ESTOPPEL WITHOUT REGARD TO EQUITY? THE PUZZLING OMISSION OF PROMISSORY ESTOPPEL'S INEQUITY CONDITION IN CANADA

Dr. Marcus Moore[1]

Promissory estoppel plays an important role in enabling the enforcement of promises not made for consideration in cases where the promise was intended to and did induce a party to change its position in regard to preexisting legal rights. However, Canadian law on estoppel has been plagued by confusion and misunderstanding. This article addresses the internationally notable absence of an inequity requirement from promissory estoppel in Canada. The requirement's absence is peculiar, in that estoppel's very foundation is in equity, and it must assure that its effect is indeed equitable. Drawing on the Supreme Court of Canada's decision in Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada, I show how Canadian law is flawed in the absence of this vital element. I further demonstrate that, in fact, Canada was once a leader on this point before the widely-known opinion about it by Lord Denning in England in 1966. Later, the requirement fell through the cracks as the Supreme Court of Canada lost its grasp on its own precedents, and on the law on estoppel more generally. However, drawing on the older jurisprudence, and scholarship here and abroad, the situation can be rectified by having Canadian law again recognize promissory estoppel's crucial inequity requirement.

La préclusion promissoire joue un rôle déterminant dans l'exécution des promesses faites sans contrepartie, lorsque celles-ci visaient, et ont effectivement conduit l'autre partie à changer sa position à l'égard de droits légaux préexistants. Or, le droit canadien en matière de préclusion est tombé sous le règne de la confusion et de l'ignorance. L'auteur explore l'absence, notable à l'échelle internationale, d'une condition d'iniquité en matière de préclusion promissoire au Canada. Ce défaut étonne, puisque la préclusion se fonde sur le principe même d'équité : elle doit avoir un effet équitable. À la lumière de l'arrêt de la Cour suprême du Canada dans Trial Lawyers Association of British Columbia c. Royal & Sun Alliance du Canada, société d'assurances, l'auteur fait la démonstration que le droit canadien est défectueux en l'absence de cet élément crucial. Il explique en outre que le Canada a déjà fait figure de chef de file en la matière, bien avant que lord Denning n'exprime en 1966 son opinion devenue célèbre en Angleterre. La

[1] Faculty of Law, University of British Columbia. The author would like to thank Christopher Waters, Wissam Aoun and the anonymous reviewers of the CBR for their helpful suggestions, as well as Prince Doh Senayah, Ranen Po, Helen Yang, Timothy Falco, Sina Seyed Ali, Fraser Caldwell, and Trevor Duncan for their valuable research assistance.

condition d'iniquité est ensuite tombée dans l'oubli, la Cour suprême ayant perdu prise sur sa propre jurisprudence, et plus généralement sur le droit de la préclusion. Toutefois, un retour aux décisions antérieures et aux travaux réalisés ici et à l'étranger porte à croire qu'il est possible de rectifier le tir en faisant reconnaître de nouveau l'impérative condition d'iniquité en droit de la préclusion promissoire au Canada.

Contents

I. Introduction

Promissory estoppel plays a key role in preventing parties who were induced by promised concessions relative to pre-existing legal obligations from having their reasonable reliance disappointed by a promissor resiling from its promise and reasserting its prior strict rights. In this regard, promissory estoppel is an important supplement to contract law—as Angela Swan puts it, "adjuvant to the law of contracts … fill[ing] in what would otherwise be serious gaps in the ability of the law to protect reasonable expectations" in situations where promises not made for consideration nonetheless should be enforced on the basis that they were intended to and did induce another party to change its position.[2]

Promissory estoppel has multiple required elements, including a clear and unequivocal promise, a pre-existing legal obligation which the promise relates to, and a need for the promise to comprise a concession rather than an expansion of pre-existing rights. As well, it must be intended that the promise have legal effect, and the promissee must have changed its position in reliance on it. A final requirement, not only accepted but viewed as essential in most places, is that it be inequitable in the particular circumstances to resile from the promise.

Presently in Canada, however, this requirement that it be inequitable for the promissor to go back on the promise (the "inequity requirement") is omitted from the stated elements of the doctrine. No reason has been given for this peculiar posture of Canadian law, nor do scholars regard the element as improper.[3] The inequity condition's absence from Canadian

---

[2] Angela Swan, Jakub Adamski & Annie Na, *Canadian Contract Law*, 4th ed (Markham: LexisNexis Canada, 2018), s 1.9; *Esso Petroleum Co Ltd v Mardon*, [1976] QB 801, [1976] 2 WLR 583; *VK Mason Construction Ltd v Bank of Nova Scotia*, 1985 CanLII 608 (SCC), [1985] 1 SCR 271. In the province of British Columbia, there is some authority that fresh consideration is not needed for a promise consisting of a going-transaction adjustment (see *Rosas v Toca*, 2018 BCCA 191). This would reduce the scope of cases in which recourse to estoppel is needed in order to protect reasonable expectations induced by promises. However, obviously the position endorsed in *Rosas* is controversial (see e.g. Mindy Chen-Wishart, "Practical Benefit and the Emperor's New Clothes" in Jack Beatson & Daniel Friedman, eds, *Good Faith and Fault in Contract Law*, (New York: Oxford University Press, 1995)); Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS. Indeed, even in *Rosas v Toca*, the court suggested that the case could and perhaps should have been resolved on the basis of estoppel, had the plaintiff not withdrawn its argument for it based on a misunderstanding of estoppel's requirements (at paras 45–46, 48).

[3] The position of Bruce MacDougall requires careful investigation—elaborated in Section V.A, below.

law calls for investigation. But to date, there has been very little attention addressed to this surprising stance.

This article examines the unusual position of Canadian law in omitting the inequity requirement that is typically included among the conditions of the doctrine's application elsewhere. I argue that this element plays a distinct and indispensable role in promissory estoppel, and that lacking this element, the Canadian version of the doctrine is critically flawed. Examining the recent Supreme Court of Canada decision in *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, I show how the missing inequity requirement created a quagmire out of what should have been an easy case to resolve based of that condition.[4] Instead, with it missing, the Court wound up stretching the meaning of other elements of the doctrine in ways likely to prove problematic in future cases, and which may leave the doctrine hard-pressed to fulfil its intended function.

Reviewing academic and jurisprudential authorities in Canada, I find strong support for recognizing the inequity requirement as an essential part of promissory estoppel. Indeed, I show how Canada was previously a *leader* in understanding the pivotal role of promissory estoppel's inequity requirement, in the essential case *Conwest Exploration Co v Letain*, affirmed in a number of other Supreme Court of Canada cases that followed it.[5] My review of the authorities suggests that the inequity requirement's omission beginning in the later case, *Maracle v Travellers Indemnity Co of Canada*—which *Trial Lawyers* relied on as the most recent authority on promissory estoppel—was likely inadvertent, and not a deliberate repudiation of the propriety of the inequity requirement.[6]

The article is further of international significance in the areas of estoppel, contracts, and good faith in showing through its in-depth study of *Conwest* how the inequity requirement may fail to be satisfied in a heretofore unrecognized scenario: *viz*. where a promissor makes and then resiles from a promise relative to a pre-existing contractual obligation to attempt to escape from it (or from a bad bargain altogether).[7] The inequity in that scenario dovetails with the good faith duty of non-evasion, shedding some light on the latter, one of the general duties of good faith

---

4 2021 SCC 47 [*Trial Lawyers v RSA*].

5 1963 CanLII 35 (SCC), [1964] SCR 20 [*Conwest Exploration*]. See generally Section V.B, below.

6 *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50, 1991 CanLII 58 (SCC) [*Maracle*].

7 Often, the aim might be to evade, or trigger, a contractual condition. See Section V.B.i, below.

recognized in *Bhasin v Hrynew* but not yet elaborated by the Supreme Court of Canada.[8]

II. Background on Promissory Estoppel's Inequity Requirement

A) Promissory Estoppel

Promissory estoppel protects a party who was induced to rely on a counterpart's promise not to fully enforce a legal right against the counterpart later unfairly going back on that promise. This provides an avenue for certain promises to be legally enforceable despite absence of consideration for the promise.[9] The promissor is "estopped" from going back on the promise.

The doctrine of promissory estoppel includes a set of requirements that must be satisfied for it to apply. The guidance these offer helps parties plan their business around what they understand to be their legal claims and responsibilities.[10]

Promissory estoppel's requirements may be summarized as follows:[11]

1. The promise must be clear and unequivocal.[12]

---

8 *Bhasin v Hrynew*, 2014 SCC 71.

9 Hugh Collins, *The Law of Contract*, 4th ed (Cambridge, UK: Cambridge University Press, 2003) at ch 5; *Central London Property Trust Ltd v High Trees House Ltd*, [1947] KB 130 (KBD), [1947] LJR 77 [*High Trees*]; *Crabb v Arun District Council*, [1976] EWCA Civ 7, [1976] 1 Ch 179; *Waltons Stores (Interstate) Ltd v Maher*, [1988] HCA 7, 164 CLR 387 [*Waltons Stores*].

10 My avoidance of the terms "rights and obligations" here is because estoppel does not create legal rights, as will be discussed below in condition (3). Some have qualified them as equitable rights and obligations (see e.g. *Waltons Stores*, *supra* note 9, Brennan J). However, I wish to avoid further semantic debate.

11 As with any doctrine, there is some variation in how its elements are formulated. Compare e.g. Hugh Beale, *Chitty on Contracts*, 33rd ed (London, UK: Sweet & Maxwell, 2019), s 4-087; Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020) at 122–29; Bruce MacDougall, *Estoppel*, 2nd ed (Markham: LexisNexis Canada, 2019), s 5.92; John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 308–14. The version I present here is consistent with most conventional accounts of it.

12 Beale, *supra* note 11, ss 4-091 to 4-093; Beatson, Burrows & Cartwright, *supra* note 11 at 122; Mindy Chen-Wishart, *Contract Law*, 6th ed (Oxford: Oxford University Press, 2018) at 147–48 [Chen-Wishart, *Contract Law*]; MacDougall, *supra* note 11, s V.C.2.b.-i; *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, [1979] 1 WLR 783 at 812 (UK HL) [*BP Exploration*], aff'd without reference to this point [1983] 2 AC 352 (UK HL); *Spence v Shell*, [1980] 55 EG 63; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and*

The evidence must be compelling that a promise was made and the promise cannot be excessively vague or imprecise. This requirement prevents preexisting legal rights from being disturbed too easily by alleged promises not to enforce them.[13] Hence, that intent must be clear and unequivocal.

2. The promise must pertain to a preexisting legal relation of the promissor.[14]

Often, the preexisting relation is a contract,[15] and the promise concerns an obligation under that contract. In any case, the promise is not to fully exercise rights under the preexisting legal relation. Where estopped, the promissor cannot reassert those rights.

3. The promise must comprise a concession, not an expansion, of the preexisting legal rights.[16]

Estoppel limits the exercise of a right; it does not expand or create new legal rights. John McCamus explains how it is "essential" that the promise "constitute a concession rather than an affirmative undertaking to provide additional benefits under the [preexisting] agreement."[17] This restriction

---

Vegetable Oils (Malaysia) Sdn Bhd ("The Post Chaser"), [1982] QBD 19 at 700, [1982] 1 All ER 19 [*The Post Chaser*]; *Goldsworthy v Brickell*, [1987] Ch 378 at 410, [1987] WLR 133 (EW CA Civ); *Hiscox v Outhwaite (No 3)*, [1991] 2 Lloyd's Rep 524 at 524, 535 (EW CA Civ); *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants*, [1999] 2 Lloyd's Rep 443 at 448 (QBD); *Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd*, [2001] EWCA Civ 1, [2001] BLR 113; *Evans v Amicus Healthcare Ltd*, [2004] EWCA Civ 727, [2004] 3 All ER 1025*; Hadley v Midland Fertility Services Ltd*, (2003) 4 All ER 903 at 303–06 (where the requirement was not met), [2003] EWHC 2161 (Fam).

13 Marcus Moore, "Developments in Contract Law: The 2021-2022 Term — The Enduring Allure of Freedom of Contract" (2023) 111 SCLR 3 at 39–41.

14 Beale, *supra* note 11, s 4-089; Piers Feltham et al, *Spencer Bower: Reliance-Based Estoppel*, 5th ed (London, UK: Bloomsbury Publishing, 2017), s 14.22; MacDougall, *supra* note 11, s V.C.2.a; Stephen Waddams, *The Law of Contracts*, 8th ed (Toronto: Carswell, 2022) at 134; *Combe v Combe*, [1951] 2 KB 215 (EW CA); *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd*, [2015] 2 Lloyd's Rep 123 at 156, [2015] EWHC 999 (Comm); *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*, [1972] AC 741 at 757 (UK HL) [*Woodhouse*].

15 Indeed, this is the case in *Trial Lawyers v RSA*, *supra* note 4 to be discussed, as I explain in Section IV.C, below.

16 McCamus, *supra* note 11 at 308–09; Beale, *supra* note 11, ss 4-099 to 4-101; Beatson, Burrows & Cartwright, *supra* note 11 at 126–29; Chen-Wishart, *Contract Law*, *supra* note 12 at 152–59; Waddams, *supra* note 14 at 139; *Orion Finance Ltd v J D Williams and Co Ltd*, [1997] CLY 986, [1995] EWCA Civ 1.

17 McCamus, *supra* note 11 at 309; Michael Barnes, *The Law of Estoppel*, 1st ed (Oxford: Hart Publishing, 2020), s 6.158.

is widely accepted, with notable exceptions in the United States and Australia.[18] The distinction reflects that estoppel, as an equitable doctrine, does not create legal rights, but only stops parties from acting inconsistently with promises that induced reliance, if inequity would otherwise result.[19]

4. It must be objectively-intended that the promise can be legally relied on.[20]

That is, it must be intended that the promise have legal effect, not merely binding in conscience, or made in jest, for instance.[21] Intention, as usual in private law, should be determined objectively, as what intent would be inferred by a reasonable person in the position of the promissee, not what the promissor actually intended.[22] The requisite intent is only that the promissee can rely on the promise, not that the promissee must do so.

In my view, above requirements (1) and (4) together establish it as reasonable to rely on the promise, as promissory estoppel only protects *reasonable* reliance.[23]

5. The promissee must have changed its position in reliance on the promise.[24]

---

[18] *Waltons Stores*, *supra* note 9; *Restatement (Second) of Contracts* § 90 (1981).

[19] *Combe v Combe*, *supra* note 14 at 220. Obviously, limiting the scope of estoppel in this way also preserves the requirement that there be consideration in return for a promise that creates legal rights: See e.g. *ibid*; Beale, *supra* note 11, s 4-099; MacDougall, *supra* note 11, s 5.321; *Brikom Investments Ltd v Carr*, [1979] QB 467 at 486, [1979] 2 WLR 737 (EW CA Civ) [*Brikom*]; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*, [1955] 1 WLR 761 at 764, [1955] 2 All ER 657 (UK HL).

[20] Barnes, *supra* note 17, s 6.146; MacDougall, *supra* note 11, s V.C.2.b; Waddams, *supra* note 14 at 137; Edwin Peel, *Treitel's Law of Contract*, 14th ed (London, UK: Sweet & Maxwell, 2015) at 131; *Woodhouse*, *supra* note 14 at 758; *The Post Chaser*, *supra* note 12.

[21] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000) at 82–83; Collins, *supra* note 9 at 82; *Carlill v Carbolic Smoke Ball Company*, [1893] 1 QB 256, [1892] EWCA Civ 1.

[22] Barnes, *supra* note 17, s 6.141; Waddams, *supra* note 14 at 137; *Smith v Hughes*, (1870–71) LR 6 QB 597, [1861–73] All ER Rep 632 (EW QBD); *Customs and Excise Commissioners v Barclays Bank Plc*, [2006] UKHL 28 at paras 5, 73, 86.

[23] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford: Hart Publishing, 1999); Swan, Adamski & Na, *supra* note 2 at 125 ff.

[24] MacDougall, *supra* note 11, s V.C.2.c; Beatson, Burrows & Cartwright, *supra* note 11 at 123–24; Beale, *supra* note 11, ss 4-094 to 4-095; Chen-Wishart, *Contract Law*, *supra* note 12 at 148–50; *Ets Soules & Cie v International Trade Development Co*, [1980] 1 Lloyd's Rep 129, [1979] EWCA Civ J0725-6; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The "Multitank Holsatia")*, [1988] 2 Lloyd's Rep 486 at 493 (QBD Comm); *Hughes v Metropolitan Railway Co*, [1877] UKHL 1, 2 AC 439 [*Hughes*]; *WJ Alan & Co Ltd v El Nasr Export and Import Co*, [1972] 2 QB 189 at 213, [1972] 2 WLR 800 (EW CA Civ) [*Alan v El*

This element confirms that the promissee was indeed legally affected by the promise. The question is whether the promissee "changed its position" based on the promise or altered its plans. Afterall, the law protects promises in order to allow people to plan their affairs around what they reasonably expect are their enforceable claims and commitments. Part of the assessment is whether the change of position was induced by the promise.[25]

Detrimental reliance is often presented as the gist of the change of position requirement.[26] However, this does not mean the detriment was from relying on the promise; often the promissee *benefits* from the promise. The "detriment" arises if the promissor *breaks* the promise.[27] Often, such detriment is uncontroversially present. The unfairness of being induced to alter one's position in reliance on a promise and then suffer detriment when it is broken is central to what promissory estoppel serves to prevent. However, some cases reveal difficulties around what qualifies as detriment,[28] and further there is dispute as to whether the doctrine requires detrimental reliance, even in the sense clarified.[29] One vision of the doctrine, espoused by Lord Denning, focuses less on detriment to the promissee and more on the conduct of the promissor in breaching a promise solemnly given and intended to have legal effect.[30] Thus, I adhere to authority which frames the requirement only as a change of position.[31]

Nasr]; *James and another v Heim Galleries*, [1980] 2 EGLR 119 at 825 (EW CA Civ); *The Post Chaser*, *supra* note 12; *Youell v Bland Welch & Co Ltd (Superhulls Cover Case) (No 2)*, [1990] 2 Lloyd's Rep 431 at 454 (QBD Comm); *Fortisbank SA v Trenwick Insurance Co Ltd*, [2005] EWHC 339 (Comm) at 13, [2005] Lloyd's Rep IR 464.

25 See e.g. Beale, *supra* note 11, s 4-094; Collins, *supra* note 9 at 80; MacDougall, *supra* note 11, s V.C.2.d-I; *Brikom*, *supra* note 19 at 490.

26 Beatson, Burrows & Cartwright, *supra* note 11 at 123; Collins, *supra* note 9 at 80; *Trial Lawyers v RSA*, *supra* note 4 at paras 15–16.

27 See e.g. MacDougall, *supra* note 11, s 5.225; Chen-Wishart, *Contract Law*, *supra* note 12 at 148–49; *The Post Chaser*, *supra* note 12.

28 *Commonwealth of Australia v Verwayen*, [1990] HCA 39, (1990) 170 CLR 394 [*Verwayen*]; MacDougall, *supra* note 11, ss 5.255–5.269; Chen-Wishart, *Contract Law*, *supra* note 12 at 148–49; Jeannie Marie Paterson, Andrew Robertson & Arlen Duke, *Principles of Contract Law*, 5th ed (Sydney: Thomson Reuters Professional Australia Pty Limited, 2016), ss 9.65–9.85.

29 Beatson, Burrows & Cartwright, *supra* note 11 at 123–24; The leading proponent of the view that detriment is not necessary was Lord Denning: *Alan v El Nasr*, *supra* note 24 at 213; AT Denning, "Recent Developments in the Doctrine of Consideration" (1952) 15 Mod L Rev at 6–8; *High Trees*, *supra* note 9; Feltham et al, *supra* note 14, s 14.29; For a strong view that detriment is essential, see MacDougall, *supra* note 11, ss 5.223–5.227, V.C.2-d.

30 Denning, *supra* note 29 at 6–8.

31 See text accompanying note 25.

6. It must be inequitable for the promissor to go back on the promise.[32]

This element is the focus of the present article. As will be discussed next, there is some difference in views on what the element entails: in particular, whether it is an overarching evaluation which subsumes the other elements, or else represents another specific requirement like those above but inquiring into issues not covered by those elements. Both views share a focus on whether—assuming all other conditions of the doctrine have been met—the circumstances suggest it would be inequitable to let the promise be broken, *or not*.

Having summarized the elements of promissory estoppel, I now discuss in more detail the inequity element at issue.

B) Inequity Requirement

As a creature of equity, the application of promissory estoppel cannot be reduced to a technistic formula; it must be assured that its operation is indeed equitable. It is the last element of the doctrine enumerated above that serves this purpose.

The change of position element also incorporates an equitable consideration. The one it includes gives inspiration to the doctrine—the inequity of being induced to change position, only to have that reliance undercut by the inducing promise's subsequent resiliation. However, precisely because this defines the fact-scenario that characterizes the doctrine, in almost any case in which a claim of promissory estoppel is being seriously investigated, that element will be present. What it does not answer is whether overall—considering all the circumstances, not just the disappointment of induced reliance—it would be inequitable to go back on the promise. This is the task of the doctrine's inequity requirement.

There is broad consensus that the inequity requirement performs this function. However, there are differing views on how.

---

32 *D&C Builders Ltd v Rees*, [1966] 2 QB 617 at 625, [1966] 2 WLR 288 (EW CA) [*D&C Builders*]; *Hughes*, *supra* note 24; Beale, *supra* note 11, s 4-096; Beatson, Burrows & Cartwright, *supra* note 11 at 122–23; Chen-Wishart, *Contract Law*, *supra* note 12 at 150–51; Collins, *supra* note 9 at 75; MacDougall, *supra* note 11, s V.C.2.e; *Maharaj v Chand*, [1986] AC 898, [1986] 3 All ER 107; *Bottiglieri di Navigazione SpA v Cosco Qingdao Ocean Shipping Company (The "Bunga Saga Lima")*, [2005] 2 Lloyd's Rep 1, [2005] EWHC 244 (Comm) [*The Bunga Saga Lima*].

England is an example of where the inequity element is a *specific* requirement of the doctrine.[33] *Chitty* explains that "even if the [other] requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not 'inequitable' for the first party to go back on his promise."[34] The inequity inherent in the change of position only provides a start point, which the inequity requirement must go beyond to ascertain whether other circumstances reinforce or counteract the significance of that in equitable terms.[35] Mindy Chen-Wishart explains how, "inequity is an *independent* requirement … and considers other factors."[36] What some of those factors include is discussed in Section i.V.B.

The United States, Singapore and Ireland, are examples of additional jurisdictions where the inequity element comprises a specific requirement, broadly along the lines of the English position.[37]

The Australian position is different. As cases like *Waltons Stores (Interstate) Ltd v Maher* and *Commonwealth of Australia v Verwayen* show, the inequity element (known as "unconscionability") is not an independent and specific inquiry. Rather, it comprises an overarching assessment of whether it would be inequitable/unconscionable for the promissor to go back on the promise.[38] The New Zealand approach appears close to the Australian.[39]

---

33 Beale, *supra* note 11, s 4-096. See also Beatson, Burrows & Cartwright, *supra* note 11 at 122; *Hughes*, *supra* note 24; *The Post Chaser*, *supra* note 12; *Maharaj v Chand*, *supra* note 32; *The Bunga Saga Lima*, *supra* note 32.

34 Beale, *supra* note 11, s 4-087; *The Post Chaser*, *supra* note 12; *BP Exploration*, *supra* note 12 at 812; *Nippon Yusen Kaisha v Pacifica Navegacion SA (The "Ion")*, [1980] 2 Lloyd's Rep 245 at 250 (QBD Comm).

35 Beale, *supra* note 11, s 4-096; Chen-Wishart, *Contract Law*, *supra* note 12, s 3.2.1.3; *Maharaj v Chand*, *supra* note 32; *The Bunga Saga Lima*, *supra* note 32.

36 Chen-Wishart, *Contract Law*, *supra* note 12, s 3.2.1.3 [emphasis in original].

37 In the US, promissory estoppel is captured in the *Restatement (2d) of Contracts*, *supra* note 18 § 90(1). On the inequity ("injustice") element in the US comprising a specific requirement, similar to its status in England (see e.g. E Allan Farnsworth, *Contracts*, 4th ed (New York: Aspen, 2004), s 2.19). On Singaporean law, see e.g. *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd*, [2012] SGHC 245 at para 83. And regarding the Irish position on the inequity or "unconscionability" element, see e.g. *The Barge Inn Ltd v Quinn Hospitality Ireland Operations 3 Ltd*, [2013] IEHC 387; Robert Clark, *Contract Law in Ireland*, 8th ed (Dublin: Round Hall, 2016) ss 2–68.

38 See note 41, below.

39 Jeremy Finn, Stephen Todd & Matthew Barber, *Burrows, Finn and Todd on the Law of Contract in New Zealand*, 6th ed (Wellington: LexisNexis New Zealand, 2018) at 141–42.; *Gillies v Keogh*, [1989] 2 NZLR 327 at 331, (1989) 5 NZFLR 549; *Elkington v Ruruku*, (2007) 9 NZCPR 97 at para 46.

In sum, all of these jurisdictions recognize promissory estoppel as having an inequity condition that looks beyond the inequity of breaking a promise that induced a change of position, and focuses on the overall equitability of breaking the promise. However, jurisdictions differ on whether the inequity element is a distinct inquiry or an overarching assessment that subsumes the doctrine's other requirements.

For purposes of this article, I adopt the view that an inequity requirement of promissory estoppel in Canada should comprise a specific condition for the doctrine's application, additional to the doctrine's other conditions. There are several reasons for this.

Firstly, as I will explain in Part V, when an inequity requirement previously *was* recognized in Canada, it expressly rested on the authority of foundational English cases. And as mentioned, in English law as well as most other jurisdictions that followed it, the inequity element is a specific requirement, not an all-in-one test for the doctrine's application.

Secondly, the Australian position reflects a more complicated situation around estoppel there. For example, Australia sees multiple types of estoppel as more closely-related than elsewhere. Indeed, some view estoppels in Australia as combined into a single unified doctrine; others see promissory estoppel as distinct. That question remains unresolved.[40] Further, some Australian cases including *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* suggest that inequity is not an element of the doctrine but merely underlies it.[41] These unsettled issues tend to a less specific, more global, approach to inequity when considered as a condition of application.

Thirdly, I am persuaded that viewing the inequity requirement as a specific condition is the preferable view, and should prevail generally,

---

[40] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*, [2016] HCA 26 at para 37, 260 CLR 1; See also *Giumelli v Giumelli*, [1999] HCA 10 at para 7, 196 CLR 101; On the claim that the estoppels have been unified, see e.g. *Verwayen*, *supra* note 28 at 411, Mason CJ, 428–29, Brennan J, 440, Deane J; *Waltons Stores*, *supra* note 9; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993), 177 CLR 485 at 506, [1993] HCA 15; On the view that promissory estoppel is distinct, see e.g. John Carter, *Cases and Materials on Contract Law in Australia*, 7th ed (Syndey: LexisNexis Australia, 2019), s 7.05; See also *DHJPM Pty Ltd v Blackthorn Resources Ltd (formerly called Aim Resources Ltd)*, (2011) 83 NSWLR 728, [2011] NSWCA 348; *Doueihi v Construction Technologies Australia Pty Ltd*, [2016] NSWCA 105, (2016) 92 NSWLR 247.

[41] Paterson, Robertson & Duke, *supra* note 28, s 9.95. *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd*, [2004] VSCA 167, 50 ACSR 679 (Victoria Court of Appeal).

wherever promissory estoppel is recognized.[42] I will not recap in detail here the arguments for this. However, mainly it is based on the need for the inequity element to address a specific issue not addressed by other conditions of the doctrine: as alluded to earlier, the possible presence of *other factors* that could result in it not being inequitable to break the promise, notwithstanding that it induced a change of position.

Hence, as per the view endorsed here, promissory estoppel's inequity requirement (1) canvasses the possible existence of equitable considerations countervailing the inequity of disappointing promise-induced reliance; (2) captures nuance overlooked by the on/off character of the doctrine's other conditions (for example, cases where the change of position is trivial[43]); and thus (3) weighs any such reasons why it might be *equitable* to resile against the "usual" inequity of disappointing reliance on the promise, captured already by the doctrine's separate change of position requirement.

I will demonstrate why this function is essential to the doctrine, and how the doctrine is flawed without it, in Part IV. But first, I survey the current situation in Canada, where the inequity element is missing.

III. Current Situation in Canada: Omission of Inequity Requirement

A) Based on the Assumed Leading Cases

Presently, the leading case on promissory estoppel in Canada is considered to be *Maracle v Travellers Indemnity*.[44] In *Maracle*, the Supreme Court of Canada stated that:

> the principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.[45]

---

[42] Marcus Moore, "When Is It Fair to Break Promises? Illuminating Promissory Estoppel's Inequity Requirement" (2023) 1 Contract and Commercial L Rev 161 at 174 [Moore, *When is it Fair to Break Promises*].

[43] MacDougall, *supra* note 11, s 5.289.

[44] *Maracle*, *supra* note 6. For cases following *Maracle*, see *Trial Lawyers v RSA*, *supra* note 4 at para 15; *MAHCP v Nor-Man Regional Health Authority Inc*, 2011 SCC 59 at paras 59–60; *Clarkdale Motors Ltd v The Dilawri Automotive Group*, 2024 BCSC 1829 at paras 90–92 [*Clarkdale Motors*]; *Crossview Developments Inc v 22624443 Ontario Limited*, 2016 ONSC 647 at para 60.

[45] *Maracle*, *supra* note 6 at 57.

Compared with the typical components of promissory estoppel spelled out earlier (section II.B), one sees that this formulation covers: the second (promise relates to a preexisting relation); fourth (promise was intended to be legally relied upon); and fifth (promissee changed position in reliance on the promise) elements.[46]

Maracle also approved a statement from a prior case, *Engineered Homes Ltd v Mason,* that the promise must be unambiguous—the first element of the doctrine, summarized above.[47]

Maracle further quoted *John Burrows Limited v Subsurface Surveys Limited* and *Collavino Inc v Employers Mutual Liability Insurance Co of Wisconsin* to the effect that the promise must be a concession not an expansion of preexisting rights—the third condition of the doctrine from the summary provided earlier.[48]

But *Maracle* did not mention the sixth conventional requirement of promissory estoppel described above—that it be inequitable to go back on the promise.[49] Thus, the inequity condition was omitted from the requirements acknowledged in *Maracle*, including those expressed and those implied by reference/quotation of prior cases. This position made Canada a notable outlier—as noted earlier, other jurisdictions typically include the inequity requirement.

Flashing forward to the Supreme Court of Canada's most recent decision concerning promissory estoppel, *Trial Lawyers v RSA*, the conventional requirement that it be inequitable to go back on the promise remains omitted in Canadian Law.[50]

The Court in *Trial Lawyers* relied on the *Maracle* account of the doctrine.[51] The majority summarized those requirements as:

> that the parties be *in a legal relationship* at the time of the promise or assurance;
> the promise or assurance be *intended* to affect that relationship and to be acted on;

---

46 See Section II.A, above.

47 *Maracle*, *supra* note 6 at 57; *Engineered Homes Ltd v Mason*, 1983 CanLII 142 (SCC), [1983] 1 SCR 641 [*Engineered Homes*]; Element (1) from Section II.A, above.

48 *Maracle*, *supra* note 6 at 57; *John Burrows Limited v Subsurface Surveys Limited*, 1968 CanLII 81 (SCC) at 615, [1968] SCR 607 [*John Burrows*]; *Collavino Inc v Employers Mutual Liability Insurance Co of Wisconsin*, 1984 CanLII 5963 (ONSC) at 101, 5 CCLI 94.

49 Condition (6) of Section II.A, above. See also Section II.B, above.

50 *Trial Lawyers v RSA*, *supra* note 4.

51 *Ibid* at para 15, Moldaver and Brown JJ (majority); *ibid* at para 55, Karakatsanis J, concurring.

> and the other party in fact *relied* on the promise or assurance. It is … implicit that such reliance be to the promisee's detriment.[52]

In paraphrasing *Maracle*, this account from *Trial Lawyers* likewise captures the second, fourth and fifth earlier-described elements of the doctrine: that the promise concern a preexisting legal relation; be intended to have legal effect; and led the promissee to change position in reliance on it.[53]

Later, in assessing whether the facts in *Trial Lawyers* meet the doctrine's requirements, the majority also reference the need for the promise be clear and unequivocal.[54] Although framed as about whether there was a pre-existing legal relationship between the third-party claimant and the insurer, arguably the majority also advert to the condition that the promise not create new rights, in their objection to the third-party seeking a benefit the insured never had.[55]

This leaves missing—again in *Trial Lawyers*, from the elements of promissory estoppel in Canada, stated or implied—the inequity requirement discussed in Section II above.

Justices Moldaver's and Brown's majority opinion actually does mention "inequity"—the "inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed."[56] Their point was that reliance is not enough—the promissee has to change position in reliance on the promise (and hence, normally will suffer detriment if the promissor resiles from it).[57] But this conflates estoppel's inequity element with detriment.[58] As explained in section II.A, the issue of detriment arises as part of a different requirement, namely that the promissee changed position in reliance on the promise.[59] That doctrinal element was already captured by what *Trial Lawyers* took from *Maracle*, discussed above.[60] Hence, *Trial Lawyers*' reference to "inequity" is not to the inequity requirement of the doctrine

---

52 *Ibid* at para 15 [emphasis in original; numbering omitted].

53 See Section II.A, above.

54 *Trial Lawyers v RSA*, *supra* note 4 at para 46.

55 See e.g. *ibid* at para 49.

56 *Ibid* at para 16, citing *Fort Frances v Boise Cascade Canada Ltd*, 1983 CanLII 47 (SCC) at 202, n 76, [1983] 1 SCR 171.

57 See element (5) from Section II.A, above.

58 See elements (5) and (6) in Section II.A, above. See also Chen-Wishart, *Contract Law*, *supra* note 12 and the text accompanying note 37, above.

59 See text accompanying notes 27–29.

60 See text accompanying note 57.

accepted elsewhere in the common law; rather it is additional detail on the change of position requirement already accepted in *Maracle*.

Inducing another party to change position in reliance on a promise, such that the promissee will usually suffer detriment if the promise is broken, obviously is an inequity. But as discussed, that inequity is the one which characterizes the very existence of promissory estoppel as a doctrine which can mitigate the harshness of contract law's requirement of consideration. The inequity requirement takes that for granted, and canvasses the possibility that although the change of position requirement is met, *other factors* might be present which could outweigh it such that it would *not* be inequitable, all things considered, to go back on the promise.[61]

Hence, while *Trial Lawyers*' mentioned the word "inequity," the comment did not pertain to the inequity requirement discussed in this article. And thus, in this most recent authority on promissory estoppel in Canada, the Supreme Court of Canada again omitted this element that is typically part of the doctrine elsewhere.

B) Confirmed by Scholarly Interpretation of the Caselaw

Canadian law's omission of the inequity element that is commonly a required condition of promissory estoppel elsewhere is confirmed by scholarly treatises' interpretation of the caselaw.

For example, Angela Swan does not mention the inequity element in listing what is required in Canada.[62] Stephen Waddams also does not discuss such a requirement in Canadian law.[63] John McCamus *does* refer to this element—but in an English case.[64] It is not in McCamus' synopsis of conditions of promissory estoppel in Canada.[65]

MacDougall notes that several lower court cases in British Columbia have referred to inequity.[66] However, these look to have often (though not always) been as an overall assessment of whether promissory estoppel should apply.[67] MacDougall suggests these cases may be influenced

---

61 See Section II.B, above.

62 Swan, Adamski & Na, *supra* note 2, s 2.210.

63 Waddams, *supra* note 14 at paras 198–209.

64 *The Post Chaser*, *supra* note 12. McCamus, *supra* note 11 at 311; see text accompanying note 29.

65 McCamus, *supra* note 11, s 8.C.

66 MacDougall, *supra* note 11, ss 5.283, 5.271. See also *ibid*, s 3.33.

67 *Ibid*, ss 5.276–5.277. Referring to cases including *Taylor Fashions Ltd v Liverpool Victoria Friendly Society*, [1981] 1 All ER 897, [1982] QB 133 (Ch D); *B & A Bobcat and*

by Australian law,[68] where the inequity element is sometimes seen as playing that role, rather than being a specific ingredient, as mentioned in Section II.B. These lower court decisions in BC may thus reflect accidental conflation of the elements of promissory estoppel in Canada with those of equitable estoppel in Australia, or a deliberate attempt to reform Canadian law along Australian lines as a quasi-unified doctrine.[69] In short, these cases do not undermine the conclusion that Canadian law currently omits an inequity requirement as a specific element of promissory estoppel—a posture which makes Canada anomalous among common law jurisdictions.[70]

C) Canadian Posture is Unexplained

What is more, the anomalous omission of the inequity element in Canada is not acknowledged and justified by the authorities. This makes it possible that it is not really a position being taken by Canadian law, but merely a posture the law lapsed into, whether by inadvertence, confusion, or failure to appreciate the distinct and important function served by that requirement.[71]

A possible conflation was alluded to earlier, in discussing how *Trial Lawyers* mentioned "inequity" but not in reference to the so-named requirement commonly found elsewhere; rather, referring to the issue of detriment, already captured by the doctrine's separate change of position requirement.[72] Talk of inequity in that sense would be redundant with the question of detrimental reliance,[73] and would provide a reason to omit it.[74] But as discussed, the change of position element covers detrimental reliance, while the inequity requirement plays a *different* role.[75]

Excavating Ltd v Sangha, 1999 BCCA 49 at para 14, Newbury JA; *Litwin Construction (1973) Ltd v Pan*, 1988 CanLII 174 (BCCA), 29 BCLR (2d) 88; *Revell v O'Brian Financial Corp*, [1991] BCJ No 3696, 1991 CanLII 415 (BCCA); *Westwood Plateau Partnership v WSP Construction Ltd*, 1997 CanLII 2085 (BCSC), 37 BCLR (3d) 82; *Cominco Ltd v Canadian Pacific Ltd*, [1988] BCJ No 526, 24 BCLR (2d) 124 (BCSC); *Charles v Insurance Corp of British Columbia*, [1989] BCJ No 105, 34 BCLR (2d) 331, Lambert JA; *M (N) v A (AT)*, 2003 BCCA 297, Huddart J.

68 MacDougall, *supra* note 11, ss 5.278–5.279.

69 The discussion in *ibid* lends some support to both hypotheses. With respect to the former, see e.g. *ibid* at ch 1; on the latter, see e.g. his reference to the "reform view" (*ibid*, s 5.283).

70 See Section II.B, above.

71 For more on its distinct and important function, see Moore, *When is it Fair to Break Promises*, *supra* note 42.

72 See the text accompanying note 58.

73 MacDougall, *supra* note 11.

74 *Ibid*, s 5.285. See also *ibid*, s 1.85.

75 See Part II, above.

Possible failure to appreciate its distinct and important function might be apparent from the above discussion of lower court cases that mentioned inequity as an overall assessment, following Australian authorities. But they did so improperly, as promissory estoppel has not been combined with other estoppels in Canada as it has in Australia where inequity plays a different role as a common theme unifying the various estoppels.

A third possibility is that the inequity requirement's present omission from Canadian law is inadvertent.[76] This possibility is examined in Section V.B.

What has been established thus far is that Canadian law omits an inequity requirement, that this represents an anomalous position within the common law, and that the Canadian posture in that regard is unexplained.

IV. The Need for an Inequity Requirement

A) The Distinct and Indispensable Role of the Doctrine's Inequity Requirement

In my view, promissory estoppel needs an inequity requirement. Without it, the doctrine lacks what is an essential element. That argument has been made elsewhere.[77] Therefore, I only briefly summarize it here.

As mentioned in Part II, promissory estoppel's separate change of position requirement incorporates the unfairness seen as animating the very existence of the doctrine, *viz*. the detriment the promissee would usually suffer if the promise is broken (or at least that resiliation is *prima facie* unfair if the promissee changed position in reliance on the promise).[78]

Yet, there are cases where the courts consider that despite the change of position condition being met, overall it is *not* inequitable to resile.[79] The doctrine's inequity requirement is where occurs the inquiry into whether this is so in the circumstances at hand.[80]

---

[76] In support of this possibility, see MacDougall, *supra* note 11 at xi for a more general description about how the treatment of estoppel in Canada has been notably wanting: "it is very rare indeed that Canadian courts engage in an in-depth and sustained way with estoppel in the manner of a number of English and Australian courts and judges."

[77] Moore, *When is it Fair to Break Promises*, *supra* note 42.

[78] Element (5) from Section II.A, above.

[79] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*, [2016] EWCA Civ 553, [2017] QB 604 [*MWB*]; *The Post* Chaser, *supra* note 12.

[80] See Section II.B, above.

One way that could happen is if this inquiry reveals countervailing equitable considerations that weigh in favour of it being *equitable* to resile.[81] For example, just as could afflict the voluntariness of a contractual promise, the promise at issue for estoppel could have been coerced by duress, undue influence, or unconscionability; or induced by misrepresentation or mistake.[82] In other cases, a promise might be frustrated if it becomes impossible to perform or its purpose becomes obsolete.[83] As another example, the promise might be contrary to public policy.[84] These represent possible reasons why it might be equitable for the promissor to go back on the promise despite the promissee having changed position. The inequity requirement must not only identify any countervailing equitable considerations present on the facts but also determine whether they outweigh the doctrine's "default" inequity, captured by the change of position element.[85]

Another way it could happen that resiliation is not inequitable is factoring in nuances not captured by the binary character of promissory estoppel's other conditions.[86] Some examples may again serve to illuminate this possibility. It could be, for instance, that the promise was made without a settled intention, so that particularly if it was swiftly retracted, it might not be inequitable to go back on it.[87] Or the change of position relying on the promise might have been trivial.[88] In other circumstances, the promissee's reliance might only be reasonable up to a certain point.[89] In all these situations, the doctrine's other requirements are met, yet nuances like these, which are left to be weighed under the inequity requirement, could lead the court to conclude it would not be inequitable to go back on the promise.[90] As such scenarios reveal, the inequity requirement gives the doctrine its equitable character by providing scope to consider nuance

---

81 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 179.

82 *Ibid* at 179–80. *D&C Builders*, *supra* note 32.

83 Supervening events may radically alter what the parties contemplated such that it would be inequitable to hold the promissor to its promise despite the promissee's reliance on it: Moore, *When is it Fair to Break Promises*, *supra* note 42 at 182; see also the Coronation cases: *Chandler v Webster*, [1904] 1 KB 493 (EW CA); *Krell v Henry*, [1903] 2 KB 740, 72 LJKB 794 (EW CA); *Williams v Stern*, (1879) 5 QBD 409 (EW CA).

84 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 183.

85 *Ibid* at 183–84.

86 *Ibid* at 186.

87 *Ibid* at 175; *The Post Chaser*, *supra* note 12.

88 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 175; *MWB*, *supra* note 79.

89 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 190–92; *Re Selectmove Ltd*, [1995] 1 WLR 474, [1995] 2 All ER 531 (EWCA); *Kiley v First Nat'l Bank* (1994), 102 Md App 317, 649 A.2d 1145 [*Kiley*]; *High Trees*, *supra* note 9 at 134.

90 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 186.

and flexibility to do justice, which would otherwise be difficult if this requirement was missing, and the doctrine merely entailed the preceding on/off conditions.[91]

In short, the inequity requirement plays an essential role in promissory estoppel. It is neither redundant of other conditions, nor a mere summation of them.[92]

B) The Flawed Character of the Canadian Doctrine Without an Inequity Condition

Given promissory estoppel's need for an inequity requirement as summarized in the preceding section, it follows that the version of the doctrine currently presented in Canada lacking such a requirement harbours a critical flaw.

In particular, without it, there is no canvassing of possible equitable considerations countervailing the inequity of disappointing the promise-induced change of position. If the circumstances did suggest the existence of such a consideration, failing to take account of it due to omitting the inquiry into such factors called for by the inequity requirement creates a risk of a promissor being estopped even where resiling would not be inequitable.

As an example of this, consider the Canadian case of *Clarkdale Motors Ltd v The Dilawri Automative Group,*[93] decided recently in the wake of *Trial Lawyers*' endorsement of *Maracle*'s account of the requirements of promissory estoppel, which, as noted, omitted the distinct inequity requirement typically included in the doctrine elsewhere.

Clarkdale concerned the sale of a car dealership. A letter of intent (LOI) was held by the court to create binding legal obligations on the parties. Among those obligations was that within 45 days of the LOI, the buyer provide written notice that it was satisfied with or waived the conditionality of the transaction on due diligence inquiries. However, because "neither of the parties appear[ed] to have paid any attention to the terms of the LOI,"[94] the notice was not sent, and meanwhile the parties proceeded towards completing the transaction. Only when, much later, the deal fell through due to a dispute between the buyer and the franchisor, Volkswagen, did the buyer raise non-issuance of the notice concerning

---

91 *Ibid* at 194.

92 *Ibid* at 195.

93 *Clarkdale Motors*, *supra* note 44.

94 *Ibid* at para 106.

due diligence, as a basis for seeking a refund of a $250,000 deposit it made under the terms of the LOI. The court held the buyer estopped, in that by proceeding with the transaction, the buyer impliedly promised not to invoke the clause requiring written notice of satisfaction or waiver of the due diligence condition.

In my view, *Clarkdale* is a case in which a party was incorrectly held to be estopped because of the omission of the inequity requirement from Canadian law. Specifically, it is an instance of a scenario where—as discussed above—the inequity condition's consideration of nuance beyond whether the (other) elements of the doctrine have technically been satisfied on a yes/no basis reveals it nonetheless equitable to resile from the promise because, in this case, the promissee's change of position was trivial.[95]

The change of position in *Clarkdale* was the seller continuing to negotiate and observing the confidentiality and exclusivity provisions of the LOI.[96] But regarding the seller continuing to negotiate, discussions of a sale were initiated by the seller, who wished to dispose of the dealership.[97] Hence, regardless of the LOI and any notice sent or not regarding due diligence, it would be (and indeed was, as the seller's conduct demonstrated) in the seller's interest to continue negotiating with a party who might potentially buy the dealership. What could constitute a non-trivial change of position is if those negotiations remained exclusive. However, under the LOI, the buyer's exclusivity period ended only 5 days after elapse of the 45 days for sending the notice concerning due diligence.[98]

As for confidentiality, its importance was primarily not to unsettle the dealership's employees.[99] Unless and until it became quite certain a sale would go through, it is principally the seller who benefits from confidentiality, so that detrimental reliance on that clause at that early stage would largely be by the buyer to the benefit of the seller, as mentioned. And indeed, at the 45-day point, there remained many obstacles to a definite sale, beyond the contemplated due diligence inquiry. These included the fact the land the dealership was located on was being sold separately so that a lease would need to be agreed with the new landowner; and even more significantly the risk of being unable to reach a satisfactory agreement with Volkswagen, which did later sink the deal, and was a risk well-anticipated.[100]

---

95 See note 53, above.

96 *Clarkdale Motors*, *supra* note 44 at para 110.

97 *Ibid* at para 7.

98 *Ibid* at paras 12–13.

99 *Ibid* at para 80.

100 *Ibid* at para 57.

For these reasons, in my view, it was not inequitable to let the buyer resile from its promise not to raise the issue of not providing written notice regarding the due diligence condition. The clearest way to see that this was not inequitable, I think, is to consider a situation such as this: what if the buyer found a serious problem through its due diligence inquiries, after the promise was made, but before elapse of the 45 days? Surely, it would not have been inequitable for the buyer to resile from its non-contractual promise, assert the strict terms of the LOI, and send the notice.

It so happens that in the actual case, no issue came up in due diligence; the court held that the due diligence inquiry was satisfied.[101] It was only the written notice requirement that was not. That being so, one readily perceives that it *would* be inequitable for the seller to benefit from that formality and get its deposit back despite there being no actual issue of due diligence. But the question is: what is the source of that inequity?

I submit the inequity is *not* in the seller resiling from a promise not to invoke the notice condition. Rather, the inequity lies in how the reason (mentioned earlier) the notice was not sent reveals *Clarkdale* to be a case of mistake: the court said the drafting of the term regarding the notice was unclear, internally inconsistent, and "does not make sense as a matter of law."[102] A contract creates law that binds its parties. That "neither of the parties appears to have paid any attention to the terms of the LOI"[103] regarding the need to send the notice fits with how they assumed the notice clause would operate: namely, for the seller to provide notice if the due diligence inquiry *did* reveal a problem, not to provide notice it didn't. Indeed the court, in holding the due diligence inquiry satisfied, noted "the lack of communication from [the buyer] asking for further information or complaining about any outstanding items on the Due Diligence List".[104] If the seller had understood the condition worked not that way, but the other way around—i.e., communication to occur if *no* complaint/question emerges from the due diligence inquiry—it would have requested the notice upon elapse of the 45 days in order to know whether a sale remained possible. And if the buyer had understood the condition worked that way, it would have endeavoured to send the notice to avoid the seller taking its silence to mean the sale did not survive due diligence inquiry and thus cease negotiations and seek another buyer.

The above case thus represents an instance of the risk in Canada of a party being estopped incorrectly because of the missing inequity

---

101 *Ibid* at para 82.

102 *Ibid* at paras 85–86.

103 *Ibid* at para 106.

104 *Ibid* at para 78.

condition. And also shows how the flawed character of the doctrine without that inequity element invites confusion which may occlude the real source of issues involving unfairness in contractual matters—in this case, the parties' mistake about how the condition operated.

Another way to see the flawed character of the Canadian doctrine without the inequity element is by looking at estoppel cases from English law where the inequity requirement is included and has played an important role.

For example, in *D&C Builders Ltd v Rees*, Lord Denning held there was no estoppel as it was not inequitable to go back on a promise procured through intimidation.[105] The inequity element thus helped avert the injustice of holding the promissor to a promise it was coerced into making.

Likewise, in *Williams v Stern*, it was not inequitable for the promissor to seize furniture, before the expiry of a grace period promised to accommodate the promissee being on jury duty, upon hearing that the furniture would be seized by a third party.[106] Otherwise, the limited purpose of the promise would have been frustrated, and the result would have been unfair.

As another example, in *Southwark LBC v Logan,* it was not inequitable for the Council to resile from a promise in order to fulfill other public interest responsibilities it had.[107] The inequity requirement enabled scope for promissory estoppel to respect public policy considerations.[108]

Besides situations like these where there are other equitable considerations countervailing the unfairness to the promissee of disappointing its promise-induced change of position, the inequity requirement was also vital, as mentioned, in cases where although the doctrine's other conditions are technically satisfied, nuance not captured by those as on/off conditions reveals it is not inequitable to go back on the promise. The inequity element's omission from Canadian law creates a risk in that scenario also of the promissor being estopped where actually it is equitable to resile. *Clarkdale* was an example from Canada of that realization being impeded by the missing inequity requirement. Conversely, its inclusion in English law again shows its salience.

---

105 *Ibid* at paras 179–80; *D&C Builders*, *supra* note 32 at 625.

106 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 182. *Williams v Stern*, *supra* note 83 at 412.

107 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 183; *Southwark LBC v Logan*, (1997) 29 HLR 40 at 47.

108 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 183; *Southwark LBC v Logan*, *supra* note 107 at 47.

For example, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd,* the inequity requirement was pivotal to the promissor being permitted to resile from a promise to reschedule debt.[109] Although a promise was made, satisfying the condition of such, it was evident that the promissor's intention was not settled and indeed a resiliation was swiftly communicated.[110] Thus, while the promissee did change position, it was not inequitable for the promissor to resile.[111] Were it not for the inequity condition, parties might too readily be treated as having given up hard-bargained rights through flaky promises made without consideration.

Another nuance the inequity requirement helps courts canvass is a trivial change of position. Unlike the *Clarkdale* case in Canada, in the English case *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd ("The Post Chaser")*, Lord Goff explained that while the change of position element might technically be satisfied, the smallness of it when measured by the inequity requirement may not suffice to make it inequitable for the promissor to resile.[112] By taking account of this nuance, the inequity element protects sanctity of contract from being too readily swept aside where there is even trivial reliance on a promise not to exercise contractual rights.

Another nuance the inequity condition helps take into account is mitigation of the inequity stemming from the detriment the promissee would suffer if the promissor resiles. For instance, in *Re Selectmove Ltd,* it was equitable for the Revenue to resile from a promise to not wind up a company, as the company missed payments due under a rescheduling of the debt.[113] The company thus failed to comply with conditions of the Revenue's promise, which mitigated the inequity of resiling.[114] In such cases, the inequity requirement serves to prevent unfairness that would result if a promissor is held to a promise conditioned on acts by the promissee that the promissee fails to perform.

As another example, in the US case *Kiley v First Nat'l Bank*,[115] after several years of keeping a promise not to change depositors' account

---

109 *MWB*, *supra* note 79.

110 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 186; *MWB*, *supra* note 79 at para 63.

111 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 187; *MWB*, *supra* note 79 at para 64.

112 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 188; *The Post Chaser*, *supra* note 12 at 27.

113 *Re Selectmove Ltd*, *supra* note 89.

114 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 191; *Re Selectmove Ltd*, *supra* note 89 at 481.

115 *Kiley*, *supra* note 89.

terms, the court held it not inequitable thereafter for the bank to resile.[116] The inequity of going back on the promise had been mitigated by the five years the depositors enjoyed the bank's keeping of its promise.[117] In cases like this, promissory estoppel's inequity condition prevents the unfairness of a promissee relying on a promised concession forever or beyond a reasonable point (even if the promise was not framed as a mere suspension of rights).

The above cases from jurisdictions in which the inequity condition *is* included in the requirements of promissory estoppel illustrate its importance and why the Canadian doctrine is flawed without it.

In some cases involving facts such as those above, it is possible that a Canadian court, guided by its intuition about justice and fairness, will not estop the promissor, despite Canadian law missing the inequity requirement. Where that happens, justice could possibly still be served in the particular case; but a different problem then arises of how to justify and explain that conclusion. A court will have to say that one of the doctrine's other conditions failed, when, properly-speaking, it did not. For instance, the court might say the promise was not unequivocal, when in reality it was; or that the promissee did not change position, when it really did. This detracts from the law's integrity, to be applied inconsistently with its provided terms.[118] It also creates unpredictability for parties seeking to plan their affairs in compliance with the law, because in other cases without the same inequity but having the same facts regarding the (other) condition which it was pretended was unsatisfied, the condition will in those other cases be satisfied. This incoherence in the law's application then hampers future courts' assessment of whether the elements of the doctrine are satisfied, compounding legal inconsistency.

It is these sorts of problems the Supreme Court of Canada found itself struggling with in *Trial Lawyers* because of Canadian law's omission of an inequity condition. As I explain next, *Trial Lawyers* was a case where the true issue with the claimed estoppel was that the claimant concealed information it was bound to disclose if it wanted to legally rely on the promise given. This should fail the doctrine's inequity element, were it not omitted from Canadian law. Then it would have been a simple matter for the Court to explain and justify its conclusion that there was no estoppel. But without an inequity requirement in Canada, the task was much more difficult.

---

116 *Ibid* at 337.

117 *Ibid.*

118 Lon Fuller, *The Morality of Law*, 2nd ed (New Haven: Yale University Press, 1969) at 81.

To its credit, the Court had the integrity not to simply claim that other conditions of promissory estoppel were not met when in reality they were. But with its intuition about justice and fairness correctly sensing that the promissor should not be estopped, the Court wound up stretching what the doctrine's other conditions require, such that the facts in *Trial Lawyers* failed those conditions. The problem is that these reshapings of other conditions of the doctrine were ill-advised and likely to prove problematic in future cases. The details follow, below.

C) Case-Study: *Trial Lawyers v RSA*[119]

The question in *Trial Lawyers* was whether an insurer should be estopped from denying coverage subsequent to its alleged promise to cover a claim concerning injuries from a motorcycle accident. The insurer's strict rights included the ability to exclude coverage in the event of alcohol consumption by the insured.[120] Here, alcohol was consumed, but the insurer being unaware of it, promised to cover the claim. Three years later, the insurer learned through discovery that the insured (who died in the accident) and the claimant (a fellow motorcyclist involved in legal proceedings arising from the accident) together consumed alcohol before the accident.[121] The claimant failed to mention this in interviews by the adjuster and police.[122] Upon discovery, the insurer reverted to its strict right to deny coverage based on the alcohol violation.[123] The claimant sought to estop the insurer from reneging on its promise to provide coverage.[124] The Court found the insurer was not estopped. The difficulty was: how to get to that conclusion without promissory estoppel having an inequity requirement in Canada?

The only way would be to not satisfy another element of the doctrine recognized by Canadian law, unlike the inequity requirement presently. Therein lay the seeds of the problems that ensued: straining to find issues with meeting other conditions of the doctrine, the Court distorted other elements in problematic ways.

In the majority opinion, this occurred most prominently vis-a-vis the requirement of intention that the promise could be legally relied upon.[125]

---

[119] This section draws in significant part on Moore, *When is it Fair to Break Promises*, *supra* note 42.

[120] *Trial Lawyers v RSA*, *supra* note 4 at para 1.

[121] *Ibid* at para 8. The claimant was injured in the accident but also partly responsible for it (*ibid* at paras 1, 11).

[122] *Ibid* at para 6.

[123] *Ibid* at para 9.

[124] *Ibid* at para 12.

[125] See Section II.A, element (4), above.; *Trial Lawyers v RSA*, *supra* note 4 at paras 18–39.

The majority treated the intention element as subjective, and necessitating the promissor's knowledge of facts affecting its promise:

> the requirement stated in *Maracle* that a promise or assurance must be intended to affect the parties' legal relationship signifies that the promisor must know of the facts that are said to give rise to that legal relationship, and of the alteration thereto—in this case, that [the insured] would be covered to the full policy limits despite his having breached the policy. We acknowledge that the jurisprudence from this Court speaks of intention, not knowledge. But the significance of intention depends entirely on what the promisor knows … It is this simple: RSA lacked knowledge of the facts demonstrating [the] breach. This alone is dispositive of Trial Lawyers' appeal.[126]

Interpreting the intention element as requiring subjective intent conflicts with the wide-consensus that the intention element of promissory estoppel is objective.[127] This is problematic, for as Justice Karakatsanis noted in her separate opinion, "[s]ubjective intent is unknowable to anyone other than the promisor."[128] Unless able to read minds, parties can only rely on what intention is reasonable to infer as that of another party based on its outward manifestation. Having to prove subjective intent would often be impossible, and thus marginalize promissory estoppel, and fail to protect parties reasonably induced to rely on promised concessions.[129] If the law does not protect reasonable reliance, it becomes difficult for parties to plan their wider business.

Further, interpreting promissory estoppel's intention element as necessitating knowledge of underlying facts is also problematic, given that the discussion was not confined to cases of mistake. It means that in any case, if a promissor ignored even *one* fact, X, it could argue that its promise was on the assumption ¬X, and that because of its ignorance, the intention element is not met. Proof would be needed of the promissor's knowledge of every fact which may have affected the giving of the promise, for such ignorance not to become a loophole which would defeat estoppel. This would further diminish promissory estoppel's capacity to fulfil its function of protecting reliance reasonably induced by promises.

---

126 *Ibid* at paras 21, 23 [emphasis removed]. On knowledge not being a requirement, see Barnes, *supra* note 17, ss 6.147–6.148.

127 See *supra* note 21 and accompanying text. See also Barnes, *supra* note 17; McCamus, *supra* note 11 at 313; MacDougall, *supra* note 11, s 5.195; J Manwaring, "Promissory Estoppel in the Supreme Court of Canada" (1987) 10 Dal LJ 43 at 64.

128 *Trial Lawyers v RSA*, *supra* note 4 at para 56.

129 Although this would partially be mitigated if the courts reform the law of consideration along the lines discussed in *Rosas v Toca*, *supra* note 2. I make no comment here on the merits of that possible course of action.

The intention element was not the only condition of promissory estoppel that the majority problematically reinterpreted in attempting to locate somewhere other than in the missing inequity element the reason why the insurer in *Trial Lawyers* should not be estopped. It also strained to find an issue with satisfying promissory estoppel's requirement of a preexisting legal relationship.[130] Indeed, the majority was "far from persuaded" that the requisite preexisting legal relationship existed.[131] They noted that Ontario (the forum), and other Canadian provinces/territories, have a provision which allows third-parties to claim directly against an insurer, bypassing the insured under the rule of privity of contract.[132] But the majority countered that the insurer ceased defending the claim before the third-party claimant obtained judgment against the insured (which grounds the direct claim against the insurer under the provision noted).[133] This, however, seems beside the point as the preexisting legal relationship was not turning a derivative claim into a direct claim; and the insurer ceasing to defend the claim merely constitutes the insurer resiling from its promise. The preexisting legal relationship is the insurance contract, which covers liability to third-parties.[134] Hence, the majority conflated estoppel's concepts of preexisting relationship (the insurance contract, which includes liability to third-parties) and promise (i.e., by the insurer that it would cover the claim and defend the third-party suit).

The reasoning here also seems problematic from an insurance perspective, in that it invites insurers to avoid third-party liability by abandoning defence of third-party claims—a perverse incentive—especially in motor vehicle insurance, where third-party liability is an essential coverage.

Besides the intention and preexisting legal relation elements, the majority also questioned whether promissory estoppel's change of position requirement was met.[135] This was said to require "detrimental reliance," which was construed in the narrow sense, which *Chitty* summarizes as the promisee must have "suffered loss: for example, by incurring some expenditure in reliance on the promise."[136] However, as *Chitty* explains, promissory estoppel does *not* require detrimental reliance

---

130 See Section II.A, element (2), above.

131 *Trial Lawyers v RSA*, *supra* note 4 at para 43.

132 *Ibid* at para 42.

133 *Ibid*.

134 *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, 1999 CanLII 654 (SCC), [1999] 3 SCR 108.

135 See Section II.A, element (5), above.

136 *Trial Lawyers v RSA*, *supra* note 4 at para 51; Beale, *supra* note 11, s 4-095 [citations omitted].

in that narrow sense.[137] As discussed earlier, normally in promissory estoppel the promissee *benefits* from relying on the promise, but having changed position in reliance on it, would suffer detriment if the promise is subsequently *retracted*.[138] Thus, the majority's discussion of detrimental reliance, in assessing whether the change of position requirement was met, was problematic and may invite additional difficulties in future cases.

Hampered by the inequity condition's omission from Canadian law, the concurring opinion also strained to locate the issue with the claimed estoppel in some other condition recognized in Canada. Justice Karakatsanis identified the issue in *Trial Lawyers* as with the condition that a promise be unequivocal.[139] She held it not unequivocal as it did not specifically concede the ability to deny coverage for alcohol consumption.[140] The promise was merely general.

To accept Justice Karakatsanis' reasoning would mean that *general* promises (here, to cover the claim) are not unequivocal. To be unequivocal, a promise must *specifically* concede every ground the promissor had (in this case, at minimum the insurance policy's various exclusions) not to have to make that promise. In my view, this is an ill-advised expansion of what the unequivocation requirement calls for. It further diminishes promissory estoppel's capacity to fulfil its function of protecting reliance induced by promises.

The above discussion summarizes the problems with the Court's attempt—hampered by the omission of the inequity requirement in Canada—to identify without it why the estoppel claim in *Trial Lawyers* should fail.

Compare this to how the Court could have handled the case were the inequity requirement *not* missing in Canada. It would have been an easy case to dispose of on the basis that the inequity requirement was unmet. The Court could simply have said the insurer's promise to cover the claim was induced by the promissee's concealment of the alcohol violation, which would obviously affect the insurer's position, and which the promissee was bound to disclose in seeking equity's protection of his reliance on that promise. It was not inequitable to resile from the promise in *Trial Lawyers* as it was induced by concealment of critical information by the

---

137 Beale, *supra* note 11, s 4-095; *The Post Chaser*, *supra* note 12; *Alan v El Nasr*, *supra* note 24 at 213; *MWB*, *supra* note 79.

138 *Supra* note 27 and accompanying text.

139 See Section II.A, element (1), above.

140 *Trial Lawyers v RSA*, *supra* note 4 at para 77.

promissee regarding conduct that affected the status of the preexisting legal relationship and that the promissee participated in.

The Supreme Court of Canada was alive to these issues. The majority was perturbed by the promissee's failure "to disclose material facts, particularly in contexts such as insurance" involving "reciprocal duties of utmost good faith."[141] It saw "no justice" in the promissee's estoppel claim.[142] But, without an inequity requirement in Canada, the majority could only suggest that the promissee's concealment made it unfair to say the insurer should have known of the alcohol violation, so that combined with the majority's dubious interpretation of the intention element as requiring such knowledge, the insurer lacked the underlying knowledge to satisfy estoppel's intention element. Meanwhile, Justice Karakatsanis saw the concealment as depriving the insurer of the notice necessary to have conceded its ability to assert an alcohol violation, so that on her overreaching interpretation of the doctrine's unequivocation requirement, the insurer's promise to cover the claim was not unequivocal. Thus, both opinions recognized the unfairness of the promissee's concealment, but with the customary inequity requirement absent in Canada, they had to fold that issue into circuitous, morally disoriented, and doctrinally problematic accounts of why estoppel did not apply.

As shown in this section, if the inequity requirement were not currently omitted from promissory estoppel in Canada, that element would have enabled a much more straightforward, morally resonant, and doctrinally sound judgment in *Trial Lawyers*. None of the above distortions of the doctrine's other elements would have been necessary to found the conclusion of no estoppel. This serves as a prominent recent illustration of why the inequity requirement is essential to promissory estoppel.

I now identify support which can be found in existing Canadian authorities for recognizing promissory estoppel's inequity requirement.

V. Support for Recognizing Inequity Requirement in Canada

In Part IV, I argued that the inequity requirement plays a distinct and indispensable role in promissory estoppel, that without this element, the Canadian version of the doctrine is flawed, and that the *Trial Lawyers* case provides a prominent recent example of problems this can cause. To avoid this, it was necessary for Canadian law to incorporate the inequity requirement as other jurisdictions do. Support for this can be found both

---

141 *Ibid* at paras 36–37 [references omitted].

142 *Ibid* [references omitted].

in scholarly writings and in the Supreme Court of Canada's jurisprudence prior to *Maracle*. I demonstrate this below.

A) Scholarship: Support in Canadian Scholarly Authorities for Adding an Inequity Requirement

A number of leading Canadian treatises perceive a need for a further element to promissory estoppel beyond the conditions currently articulated in Canadian caselaw.

MacDougall discusses in detail promissory estoppel in Canada, and other types of estoppel, such as proprietary estoppel, estoppel by representation, and estoppel by convention.[143] A cursory reading of MacDougall could give the misleading impression that he opposes an inequity requirement: the text contains many statements critiquing the inclusion of a requirement of inequity, unfairness, or unconscionability.[144] But what does he mean by that? A more careful reading reveals that what MacDougall disapproves of—and I agree—is making inequity an all-encompassing assessment of whether estoppel applies; that is, subsuming all the other elements of the doctrine.[145]

As MacDougall explains, "the problem with replacing" the various elements of "promissory estoppel (or other estoppels) with a generalized conception of" inequity/unfairness/unconscionability "is that it renders the doctrine both practically and conceptually uncertain and unpredictable. It tends to promote palm-tree justice. It encourages and necessitates litigation."[146] The view of some that inequity should play that role I rejected above for similar reasons as MacDougall, among others.[147] Instead, I adhered to the view that the inequity element constitutes a specific requirement, alongside the doctrine's other elements, not subsuming them. That specific role, as mentioned, is: (1) to canvass the possible presence of equitable considerations countervailing the "usual" inequity of disappointing a promise-induced change of position (already addressed by the change of position requirement); as well as (2) to factor in nuance not captured by the on/off character of the doctrine's other conditions (such as a trivial change of position); and (3) to weigh the above against the inequity of disappointing reasonable expectations arising from the

---

143 MacDougall, *supra* note 11.

144 See generally *ibid*, s V.C.2.e-i-ii.

145 *Ibid*.

146 *Ibid*, s 5.271.

147 See Section II.B, above. See also Moore, *When is it Fair to Break Promises*, *supra* note 42 at 174–75.

induced change of position, thereby assessing whether on balance it would be equitable to let the promissor resile.[148]

Along those lines, MacDougall, despite disapproving of inequity as a one-stop-shop on whether estoppel applies, goes on to say: "That said, there have always been equitable considerations that prevent the estoppel from having any effect, even if" the other elements of the doctrine have been satisfied.[149] In an ensuing section styled as "Equitable Bars,"[150] he explains that estoppel may be unavailable or negated if the claimant lacks clean hands.[151] The situations he describes and cases he references in his discussion are typical of those commonly-cited in the view that the inequity requirement constitutes a specific condition, distinct from the doctrine's other requirements, which must all be satisfied for estoppel to apply.[152] Thus, MacDougall clearly recognizes the need to take stock of equitable considerations other than disappointing promise-induced reliance, and agrees that in appropriate cases the result may be to *allow* the promissor to resile. He merely prefers to classify "these factors" as "bars," technically external to the doctrine, but able to "negate the ability of the promissory estoppel's having any effect."[153] Additionally, while using the word "bars," he notes that their presence does not pre-empt the doctrine; rather, they are part of an equitable weighing.[154]

Leading treatises on Canadian contract law also contain allusions to a need for something additional to the currently recognized elements of promissory estoppel in Canada. Waddams, for instance, emphasises that "the principle is one of preventing injustice, not of enforcing promises."[155] While this refers primarily to the basis and effect of the doctrine, it also suggests a need to establish a *net* injustice, not just a broken promise.

McCamus does include an additional element.[156] Focused on Lord Denning's reference to intimidation in discussing the inequity requirement in *D&C Builders*, McCamus frames his additional condition as that the promise be voluntary.[157] I agree that constraint of the promissor's autonomy in making the promise is one possibility the

---

148 See Section II.B, above. See also Moore, *When is it Fair to Break Promises*, *supra* note 42 at 178–94.

149 MacDougall, *supra* note 11, s 5.287.

150 *Ibid*, s V.C.2.e-iii.

151 *Ibid*, s 5.289 ff.

152 View (d) from Section II.C, endorsed in Section III.A, above.

153 MacDougall, *supra* note 11, s 5.287.

154 *Ibid*, s 5.292.

155 Waddams, *supra* note 14 at paras 200, 206.

156 McCamus, *supra* note 11, s 8.C.3.

157 *Ibid*.

doctrine must inquire into, beyond the requirements stated in *Maracle* and *Trial Lawyers*. A promise induced by pressure is one example of an equitable consideration countervailing and likely outweighing the promissee's reliance on the promise.[158] However, as I previously argued, there are additional reasons it could be outweighed.[159] The principle from *D&C Builders* is broader than the single issue of whether the promise was voluntary. Denning explained: "In applying [promissory estoppel], we must note the qualification: The creditor is only barred from his legal rights where it would be *inequitable* for him to insist upon them."[160] This statement is commonly referenced in accounts of the doctrine's inequity requirement outside Canada where the inequity requirement is a well-accepted component of the doctrine.

Swan references Denning's qualification that estoppel only applies where it is inequitable to resile, in noting that case's emphasis on estoppel being because of that an equitable doctrine.[161] Swan also mentions like MacDougall the issue of a party's ability to obtain estoppel if they themselves behaved badly.[162] Such behaviour by the promissee might render it *not* inequitable for the promissor to resile, as discussed earlier.[163]

In sum, leading Canadian treatises, though aware that caselaw in Canada does not currently include an inequity requirement,[164] perceive the doctrine as needing an additional inquiry beyond the other elements. MacDougall's reference to equitable bars, Waddams' emphasis of net injustice, McCamus' example of coerced promises, and Swan's allusion to misconduct by the promissee, all are consistent with the broader argument here that the inequity requirement is not superfluous but adds something essential not captured by the other elements. These discussions in Canadian scholarly authorities lend support to the step of Canadian law recognizing an inequity requirement.

Next, I elucidate caselaw support for incorporating an inequity requirement into promissory estoppel in Canada demonstrating that one was actually long-recognized in Canada before vanishing—likely accidentally.

---

158 Moore, *When is it Fair to Break Promises*, *supra* note 42 at 179.

159 *Ibid* at paras 179–85.

160 *D&C Builders*, *supra* note 32 at 625 [emphasis in original].

161 Swan, Adamski & Na, *supra* note 2, s 2.234.

162 *Ibid*.

163 See above discussion in this section of MacDougall, *supra* note 11, as well as Section IV.B, above, and Moore, *When is it Fair to Break Promises*, *supra* note 42 at paras 179–81, 190–91.

164 See Section III.B, above.

B) Jurisprudence: Support in Canadian Caselaw for Recovering a Previously Long-Recognized Inequity Requirement

A historical review of the jurisprudence on promissory estoppel in Canada shows two main points critical to the discussion here: first, an inequity requirement *was* previously recognized in Canada, including in the Supreme Court of Canada decision in *Conwest*, where it played a decisive role even before attracting attention in England via Lord Denning's discussion in *D&C Builders*. Second, a review of the jurisprudence following *Conwest* suggests the later omission of the inequity element in Canada likely arose accidentally; it was not intentionally repudiated for any reason. I draw this out in the following subsections.

i) Conwest Exploration

Well before *Trial Lawyers* and *Maracle*, the leading authority on promissory estoppel in Canada was *Conwest*.[165]

Looking at *Conwest*, we see that it *did* include an inequity element, like that present in the doctrine elsewhere.[166] *Conwest* drew authority from the well-known English case *Hughes v Metropolitan Railway Co*,[167] which it quoted in describing the principle and operation of estoppel:

> "The principle is stated in the following terms: It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results … afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties."[168]

As that explanation shows, an essential element is that it be *inequitable* for the party to enforce its strict rights after leading its counterpart to believe it would not.

As to whether Lord Denning's restatement of estoppel in *Central London Property Trust Ltd v High Trees House Ltd* altered that, *Conwest*

---

165 *Conwest Exploration*, *supra* note 5.

166 See Section II.C, above.

167 *Hughes*, *supra* note 24.

168 *Conwest Exploration*, *supra* note 5 at 28, Judson J [emphasis added].

expressly said that "it does not seem … that the recent interest in England in this subject-matter, beginning with *High Trees* has done anything more than to restate the principle" from *Hughes*, quoted above.[169]

Beyond expressly acknowledging the inequity requirement as a constituent of the doctrine, I submit that it played an important role in *Conwest*.

Conwest was a case from British Columbia. The relevant facts can be summarized as follows: Letain sold mining claims to Conwest in return for agreement to incorporate a company to hold the claims and issue a portion of the shares to Letain (the "claims-option" contract). A condition of this claims-option contract required Conwest to incorporate the company by Oct 1, 1958. By a further contract, Letain borrowed money from Conwest in return for options on his shares in the company to be incorporated (the "share-option" contract). On Sept 18, 1958, Conwest applied to incorporate the required company; the government said that letters patent were being prepared bearing the date Sept 25. However, the letters patent were not sealed and issued until Oct 20. Meanwhile, on Sept 26 Letain signed a consent for his name to appear in the company being incorporated, and on Oct 7, provided the government with an associated declaration. Two days later, Letain withdrew his consent, and took the position that the claims-option contract with Conwest was void on the basis that Conwest did not comply with the condition to incorporate the company by Oct 1. Letain refused to transact the shares per the share-option contract, and sought return of the mining claims under the claims-option contract, as well as nearby claims staked by Conwest after the date of that deal.

The majority of the Court saw Letain's actions around the incorporation as amounting to a promise not to assert that the company's late incorporation violated the claims-option agreement, and Letain was estopped from going back on that.[170] As Justice Judson (Chief Justice Taschereau concurring) summarized, "[t]here was an unambiguous representation of intention [i.e., promise] made by Letain which was intended to be acted upon and was acted upon by Conwest, with the result

---

169 *Ibid*, Judson J.

170 *Ibid* at 27, Judson J; *ibid* at 29–30, Cartwright J. Two judges dissented: Justice Ritchie disagreed that Letain's actions amounted to a promise not to enforce the condition on the company's incorporation by Oct 1; Justice Martland opined that estoppel was being used in this case to expand rights, contrary to the rule in *Combe v Combe*, *supra* note 14, that the promise must consist of a concession (see requirement (3) from Section II.B, above), in that a promise to relieve a condition of the exercise of an option contract amounted to creating a new contract.

that Conwest's position … was prejudiced" in respect of what Letain argued constituted performance of the incorporation condition.[171]

Further, the inequity element played a decisive role. One reason it might be equitable to resile from a promise despite inducing reliance, is if the promise was procured by a misrepresentation by the promissee.[172] This was precisely the case in *Conwest*, where as Justice Judson recounted, "Letain says in answer to" whether he should be estopped that his promise "should go for nothing because Conwest represented to him … that the company was incorporated."[173] However, the facts did not establish this alleged misrepresentation: firstly, the documents signed by Letain and sent to the government did not support that; and secondly, the trial judge made an expressly contrary fact-finding.[174] Thus, it was the inequity condition of promissory estoppel whose presence on the facts was disputed between the parties in *Conwest*, and which the judgment analyzed in deciding whether Letain was estopped.

Justice Cartwright gave a concurring opinion for the purpose of commenting further on promissory estoppel.[175] He too concluded that the doctrine applied.[176] His reasoning was that "Letain led Conwest to suppose that he would not exercise his right to insist on performance of the condition by the date mentioned; in my view it would be inequitable having regard to those dealings to allow Letain to take advantage of the delay which occurred" and go back on that promise.[177] Thus in Cartwright's opinion, estoppel's inequity element is again not only expressly referenced, but plays the decisive role.

However, it is apparent that Justice Cartwright saw the inequity of resiliation arising for quite a different reason than Justice Judson. Justice Cartwright noted Conwest's reliance on Letain's promise not to enforce his strict rights regarding the condition of incorporation by Oct 1.[178] However, beyond referencing "the delay which occurred," Justice Cartwright does not discuss Conwest changing position, such that it would suffer detriment if Letain resiled from his promise. Of course, if Letain had not gone along with Conwest's course of action regarding the incorporation in the days before Oct 1, and had instead told Conwest that he viewed that as non-compliant (as he later argued on Oct 9), then Conwest might have taken

---

171 *Conwest Exploration, supra* note 5 at 27–28.

172 *Moore, When is it Fair to Break Promises, supra* note 42 at 179–81.

173 *Conwest Exploration, supra* note 5 at 28.

174 *Ibid.*

175 *Ibid* at 29.

176 *Ibid* at 29–30, Cartwright J.

177 *Ibid.*

178 *Ibid.*

some action to avoid the delay Justice Cartwright notes occurred. On that basis, promissory estoppel's change of position requirement was met. But that is not the whole story.

As discussed earlier, in some cases, while the change of position element is technically met, the promissee will suffer minimal detriment from its reliance on the promise.[179] The inequity of the disappointed reliance may then easily be outweighed by countervailing equitable considerations canvassed by the inequity element.[180]

Conwest was such a case: even if on Sept 26, instead of consenting to the incorporation, Letain told Conwest that its plan would breach its obligation under the share-claims agreement, it seems that Conwest would have been unable to get the letters patent sealed and issued by Oct 1.[181] Thus, the detriment Conwest might suffer from incorporating the company late cannot be fully attributed to reliance on Letain's promise. Justice Judson sought to sidestep this problem by arguing that the company could at least have delivered shares to Letain by Oct 1.[182] However, Justice Judson acknowledged that Letain would have had difficulty transacting the shares without the certificates (unavailable until issuance of the letters patent).[183] Justice Judson therefore made an extended argument that by effect of the share-option agreement, Letain lacked any *real* interest in the shares at that point—that is, unless/until Conwest defaulted on exercising its options under the share-option contract.[184] With respect, in my view, that argument is weak; and Justice Judson appears to admit this in qualifying it as "at least arguable."[185]

This brings us back to Justice Cartwright's concurring opinion. In those unusual estoppel cases mentioned where the change of position requirement is met, but the detriment resulting from reliance on the promise is minimal, it is still possible for the inequity requirement to be satisfied.[186] As observed previously, "[t]his could happen where,

---

179 Moore, *When is it Fair to Break Promises, supra* note 42 at 188–90. See also *The Post Chaser*, *supra* note 12 at 27, where Justice Goff (as he then was) stated that "it does not follow that in every case in which the representee has acted … in reliance on the representation, it will be inequitable for the representor to enforce his strict legal rights for the nature of the action … may be insufficient to give rise to the equity, in which event [the inequity] requirement … for the application of the doctrine would not have been fulfilled."

180 Moore, *When is it Fair to Break Promises*, *supra* note 42 at paras 186–94.

181 *Conwest Exploration*, *supra* note 5 at 25.

182 *Ibid.*

183 *Ibid.*

184 *Ibid* at paras 25, 27.

185 *Ibid* at para 27.

186 Moore, *When is it Fair to Break Promises*, *supra* note 42 at paras 188–90.

for instance, the circumstances are such that the other side of the scale weighs heavily — the side emphasised by Lord Denning, focusing on the repudiation of a promise solemnly given and intended to have legal effect."[187] On Justice Cartwright's view, *Conwest* was such a case: even if without Letain's promise, Conwest would have breached the incorporation by Oct 1 condition, Letain consented to the plan just before Oct 1 and bookended that with a declaration requested by the government after Oct 1. To allow him to subsequently assert his strict right to void the share-claims agreement for failure of the condition to incorporate by Oct 1 would let him—in Justice Cartwright's words—"take advantage"[188] of the lateness of the incorporation, despite having gone along/acquiesced himself.

Rarely will there be successful cases of promissory estoppel where the detriment to the promissee is minimal. But in *Conwest*, the above advantage-taking led Justice Cartwright to conclude that estoppel nonetheless applied, as apparent from his comment that Letain:

> is not simply resisting an attempt to enforce the option; he is seeking to compel the conveyance to himself not only of the eight claims which he caused to be transferred to Conwest but also of a number of other claims which were never his. The foundation of his asserted right to a conveyance of these claims is the failure by Conwest to perform strictly the term in the agreement … as to causing a company to be incorporated on or before October 1, 1958.[189]

By insisting on his strict rights under the share-claims agreement, Letain would obtain a benefit (the claims later staked by Conwest) that he never bargained for when the share-option agreement was made. Meanwhile, Letain led Conwest to believe he would not exercise his strict right. So, it was inequitable for Letain to take advantage of Conwest's lateness after signing off on the (late) incorporation in official government documents before and after Oct 1.

The scope and parameters of the equitable consideration highlighted by Lord Denning about promises solemnly given and intended to have legal effect are admittedly vague.[190] Some indication of scenarios that would fall under this are evident from Justice Cartwright's pointing to the advantage-taking in *Conwest* as one such scenario. But advantage-taking is itself vague; it would help to have some clearer understanding of what sorts of advantage-taking might be grounds for concluding that

---

187 *Ibid* at paras 188–89; Denning, *supra* note 29 at 6–8.

188 *Conwest Exploration*, *supra* note 5 at 30.

189 *Ibid* at 29.

190 See the text accompanying note 30, above.

promissory estoppel's inequity condition is met in cases where resiliation (alone) would cause little detriment.

I suggest that further insight in this regard can be obtained by comparing the situation in *Conwest Exploration* to those cases in which it is said that a party's performance of a contract is in bad faith in seeking to exploit some term of the contract to evade a contractual obligation.[191] For example, in *Mason v Freedman*, a real estate transaction required the seller's wife to provide a bar of dower.[192] Regretting the bargain, the seller made no effort to obtain the bar of dower from his wife. The issue for the Supreme Court of Canada was whether he could take advantage of the aforementioned clause to repudiate the transaction. Justice Judson held that he could not, as he was seeking to take advantage of "a cause which he himself has brought about" as the basis for repudiating the contract.[193] In Canada, such conduct is an instance of contractual performance which does not meet a recognized duty of good faith.[194]

Conwest may be regarded as analogous to that category of cases, except that the bad faith conduct seeking to evade a contractual obligation arises from taking advantage not of a contract term alone, but of a promise-without-consideration relative to the exercise of that term, as covered by promissory estoppel. Like the seller in *Freedman*, Letain regretted the bargain he made—his share-claims agreement with Conwest.[195] He saw an opportunity, as in *Freedman,* to repudiate the bargain by asserting on Oct 9 that Conwest breached the Oct 1 incorporation condition. However, like the seller in *Freedman,* Letain had previously involved himself in the cause for repudiation he was asserting. And as in *Freedman,* arguably Letain did so in bad faith, in that the majority noted the following facts found at trial:

> The plaintiff knowing the situation between himself and the defendants but thinking that he should have made a better deal, as he says instead of taking "two-bit shares", he should have had more, testified that he said to himself before his telegram interfering with the use of his name was sent to the Department of State "By golly, it is not incorporated" … I disbelieve the plaintiff when he suggested

---

191 *Bhasin v Hrynew*, *supra* note 8 at paras 47, 51; *Mason v Freedman*, 1958 CanLII 7 (SCC), [1958] SCR 483; *CivicLife.com Inc v Canada (Attorney General)*, 2006 CanLII 20837 (ONCA) at paras 49–50, 215 OAC 43. See also McCamus, *supra* note 11 at 943–50; Swan, Adamski & Na, *supra* note 2, ss 4.228–4.324; *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, (1992) 26 NSWLR 234 (NSWCA); *Alcatel Australia Ltd v Scarcella*, (1998) 44 NSWLR 349 (NSWSC); *Burger King Corp v Hungry Jack's Pty Ltd*, (2001) 69 NSWLR 558 (NSWCA).

192 *Mason v Freedman*, *supra* note 191.

193 *Ibid* at 486.

194 *Ibid* at 487; *Bhasin v Hrynew*, *supra* note 8 at para 51.

195 *Conwest Exploration*, *supra* note 5 at 28.

> in his evidence that one or more of the three gentlemen with whom he had dealings on behalf of Conwest represented to him that the company was in fact incorporated when he was communicated with before and after the 1st day of October, 1958.[196]

The majority therefore held Letain, by his involvement in the actions around incorporation, to have promised not to assert the failure of the Oct 1 incorporation condition, and estopped Letain from going back on this. Despite little detriment caused to Conwest by its reliance on that promise, Justice Cartwright explained that it would be inequitable for Letain to go back on it and thereby take advantage of the late incorporation, which in bad faith he acquiesced in, hoping to escape from the share-claims bargain he made but later regretted.

In sum, in *Conwest*, the Supreme Court of Canada firstly accepted promissory estoppel in Canada as having an inequity requirement.[197] And further, the inequity requirement was central to the majority's analysis of whether the doctrine was made out. *Conwest* therefore represents an important precedent supporting promissory estoppel's inclusion of an inequity requirement in Canada, as in other jurisdictions.[198] Moreover, I suggest the case is internationally significant, in shedding light on another possible scenario in which the inequity requirement might fail to be satisfied, evident in the concurring judgment of Justice Cartwright: attempting in bad faith to take advantage of the lack of consideration for a promise relating to contractual performance by going back on it as a way of circumventing the pre-existing terms of a contract or escaping a bad bargain altogether.

I now review the post-*Conwest* caselaw to demonstrate how promissory estoppel went from clearly having an inequity requirement in *Conwest* to lacking one in *Maracle* and *Trial Lawyers*.

ii) Subsequent Recognition of the Authority of Conwest

After *Conwest*, the Supreme Court of Canada dealt with promissory estoppel again in *Subsurface Surveys*. Writing for a unanimous Court, Justice Ritchie noted that "there has been a great deal of discussion, both academic and judicial" of whether the doctrine had been changed by Lord Denning MR's opinion in *High Trees*. Justice Ritchie responded that

---

196 *Ibid*.

197 The dissenting judges did not disagree as to there being an inequity requirement, or even as to the elements of the doctrine generally. As mentioned, Justice Martland saw a promise not to enforce the condition of an option contract as an expansion of rights, not a concession, while Justice Ritchie disputed that Letain had made the supposed promise.

198 See Section III.C, above.

"this Court in the case of Conwest … expressed the view Lord Denning's statement had not done anything more than restate the principle expressed by Lord Cairns in *Hughes v Metropolitan Railway*."[199] He then quoted *Conwest*'s quotation of the doctrine given in *Metropolitan Railway*, which as discussed earlier, includes the inequity requirement.[200]

Beyond this, *Subsurface Surveys* quoted a passage from Lord Denning MR's speech in *Combe v Combe* for the purpose of emphasizing the point that there must be evidence the promise was intended to have legal effect.[201] There was no issue in *Subsurface Surveys* relevant to the doctrine's inequity requirement. Thus, *Subsurface Surveys* expressly endorsed the precedential authority of *Conwest*, and did not question the propriety of promissory estoppel's inclusion of an inequity requirement.

After *Subsurface Surveys*, the Supreme Court of Canada addressed estoppel again in *Canadian Superior Oil v Hambly*.[202] In a unanimous judgment penned by Justice Martland, the Court repeated what it said in *Subsurface Surveys* regarding what promissory estoppel in Canada comprises: again was noted that the doctrine was set forth by the Court in *Conwest*; again was endorsed *Conwest*'s conclusion that the ferment around estoppel since *High Trees* had not altered the principle from *Metropolitan Railway*; and again was quoted the statement from *Metropolitan Railway* that the doctrine applies "where it would be inequitable" for the promissor to resile.[203]

In *Canadian Superior Oil,* there was no estoppel because the requirement of a preexisting legal relationship was unmet—the preexisting relationship had terminated by the time of the promise.[204] Hence, the inequity requirement was not an issue in *Canadian Superior Oil*, and the Court did not question or disavow that requirement.

As the Supreme Court of Canada judgments in *Subsurface Surveys* and *Canadian Superior Oil* show, *Conwest* was not an isolated case or outlier. Subsequent cases dealing with promissory estoppel recognized its authority, affirming *Conwest*'s statement of the doctrine in Canada including the inequity element, and confirming that *High Trees* and ensuing commentaries on the doctrine had not altered the principle from *Metropolitan Railway* which included the inequity requirement. The

---

199 *John Burrows*, *supra* note 48 at 614 [references omitted].

200 *Ibid* at 614–15 [references omitted]. Regarding *Hughes*, see the text accompanying note 160, above.

201 *John Burrows*, *supra* note 48 at 615; *Combe v Combe*, *supra* note 14.

202 1970 CanLII 3 (SCC), [1970] SCR 932 [*Canadian Superior Oil*].

203 *Ibid* at 937–38.

204 See element (2) from Section II.B, above.

ferment referenced includes the speech of Lord Denning MR in *D&C Builders* and scholarly comment on it, in which the inequity requirement was key.[205] That the Supreme Court of Canada in these cases did not specifically comment on *D&C Builders* only reinforces the arguments above. That is, (a) the Court had already highlighted the inequity requirement in *Conwest,* even before the English Court of Appeal did so in *D&C Builders*, so that the Supreme Court of Canada was accurate in saying that the above ferment changed nothing in that regard, and (b) as the inequity element was not an issue in the cases after *Conwest*, there was no reason to dwell on it, and no reconsideration of it.

Thus far, this brief review of the jurisprudence only deepens the mystery as to the later omission of the inequity requirement in cases like *Trial Lawyers*. Did the Supreme Court of Canada, notwithstanding the trio of precedents just discussed, later decide that the inequity requirement was redundant, irrelevant, or illegitimate? Did some later case reverse *Conwest* and the cases that affirmed it as unsound?

As I show in the next section, none of those appear to have happened. Instead, I suggest the later elision of the inequity requirement from the doctrine in Canada was accidental.[206] I now present the final stages of my investigation supporting that conclusion.

iii) Lost in Citation: From Elusiveness in *Engineered Homes* to Omission in *Maracle*

Having shown that the inequity requirement was alive, well, and performing the distinct role expected of it in *Conwest*,[207] and that the authority of *Conwest* was clearly recognized in multiple subsequent Supreme Court of Canada cases, it may be most illuminating to now skip

---

[205] *D&C Builders*, *supra* note 32. For academic discussions of *D&C Builders* published prior to *Canadian Superior Oil*, see Ralph Sutton, NP Shannon & Aubrey L Diamond, *Sutton and Shannon on Contracts*, 7th ed (London, UK: Butterworths, 1970) at 442–45, 485; GH Treitel, *The Law of Contract*, 3rd ed (London, UK: Stevens, 1970) at 98–101, 106–07; Sir William Reynell Anson & Anthony Gordon Guest, *Anson's Law of Contract*, 23rd ed (Oxford: Clarendon Press, 1969) at 107–08.

[206] Of course, a critic might contend that there is no such thing as a true "accident" in this context: that if it was not deliberately excised from the doctrine, then its later inadvertent omission reflects MacDougall's observation, quoted earlier, that Canadian courts, unlike their English and Australian counterparts, have more generally not engaged with estoppel in a sufficiently rigorous way: See note 76, above. In any event, the key point is that it seems that the later omission of estoppel's inequity requirement in Canada was not a deliberate step.

[207] By expected role, I am referring to that described in Section II.B, above. See also Moore, *When is it Fair to Break Promises*, *supra* note 42.

forward to *Trial Lawyers*, and work backwards from there to see when and how the inequity requirement fell out of the doctrine's list of elements in Canada.

As mentioned previously, *Trial Lawyers* pointed to *Maracle* as the leading precedent on promissory estoppel in Canada; and *Maracle* did not mention an inequity requirement.[208]

Maracle is the sort of case MacDougall may have had in mind in his aforementioned appraisal of the lacklustre treatment of estoppel in Canada.[209] This 1991 judgment, authored by Justice Sopinka—who was known for his expertise in criminal law, not private law—was hardly a rigorous study of the doctrine. The judgment as a whole was a mere 18 paragraphs. And of those, a single one was devoted to ascertaining what the doctrine entails.[210]

Justice Sopinka began that paragraph by stating "[t]he principles of promissory estoppel are well settled."[211] Following that was a cursory statement of those principles, which left out, in addition to the inequity requirement, the well-settled conditions that the promise be a concession not an expansion of rights and that the promise be clear and unequivocal.[212]

Brief quotes from *Subsurface Systems*[213] and *Engineered Homes*[214] effectively reincorporated the latter two conditions, respectively. And that was it, as far as *Maracle*'s investigation of the constituent elements of promissory estoppel went. The inequity requirement went entirely unmentioned. This is what led to the problems in *Trial Lawyers,* relying on *Maracle*'s supposed authority, as explained earlier.[215]

We should look further back, then, to learn more about the disappearance in Canada of promissory estoppel's inequity condition. Take the Supreme Court of Canada's decision in *Engineered Homes*. In this 1983 case, the enigmatic Justice McIntyre took as his starting point an account of the doctrine "conveniently set out" in the fourth edition of

---

208 See the text accompanying notes 51–52, above.

209 *Supra* note 76.

210 *Maracle*, *supra* note 6 at 57.

211 *Ibid*.

212 See (3) and (1) from Section II.B, above. See *Canadian Superior Oil*, *supra* note 202; *Gilbert Steel Ltd v University Construction Ltd*, 12 OR 19 at 23, 1976 CanLII 672 (ONCA), aff'g that estoppel can only be used as a shield and not a sword.

213 *John Burrows*, *supra* note 48.

214 *Engineered Homes*, *supra* note 47.

215 See Section III.B, above.

Halsbury's Laws of England.[216] The passage from the latter desk reference did not expressly mention the inequity requirement (in addition to not mentioning the requirement that the promise be a concession, not expansion, of existing rights[217]).[218] However, the passage from *Halsbury* quoted in *Engineered Homes* did specify that "[t]his doctrine … is derived from a principle of equity enunciated in 1877."[219] This principle of equity enunciated in 1877 was, of course, *Metropolitan Railway*, with its indispensable inequity requirement, which as discussed, was endorsed and relied on in *Conwest*, and affirmed again in *Subsurface Surveys* and *Canadian Superior Oil*.[220]

Engineered Homes, in fact, went on to note *Conwest* and *Subsurface Surveys* as prior Canadian authorities which already dealt with promissory estoppel, and which established further that the doctrine is unchanged from its enunciation in *Metropolitan Railway* despite the ferment following Denning's discussion of estoppel in *High Trees*.[221]

Engineered Homes' reference to *Subsurface Surveys* included the latter's quotation of *Combe v Combe*.[222] As explained earlier, *Subsurface Surveys* quoted a passage from *Combe v Combe*, explaining that the promise must be intended to have legal effect.[223] That passage did not discuss the doctrine's inequity requirement, but other passages of *Combe v Combe* certainly drew attention to it. Indeed, at the opening of his judgment, Denning emphasized in *Combe v Combe* that promissory estoppel:

> only prevents a party from insisting upon his strict legal rights, when it would be *unjust* to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes v. Metropolitan Railway*, the case in the House of Lords in which the principle was first stated, and in *Birmingham etc. Land Company v London and North-Western Railway Co*, the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed.[224]

Thus, *Combe v Combe* was firstly a prominent case preceding *Conwest* and the later Supreme Court of Canada decisions—including *Engineered*

---

216 *Engineered Homes*, *supra* note 47 at 646.

217 See element (3) from Section II.B, above.

218 Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, 4th ed, vol 16 (Butterworths, 1976) at para 1514.

219 *Ibid*; *Engineered Homes*, *supra* note 47 at 647.

220 See text accompanying notes 168, 200, 203, above.

221 *Engineered Homes*, *supra* note 47 at 647.

222 *Ibid*.

223 See text accompanying note 201, above.

224 *Combe v Combe*, *supra* note 14 at 219 [emphasis added; references omitted].

Homes—that endorsed *Conwest*'s position that English cases since *High Trees* had not changed the doctrine enunciated in *Metropolitan Railway*, which included the inequity requirement. Secondly, *Combe v Combe* certainly maintained the view that the doctrine included such a requirement, as noted above. And thirdly, *Combe v Combe* was followed by *D&C Builders* in which the inequity requirement was central, much as it was for the Supreme Court of Canada in *Conwest,* earlier.[225] Hence, it cannot be seriously argued that *Combe v Combe* stood for the proposition that promissory estoppel had dispensed with the inequity requirement, and that *Engineered Homes* meant to adopt that position by a second-hand reference to *Combe v Combe* incorporated in approving of *Subsurface Surveys*, which had itself affirmed *Conwest*, which in turn endorsed *Metropolitan Railway* with its inequity requirement that indeed was decisive as to whether Letain was estopped.

The inequity requirement was not at issue in *Engineered Homes*, where the estoppel claim failed because there was not a clear and unequivocal promise.[226] *Engineered Homes* did not reconsider or disavow promissory estoppel having an inequity requirement.

To conclude this review of Canadian jurisprudence, all signs point to the inequity requirement being solidly entrenched in the authorities, including being central to the analysis in *Conwest*, even before it played a decisive role in England in *D&C Builders*. The authority of *Conwest* was consistently reaffirmed up to and including *Engineered Homes*. In *Engineered Homes* the inequity element was not expressly mentioned, but was incorporated by reference to authorities such as *Conwest*, *Subsurface Surveys*, and above all, the nameless reference to the principle of equity from *Metropolitan Railway*. *Maracle*'s superficial skim of the authorities then failed to pick up the less-than-explicit signals in *Engineered Homes*. And *Maracle* further misled itself in relying on the passage from *Combe v Combe,* which *Subsurface Surveys* had quoted merely to make the point that the promise must be intended to have legal effect, not as a comprehensive account of the doctrine.[227] As a result, the inequity element fell through the (admittedly wide) cracks of *Maracle*'s skim of the authorities; and so, not by any deliberate decision, disappeared from promissory estoppel in *Maracle* and later Canadian cases relying on *Maracle* as precedent. These cases include *Trial Lawyers*, where as discussed, the inequity requirement's absence caused major difficulties wrestling with a fact-scenario in which

---

225 See Section V.B.i., above, and the text accompanying note 205, above.

226 *Engineered Homes*, *supra* note 47 at 647–52. See condition (1) from Section II.B, above.

227 See Section V.B.iii, above.

that element should have been the focus had it not gotten lost between the elusiveness of *Engineered Homes* and superficiality of *Maracle*.

If the foregoing analysis is correct, it follows that *Maracle* should be regarded as unsound, that *Engineered Homes* should be approached with caution, and that the leading case on promissory estoppel in Canada is neither of those, but *Conwest*. The latter was in fact long recognized as the authoritative statement on the doctrine in Canada, prior to the unhelpful two decisions just discussed. Based on the jurisprudence, it was an inexcusable error for *Maracle* not to refer to *Conwest*, though hardly surprising in that *Maracle* only referred to two authorities, and in its apparent haste, misread both. Had it looked at *Conwest*, *Maracle* would have realized that an inequity requirement is part of and essential to promissory estoppel. And had *Maracle* mentioned the inequity requirement among the doctrine's elements, it would have been easy to deal with the issues raised later in *Trial Lawyers*.[228]

VI. Conclusion

This article showed how the present omission in Canada of the inequity requirement, which is an integral element of promissory estoppel elsewhere, is a critical flaw. Without it, there is a risk of the doctrine working inequity rather than equity, by neglecting to account for possible additional equitable considerations countervailing the inequity of disappointing the promissee's reliance, as well as potential nuance not captured by the on/off character of the doctrine's other conditions. Further, even where inequity is avoided by courts' intuitions about justice leading to the right decision on whether estoppel should apply, problems arise in justifying the outcome in cases that should turn on the missing inequity condition. The Supreme Court of Canada judgment in *Trial Lawyers* serves as an example: the Court, in trying to explain why the insurer was not estopped, had to strain other conditions of the doctrine in problematic ways that will affect future cases, instead of being able to say simply that the inequity requirement was unmet due to the claimant concealing pivotal information from the insurer including breach of a policy condition that he was involved in.

However, this predicament can easily be rectified by Canadian law recognizing promissory estoppel as having an inequity requirement, as it does elsewhere. There exists already support in Canadian scholarship for recognizing an additional doctrinal element, and the jurisprudence reveals that Canadian law in fact previously had an inequity requirement, before it fell through the cracks of the elusive discussion of estoppel in

228 See Section IV.C, above.

Engineered Homes and the cursory sweep over it by *Maracle*. A more reliable authority on promissory estoppel in Canada—including its having the crucial inequity requirement—is *Conwest,* as a series of later Supreme Court of Canada precedents affirmed.

Due study of *Conwest* reveals it not only as the key authority on promissory estoppel in Canada, including it having an inequity requirement. It also furnishes an example of a previously undiscussed scenario to which the inequity condition should apply: where a promise relating to a contract is made and then retracted, as part of a ploy to evade a contractual duty (or a bad bargain altogether). This further connects *Conwest* with the under-studied good faith duty of non-evasion.