PART PAYMENT OF A DEBT AND A PROPOSAL FOR FINAL SETTLEMENT OF THE LAW: *PROCESS AUTOMATION INC V NORSTREAM INTERTEC INC*

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1. Introduction

Since its enactment by the legislature of Ontario in 1885,[1] section 16 of the *Mercantile Law Amendment Act*[2] has been one of the great conundrums of the law of contract. There is no English equivalent. Its purpose is said to be to correct the deficiencies in *Foakes v Beer*,[3] the 1884 decision of the House of Lords that part payment alone cannot constitute full settlement of a debt, yet its meaning and scope of application remain both contested and not entirely tested in the courts. Discernment of the meaning of section 16 requires wading into the murky waters of a number of principles relating to consideration: accord and satisfaction; the rule in *Stilk v Myrick*[4] that performance of a pre-existing contractual duty is not good consideration; the rule in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[5] that a practical benefit can be good consideration; the rule in *Central London Property Trust Ltd v High Trees House Ltd*[6] that a promissory estoppel can prevent the restoration and enforcement of the original agreement; as well as the various situations in which courts have been prepared to find consideration including promises to do more or to do something different,[7] forbearance to sue,[8] and mutual agreement to replace an old contract with a new contract.[9] But the

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1 48 Vict, c 13. Now the *Mercantile Law Amendment Act*, RSO 1990, c M. 10, s 16.

2 For other provincial equivalents: *Judicature Act*, RSA 2000, c J-2, s 13(1); *Law and Equity Act*, RSBC1996, c 253, s 43; *The Mercantile Law Amendment Act*, RSM 1987, c M120, s 6; *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 64.

3 (1884), 9 App Cas 605 (HL) [*Foakes*]; see also *Pinnel's Case* (1602), 5 Co Rep 117a [*Pinnel*].

4 (1809), 2 Camp 317, 170 ER 1168 (KB) [*Stilk*].

5 [1990] 1 All ER 512 (CA) [*Roffey*].

6 [1947] KB 130 [*High Trees*].

7 *Hartley v Ponsonby* (1857), 7 E1 & B1 872, 119 ER 1471 (KB).

8 Identified as an exception by Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney-General, 1987) at 14.

9 *Raggow v Scougall & Co* (1915), 31 TLR 564 (KB); *Morris v Baron & Co* [1918] AC 1 (HL); *Deluxe French Fries Ltd v McCardle* (1976), 10 Nfld & PEIR 414 (PEI SC).

very situation of section 16 within this larger law of contract itself and whether or not its application can be prevented by findings of undue influence, economic duress, unconscionability, and the like, remained definitively untested until the recent decision of the Ontario Superior Court of Justice in *Process Automation Inc v Norstream Intertec Inc*,[10] in which Harris J found that section 16 will not be applied to permit part payment in full settlement where the agreement to accept part payment was the result of economic duress.[11] Although simple to express and coherent with the well-established principle that agreements induced by improper pressure vitiate consent and should not therefore be enforced, *Process* invites reconsideration of the status of section 16 within the larger law of contract and of the question of whether it is still necessary. The legislatures of the four Atlantic provinces have never enacted an equivalent section, relying entirely on the common law.

2. The Case

The facts were slightly complex. The defendant, Norstream, procured a contract for $US 260,320.00 with the Ministry of Oil in Iraq, to supply a propane station, and payment was to be made by letter of credit drawn on JP Morgan Chase in London. Norstream entered a subcontract with Process, signed in March 2006, to build the station for $US 174,892.00, with a delivery date of April 2006. Delivery was made in late May 2006, some six weeks late. The Ministry deducted a late charge of $US 18,222.40, so that Norstream would be paid $US 242,097.60. Between May 2006 and February 2007, there was significant correspondence between Process and the principal of Norstream, Arroyare, about payment; Norstream was experiencing difficulty in receiving payment from the Ministry. On 1 February 2007, Arroyare accepted payment and on 12 February 2007, received by wire transfer the sum of $US 242,097.60. The following day, Arroyare arranged to meet the principal of Process, Fenske, at a Donut Diner, and at that meeting produced a brief written agreement that stated that Process would accept $US 90,000.00 in full settlement and Norstream would agree to negotiate for this payment as a gesture of goodwill and without obligation. The agreement was signed and a cheque for that sum given.

Process subsequently sued for damages for breach of the March 2006 agreement in the amount of $US 94,471.15, which reflected the difference owing plus some additional charges pursuant to the March 2006 agreement

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10 2010 ONSC 3987, (2010), 321 DLR (4th) 724 (Ont Sup Ct) [*Process*]. There was no appeal.

11 An earlier BC County Court judgement also considered the issue: *Graham v Voth Bros Construction (1974) Ltd,* [1982] 6 WWR 365 (BC Co Ct).

and a sum to reflect the currency exchange rate. Process argued that the Donut Diner agreement was void for economic duress and an absence of consideration. The trial judge heard a mass of conflicting evidence, but, doubting the credibility of Arroyare, came to the following conclusions of fact: (1) Arroyare did not disclose to Fenske the fact that he had already been paid; (2) Arroyare did not disclose that the reason he brought an unnamed witness to the meeting was to have a witness to the signature of Fenske; (3) Arroyare did not intend to negotiate a new price at the meeting because he had already placed $US 90,000.00 in a new bank account on which to draw the cheque; (4) Arroyare did not disclose the purpose of the meeting but led Fenske to believe that he would be paid; (5) Arroyare did not give a copy of the agreement in advance to Fenske or give him an opportunity to consider it or to receive legal advice prior to signing it; and (6) Arroyare left Fenske with no choice but to sign if he wished to be paid, knowing that Process desperately needed the payment.[12]

The learned trial judge first addressed the economic duress argument and adopted the two-stage test set out in earlier Ontario decisions:[13] (1) was the will coerced as determined by four factors, protest, alternative course, independent advice and immediate steps to avoid contract? and (2) was the pressure illegitimate? Harris J thought the decision in *Greater Fredericton Airport Authority Inc v NAV Canada*[14] to eliminate the second stage of illegitimate pressure to be "compelling,"[15] but felt bound to follow the Ontario authorities. Thus, he found that (1) there was compulsion of Fenske's will because Fenske protested at signing the agreement, had no alternative course since he faced legal proceedings of his own by his own subcontractors in three days, did not receive independent legal advice and took immediate legal steps to commence legal proceedings against Norstream; and (2) the pressure was illegitimate insofar as Fenske was given no choice but to sign in the context of a massive disparity in bargaining power.[16] In light of the facts as found by Harris J, this result on the economic duress point is obvious.

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12 *Supra* note 10 at para 69.

13 *Stott v Merit Investment Corp* (1998), 48 DLR (4th) 288 (Ont CA); *Gordon v Roebuck* (1992), 92 DLR (4th) 670 (Ont CA); *Techform Products Ltd v Wolda* (2001), 206 DLR (4th) 171 (Ont CA) [*Wolda*]. On *Wolda*, see also MH Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's LJ 809.

14 (2008), 290 DLR (4th) 405 (NBCA) [*Greater Fredericton Airport*]; see also M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution" [2011] J Bus L 229.

15 *Supra* note 10 at para 73.

16 *Ibid* at paras 76-83.

Turning to the second argument that the Donut Diner agreement was also invalid for a lack of consideration, Norstream argued that consideration for payment of the lesser sum in full settlement could be found either in the fact that Process received payment shortly after Norstream was paid, as opposed to within 60 days as provided in the March 2006 agreement, or in the benefit of knowing that there would be no litigation to ensure payment. Apparently, Norstream did not attempt to support these arguments by reference to a practical benefit argument based on *Roffey*, that is, there was a practical benefit to Process in receiving funds to stave off its litigation with its own subcontractor as well as in avoiding potential litigation against Norstream to procure payment. But for the economic duress which procured the agreement to accept less in full settlement, it might have been interesting to see how the Court would treat such an argument. Indeed, the Court considered the argument within the context of section 16 of the *Mercantile Law Amendment Act*, which reads:

> Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.[17]

The Court characterized section 16 as having "reversed"[18] the common law rule found in *Stilk* and *Foakes* on which Process relied, and also characterized section 16 as being about accord and satisfaction. It further noted that section 16 made no provision for exceptions to its application; provided no guidance on how it applies to existing common law principles; and "appears to be quite clear"[19] that new consideration is not required when a creditor expressly agrees to accept part performance of an obligation.[20]

Process' argument that section 16 was not applicable was based on *D & C Builders Ltd v Rees*,[21] which was said to be about "unconscionability" – that is, the agreement to accept part payment was void because induced by

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17 Harris J noted that section 16 was not actually argued at trial but that the court asked for written submissions on the issue subsequently which were found not to be particularly helpful; see *supra* note 10 at para 91.

18 *Ibid* at paras 89, 110.

19 *Ibid* at para 90.

20 *Ibid*.

21 [1965] 3 All ER 837 (CA) [*Rees*]. The Court also noted that in two Ontario cases also cited as applications of *Rees*, the courts declined to apply *Rees* to the facts on grounds of "unconscionability." In *Moss v Finley* (1997) 74 ACWS (3d) 956 (Ont SCJ) the reason given was an absence of coercion; and in *McMurchy v Long* (2000) 99 ACWS (3d) 780 (Ont Sm CI Ct) the reason was laches.

unconscionable conduct. This characterization of *Rees* is legally sloppy because the English Court of Appeal did not call the offending conduct in *Rees* unconscionable but rather inequitable; yet the point remains that, however characterized, improper conduct was argued as a defence against the enforcement of a part payment pursuant to section 16.

To decide whether section 16 should be applied, the Court first decided what it meant within the context of the facts, and secondly, decided whether Norstream could rely on it in light of the earlier finding of economic duress. The Court agreed with Process that there was no additional consideration for its promise to accept less; there was no benefit in receiving less when expecting to be paid within a reasonable period of time rather than nine months after completion of performance, nor was there any benefit in knowing that litigation would not ensue since litigation had never been discussed. Section 16 does not require additional consideration for enforcement and there was none here. The Court then conceded that if section 16 was an exhaustive code, the defendant should succeed. However, the Court found that it was not comprehensive of all fact situations where there is no new consideration on two bases. First, by reference to the textbook opinions of Waddams and McCamus,[22] the Court thought that section 16 was still subject to the common law. Secondly, by reference to the rule of statutory interpretation that there is a presumption that legislation does not change the common law except where clearly so expressed,[23] the Court concluded that section 16 was not an exhaustive code but rather takes its place within the larger body of contract law and is still subject to that law. Thus, the Court concluded that section 16 is not applicable where the agreement is the result of economic duress, undue influence or unconscionability, or where there is unequal bargaining power, and declined to enforce the Donut Diner agreement.[24]

Although set out as a separate legal issue in the case, unjust enrichment also seemed to be another reason why section 16 was not enforced. Process argued that Norstream was unjustly enriched by the Donut Diner agreement and the Court agreed. It found that Norstream had been enriched by paying less than the original contract price, that Process had suffered a corresponding deprivation for precisely the same amount; and that there was no juristic reason for the deprivation in light of the economic duress, the reasonable expectation of Process that it would be compensated

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22 SM Waddams, *The Law of Contracts*, 5th ed (Toronto, Canada Law Book, 2005), at 100 [now in 6th ed, 2010 at 103] and John D McCamus, *The Law of Contracts* (Toronto, Irwin Law, 2005) at 254-56.

23 Citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Toronto, Lexis Nexis, 2008), at 431, 441.

24 *Supra* note 10 at para 111.

pursuant to the original agreement, and the absence of any public policy reason to permit Norstream to retain the windfall.[25] The relationship of section 16 and unjust enrichment was not considered, but in the Court's reasoning, unjust enrichment operated as another reason not to enforce the Donut Diner agreement.

In coming to its decision, the Court explicitly and implicitly reflected upon the meaning and scope of section 16 in relation to consideration. By confirming the views of several contract law scholars, it explicitly clarified that section 16 is not an exhaustive code but is subject to the rules of contract law where improper pressure is applied to procure a promise of part payment in full settlement of a debt. The Court did not consider whether section 16 may be subject to other rules on matters on which it is not explicit but opened up that possibility. The Court explicitly applied section 16 to situations where a creditor expressly agrees to accept part performance but is unclear as to what precisely that means. It explicitly stated that section 16 reversed *Pinnel* and *Foakes*, but does not explain how it does so, thereby failing to address doubts regarding how and to what extent section 16 ever accomplished that stated purpose when first enacted. Implicitly the Court cast considerable doubt on the utility and effectiveness of section 16 except where part performance is tendered and accepted without objection by the debtor. As a private arrangement between debtor and creditor, such transactions are legion and unsurprisingly never go to court, so implicitly limiting the application of section 16 to them reveals very little about its current interpretation. It is to this question that this comment now turns.

3. Discussion

The part payment rule is often[26] understood as a corollary of or a specific application of the rule that performance of a pre-existing duty is not good consideration for a promise in return to pay more since there is no new consideration for the promise to pay more.[27] The pre-existing duty rule has always been controversial; in the earlier cases,[28] the courts justified the outcome on the alternative bases of consideration or of preventing extortion, and the rule has always prevented the enforcement of what may initially have been a voluntary arrangement for contractual modification

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25 The Court applied the familiar three-part test *supra* note 10 at paras 112-21; see *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30, [2004] 1 SCR 629.

26 GHL Fridman, *The Law of Contract in Canada*, 5th ed (Toronto, Carswell, 2006), at 105; McCamus, *supra* note 22 at 250.

27 This reading of the earlier cases, such as *Stilk*, was finally confirmed in *Pao On v Lau Yiu Long* [1979] 3 All ER 65 (PC) *per* Lord Scarman at76-77.

28 *Harris v Watson* (1791), Peake 102, 170 ER 94 (KB); *Stilk*, *supra* note 4.

between the parties, in relation to which one party subsequently had second thoughts.[29] The uneasy status of the rule in the law of contract is demonstrated by the exceptional situations in which promises to pay more for the same performance can be enforced: (1) where there is substantially greater performance;[30] (2) where there is an implied mutual agreement to abandon an earlier contract in consideration for a new contract;[31] (3) where there is detrimental reliance on a promise to pay more; (4) where there is consideration in a forbearance to sue to enforce the original agreement;[32] and (5) where there is a practical benefit in enforcing the promise to pay more for the same performance.[33] These exceptions assume the absence of undue influence, economic duress, unconscionability and so on for the enforcement of the modified promise and findings of "consideration" where it would not normally be found.

The most recent substantial challenge to the pre-existing duty rule in *Roffey* is relevant to any reconsideration of section 16. In that case, a head contractor promised a sub-contractor an increased price for the same work when the subcontractor faced financial and completion difficulties because the original price was too low and he had not sufficiently supervised his workmen. The head contractor ceased payments at the higher price and the subcontractor succeeded in an action to recover the modified price because there was a practical benefit to the head contractor in avoiding late penalties if the main contract was not completed on time, avoiding the trouble and expense of finding a substitute subcontractor and the establishment of a payment schedule requiring more orderly performance by the subcontractor. Although the English Court of Appeal characterized the decision as a refinement of *Stilk*, troubling questions remain.[34]

Stilk required something new to be added to the bargain to constitute consideration for the promise to pay more, but there was nothing new in the bargain in *Roffey*, notwithstanding the external advantages in ensuring contractual performance as originally promised. *Roffey* therefore casts doubt on *Pinnel* and *Foakes* because part performance in full settlement can usually be justified by external advantages, such as some payment rather than none, which could be characterized as a practical benefit.

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29 *Gilbert Steel Ltd v University Construction Ltd* (1975), 67 DLR (3d) 606 (Ont CA).

30 *Glasbrook Brothers Ltd v Glamorgan CC* [1925] AC 270 (HL). Here the issue was performance of a statutory public duty.

31 Cases cited *supra* note 9.

32 Ontario Law Reform Commission, *supra* note 8.

33 *Roffey, supra* note 5.

34 For a fuller analysis of these see MH Ogilvie, "Of What Practical Benefit is Practical Benefit to Consideration?" (2011) 62 UNB LJ 131 [Ogilvie,"Practical Benefit"].

Moreover, by relaxing the technical consideration requirements, *Roffey* may effectively have shifted the burden of regulating the enforcement of promises to doctrines such as undue influence, economic duress, and fraud. Finally, even if *Roffey* is the correct approach, the meaning of "practical benefit" is unclear,[35] since it seems to substitute external reasons for the enforcement of a promise in place of consideration, a distinction long ago established in *Thomas v Thomas*,[36] between consideration and motive for making a promise.

Most recently, Canadian courts have moved hesitantly toward adoption of *Roffey* without sacrificing *Stilk*. In *Greater Fredericton Airport*,[37] the most significant case to date, the New Brunswick Court of Appeal would have applied *Roffey* but for the economic duress on the facts. In that case, NAV Canada procured an agreement to upgrade navigational services in exchange for a price in excess of the original contract price agreed to by the airport authority, by virtue of exerting time pressures on the airport authority, which agreed "under protest." On completion, the authority refused to pay and the Court upheld its refusal on the grounds of absence of consideration, although there was a practical benefit, and economic duress since the authority had no practical alternative given NAV Canada's national monopoly over the provision of aviation services. In finding practical benefit, Robertson JA noticed *Roffey* and *Techform Products Ltd v Wolda*,[38] an earlier decision of the Ontario Court of Appeal, both of which took less technical approaches to consideration, and concluded that there was a practical benefit in upgrading the landing system, on the basis of which the agreement could have been enforced but for the economic duress which had procured the promise. Notwithstanding this *obiter dicta* approval of *Roffey*, the problems with its meaning and scope of operation within the law of contract remain.

The same problems are associated with the part payment rule, which is a specific example of the pre-existing duty rule in which the promise is to pay less rather than more for the same consideration, typically the

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35 For a fuller criticism, see John Adams and Roger Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 Mod L Rev 536 and Mindy Chen-Wishart, " Consideration: Practical Benefit and the Emperor's New Clothes" in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, Oxford UP, 1995), ch 5.

36 (1842), 2 QB 851, 114 ER 30.

37 *Supra* note 14. For other recent cases involving consideration of *Roffey* but not application on the facts, see *River Wind Ventures Ltd v British Columbia*, 2009 BCSC589, [2009] BCJ No 880 (QL); *Burin Peninsula CBDC v Grundy*, 2010 NLCA 69, (2010), 327 DLR (4th) 752 (NLCA); and *Matchim v BGI Atlantic Inc*, 2010 NLCA 9, (2010), 294 Nfld & PEIR 46 (NLCA). See also Ogilvie, "Practical Benefit," *supra* note 34.

38 *Supra* note 13.

repayment of a debt but also in exchange for goods or services provided. The equally uneasy status of the part payment rule has also been subject to the criticisms that it may defeat good commercial compromises to which the parties voluntarily agreed as well as to various exceptions in which the rule will not be enforced unless there is some type of "new consideration" such as earlier payment, payment at another place or with some chattel, or to prevent fraud either to other creditors or third-party payers of a partial debt settlement.[39] The part payment rule was also doubted by Lord Denning in *High Trees*[40] in which he suggested promissory estoppel as a means for permitting the enforcement of a promise to accept less in full settlement in equitable circumstances.

Both Canadian and English courts have adopted ambiguous positions in relation to the rule in recent decisions, although it has not been overturned by a top court. In *Re Selectmove Ltd*,[41] in which the debtor's promise was to pay late rather than to pay less, the English Court of Appeal conceded that there was a practical benefit in these cases but declined to apply *Roffey* on the ground that a doctrine such as economic duress might be more usefully employed than consideration to distinguish agreements which ought not to be enforced from those which ought to be enforced. Again, in *Collier v P & MJ Wright (Holdings) Ltd*,[42] in which a creditor asserted a statutory right under insolvency rules to full settlement after allegedly permitting a joint debtor to repay "his share," the English Court of Appeal resolved the matter by reference to promissory estoppel but briefly dismissed *Roffey* as restricted to payments for services and applied *Pinnel* because there was an absence of consideration for past payment in full settlement of the joint and several liability. Yet, by resolving the case on the basis of promissory estoppel, the Court effectively undercut the *Pinnel* rule. Finally, in *Robichaud v Caisse populaire de Pokemouche Ltée*,[43] a creditor got a judgement against a debtor, subsequently agreed to take less and then sued for the full amount of the original debt. The New Brunswick Court of Appeal refused to order that the full amount be paid on the grounds that the immediate receipt of payment and the saving of time and expense constituted consideration. Although not framed as a practical benefit case, *Robichaud* looks like one as well as one in which the court simply declined to apply *Pinnel*.

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39 The most comprehensive list of exceptions is found in HG Beale, gen ed, *Chitty on Contracts*, 30th ed (London, Sweet and Maxwell, 2008) vol 1 at. 329-36.

40 *Supra* note 6.

41 [1995] 2 All ER 531 (CA) [*Collier*].

42 [2008] 1 WLR 643 (CA); see also MH Ogilvie, "Part Payment, Promissory Estoppel and Lord Denning's 'Brilliant' Balance" (2010) 49 Can Bus LJ 287.

43 (1990), 69 DLR (4th) 589 (NBCA).

Faced with a decision about the enforcement of a promise to accept part performance in full settlement, the courts have several options where there is no new consideration, in addition to the application of *Pinnel/Foakes*. Where there is some improper pressure or fraud, the case can be disposed of on the basis of economic duress, undue influence, fraud and so on. Where there is no improper pressure or fraud, the common law provides promissory estoppel or practical benefit as the basis for part payment in full settlement, that is, enforcement can be justified in equity or by finding some motive external to the agreement which may or may not be properly characterized as consideration. Additionally, in those provinces which have enacted section 16 or an equivalent, a statutory approach is also available.

The task of deciding whether part payment in full settlement can be sustained under section 16 is not an easy one, and it is clear from the case law that section 16 did not simply reverse *Pinnel/Foakes*.[44] Previous commentators have noted a number of problems with the exception, including the following: (1) the reference to "obligation" suggests the section could apply to obligations in addition to debt;[45] (2) there must be a new agreement, but it is not clear if its sole purpose is to satisfy the original obligation;[46] (3) while what was agreed to has to be accepted and performed, it is not clear whether part performance of part performance is sufficient to activate the application of the section;[47] (4) where the new agreement is not performed, it is not clear if the creditor can restore the original agreement;[48] (5) it is not clear if the creditor still has time to change his mind prior to the commencement of the part performance and to restore the original agreement;[49] (6) the section does not appear to be applicable at all to the outright forgiveness of a debt, so that where a creditor does so and changes his mind, the possibility of restoration of the original debt arises;[50] and (7) the section is silent as to how it operates where there is economic duress, undue influence or fraud.[51] In this regard, the Manitoba legislation provides for the following exception, pointing the common law to the position taken in *Process*:

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[44] A thorough and extensive, if largely overlooked, analysis of the cases up to 1980 can be found in Paul J Brenner, "Part Payment of an Debt by Accord and Satisfaction: The Canadian Experience" (1980) 18 UWO L Rev 369.

[45] Fridman, *supra* note 26 at 119.

[46] *Ibid*.

[47] Waddams, *supra* note 22 at 103; McCamus, *supra* note 22 at 256; Angela Swan, *Canadian Contract Law*, 2nd ed (Toronto, Lexis Nexis, 2009) at 71.

[48] Fridman, *supra* note 26 at 120; Waddams, *ibid*.

[49] Fridman, *ibid*; Waddams, *ibid*.

[50] Waddams, *ibid*; McCamus, *supra* note 22 at 255; Swan, *supra* note 47 at 71.

[51] Waddams, *ibid*; McCamus, *ibid* at 256.

> Notwithstanding subsection (1), an obligation is not extinguished by part performance where a court of competent jurisdiction finds it is unconscionable to so allow.[52]

Presumably the policy direction implicit in the unconscionability exception could be used by a court to add economic duress or fraud as reasons to overturn promises to accept part performance at common law.

Although never enacted, the Ontario Law Reform Commission (OLRC) made recommendations as to how these issues should be resolved: (1) agreements to accept part payment in full settlement should not require consideration to be binding; (2) agreements to waive performance of an obligation should not require consideration to be binding; and (3) an agreement to accept part payment should be revocable where it is breached except where the breach is trivial or technical.[53] Had these proposals been enacted, the rule in *Pinnel/Foakes* would have been truly reversed except where there is some fault in performance on the part of the debtor. The Commission did not address the role of economic duress and other such doctrines in this context, but did recommend the enactment of a general power to be bestowed on the courts to provide relief from contracts induced by unconscionability.[54]

While revocation of section 16 in its entirety was clearly beyond the power of the Court in *Process*, the approach taken to the section 16 issue is broadly coherent with that proposed almost a quarter century before by the OLRC: a promise to accept part payment in full settlement of a debt is enforceable notwithstanding the absence of consideration except where it is the result of some wrongful pressure. The Court did not resort to either promissory estoppel or practical benefit to reach this conclusion and it extended the category of reasons for upholding such a promise beyond unconscionability to other categories of wrongful pressure.

One complication is the role of "accord and satisfaction" in relation to the requisite absence of consideration in these cases. In *Process*, the Court understood section 16 to be about accord and satisfaction as well as consideration, although section 16 itself does not expressly use these words.[55] *Foakes* itself was framed alternatively as about consideration and accord and satisfaction, and the House of Lords rejected the argument that accord and satisfaction constituted an exception to the consideration requirement. Section 16 was expressly enacted to reverse the outcome in

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52 *Supra* note 2 at s 6(2). Waddams, *supra* note 22 at 103-104 and McCamus, *supra* note 22 at 256 advocate this approach.

53 Ontario Law Reform Commission, *supra* note 8 at 9-13.

54 *Ibid* at ch 6.

55 *Supra* note 10 at para 87 ff.

Foakes, notwithstanding its failure in draftsmanship to do so. Thus, at common law, accord and satisfaction was left intact for a debtor who could not bring himself within section 16. The most widely accepted definition of accord and satisfaction is that of Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v Associated Newspaper Ltd*:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.[56]

Part performance in full settlement could, presumably, be an accord and satisfaction where some additional consideration is added[57] or where the agreement is under seal. Both accord and satisfaction – that is, agreement and performance of that agreement – must be present to release from payment of original obligation in full.[58] However, accord and satisfaction is subject to the qualification that it will be set aside where it was the result of the exercise of unequal bargaining power,[59] improper pressure,[60] or where the original agreement was illegal.[61] Presumably, it is also subject to other qualifications such as promissory estoppel, composition agreements with creditors or part payment in full settlement by a third party.[62] Thus, accord and satisfaction operates very much like the consideration rule where part payment is at issue. This means a debtor has three choices where part payment in full settlement is the desired outcome and in the absence of third parties such as other creditors or a third party payer: provide new consideration to support the part payment; invoke section 16; or be a party to an accord and satisfaction under seal. In all three cases, improper pressures will avoid an agreement for part payment.

Process implicitly suggests that it is past time to re-consider legislative reform in this area. Section 16 has constituted a distraction for too long. To re-state: the essential problem is whether part payment can constitute full

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56 [1933] 2 KB 616 (CA) at 643; approved by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1997), 153 DLR (4th) 385 at 427. One of the most extensive discussions in Canada is by Master Funduk in *Esquire Heating & Air Conditioning Ltd v Hoffman* [1984] 6 WWR 730 (Alta QB).

57 *Couldery v Bartrum* (1881), 19 Ch D 394 (CA) *per* Jessel MR at 399.

58 *Sibree v Trip* (1846), 15 M & W 23, 153 ER 745 (Ex Ch).

59 *Blackmore v Cablenet Ltd* [1995] 3 WWR 305 (Alta QB).

60 *Rees, supra* note 21.

61 *VanderKerkhove v Litchfield* (1995), 121 DLR (4th) 571 (BCCA); leave to appeal to SCC refused (1995), 9 BCLR (3d) xxxi (SCC).

62 *Chitty on Contracts, supra* note 39 at 1457 is of this opinion

settlement of a debt where the creditor has originally agreed to accept part payment in the absence of new consideration. Everyday commercial practice suggests the practical reason for allowing part payment where a business assessment has been made that part payment today is better than the possibility that full settlement will never be made tomorrow. The only real issue is to ensure that an unscrupulous debtor, as in *Rees* or *Process*, does not take advantage of a creditor's fragile financial situation to procure part payment by some improper pressure. Thus, a "new" section 16 would simply permit part payment in full settlement except where the agreement was so procured. Where there is no performance of the agreement, the creditor should be permitted to enforce the payment of the entire indebtedness to the extent still possible. Consideration should not be a consideration. This legislative change would obviate the need to decide when promissory estoppel or practical benefit would apply by restricting the court's concerns to the well-known, if sometimes difficult to apply, doctrines such as economic duress, etc. Thus, contradictory outcomes could be avoided such as that in *Collier* where promissory estoppel effectively undermined *Pinnel*.

The remaining concern would be the impact of such a change on the doctrine of consideration generally and on the pre-existing duty rule. Consideration considered as exchange is both a foundation for economic life and a cornerstone of the common law of contract, and should not be swept away by a side wind enforcing a contractual modification lacking consideration. So framed, the answer must be that changing the part payment rule should have no impact on the requirement for consideration, but be an exception to that rule. Several reasons may be given. First, a modification differs from its underlying contract insofar as it is really an attempt to make that underlying contract work, if on a modified basis. The underlying contract is still the foundation for the relationship between the parties and so of greater importance: without it, there can be no modification. Secondly, the voluntary consent of both parties to the modification is evidence of commitment to the underlying contract and to making it work in changed circumstances. In the rare cases where there is litigation, it is reasonable to presume that there is some impropriety in the procurement of the amended obligation, so that the question becomes identification of the appropriate legal rule to resolve that issue, consideration or a rule relating to improper pressure such as economic duress, etc. In contrast to the current approach, this proposal has the merit of directly addressing the problem rather than diverting the court's attention away to a more indirect way of regulating the modification by searching for an absence of consideration or willingness to suffer a detriment voluntarily as a justification for enforcement of the promise to accept part payment. This approach has the additional public policy merit

of emphasizing the role of the court in avoiding promises induced by improper pressures, such as undue influence or economic duress. Thus, there is no obvious reason to fear a future declining role of voluntary consent in determining which agreements the court will enforce as evidenced by the presence of consideration in the agreement. In any case, the courts have considerable experience in determining whether agreements, whether original or now modified, have been made and it is simply proposed that that experience be applied to deciding whether there is objective consent to a modified agreement. Thirdly, even if consideration was still required in part payment cases, the legal principles currently used to circumvent this requirement come close to a similar approach. Promissory estoppel is designed to do equity as famously demonstrated in *Rees*. Practical benefit appears to involve the search for some motive in place of consideration for enforcing the promise as shown in *Roffey*. Both operate in a manner akin to the improper pressure doctrines, again indirectly, and thereby point to the value of a more direct approach. As these cases demonstrate, the courts do not today think of consideration as their sole concern or line of attack in resolving disputes.

Concerns in respect to the pre-existing duty role are different given that the part payment rule is essentially an example of a corollary to that rule. Contract modification to sustain the original contractual relationship is again at issue, and again, the question at the heart of these cases is whether the promise to pay more for the performance of a pre-existing duty was procured by some improper pressure. The existence of numerous exceptional situations in which the courts will enforce such promises notwithstanding the absence of consideration again suggests that the more direct approach of dealing with improper pressures is equally appropriate for the reasons already given. To do so would be to resolve the confusion in the law for about two centuries since the old "seadog cases" as to whether they should be resolved on public policy or consideration grounds.

4. Conclusion

Although a trial decision, *Process* both clarifies an important previously unresolved point in relation to section 16 and implicitly reopens the larger questions of section 16 and of part payment in full settlement. The Court confirmed that it is not an entire code unto itself but operates within the larger law of contract which implicitly ought to be reconsidered. While such re-examination would also raise doubts about the pre-existing duty rule, it would not endanger the doctrine of consideration generally, merely clarify the need to adopt an exception in relation to modified promises voluntarily assented to by the parties.