive interpretation.[55] In *Al-Nakib Investments (Jersey) Ltd.* v. *Longcroft*,[56] directors of a company inviting, through a prospectus, shareholders to subscribe by way of a rights issue were held to owe no duty of care with respect to a shareholder who relied upon the prospectus to purchase further shares in the company on the stock market. By so doing, the plaintiff was using the information for a different purpose than contemplated by the directors.

In *Morgan Crucible Co. p.l.c.* v. *Hill Samuel Bank Ltd.*,[57] auditors were held to owe no duty of care in respect of allegedly misleading accounts relied upon by a known take-over bidder. The court held that the documents were prepared for the purpose of advising the shareholders of the target company as to whether to accept the bid and were not meant for the guidance of the bidder itself. The court also rejected any analogy with

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[51] *Supra*, footnote 10, at pp. 202 (A.C.), 1003 (All E.R.).

[52] See, most recently, *Murphy* v. *Brentwood District Council*, *supra*, footnote 6, at p. 919, per Lord Keith.

[53] *Muirhead* v. *Industrial Tank Specialities Ltd.*, [1986] Q.B. 507, at p. 528, [1985] 3 All E.R. 705, at p. 715 (C.A.), per Robert Goff L.J.

[54] See generally H. Evans, The Application of Caparo v. Dickman (1990), 6 P.N. 76, at pp. 78-79.

[55] See generally R. Martin, The Duty of Care of Professional Advisers: Further Applications of Caparo (1990), 6 P.N. 176.

[56] [1990] 3 All E.R. 321 (Ch. D.).

[57] [1990] 3 All E.R. 330 (Ch. D.). See also *James McNaughton Paper Group Ltd.* v. *Hicks Anderson & Co.*, [1991] 1 All E.R. 134 (C.A.). The decision in *Morgan Crucible* was reversed by the Court of Appeal, [1991] 1 All E.R. 148 (C.A.) on the ground that it could be said that one of the purposes of the supply of the financial information was to induce the take-over bidder to rely on it in determining whether to modify its bid. The court therefore determined that it was arguable that the defendants owed the plaintiff a duty of care and that the case should be permitted to proceed to trial. Interestingly, the court intimated a return to the tripartite test for determining the existence of a duty of care—foreseeability, proximity and justice and reasonableness—seemingly rejected by the House of Lords in *Caparo*.

Smith v. *Eric S. Bush*[58] by pointing out that the take-over bidder had not in any way paid the auditor's fees and was an entrepreneur taking high risks for high rewards rather than a purchaser of modest means of a home. Moreover, the losses incurred following a take-over bid could be massive and thus the imposition of liability on the accountants could lead to huge increases in insurance premiums which might fall beyond the means of many accountants.

In *The "Morning Watch"*[59] the owners of a yacht requested that Lloyd's conduct a special survey of the vessel. Such surveys, and other inspections, were required from time to time in order to keep the vessel classed at Lloyd's. The primary purpose of the classification system was to ensure the safety of life and property at sea and not the protection of economic interests. This special survey, however, was requested some time before the next one was due because, as Lloyd's was informed, the owners were intending to sell the yacht. The plaintiffs relied on the survey in purchasing the yacht and the question arose as to whether Lloyd's owed them a duty of care in respect of the survey. The court held that no such duty was owed. The survey was not carried out for the benefit of purchasers generally. There was no particular purchaser in contemplation at the time that the survey was undertaken. The plaintiffs had not paid, directly or indirectly, the survey fees. It was not probable or highly probable that the plaintiffs would rely upon the survey without some independent inquiry on their part.

Caparo in Canada

The decision reached in *Caparo* is in line with the leading Canadian authority in this context, *Haig* v. *Bamford*.[60] That case too concerned the liability of accountants to a prospective investor in a company in respect of negligently produced financial statements. The court held that the accountants owed a duty of care to the plaintiff who invested $20,000 in reliance on the statements. That conclusion was reached in circumstances where the accountants knew that the purpose of the statements was to attract further investment in the company and that the statements would be shown to prospective investors. In the words of Dickson J., "[t]he very end and aim of the financial statements prepared by the accountants ... was to secure additional financing for the company from ... an equity investor".[61] He stressed the fact that the accountants knew the purpose for which the statements were being prepared. In response to the argument that the defendants had no knowledge of the specific investor, Dickson J. held that it was sufficient for the accountants to have "actual knowledge

[58] *Supra*, footnote 39.

[59] [1990] 1 Lloyd's Rep. 547 (Q.B.D.).

[60] [1977] 1 S.C.R. 466, (1976), 72 D.L.R. (3d) 68.

[61] *Ibid.*, at pp. 482 (S.C.R.), 78 (D.L.R.).

of the limited class"[62] of people that would rely on the statements. Indeed, his judgment can be read as indicating that such knowledge would be sufficient to found a duty of care even without knowledge of the particular transaction in respect of which the information was to be used. In fact, however, Dickson J. emphasized throughout his judgment the need for the defendants to know the purpose for which the information would be used[63] and later decisions have stressed this requirement.[64]

To date, the Canadian decisions since *Caparo* have indicated that that case has worked no real change in the Canadian position from that expressed in *Haig* v. *Bamford*. The courts have stressed the need for the defendant to know the purpose for which the information was provided and for the information to be used in furtherance of that purpose. In such circumstances, they have not hesitated to find that a duty of care was owed.[65] They have certainly not exhibited the inclination of the subsequent English cases to restrict the duty of care even further.[66]

The Fletcher Decision

The recent decision of the Supreme Court in *Fletcher* v. *Manitoba Public Insurance Co.*[67] was not concerned with the liability of an adviser to some third party. The parties there were in a direct, indeed subsequently contractual, relationship. The plaintiffs suffered severe injuries as a result of an automobile accident for which the driver of the other vehicle was found totally responsible. The negligent driver, however, was underinsured with the result that the plaintiffs failed to recover almost $900,000 of their assessed damages of about $1,400,000. At the time of the accident, the plaintiffs were insured under a policy, supplied by the defendant, which provided for the maximum liability coverage of $2,000,000 but which did not contain an endorsement for underinsured motorist coverage. Such

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[62] *Ibid.*, at pp. 476 (S.C.R.), 75 (D.L.R.).

[63] See the analysis by B.P. Feldthusen, Economic Negligence (2nd ed., 1989), pp. 101-102.

[64] *E.g.*, *MacPherson* v. *Schachter* (1989), 1 C.C.L.T. (2d) 65, at pp. 74-75 (B.C.S.C.), per Murray J.; see also, *Kripps* v. *Touche Ross & Co.* (unreported, December 31, 1990, B.C.S.C.). One issue remaining from *Haig* v. *Bamford*, *supra*, footnote 60, is the extent to which the defendant must know not only the particular transaction in question but also the amount of money involved. It is not clear from the judgment whether the accountants knew that the company was looking precisely for $20,000 in equity capital, although there is an intimation that they did.

[65] For example, *Surrey Credit Union* v. *Willson* (1990), 73 D.L.R. (4th) 207, [1990] 6 W.W.R. 578 (B.C.S.C.); *Kripps* v. *Touche Ross & Co.*, *ibid.*

[66] Indeed, the recent decision of *Dixon* v. *Deacon Morgan McEwen Easson* (1990), 70 D.L.R. (4th) 609 (B.C.S.C.) may be seen as going too far. The court held that a company owed a duty of care to a party who purchased shares in reliance on a press release issued by the company which provided an inaccurate statement of the defendant's financial position.

[67] *Supra*, footnote 21.

an endorsement would have allowed the plaintiffs to recover the shortfall from the defendant. The plaintiffs brought an action against the defendant claiming that it had breached its duty of care, in tort and in contract, by failing to inform them that such coverage was available for a small sum and about its purpose.

Having accepted the trial judge's findings of fact that the plaintiffs had relied upon the defendant's employees for information and advice and that they would have purchased the extra coverage had it been offered, the court addressed the central issue of whether the defendant owed a duty of care to its customers to advise them as to the existence, nature and extent of the underinsured motorist coverage. The court held that such a duty was owed as a matter of tort law pursuant to the principle underlying *Hedley Byrne*.[68] Wilson J., in giving the unanimous judgment for the court, determined that *Hedley Byrne* liability embraced not only positive misstatements but also a failure to supply relevant information. Moreover, there was ample authority to the effect that such a duty applied to parties (normally an insured and an insurance agent) negotiating towards a policy of insurance.

Wilson J., therefore, held that the defendant owed the plaintiffs a duty of care provided that the plaintiffs reasonably relied upon the information supplied by the defendant and that the defendant knew or ought to have known that they would so rely. She saw no difficulty with the first requirement. The trial judge had found the plaintiffs had relied and such reliance was seen as eminently reasonable given the lack of familiarity of the ordinary customer with either the compulsory insurance requirements or the types of optional coverage available. Wilson J. drew the second requirement from Dickson J.'s statement in *Haig* v. *Bamford*[69] that the defendant must know that a limited class of persons, of which the plaintiff was a member, would rely upon the information. She then concluded that the defendant knew, or ought to have known, that purchasers of insurance constituted a class of persons that would reasonably be expected to rely on the information communicated by its employees.

Having determined that the defendant owed a duty of care to the plaintiffs, Wilson J. held that the duty was not as stringent as that imposed upon a private insurance agent. It was not a duty to provide both information and advice to its customers.[70] As a public insurer, the defendant merely had a duty to supply the customer with all the relevant information as to the insurance options available.

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[68] *Supra*, footnote 22.

[69] *Supra*, footnote 60. See also, *B.D.C. Ltd.* v. *Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at p. 238, (1986), 26 D.L.R. (4th) 1, at p. 9, per Estey J.

[70] This was the duty imposed on an insurance agent in *Fine's Flowers Ltd.* v. *General Accident Insurance Co. of Canada* (1977), 81 D.L.R. (3d) 139, 17 O.R. (2d) 529 (Ont. C.A.).

Wilson J., then, concluded that the defendant had breached its duty by failing to inform the public generally, and the plaintiffs in particular, of the existence and meaning of the underinsured motorist protection, especially given the fact that the plaintiffs had indicated that they wanted to purchase the maximum coverage available. Moreover, that breach of duty caused the plaintiffs' loss, given the finding that the plaintiffs would have purchased the additional coverage had they known of its availability.

Having concluded that the defendant was liable in tort, Wilson J. said that there was no need to consider whether the defendant also owed the plaintiffs a similar contractual duty. She intimated that one problem with a contractual analysis was the apparent lack of a contractual relationship at the time that the plaintiffs relied upon the defendant.

The Impact of Fletcher

There is much of importance in the *Fletcher* decision; in particular, the recognition that public insurers, in selling insurance, owe a duty of care to their customers to give clear and accurate information about the various insurance options available so that the customers can make intelligent decisions as to the appropriate insurance coverage to take out. The relationship between the parties was not simply an arm's length commercial relationship, especially given the practically monopolistic position of the public insurer.

There are a number of specific points to be made about the court's reasoning. First, *Hedley Byrne* liability was seen as an application of the general neighbourhood or proximity principle from Lord Atkin's judgment in *Donoghue* v. *Stevenson*.[71] This reasoning is, of course, at odds with the approach taken by the House of Lords in *Caparo*. Having said that, the Supreme Court did in the main restrict its consideration to negligent misstatement cases, especially in the insurance field.

Secondly, Wilson J. seems to support the concept of a voluntary assumption of responsibility as forming the basis for a duty of care with respect to the communication of information or advice, although she did recognize that such an assumption might readily be inferred where it was known to the defendant that the plaintiff would reasonably rely upon the information. This reasoning again is inconsistent with the expressed view of at least two judges in *Caparo*.

Thirdly, there is a recognition of the fact that *Hedley Byrne* liability embraces not only negligent misstatements but also negligent failures to speak. Of course, it is much easier for a court to reach this conclusion where the duty is founded upon a voluntary assumption of responsibility. The decision here is in line with that made in cases involving the negligent provision of professional services. The best example is *Central Trust Co.*

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[71] *Supra*, footnote 3.

v. *Rafuse*[72] where the Supreme Court held, on the basis of *Hedley Byrne*, that solicitors owed a duty of care in tort, as well as in contract, for the negligent performance of their contract with their client. Le Dain J. said:[73]

> That principle [underlying *Hedley Byrne*] is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained.

The recognition that *Hedley Byrne* liability can be constituted by a failure to speak is also at variance with the general reluctance in the United Kingdom to reach that conclusion.[74]

Fourthly, Wilson J. seems to accept the view of *Haig* v. *Bamford*[75] that the defendant must be aware that a limited class of people, to which the plaintiff belonged, would rely upon the misstatement. As has been seen, Dickson J. in *Haig* also emphasized the need for the defendant to know the purpose for which the information was to be used and for the plaintiff to have used the information for that purpose. Indeed, it was this requirement that was stressed in *Caparo*. Presumably, Wilson J. did not intend to dissent from this view. In *Fletcher* itself, there was no third party involved who was relying on the advice for some unknown purpose of his or her own.

Fifthly, it is a reasonable inference to draw from Wilson J.'s judgment that she would have seen no difficulty in holding the defendant liable in both tort and contract had there been a contractual relationship between the parties. This reasoning is, of course, in line with the Supreme Court's earlier judgment in *Central Trust Co.* v. *Rafuse*,[76] where the only limitation placed upon the imposition of tortious liability between contracting parties was that such liability could not be employed so as to circumvent the terms of the contract, such as a valid and applicable exclusion clause. The only other limitation since recognized by the Supreme Court is that a duty of care in tort will not be imposed between contracting parties "when that same duty has been rejected or excluded by the courts as an implied term of a particular class of contract".[77] In contrast, the courts in the United Kingdom are still struggling with the opinion of Lord Scarman

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[72] [1986] 2 S.C.R. 147, (1986), 31 D.L.R. (4th) 481.

[73] *Ibid.*, at pp. 206 (S.C.R.), 522 (D.L.R.).

[74] See, for example, *Banque Financière de la Cité* v. *Westgate Insurance Co. Ltd.*, [1990] 2 All E.R. 947 (H.L.) where such a possibility was doubted unless the failure to speak could be interpreted as a positive assertion. Interestingly, Wilson J. had relied upon the judgment of Slade L.J. in the Court of Appeal in that case, [1989] 2 All E.R. 952, at p. 1007, for the proposition that *Hedley Byrne* could apply to a mere failure to speak.

[75] *Supra*, footnote 60.

[76] *Supra*, footnote 72.

[77] *Canadian Pacific Hotels Ltd.* v. *Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 778, (1987), 40 D.L.R. (4th) 385, at p. 432, per Le Dain J.

in *Tai Hing Cotton Mills Ltd.* v. *Liu Chong Hing Bank*[78] that there is nothing "to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship"[79] and that it was "correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis".[80]

Finally it is interesting to note that Wilson J. cited the judgment of Lord Diplock from *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt*,[81] where he had held that *Hedley Byrne* liability was restricted to those who were in the business of giving advice of the kind in question or who had in some other way held themselves out as possessing comparable skill and competence to those in such a business. Again, the *Evatt* decision was in no way crucial to the conclusion of the Supreme Court in *Fletcher* and was used only for the proposition that a duty of care would be owed by those in the business of providing information or advice. It is unfortunate, however, that *Evatt* can still, it seems, not be regarded as entirely dead and buried.[82]

Conclusions

The emphasis in *Caparo*[83] upon the need to establish that the plaintiff's loss arose out of the very transaction for which the defendant knew that he or she was supplying the information or advice is to be welcomed. The test provides a sensible restriction on the scope of the *Hedley Byrne*[84] principle in the interest of avoiding excessive liability.[85] Moreover, the approach taken in *Caparo* accords in general with that adopted by the Canadian courts. Any suggestion to the contrary in *Fletcher*,[86] where *Caparo* was not cited, can be explained on the ground that no such problem was raised in *Fletcher*. Of course, the *Caparo* test will need to be worked out in detail by future decisions. In that endeavour, it is to be hoped that the courts will not be too conservative in their interpretation.

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[78] [1986] A.C. 80, [1985] 2 All E.R. 947 (P.C.).

[79] *Ibid.*, at pp. 107 (A.C.), 957 (All E.R.).

[80] *Ibid.* For a discussion of the recent cases from the United Kingdom dealing with Lord Scarman's dicta, see J. Holyoak, Concurrent Liability in Contract and Tort (1990), 6 P.N. 113.

[81] [1971] A.C. 793, [1971] 1 All E.R. 150 (P.C.).

[82] The *Evatt* restriction has been rejected in a number of Canadian cases, for example, *Nelson Lumber Co. Ltd.* v. *Koch* (1980), 111 D.L.R. (3d) 140, [1980] 4 W.W.R. 715 (Sask. C.A.). See also J. Irvine, Annotation to Nelson Lumber Co. v. Koch (1980), 13 C.C.L.T. 202. From time to time, however, it has been supported; for example, *Andronyk* v. *Williams* (1985), 21 D.L.R. (4th) 557, at p. 573, [1986] 1 W.W.R. 225, at p. 245 (Man. C.A.), per O'Sullivan J.A. In *Caparo*, *supra*, footnote 20, at p. 588, Lord Oliver left open the question of whether the *Evatt* restriction represented the existing law.

[83] *Supra*, footnote 20.

[84] *Supra*, footnote 22.

[85] See generally Feldthusen, *op. cit.*, footnote 63, pp. 96-110.

[86] *Supra*, footnote 21.

It is submitted, however, that the courts should ground the duty of care in respect of statements in the concept of a voluntary assumption of responsibility.[87] Such a concept fits well with the requirement that the defendant must know of the transaction with respect to which his or her advice is being sought. It also illuminates the fact that *Hedley Byrne* liability is in many ways more akin to contractual liability than tortious liability and allows naturally for the operation of express disclaimers of responsibility. Often the advice in question is given pursuant to a contract and the plaintiff, although not in contractual privity with the defendant, may indeed have paid for the advice.[88] Such an approach would also rid the law of the restrictive limitation proposed by Lord Diplock in *Evatt*.[89] On this view, the presence of the elements identified by Lord Diplock would merely assist a court in drawing an inference of the requisite assumption of responsibility.

There is merit in the determination in *Caparo* that there is no single guiding test against which all actions in the tort of negligence can be assessed. The question of the recovery of purely economic loss in particular raises several problems and not just one. Principles must be developed in each of the contexts in which that question arises. At present, the area of negligent statements causing financial loss is the most fully developed. It is not especially instructive to view *Hedley Byrne*, or the recovery of economic loss generally, as simply a sub-category of *Donoghue* v. *Stevenson*[90] liability. On the other hand, there is the danger that the development of tort law will be stultified if too close attention is paid to precedent and not enough to policy.

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[87] See generally Feldthusen, *op. cit.*, footnote 63, pp. 41-82.

[88] For example, *Smith* v. *Eric S. Bush (a firm)*, *supra*, footnote 39.

[89] *Supra*, footnote 81.

[90] *Supra*, footnote 3.