

IS IT POSSIBLE TO PROTECT YOURSELF WITH CONTRACT TERMS? DOS AND DONT'S FROM CANADA'S HIGHEST COURTS

I. Introduction

Construction projects generally involve a complex network of complimentary and occasionally conflicting contractual rights and obligations. Standard forms of contract exist which, with varying degrees of success, are meant to address the commercially reasonable balancing of rights and obligations, risks and rewards that is necessary to the orderly functioning of this important industry. Every now and then, however, there is a small efflorescence of creativity, or greed, which causes a reconsideration of the power of private parties to organize their business affairs by contract. Such new contract language is usually meant to either generate or insulate from liability. It is always designed to tip the balance in the draftman's favour. This paper will isolate and explore a few selected developments of this nature. What this involved in each such case, of course, is the reconsideration from time to time of the public interest in private contracts.

To understand the way in which contracts work is to learn to extract from the formal language courts use to express their opinions the sense of their decisions, to extract the right and reason underlying the use of such language. Courts speak in terms such as "ambiguity", for example. Ambiguity is most often in the eye of the beholder. It is there if you choose to find it there. Ambiguity can be found by a Court to rationalize an outcome that is necessary on a policy level. Courts discuss "intention", that most elusive

of all concepts, as a means to rationalize outcomes. The discovery of intention is usually an almost ceremonial act of divination involving the entrails of a failed contract. It is a very approximate science at best. Platitudes also play a part in contractual interpretation. Courts will say that they are not there to remake a bad bargain, but then, in another case, will do just that by implying terms by custom of the trade. Other platitudes you will hear involve such ephemeral and untrustworthy concepts as “consideration”. Consideration, as the exchange of tokens, is thought to bind people to bargains by proving the concentration of their minds and bodies on the bargain and hand. Past consideration, it is said, is no consideration, but then, this too becomes a platitude in modern cases.

Our own Supreme Court of Canada has taken a leading role, as well it should, in attempting to sweep away the use of such formalities, rationales, platitudes, *non sequiturs* and other infirmities that have afflicted the law of contract. Recently, in announcing the demise of another antediluvian concept, the doctrine of fundamental breach, the Supreme Court of Canada has made a stand for a principled approach to contract law. It remains to be seen how successfully our Supreme Court will adhere to its modern approach on difficult facts. Remember, this is the same Court that reads an over-arching duty of “fairness” into a commercial context. Almost thirty years ago, in the United States, Professor Grant Gilmore attempted a deconstruction of the law of contract in a lecture presented at the Ohio State University called “The Death of Contract”. He later published his ideas in book form.¹ Professor Gilmore found it more rewarding to analyze the nature of the interests Courts choose to protect than to pursue the often tortured contractual analysis in which such decisions are usually framed.

And how does all of this relate to our topic? As I hope you will have seen by the end of this paper, now, more than ever before, the answer to the question “Is it possible to protect yourself with contract terms?” is dependent on such an analysis as Professor Gilmore recommended in April of 1970. After some general remarks, we will look at exclusion clauses, pay when paid clauses, notice clauses, exculpatory clauses, privilege clauses and others and consider, but only just, the boundary layer between contract and tort.

II. Limitation and Exclusion Clauses

1. General Principles

The most common attempt to limit or even exclude a party’s liability to the other parties is the inclusion of a direct clause to that effect into the contract documents. Limitation clauses may restrict the substantive responsibility of a party or procedural remedies available to a party.² They may protect a party from virtually all forms of liability, from liability resulting from certain types of work, or they may set a limit as to the amount recoverable in case of default.³ However, no clause can exempt a party from liability for

¹ Ohio State University Press, 1974.

² I.N. Duncan Wallace, *Hudson’s Building and Engineering Contracts*, Vol. 1, 11th edition (London: Sweet & Maxwell, 1995) 1-231.

³ G.H.L.Fridman, *The Law of Contract in Canada*, 3rd edition (Scarborough: Carswell, 1994) 571.

fraud.⁴ Most often, in a building context, it will be the owner inserting a clause limiting its liability to the contractor.⁵ As a clause solely inserted for the benefit of one of the parties, an exclusion or limitation clause is a classic candidate for the application of the *contra proferentem* rule. Therefore, in case of any ambiguity in its meaning, such a clause is to be interpreted strictly against the party it was intended to benefit.⁶ This does not mean, however, that parties cannot use clear words to restrict their liability. In *Photo Production Ltd. v. Securicor Transport Ltd.*,⁷ a 1980 House of Lords decision, Lord Diplock held that:

A basic principle of the common law of contract... is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do so, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.

2. Exclusion Clauses

⁴ *Ibid.*; *Ballard v. Gaskill* [1955] 2 D.L.R. 219 (B.C. C.A.).

⁵ Immanuel Goldsmith, Thomas G. Heintzman, *Goldsmith on Canadian Building Contracts*, 1998 – Release 1 (Toronto: Carswell, 1998) 6§2(b)(i)(C).

⁶ *Woollatt Fuel & Lumber (London) Ltd. v. Matthews Group Ltd.* (1981), 128 D.L.R. (3d) 68 (Ont. C.A.), leave to appeal to S.C.C. refused 35 O.R. (2d) 140; *Chomedy Aluminum Co. Ltd. v. Belcourt Construction (Ottawa) Ltd.* [1980] 2 S.C.R. 718 (S.C.C.).

⁷ [1980] 1 All E.R. 556 (H.L.).

Exclusion clauses in contracts have received a good deal of judicial attention. They are perhaps the best example of the conflict between the private right to organize one's affairs by contract and the public interest in protecting the prey from the predator. Exclusion clauses are designed to keep the more powerful of two contracting parties out of Court. While Courts seem prepared to go along with such clauses in the interest of protecting our freedom of contract, they are also prepared to intervene when it would be unconscionable not to do so. The judicial history of exclusion clauses is therefore a veritable gallery of judicial trends and theories. There is even profit to be made by some on these developments, for if you cannot pass on a loss with contract language, you have little choice but to assume the risk or insure against it.

One method that Courts developed to justify their intervention in hard cases was the so-called doctrine of fundamental breach. This doctrine has been described as follows:

The doctrine of fundamental breach in the context of clauses excluding a party from contractual liability has been confusing at the best of times. Simply put, the doctrine has served to relieve parties from the effects of contractual terms, excluding liability for deficient performance where the effects of these terms have seemed particularly harsh.⁸

Like many of the developments in Canadian common law, this development owes its origin and early development to English common law. In *Karsales (Harrow) Ltd. v. Wallis*,⁹ a garage owner was approached by a man with a car to sell and was shown a car that appeared to be in excellent condition. The garage owner signed a hire-purchase

agreement, but when the car was subsequently delivered it proved to be in unworkable condition. New parts had been replaced by old ones, parts were missing and the engine was so defective that it would not turn over. Hard facts. The contract for the purchase of a car included the following clause: “No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein”. At trial, Rawlins J. of the Aldershot County Court recognized that the car, when handed over, was indeed in a deplorable state. He held, however, that all the representations in the contract were covered by the language of the exemption clause. Reluctantly, he therefore excluded any condition or warranty in the transaction from his consideration. On appeal to the English Court of Appeal, Lord Denning held that:

The law about exempting clauses has been much developed in recent years, at any rate about printed exempting clauses, which so often pass unread. Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.

⁸ *Hunter Engineering Co. v. Syncrude Canada Ltd.* [1989] S.C.R. 426, 57 D.L.R. (4th) 321 (S.C.C.).

⁹ [1956] 1 W.L.R. 936 (C.A.).

Like many of Lord Denning's decisions, this one did equity between the parties, but in doing so caused the prevailing law to undergo a significant change. The significant change effected by *Karsales* was that something that had previously been a matter of interpretation had now become a fixed rule of law. If you could find a breach that went to the very "root of the contract", then an exemption clause was unenforceable at the hands of the party in breach.

Fundamental breach was therefore held to be a rule of law operating regardless of the parties' intentions. This doctrinal "rule of law" approach held sway in the United Kingdom for approximately 10 years. In Canada, *Karsales* was applied in a number of cases both at the trial and appeal level.¹⁰ Until *Suisse Atlantique*, that is. In 1967, the English House of Lords rejected the approach taken in *Karsales* in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*.¹¹ *Suisse Atlantique* involved a charterparty which contained the following clause:

If longer delayed charterer to pay \$1,000 U.S. currency payable in the same manner as the freight per running day (or pro rata for part thereof) demurrage, if sooner dispatched vessel to pay charterer or his agents \$500 U.S. currency per day (or pro rata for part thereof) dispatch money for lay time saved.

¹⁰ *Knowles v. Anchorage Holdings Co.* (1964), 46 W.W.R. 173 (B.C. S.C.); *Schmidt v. Int. Harvester Co.* (1962), 38 W.W.R. 180 (Man. Q.B.); *Varga v. Stokes Seeds Ltd.* (1962), 32 D.L.R. (2d) 167 (Ont. H.C.); *Western Processing & Cold Storage Ltd. v. Hamilton Const. Co.* (1965), 51 W.W.R. 354 (Man. C.A.); *Can. Dom. Leasing Corp. v. Suburban Superdrug Ltd.* (1966), 55 W.W.R. 396 (Alta. C.A.); *Traders Finance Corp. v. Norray Distributing Ltd.* (1967), 60 W.W.R. 129 (Man. Q.B.).

¹¹ [1967] 1 A.C. 361 (H.L.).

The appellants claimed that the sum for demurrage was inadequate. Lord Reid, in his famous speech, argued that:

In my view no such rule of law ought to be adopted. I do not take that view merely because any such rule is new or because it goes beyond what can be done by developing or adapting existing principles... But my main reason is that this rule would not be a satisfactory solution to a problem which undoubtedly exists. Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them... At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a *quid pro quo* or other good reason. But this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer.

Almost immediately, controversy arose in England as to how *Suisse Atlantique* was to be interpreted. Lord Denning M.R. did not give up on the doctrinal approach to fundamental breach. In fact, when he got his next opportunity to consider the same, in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*,¹² he held that *Suisse Atlantique*

... affirms the long line of cases in this court that when one party has been guilty of a fundamental breach of the contract, that is, a breach which goes to the very root of it, and the other side accepts it, so that the contract comes to an end – or if it comes to an end

anyway by reason of the breach – then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach.

In *Harbutt's*, the defendants had contracted for the design and installation of a heating system in the plaintiff's factory for storing and dispensing a heavy wax, which had to be liquefied under heat. The defendants used materials for pipes and installed a heating system entirely unsuitable for the purpose intended. Intended tests would have revealed the defects and it would have become clear that the defects could have been easily and quickly rectified. However, in order to conduct the test, the wax had to be in a liquid state and, due to severe weather, it was in a solid state the day before the test was scheduled. The defendants therefore switched on the entire heating system and left the plant unattended for the night. The entire factory erupted into flames and was completely destroyed. The contract between the plaintiff and defendant contained the following clause:

15. Liability for accidents and damage. Until the goods shall have been taken over, or be deemed to have been taken over under clause 13, our sole liability for accidents and damage is as follows: (1) We will indemnify you against direct damage or injury to your property or persons or that of others caused by the negligence of ourselves or of our servants, but not otherwise, to the extent of repairing the damage to property or compensating personal injury, provided that such damage or injury is not caused or does not arise wholly or partially from your acts or omissions or the acts or omissions of others, or is not due to circumstances over which we have no reasonable control, provided always that our total liability for loss, damage or injury shall not exceed the

¹² [1969] 1 Q.B. 447 (C.A.).

total value of the contract. (2) We will indemnify you against claims and actions brought against you by persons in our employ on the site under, and subject to the provisions of, the Workmen's Compensation Act, 1925, or other statute in force at the time dealing with employers' liability for injuries sustained by employees. We will not be liable for loss due to stoppage of machinery or for any other damage, loss or injuries of any kind whatsoever. After such taking over all liability on our part for accidents and damage ceases.

The trial judge held that the defendants had been in fundamental breach of contract and did not allow it to rely on clause 15. Lord Denning M.R., for the whole Court of Appeal, agreed that there was a fundamental breach of contract, which brought the contract to an end, leaving the plaintiffs with no option as to treat the contract as terminated. Consequently, the limitation clause was held not to be operational and the plaintiffs were allowed to sue for the entire damage. Lord Denning relied on the following passage from *Suisse Atlantique*:

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term.

Lord Reid's dictum repudiating the doctrine notwithstanding, Lord Denning M.R., in *Harbutt's*, treated it as alive and well.

The reader will quickly detect in the language used by Lord Reid in *Suisse Atlantique* the emergence of what could be called a principled rather than a doctrinal approach to this problem. The reasoning in *Suisse Atlantique* was adopted by the Supreme Court of Canada in *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*,¹³ a case that arose in a construction setting. In *Linton*, the appellant contractor had attempted to send a telegram to a tendering authority. Due to admitted negligence of the respondent, this telegram never arrived at its destination, and the appellant sought damages. The respondent relied on the following exclusion clause:

It is agreed between the sender of the message on the face of this form and this Company that the said Company shall not be liable for damages arising from failure to transmit or deliver, or for any error in the transmission or delivery of any unrepeated telegram, whether happening from negligence of its servants or otherwise, or for delays from interruptions in the working of its lines, for errors in cypher or obscure messages, or for errors from illegible writing, beyond the amount received for sending the same.

In a 5:4 split decision, the Supreme Court of Canada interpreted the contract by relying on our old friend – the concept of ambiguity. While in cases of ambiguity, an exemption clause had to be strictly construed against the party relying on it, an exemption clause

¹³ [1975] 2 S.C.R. 678, 49 D.L.R. (3d) 548 (S.C.C.).

was to be given full effect, even in cases of “fundamental breach”, if the language used was clear and if the parties clearly intended the clause to apply even in such circumstances.

The majority, Ritchie, Martland, Judson, Pigeon and de Grandpré JJ., held that liability for negligence was clearly excluded, particularly in view of the fact that the exemption clause referred to “unrepeated” telegrams and the respondent offered a service of repeating back any telegram for extra payment to guard against error. Unfortunately, as a tool for the desirable quality of predictability, the quality of “ambiguity” is most often in the eye of the beholder. What was crystal clear at the time the service was purchased can seem ambiguous once the event causing damage has occurred. *B.G. Linton* sent lawyers scrambling back to precedents looking for tried, tested and true exclusion language, free of any ambiguity.

The minority, Spence J., Laskin C.J.C., Dickson and Beetz JJ., would have precluded the respondent from relying on the exemption clause based on the fact that the non-delivery amounted to a fundamental breach of contract.

And so the law remained for almost 5 years in this country, an unsatisfactory amalgam of doctrinal and principled approaches. The bellweather change occurred in 1980 in the United Kingdom in *Photo Production Ltd. v. Securicor Transport Ltd.*¹⁴ Photo Production, the plaintiff, contracted with Securicor, a security services provider, to

¹⁴ [1980] A.C. 827 (H.L.).

provide nightly patrols of its factory. One of Securicor's employees deliberately set fire to Photo Production's property. The contract contained the following clause:

Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment.

Securicor denied liability, but Photo Production argued that Securicor was liable under the doctrine of fundamental breach. The House of Lords rejected Photo Production's argument. The Lords explained *Suisse Atlantique* and made clear that it had been misinterpreted by Lord Denning in *Harbutt's* case. Lord Wilberforce, with regard to the above quote from *Harbutt's* case, held as follows:

My Lords, whatever the intrinsic merit of this doctrine, as to which I shall have something to say later, it is clear to me that so far from following this House's decision in the *Suisse Atlantique* it is directly opposed to it and that the whole purpose and tenor of the *Suisse Atlantique* was to repudiate it. The lengthy, and perhaps I may say sometimes indigestible speeches of their Lordships, are correctly summarized in the headnote, holding No. 3 [1967] 1 A.C. 361, 362 "That the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract." That there was any rule of law by which exception clauses

are eliminated, or deprived of effect, regardless of their terms, was clearly not the view of Viscount Dilhorne, Lord Hodson, or of myself.

The rule of construction was therefore held to be the proper approach to the fundamental breach issue. In *Photo Production*, liability was excluded, the clause was enforced. In the United Kingdom at least the whole cycle had taken 24 years to make one full revolution. Draftsmen could no longer declare clauses to be “fundamental” so as to attempt to trigger the fundamental breach of contract and avoid a bargained for but harsh exclusion clause. In the same year our Supreme Court of Canada, differently constituted, had occasion to consider the issue in *Beaufort Realties (1964) Inc. and Belcourt Construction (Ottawa) Ltd. v. Chomedy Aluminum Co. Ltd.*¹⁵ *Beaufort* was, again, by coincidence more than anything, a construction law case, involving a waiver of lien clause:

Article 6. The Subcontractor hereby waives, releases and renounces all privileges or rights of privilege, and all lien or rights of lien now existing or that may hereinafter exist for work done or materials furnished under this Contract, upon the premises and upon the land on which the same is situated, and upon any money or monies due or to become due from any person or persons to Contractor, and agrees to furnish a good and sufficient waiver of the privilege and lien on said building, lands and monies from every person or corporation furnishing labour or material under the Subcontractor.

In addition to the requirements as set forth hereinabove, the Subcontractor agrees to waive to the extent of one hundred percent (100%) of the final contract amount, any privilege, lien and right of preference which he may have or which he hereafter may have

upon the aforesaid building and/or the land upon which it is constructed as a result of or in connection with work to be done or materials to be supplied by him, and moreover that he holds and will hold the Owner and Contractor harmless and indemnified from and against a registration against the said property of any privilege, lien or right of preference by or on behalf of any person, firm or corporation performing work or supplying materials under authority derived from him, and, if and when so required by the Contractor, he will obtain and deliver to the said Contractor, releases from any such privileges, liens or rights of preference signed by such persons, firms or corporations.

In *Beaufort*, a general contractor was in breach of contract to its subcontractor, Chomedey Aluminum, for failing to make payments when due. The Court of Appeal held that the plaintiff was entitled to register a mechanic's lien, allowing an appeal from a judgment of the Divisional Court which had in part allowed an appeal from the judgment of Fogarty Co.Ct.J. The Supreme Court of Canada, dismissing the appeal, did not allow the defendant to rely on a waiver of lien clause in this case, but adopted the contract construction approach from the later House of Lords decisions. Ritchie J., for a unanimous Court, held that:

Stated bluntly, the difference of opinion as to the true intent and meaning of their Lordships' judgment in the *Suisse Atlantique* case centered around the question of whether a rule of law exists to the effect that a fundamental breach going to the root of a contract eliminates once and for all the effect of all clauses exempting or excluding the party not in breach from rights which it would otherwise have been entitled to exercise, or whether the true construction of the contract is the governing consideration in

¹⁵ [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193 (S.C.C.).

determining whether or not an exclusionary clause remains unaffected or enforceable notwithstanding the fundamental breach... It has been concurrently found by the learned trial judge and the Court of Appeal that art. 6 of this contract [lien waiver] constituted an exclusionary or exception clause and Madam Justice Wilson adopted the same considerations as those which governed the House of Lords in the *Photo* case in holding that the question of whether such a clause was applicable where there was a fundamental breach was to be determined according to the true construction of the contract. I concur in this approach to the case.

Beaufort stood as the law of Canada for 9 years and then, in 1989, the Supreme Court of Canada again considered the issue in *Hunter Engineering Co. v. Syncrude Canada Ltd.*¹⁶ By this time, Madam Justice Wilson, who had been on the Ontario Court of Appeal in *Beaufort*, had been elevated to the Supreme Court of Canada. This case has attracted much learned commentary.¹⁷ Madam Justice Wilson explained why, after *Beaufort*, the issue was again discussed in *Hunter*:

The law in Canada on this point appears to be settled. Some uncertainty, however, does remain primarily with regard to the application of the construction approach... Commentators seem to be in agreement [...] that the courts, while paying lip service to the construction approach, have continued to apply a modified “rule of law” doctrine in some cases... Professor Ogilvie, in a review of Canadian cases decided shortly after *Photo Production*, including *Beaufort Realities* itself, argues that the rule of law approach

¹⁶ [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 (S.C.C.).

¹⁷ See, for example, M.H. Ogilvie, “Fundamental Breach Excluded but not Extinguished: *Hunter Engineering v. Syncrude Canada*” (1990) 17 *Canadian Business Law Journal* 75; M.H. Ogilvie, “‘Reasonable’ Exemption Clauses in the Supreme Court of Canada and the House of Lords” (1991) 25

“has been replaced by a substantive test of reasonableness which bestows on the courts at least as much judicial discretion as to intervene in contractual relationships as fundamental breach ever did”... Little is to be gained from a review of the recent cases which have inspired these comments. Suffice it to say that the law in this area seems to be in need of clarification.

In *Hunter*, due to design deficiencies, gear boxes supplied by the vendor were not fit for the purpose intended. Bull gears inside the gear boxes failed due to a defective weld. Syncrude had entered into two different contracts with two separate companies for the design, manufacture and supply of the gearboxes: Hunter U.S. was to supply 32 mining gearboxes, and Allis-Chalmers was to supply 14 conveyor systems, including four extraction gearboxes. The specifications as to the intended purpose of the boxes, but not as to the design, were provided by one of Syncrude’s agents. Syncrude was forced to repair the gearboxes itself when both Hunter and Allis-Chalmers refused warranty coverage. The overall cost for the repair exceeded \$1,000,000.00. An express warranty covering the items had expired. The purchaser argued that the deficiency was of such magnitude as to make the gear boxes not the gear boxes contracted for, thus making the breach in question a fundamental breach. The design of the gearboxes was found to have been the responsibility of Hunter, and the design had been inadequate. The express warranties had expired. Both defendants had, however, breached the implied warranty of fitness in s. 15 of the Ontario *Sale of Goods Act*.¹⁸ While Hunter was found liable for breach of the statutory warranty, the Allis-Chalmers contract contained an additional

University of British Columbia Law Review 199; R. Flannigan, “Hunter Engineering: The Judicial Regulation of Exculpatory Clauses” (1990) 69 *Canadian Bar Review* 514.

¹⁸ R.S.O. 1970, c. 421.

clause expressly excluding all statutory warranties. Syncrude argued that Allis-Chalmers would be liable if a fundamental breach of contract overrode the express contractual exclusion.¹⁹

The whole course of the development of the law in this area is reflected in the careful words of the contract draftsmen as follows:

Notwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise or from any tortious acts or omissions of their respective employees or agents and in no event shall the liability of the Seller exceed the unit price of the defective product or of the product subject to late delivery.

The Supreme Court of Canada was unanimous regarding both the result that Allis-Chalmers was not liable and the fact that while limitation clauses are generally enforceable according to their true meaning, there are limited circumstances in which courts can decide not to enforce them. The Court was divided, however, on the question of the applicable test for determining when such circumstances have arisen.

Canada's then Chief Justice, Dickson C.J.C., for himself and LaForest J., held that:

¹⁹ See M.H. Ogilvie, *supra*, note 17 at 79-80; R. Flannigan, *supra*, note 17 at 521-2.

In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability. In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of “fundamental breach”... If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not blindly enforce harsh or unconscionable bargains and, as Professor Waddams has argued, the doctrine of “fundamental breach” may best be understood as but one manifestation of a general underlying principle which explains judicial intervention in a variety of contractual settings. Explicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties. I wish to add that, in my view, directly considering the issues of contract construction an unconscionability will often lead to the same result as would have been reached using the doctrine of fundamental breach, but with the advantage of clearly addressing the real issue at stake.

Madam Justice Wilson, Madam Justice L’Heureux-Dubé concurring, preferred a different approach. She held, boldly, that the exclusion clause in question was enforceable unless it ought not to be enforced in the particular circumstances of the breach. This meant a

purely subjective, “after-the-fact” analysis that must have given the deal makers and commercial lawyers many sleepless nights, and their insurers visions of greatly enhanced profit:

Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties’ intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as fundamental breach committed by the party seeking its enforcement through the courts. Whether the courts address this narrowly in terms of fairness as between the parties (and I believe this has been a source of confusion, the parties being, in the absence of inequality of bargaining power, the best judges of what is fair as between themselves) or on the broader policy basis of the need for the courts (apart from the interests of the parties) to balance conflicting values inherent in our contract law (the approach which I prefer), I believe the result will be the same since the question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause?

Wilson J. argued that the seller relying on the exclusion clause in the Hunter case was not guilty of any sharp or unfair dealings, that it supplied what had been bargained for, even if the product was defective, and that this was consequently not a case in which the purchaser had been deprived of substantially the whole benefit of the contract. There

having been no abuse of freedom of contract, Wilson J. found no reason not to enforce the clause excluding the statutory warranty.

Not surprisingly, a main point of criticism in the commentary referred to was the lack of clarity as to what the notion of unconscionability might involve. As one learned commentator put it:

The divergence in views on the issues of reasonableness and unconscionability means, in effect, that the law remains as it was – all contracts being regulated by some (unclear) standard of unconscionability... This may account for the continuing hesitation of judges to go beyond the unhelpful platitudes that litter this area of the law. But the principle will not define itself.²⁰

A look at subsequent decisions by Courts of the highest authority will confirm that the unconscionability standard still remains a complex and contestable notion.

Hunter v. Syncrude was discussed, in the year it was first decided, in a construction law context by the Alberta Court of Appeal in its decision in *Catre Industries Ltd. v. Alberta*.²¹ In that case, an experienced builder had entered into a contract for the construction of a secondary highway. The conditions the contractor encountered during construction differed substantially from those shown in the documents the contractor relied on when submitting its tender. The contractor submitted that soil conditions were

²⁰ R. Flannigan, op. cit. at 536-7.

fundamentally different from those shown, that the road grade as designed by the department was unbuildable in the time specified, and that the distance over which the plaintiff had to haul the material was substantially longer than indicated, all of which caused real and substantial loss. The contract documents contained the following clauses:

The following quantities, based on design estimates, are provided for information purposes only and shall not be construed to restrict the Department's action relative to revision. Final payment will be made on the basis of actual measured quantities of the work as completed.

The information pertaining to data as shown has been compiled for the use of the Department of Highways. No responsibility will be assumed by the Department for the correctness or completeness of the data shown and should any such data be found incorrect or incomplete the contractor shall have no claim on that account.

The trial judge held that the defendant had breached implied terms of the contract to provide soil information of reasonable accuracy and to provide a correct design and the defendant was not, therefore, allowed to rely on the exclusion clauses. The Court of Appeal reviewed the two approaches taken to this problem by Dickson C.J.C. and Wilson J. in *Hunter* and found that on the basis of either approach, the exclusionary and exculpatory clauses were valid and enforceable. Stratton J.A. argued that the plaintiff was an experienced builder and had access to and utilized professional assistance where needed. These factors indicated a level of sophistication in its dealings that denied inequality in bargaining, even with the government. Being this experienced, the Court

²¹ (1989), 36 C.L.R. 169 (Alta. C.A.).

held that it was unreasonable to conclude that the plaintiff did not fully comprehend the stringent terms of the contract it entered into. Stratton J.A. concluded that:

If this Court should interfere in the circumstances of this case and find the said exculpatory clauses to be unenforceable and thus restructure the contract, the resulting impact on contract law would, in my view, be chaotic and in any event, not justified in law.

The fact that both approaches outlined by the Supreme Court of Canada in *Hunter* will often lead to the same result was again demonstrated in the Federal Court of Appeal case of *MacKay v. Scott Packaging and Warehousing Co. (Canada) Ltd.*²² The appellant in this case entered a contract for the transportation of antiques, a form of contract it was very familiar with. The contract expressly referred to conditions printed on the back, and the appellant had the contract in its possession for a week, but signed it without reading it in detail. The printed exclusion clause, unread by the appellant as it turned out, read as follows:

The customer bears all the risks of loss or damage both during transit and whilst goods are in store and the Company shall not be liable for any loss or failure to produce or damage (howsoever caused) to the goods and accordingly no claim shall be made upon the Company in respect of any loss, failure to produce or damage to any article or articles howsoever caused...

²² [1996] 2 F.C. 36 (Fed. C.A.).

When the goods arrived in England, 37 of the 220 items shipped were missing, and some of the remaining ones were damaged. The appellant claimed damages of more than \$457,000. With regard to the different *Hunter* approaches, Robertson J.A. held that:

On the facts of this appeal, the difference between these approaches is of no legal significance. Whether one assesses the unconscionability of the contract at the time it was signed, or the fairness and reasonableness of enforcing the exclusion clause at the time of the breach, the clause under consideration should be enforced. I agree fully with the Trial Judge that in the circumstances of this case, it would not be unconscionable to uphold the limitation clause. I can do no better than reproduce his analysis and conclusion...: Returning to the facts of this case recited above, the plaintiff was experienced in arranging and overseeing the movement of valuable belongings. He was sophisticated enough in such dealings that he was able to recognize that Mr. Roberts' original quotation for his move to London was too low, and that the insurance rate quoted was too high. He bargained the insurance rate with Mr. Roberts and eventually decided to make his own insurance arrangements. The plaintiff was also familiar with the concept of standard form documents and had ample opportunity (at least one week) to review the formal quotation including the conditions on its reverse side. He was not put under any time constraint or pressure by the defendant. There was no reason offered why he failed to review in detail the conditions on the reverse of the formal quotation. The plaintiff was not dealing with the defendant from a position of weakness or unequal bargaining power. In all, the plaintiff had a somewhat cavalier approach to the settlement of the contract in question. I conclude that it is not at all unconscionable or unreasonable to allow the defendant to rely on the limitation of liability clause in this instance.

Similarly, in the case of *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*,²³ the two approaches to exclusion clauses did not trouble the Ontario Court of Appeal. The clause in question was enforceable. In this case, a contract between a jeweller and a security company contained the following clause:

It is understood that ADT is not an insurer, that insurance, if any, shall be obtained by the customer and that the amounts payable to ADT hereunder are based upon the value of the services and the scope of liability as herein set forth and are unrelated to the value of the customer's property or property of others located in customer's premises. ADT makes no guarantee or warranty, including any implied warranty of merchantability or fitness, that the system or services supplied, will avert or prevent occurrences of the consequences therefrom, which the system or service is designed to detect or avert; that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or \$10,000.00, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy; and that the provisions of this paragraph shall apply if loss, damage or injury irrespective of cause or origin, results, directly or indirectly to person or property from performance or non-performance of obligations imposed by this contract or from negligence, active or otherwise, of ADT, its agents or employees.

The jeweller was robbed and pressed an alarm button while the robbers were on the premises, but, for or no apparent reason, an employee of the security firm failed to respond to the alarm for 10 full minutes and the robbers made a clean getaway. The trial judge refused to allow the defendant company to rely on the exclusion clause. The trial

²³ (1997), 34 O.R. (3d) 1 (Ont. C.A.).

judge first argued that the failure to respond to the alarm was a fundamental breach of contract. Then, applying the test outlined by Wilson J. in *Hunter*, he concluded that it would have been unfair or unreasonable in the circumstances of this case to permit the defendant to rely on the limitation clause. In this context, the trial judge considered the fact that the plaintiff had not read the agreement and was unaware of the exclusion clause when signing the contract. Applying the test outlined by Chief Justice Dickson in the *Hunter*, the trial judge found that “no honest and fair man would expect in the circumstances of this case that [the exclusion clause] should be worked against the plaintiff company to limit its recovery to \$890. To that extent it would be unconscionable to do so”. The Ontario Court of Appeal disagreed. Robins J.A. said:

With deference to the learned judge, I am unable to accept his conclusions. In my opinion, the breach in this case was not fundamental and, even if it were, the circumstances here are not such as to warrant striking down this limitation on liability clause. In the context of this commercial transaction, I see nothing unfair or unreasonable or, indeed, unconscionable in giving effect to this term of the agreement between the parties. If, as I understand it, a fundamental breach occurs when the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit of the contract, no such breach occurred here.

The Court of Appeal concluded that the mere fact that contracting parties have different bargaining powers does not in itself make an agreement unconscionable. In order to render such an agreement unenforceable, there must have been an abuse of that bargaining power. In *Fraser Jewellers*, there was no evidence of abuse of bargaining

power. In fact, exclusion clauses such as the one in this case were found to be very common in the security industry. To void the exclusion clause would be to deem the defendant to be in effect an insurer, but with no ability to measure the risk or charge an appropriate provision. The defendant was therefore allowed to rely on the exclusion clause.

This decision by the Ontario Court of Appeal in *Fraser Jewellers* was discussed by the Ontario Divisional Court in the recent case of *Newcourt Credit Group Inc. v. Hummel Pharmacy Limited*.²⁴ In this case, Hummel had signed a short form lease agreement, there was no indication that the party was pressured into signing. The exclusion clause appeared in normal font on the front of the document. There was no evidence of any abuse of bargaining power. The Divisional Court in *Newcourt Credit*, like the Court of Appeal in *Fraser Jewellers*, expressly adopted the suggestion of Professor Waddams in *The Law of Contract* that in close analysis the difference between the positions put forward by Dickson C.J.C. and Wilson J. in *Hunter* was indeed small. To sum up, Courts will enforce exclusion clauses where it is established that “the foundation of the contract has been undermined, where the very thing bargained for has not been provided”, or where it would be manifestly unconscionable to allow a party to abuse an exclusionary clause that had otherwise been bargained for. There now seems to be a general acceptance, even at the trial level, that a well drafted exclusion clause generally means what it says.²⁵

²⁴ (1998), 38 O.R. (3d) 82 (Ont. Div. Ct.).

²⁵ For a trial decision to the same effect, see *Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd.* (1989), 21 C.L.R. (2d) 128 (B.C. S.C.) and see, for example, *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc.* (1998), 163 D.L.R. (4th) 740 (Ont. Gen. Div.).

3. Tender Issues: Investigation Clauses and Privilege Clauses

Whereas exclusion clauses are, or may be, the best example of the boundary layer between the private right to contract and the public interest in order, fairness and decency, these issues are also developed in cases involving construction tenders.

In *Carman Construction Ltd. v. Canadian Pacific Railway Co.*,²⁶ the plaintiff had relied on a verbal representation made by one of the defendant's employees with regard to the quantity of rock to be excavated. At the completion of the job, Carman had excavated more rock than estimated and submitted an additional claim for labour and equipment. In the Supreme Court of Ontario, Griffiths J. dismissed the action, concluding that a clause in the contract precluded him from finding for the plaintiff. Clause 3.1 read as follows:

3.1 It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the Work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company.

²⁶ (1982), 136 D.L.R. (3d) 193 (S.C.C.).

The plaintiff appealed. The majority of the Ontario Court of Appeal, Brooke J.A. dissenting, dismissed the appeal. Wilson J.A.'s argument was adopted by the Supreme Court of Canada. Martland J., for a unanimous Court, stated:

The plaintiff was aware of these provisions before it approached the defendant's employees seeking information as to the quantity of rock to be removed. It knew that this precise matter was dealt with in clear and unambiguous terms in the contract on which it was tendering. Indeed, the provisions were clearly meant for the sole purpose of ensuring that, if prospective bidders got any information on this subject from the defendant's employees, they would be relying upon it at their own risk.

Calls for tender routinely contain clauses such as the following, which was recently considered by the Court in *Alden Contracting Ltd. v. Newman Bros. Ltd.*:²⁷

2.2 The Contractor declares that in tendering for the work, and in entering into this contract, he has either investigated for himself the character of the work to be done and all local conditions, including the location of any utility which can be determined from the records or other information available at the office of any person, partnership, corporation, including a municipal corporation and any board or commission thereof having jurisdiction or control over the utility, that might affect his tender or his acceptance of the work, or that, not having so investigated, and except as hereinafter provided, he is willing to assume and does hereby assume, all risk of conditions now existing or arising in the course of the work which might or could make the work, or any

²⁷ (1997), 38 C.L.R. (2d) 1 (Ont. Gen. Div.).

items thereof more expensive in character, or more onerous to fulfil, than was contemplated or known when the tender was made or the contract signed.

The Contractor also declares that in tendering for the work and in entering into this contract, he did not and does not rely upon information furnished by the Corporation or any of its servants or agents respecting the nature of conformation of the ground at the site of the work, or the location, character, quality or quantity of the materials to be removed, or to be employed in the construction of the work, or the character of the equipment or facilities needed to perform the work, or the general and local conditions and all other matters which could in any way affect performance of the work, under the contract other than information furnished in writing for or in connection with his tender or this contract by the Engineer, except information specifically excluded from this section.

Many of you who are reading this will be familiar with such clauses, which have been described, even in expert testimony, as “weasel clauses”. The plaintiff in the *Alden* case was a subcontractor for excavation work in a water and sewage treatment plant project. Alden had based its bid on a hoe-ram excavation method rather than the blasting technique. After work commenced, it became clear to Alden that the work could not be done in the time anticipated using the hoe-ram method because the rock proved to be harder than anticipated. Instead, it was completed at great cost and delay using the blasting technique. Alden sued the general contractor for the extra cost, and the general contractor crossclaimed against the owner, a Regional Municipality, for contribution and indemnity. Before the work commenced, the Region’s consulting engineers had drilled two boreholes and provided a report to the Region stating that blasting would be required

and recommended to the Region that a third borehole test should be conducted, which the Region refused, presumably on grounds of expense. The plaintiff, when preparing its bid, had actually examined the geotechnical report and asked permission from the Region to enter upon the site with a hoe-ram to establish a production rate. This request was declined by the Region. On these facts the Region attempted to rely on Clause 2.2.

The trial judge, Dandie J., based his decision on *Hunter v. Syncrude* and set out to examine whether the enforcement of the exclusion clause in these circumstances would be unfair and unreasonable. In doing so, he relied on the discussion of disclaimer or exemption causes in construction contracts in the Ontario High Court case of *Cardinal Construction Ltd. v. Corporation of the City of Brockville*²⁸ and the Alberta case of *Opron Construction Co. v. Alberta*.²⁹ Dandie J. summarized his reading of the decision of Henry J. in *Cardinal* and the decision of Feehan J. in *Opron* as follows:

- (a) Where the construction contract purports to shift to the bidder the risk of failing to detect adverse site conditions, a contractor will have discharged the obligation to investigate and become satisfied of the condition of the work and will have relevantly informed himself by acceptance of the basic information conveyed by the tender calling authority on behalf of the owner.
- (b) Where there is a positive assertion in the tender document as to the nature of sub-surface conditions, a contractor is entitled to rely upon such information without the necessity of an investigation to establish the correctness or incorrectness of the information.

²⁸ (1984) 4 C.L.R. 149 (Ont. H.C.).

- (c) That a site investigation must be both practically feasible within the time allotted.
- (d) That before an investigation clause can abrogate a contractor's right to rely upon the express information as to the sub-surface conditions contained in the tender documents, a site investigation must have been capable of disclosing that the information in the tender documents was incorrect.
- (e) A bidder is entitled to rely upon information conveyed by an owner to evaluate a project.
- (f) Tender documents must be prepared having in mind the average bidder, not the bidder who has special knowledge or experience.
- (g) A bidder is entitled and expected to rely on the tender documents as conveying the best information an owner can give.

The Supreme Court of Canada case of *Carman Construction* was distinguished on its facts in one sentence:

I distinguish *Carman Construction* on its facts because the plaintiff does not rely upon any verbal representation made by the Region, its servants or agents.

Dandie J. stressed the following circumstances in determining whether it would be unfair and unreasonable to enforce the exclusion clause:

1. The Region stipulated that the plaintiff make such further investigations as it deemed necessary, but then unreasonably refused the plaintiff permission to enter the site to conduct such further investigations.

²⁹ (1994), 14 C.L.R. (2d) 97 (Alta. Q.B.).

2. The Region, while admitting a duty to provide as much information as possible and while being aware of the fact that the plaintiff intended to use the hoe-ram method, did not advise the plaintiff of the fact that the engineers' report concluded that there was no alternative to blasting.
3. The Region refused to conduct a third borehole test as recommended by the engineers, which was the only way to determine the nature of the rock formation before excavation commenced.

In these circumstances, according to Dandie J., "my sense of fairness and reasonableness dictates that the owner is responsible for the extra cost. It was the Region's rock and it was within its power to provide better information". The case would appear to be correctly decided as a tender investigation clause case and is also consistent with either of the two Supreme Court of Canada analyses in the *Hunter v. Syncrude* line of cases.

The focus in the law of tendering is currently on the enforceability of the so-called privilege clause.

In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*,³⁰ the Alberta Court of Appeal dealt with a situation where the lowest bid was not a valid bid, but had nevertheless been accepted by the respondent owner. The appellant argued that by doing so, the respondent breached the contract with the appellant. The invitation to tender contained the usual privilege clause stating that:

The lowest or any tender shall not necessarily be accepted.

The trial judge had dismissed the action, the appeal was dismissed. The Court of Appeal held that while the lowest bid was indeed not valid, the privilege clause was the complete answer to the action. There was no broken obligation to accept the tender, therefore there were no recoverable expenses. Dealing with the question whether industry practice could place a new meaning on the privilege clause, the court held that:

Parol evidence of local or industry practice cannot, in our view, redefine the phrase ‘or any tender’. It does not say ‘qualified tender’, ‘invalid tender’ or ‘rejectable tender’.

The court allowed, though, that “fairness dictates that [the appellant] be reimbursed for the probable costs of preparing its rejected tender.”

On further appeal, the Supreme Court of Canada allowed the appeal and set aside the judgment of the Court of Appeal.³¹ Iacobucci J., writing for a unanimous Court, held that the privilege clause did not allow the person calling for tenders to accept a non-compliant tender:

[T]he privilege clause must be read in harmony with the rest of the Tender Documents. To do otherwise would undermine the rest of the agreement between the parties. I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation.

³⁰ (1997), 33 C.L.R. (2d) 1 (Alta. C.A.).

However, the Court held that the privilege clause did allow the person inviting tenders to accept a bid other than the lowest compliant bid:

The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of “cost” than the prices quoted in the tenders. In this respect, I agree with the result in *Acme Building & Construction Ltd. v. Newcastle (Town)*.³² In that case Contract B was awarded to the second lowest bidder because it would complete the project in a shorter period than the lowest bid, resulting in large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost.

[...]

Therefore I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the *lowest* compliant bid. With respect to this latter proposition, the privilege clause must prevail.

Although not at issue in that case, Justice Iacobucci also made clear that the privilege clause would entitle the owner not to award the contract at all if unforeseen circumstances arise.

³¹ (1999), 170 D.L.R. (4th) 577, 44 C.L.R. (2d) 163 (S.C.C.).

³² (1992), 2 C.L.R. (2d) 308 (Ont. C.A.).

4. Contractual Protection Against Claims for Economic Loss by Non-Privies

The relationship between tort and contract has always seemed uneasy. The law of tort grew out of the law of contract originating as a pleading of *assumpsit*, one of the “common courts”, by which arcane device the courts implied and underlying contract so that they could shift losses in hard cases. It is said that the measure of damages in tort, placing the plaintiff in the position it would have been in had the damage not occurred, as nearly as money can do it, is different from the measure of damages in contract, being those reasonably contemplated by the parties at the time of the contract. In our modern, complex world, these lines have become blurred and it has become necessary for our highest courts to consider whether a limitation in a contract between A and B can avail A in an action by B in tort and, if that is possible, in an action by a non-party, C or D, arising from damages sustained as a result of A’s contract with B.

The problem is particularly acute because that which gives the parties the proximity that in turn gives rise to a duty of care in tort, itself arises because of the existence of an underlying contract. Our Supreme Court of Canada has dealt with this issue in a series of modern cases.

The case of *Central & Eastern Trust Co. v. Rafuse*³³ involved an action against solicitors for damages for breach of contract and negligence. The solicitors had acted for the plaintiff trust company in a mortgage transaction. Both parties were aware of the fact that the proceeds of the loan were supposed to go to individuals in order to allow them to buy

shares in the company. Neither the trust company nor the solicitors were aware of provisions in the Nova Scotia *Company Act* disallowing the intended procedure. The mortgage was subsequently held to be void, and the plaintiff sued for damages. Both the Nova Scotia Supreme Court and the Court of Appeal dismissed the trust company's action. On further appeal to the Supreme Court of Canada, the appeal was allowed.

The decision primarily stands for the proposition that a duty of care in tort may arise co-extensively with a contractual duty. Justice LeDain held that:

The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stephenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract... the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one.

What makes the judgment relevant in this context, however, is the fact that the logic of the judgment of the unanimous Court required the Court to go on to state that a party

³³ [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, varied [1988] 1 S.C.R. 1206.

could protect itself to a certain extent against potential actions in tort by including limiting clauses in an underlying agreement.

The issue came before the Supreme Court of Canada again in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*.³⁴ Briefly, in that case, a power authority called for tenders for the erection of transmission towers. The tender documents stated that the clearing of a right-of-way would be done by a third party, but no such clearing ever took place. The plaintiff sued the authority for negligent misrepresentation or, alternatively, for breach of contract. The trial judge found the defendant liable in damages under the head of fraud and did not go on to deal with the claim for breach of contract. The British Columbia Court of Appeal substituted a finding of negligent misrepresentation for the finding of fraudulent misrepresentation. With regard to the breach of contract, the case was referred back to trial for assessment of whether there was a breach of contract and, if so, what damages flowed from such breach.

The question of concurrency was addressed on further appeal to the Supreme Court of Canada. With regard to the question whether the contract in this case precluded the plaintiff from suing in tort, Iacobucci J., Sopinka J. concurring, concluded that a contract between the parties might preclude the possibility of suing in tort for a given wrong where there is an express term in the contract dealing with the matter. McLachlin and LaForest JJ., writing for the majority of the Court, L'Heureux-Dubé and Gonthier JJ. concurring, favoured a narrower approach. Referring to the judgment in *Rafuse*, McLachlin and LaForest JJ. explain in detail the relevant provisions of *Rafuse*:

In our view, the general rule emerging from this Court's decision in *Central & Eastern Trust Co. v. Rafuse*, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility.

Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering – the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

By way of example, *La Forest* and *McLachlin JJ.* point out that in cases with a partial contractual limitation on tort duties, a tort action based on the modified duty remains possible. Of the three situations outlined by the Justices that can arise when applying contract and tort to the same wrong, the second class is of interest here. This is the class

³⁴ (1993), 5 C.L.R. (2d) 173.

of cases where the contract stipulates a duty the standard of which is lower than the duty of care in tort. This class of cases occurs when the underlying contract that creates the relationship of proximity necessary to found a duty of care includes clauses of exemption or exclusion of liability. *La Forest and McLachlin JJ.* held that as a rule, tort duty can only be negated by clear terms. Having said this, however, they went on to hold:

We do not rule out, however, the possibility that cases may arise in which merely inconsistent contract terms could negative or limit a duty in tort, an issue that may be left to a case in which it arises. The issue raises difficult policy considerations, viz., an assessment of the circumstances in which contracting parties should be permitted to agree to contractual duties that would subtract from their general obligations under the law of tort. These important questions are best left to a case in which the proper factual foundation is available, so as to provide an appropriate context for the decision. In the second class of case, ... there is usually little point in suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed. An exception might arise where the contract does not entirely negate tort liability (e.g., the exemption clause applies only above a certain amount) and the plaintiff wishes to sue in tort to avail itself of a more generous limitation period or some other procedural advantage offered by tort.

The philosophy expressed in *Rafuse* in 1986 and *BG Checo* in 1993 was further affirmed in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*,³⁵ decided in the same year as *BG Checo* by a differently composed Supreme Court, comprised of LaForest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. The effect of *Edgeworth* is that plaintiffs may

sue concurrently in contract and tort, provided the contract does not negate the imposition of a duty of care in tort. The importance of this principle became evident in a series of cases in the Supreme Court of Canada over the five year period following *BG Checo*.

These developments involved the Court's dilemma in dealing with cases of pure economic loss. These are cases in which a remedy is sought in tort where there has been no personal injury or property damages, just a risk of such an occurrence and the need to spend money to avoid the occurrence. If the remedy is sought by C as a result of damage to B's property by A, C's claim against A is said to involve "relational economic loss".

The development of this branch of the law began with the 1932 decision in *Donoghue v. Stephenson*³⁵ in 1932 and continued in the subsequent decisions of *Hedley Byrne & Co. v. Heller & Partners Ltd.*³⁷ in 1964, *Dutton v. Bognor Regis Urban District Council*³⁸ in 1972, *Anns v. London Borough of Merton*³⁹ in 1978, *Nielsen v. Kamloops (City)*⁴⁰ in the Supreme Court of Canada in 1984 and *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*⁴¹ in the Supreme Court of Canada in 1992 and finally culminated in the 1995 landmark decision of the Supreme Court of Canada in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*⁴² and the 1997 decision in *Bow Valley Husky v. Saint John Shipbuilding*.⁴³ On the facts of the *Winnipeg Condominium* case, more than 15

³⁵ [1993] 3 S.C.R. 206, 107 D.L.R. (4th) 169, 12 C.L.R. (2d) 161 (S.C.C.).

³⁶ [1932] All E.R. 1 (H.L.).

³⁷ [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

³⁸ [1972] Q.B. 373, [1972] 1 All E.R. 462 (C.A.).

³⁹ [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

⁴⁰ [1984] 2 S.C.R. 2, 8 C.L.R. 1 (S.C.C.).

⁴¹ [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289 (S.C.C.).

⁴² [1995] 1 S.C.R. 85, 18 C.L.R. (2d) 1.

⁴³ (1997), 153 D.L.R. (4th) 385 (S.C.C.).

years after substantial completion of a condominium tower block, several tons of stone cladding fell to the ground injuring neither person nor property. The condominium corporation, which took title to remove from the original owner, claimed for the prospective costs of repairing or replacing the entire exterior stone cladding, i.e. pure economic loss. The Supreme Court of Canada allowed the corporation to recover from the general contractor in tort even though there was no contractual *nexus* between or among any of the parties and even though the limitation periods in the contract between the general contractor and its defunct masonry subcontractor had long since expired. La Forest J. held the case to be distinguishable on a policy level from cases where the workmanship was merely shoddy or substandard but not dangerously defective. La Forest, writing for the majority, argued that it was:

...reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable.

The limitation clause in the original contract did not help Bird::

It must be remembered that we are speaking here of a duty to construct the building according to reasonable standards of safety in such a manner that it does not contain *dangerous* defects. As this duty arises independently of any contract, there is no logical

reason for allowing the contractor to rely upon a contract made with the original owner to shield him or her from liability to subsequent purchasers arising from a dangerously constructed building.

In light of this decision, insurance underwriters should drastically revise their terms to exclude the threat of indeterminate liability, and contractors would be well advised to obtain a binding covenant that the owner, in the event of resale, enforce restrictions similar to the original one.⁴⁴

The most recent Supreme Court of Canada development of this point is *Bow Valley Husky v. Saint John Shipbuilding*.⁴⁵ Two exploration companies, Husky and Bow Valley, contracted with Saint John Shipbuilding to build an oil drilling rig. An off-shore company, Bow Valley Husky (Bermuda) Ltd., was incorporated, and ownership and the construction contract were transferred to that company before construction began. The owner selected a heat trace system built by an independent manufacturer and had the builder install it. The manufacturer's specifications called for the installation of a ground fault circuit breaker to cut off the power in case of an electrical fault. The breaker was not installed. In addition, the shipbuilder and its trade knew that the insulation they had specified was particularly flammable, but they chose not to warn the plaintiff. A fire ensued because of the ground fault breaker, the cable trays spread the fire because of the flammable insulation and the rig was out of service for several months.

⁴⁴ W.L.N. Somerville, "Plaintiffs 10 – Insurers -0.5" (1995), 21 C.L.R. (2d) 166.

With regard to Husky's and Bow Valley's claim for pure economic loss, the Court held that contractual relational economic loss is recoverable only in certain circumstances. So far, these circumstances were defined as follows: cases where the claimant has a possessory or proprietary interest in the damaged property; "general average cases", and cases where the relationship between the claimant and property owner constituted a joint venture. The *Husky* case did not fall into any of these three categories. McLachlin J. held, however, that these categories were not closed and that the Court had to consider whether the situation was one where the right to recover such loss should nevertheless be recognized. Applying the *Anns v. Merton* test, the Supreme Court of Canada held that the manufacturer "knew of the existence of the plaintiffs and others like them and knew or ought to have known that they stood to lose money if the drilling rig was shut down." However, the Court went further to hold that on the facts of this case policy reasons did indeed preclude recovery. The most important policy reason was the policy against indeterminate liability. McLachlin J. held that:

If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged... What has been referred to as the ripple effect is present in this case.

The *prima facie* duty of care was therefore negated. The trial judge's apportionment of liability was not disturbed. In a purely commercial setting, without any issues of public safety at stake, the Supreme Court seems prepared to apply the *Anns v. Merton* test

⁴⁵ (1997), 153 D.L.R. (4th) 385.

against expanded liability. There is a clear trend, however, towards findings of liability in cases with an aspect of real and substantial danger to the public, even where there is no privity of contract between plaintiff and defendant and even when no injury has actually been sustained by the plaintiff.⁴⁶

The respondent shipbuilder had attempted to argue that the following clauses in its contract with the respondent excluded its duty to warn. Clause 702 stipulated that upon delivery, the respondent's only "sole obligation with respect to the Vessel shall be as specified in article IX (Warranties). The two other clauses relied on read as follows:

905. The remedies provided in this Article are exclusive, and Builder shall have no liability whatever for any consequential loss, damage or expense arising from any defects.

907. Builder's liability with respect to the Owner Directed Supply shall extend only to installation thereof in accordance with the certified equipment drawings and manuals furnished by the supplier in those instances where such equipment is actually installed by the Builder. In all other instances, the sole risk and responsibility for Owner Directed Supply shall, as between Builder and Owner, be borne by Owner.

Referring to *BG Checo*, McLachlin J. held that parties are generally free to contract to limit or waive the duties which the common law would impose on them for negligence, but that as far as the tort duty is not contradicted by the contract, it remains intact. As held in *London Drugs v. Kuehne & Nagel*, tort liability has to be assessed in a

⁴⁶ See also *Lewis (Guardian ad litem of) v. British Columbia* (1997), 153 D.L.R. (4th) 594 (S.C.C.).

“contractual matrix”, stressing the importance of the parties’ planned obligations. Finally, reference was made to the *Rafuse* principle that a tort claim cannot be used to escape an otherwise applicable contractual exclusion or limitation clause. Based on these cases, Madam Justice McLachlin argued that:

In order to determine the extent to which the parties’ planned obligations affect their tort liabilities, it is necessary to ascertain the intention of the parties with respect to the particular issue from the contract documents as a whole: *BG Checo, supra*. In doing so, it must be kept in mind that generally limitation clauses are strictly construed against the party seeking to invoke the clause: see e.g. *Hunter Engineering Co. v. Syncrude Canada*.

Applied to the facts in this case, Justice McLachlin would not have allowed the appellant to rely on the exclusion of liability clauses. As the passage provides a powerful example of interpretation of an exclusion clause, it is reproduced in full (paragraphs 32 to 34):

[The appellant] places special emphasis on the fact that [the flammable insulation material] was “owner directed supply”. Clause 907, it submits, excludes all liability for owner-directed supply, including liability for breach of duty to warn of the risks associated with the use of a product. I do not read clause 907 as extending to duty to warn. The starting point in construing clause 907 is that it functions to exclude or exempt from liability. As such, it must be narrowly construed. With this in mind, one turns to the wording and context of the clause 907 exemption. The first thing to note is that it falls under Article XI, entitled “Warranties”. This suggests, as argued earlier, that the parties intended clause 907 to apply to defects in materials and workmanship. The words of clause 907 are consistent with this interpretation. The words “owner directed supply”

connote goods supplied, not damages that might flow from the inappropriate use of a product. The purpose of owner-directed supply clauses in the context of construction contract warranties is to narrow the scope of the warranty for owner-directed materials or “supply”. The builder is not responsible for defects in the materials chosen by the owner, only for defective installation. This is fair, since the owner has directed the use of the materials. In this sense, [the appellant] limited its liability “for the choice of [the insulation material]”. Through its contract, it stated that it would not be liable for defects in the product supplied. Clause 907, however, does not address the quite different problem of whether, in all the circumstances, [the appellant] was under a duty to warn [the respondent] of the fire risks associated with the use of [the insulation material]. That duty arose independently of contract. It is grounded not in the contract but in [the appellant’s] particular knowledge of the flammability of [the insulation material]. To put it another way, clause 907 addresses defects in products or their installation. If [the respondent] alleged that the [insulation material] supplied was defective, clause 907 would provide a complete defence. But [the respondent] does not allege that the [insulation material] supplied was defective. It makes the quite different claim that perfectly sound [insulation material], properly installed, introduced a risk which [the appellant] was under a duty to warn it about. To that claim, clause 907 provides no defence. I conclude that the contractual matrix in which the duty to warn of the inflammability of [the insulation material] arose does not negate or “contradict”, to use the language of *BG Checo, supra*, that duty. It follows that [the respondent] was entitled to claim against [the appellant] based on the tort duty to warn.

On this point, however, the majority of the Court disagreed. Justice Iacobucci, with Gonthier, Cory and Major JJ. concurring, upheld the exclusion clause:

While I agree with most of [Justice McLachlin's] analysis in this case, I cannot, with respect, concur with her interpretation of clauses 702, 905 and 907 of the contract between [the builder] and [the owner]. I agree with my colleague when she points out that limitation and exclusion clauses are to be strictly construed against the party seeking to invoke the clause. I also agree that, where the planned contractual obligations of two parties negate tort liability, contract will "trump" tort. But, I disagree with her conclusion that the clauses in question do not negate [the builder's] duty to warn.

Clause 907 states in part that "Builder's liability with respect to Owner Directed Supply shall extend *only* to installation thereof... (emphasis added). As I read this clause, the parties have chosen to specify the *only* ground of builder liability related to the use of Thermaclad, namely, negligence in the installation thereof. By expressly limiting liability to *only* these circumstances, the parties have, in my view, by necessary implication excluded all other grounds of builder liability, including the duty to warn...

Additional reinforcement for my conclusion that the contract provisions create exclusive liability limited to installation is found in the concluding language of clause 907, which reads: "In *all* other instances, the *sole* risk and responsibility for Owner Directed Supply shall, as between Builder and Owner, be borne by Owner" (emphasis added). I also draw support from clause 905, which states in part that, the "remedies provided in this Article are *exclusive*" (emphasis added). In addition, clause 702 states that "the Builder's *sole* obligation with respect to the Vessel shall be as specified in Article IX" (emphasis added). That article contains both clauses 905 and 907.

5. Third Party Beneficiaries

In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*,⁴⁷ employees of the defendant corporation were ultimately found liable for damages to a large transformer that had been delivered to the defendant corporation for storage. The warehouse contract limited the defendant's corporation liability to \$40.00, unless additional insurance was purchased:

LIABILITY – Sec. 11(a) The responsibility of a warehouseman in the absence of written provisions is the reasonable care and diligence required by the law.

(b) The warehouseman's liability on any one package is limited to \$40 unless the holder has declared in writing a valuation in excess of \$40 and paid the additional charge specified to cover warehouse liability.

The plaintiff opted to include the transformer on its own policy and did not buy the additional coverage. With such a limitation staring it in the face, it is a small wonder the plaintiff took a run at the employees themselves. Two of Kuehne & Nagel's employees attempted to lift the 7500 lb. transformer by using two forklifts at the same time. Safe practice required the transformer to be lifted by crane by lifting brackets attached to the transformer for that specific purpose. The transformer fell off the two forklifts, causing \$33,955.41 in damages. A conventional analysis would have found the employer and not the employees liable for any damage caused during the normal course of carrying out the employees' work for the employer and, by contract, limited

⁴⁷ [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261.

the damages to \$40.00. On the issue of the employees' personal liability in *London Drugs*, however, Iacobucci J. wrote for the Supreme Court of Canada that:

There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the 'very essence' of his or her employer's contractual obligations with a customer, does not owe a duty of care, whether one labels it 'independent' or otherwise, to the employer's customer.

The Court held the workers generally liable, but held that they were third party beneficiaries to the limitation of liability clause in the employer's contract with the appellant. Iacobucci J., writing for the majority, held as follows:

In my view, the respondents were third party beneficiaries to the limitation of liability clause found in the contract of storage between their employer and the appellant and, in view of the circumstances involved, may benefit directly from this clause notwithstanding that they are not a signing party to the contract. I recognize that such a conclusion collides with privity of contract in its strictest sense; however, for reasons that follow, I believe that this Court is presented with an appropriate factual opportunity in which to reconsider the scope of this doctrine and decide whether its application in cases such as the one at bar should be limited or modified. It is my opinion that commercial reality and common sense require that it should.

After reviewing in detail the law on privity of contract, Iacobucci J. set forth the following test to determine when employees should be allowed to benefit from a liability clause found in a contract between their employer and its customer:

- (1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and
- (2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment *and* must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.

Applying the new test to the case at bar, Iacobucci J. found that:

When all circumstances of this case are taken into account, including the nature of the relationship between employees and their employer, the identity of interest with respect to contractual obligations, the fact that the appellant knew that employees would be involved in performing the contractual obligations, and the absence of a clear indication in the contract to the contrary, the term “warehouseman” in s. 11(b) of the contract must be interpreted as meaning “warehousemen”. As such, the respondents are not complete strangers to the limitation of liability cause. Rather, they are unexpressed or implicit third party beneficiaries with respect to this clause.

The Ontario approach developed in the 1990 case of *Muller Martini Canada Inc. v. Kuehne & Nagel International Ltd.*⁴⁸, which had come to the opposite result and had not allowed warehouse employees to rely on a limitation clause in the warehouse receipt, will

⁴⁸ (1990), 75 O.R. (2d) 176 (Ont. C.A.).

therefore have to be reconsidered.⁴⁹ It is now clear that a third party which is involved in the activity covered by the limitation clause and which was intended to be covered by the clause can rely on the protection offered by that clause.⁵⁰

The Nova Scotia Court of Appeal, in *A.C.A. Co-operative Assn. Ltd. v. Associated Freezers of Canada Inc.*,⁵¹ also dealt with a warehousing contract limiting liability to \$40 per package. Freeman J.A. held that:

The contractual limit would apply in tort as well, but that is not an issue in this appeal. I accept the reasoning of the British Columbia Court of Appeal in *London Drugs v. Kuehne & Nagel International Ltd.* that tort liability in bailment is subject limitations provided for by contract, and extends to employees of the bailee.

If the employees in *Kuehne & Nagel* were in a position to rely on the limitation clause, what about other potential third party beneficiaries? In the Supreme Court of Canada's decision in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*,⁵² a contractor had successfully tendered to construct a road. Due to errors in the drawings and specifications prepared by the engineers, the contractor incurred additional expenses. Both the chambers judge and the British Columbia Court of Appeal had ruled that the contractor could not pursue an action against the engineers, holding that the engineers

⁴⁹ For a discussion of the different approaches taken in *London Drugs* and *Muller Martini*, see Nishan Swais, "Exemption Clauses in the Construction Law Setting: An Analysis of Recent Developments" (1991), 44 C.L.R. 272.

⁵⁰ Immanuel Goldsmith, Thomas G. Heintzman, *Goldsmith on Canadian Building Contracts*, 1998 – Release 1 (Toronto: Carswell, 1998) 6§2(b)(i)(C). See also two appeal decisions on point referred to: *British Columbia v. R.B.O. Architecture Inc.* (1995), 20 C.L.R. (2d) 285 (B.C. C.A.); *A.C.A. Cooperative Association Ltd. v. Associated Freezers of Canada* (1992), 3 C.L.R. (2d) 263 (N.S. C.A.).

⁵¹ (1992), 3 C.L.R. (2d) 263 (N.S. C.A.).

owed no duty of care to the contractor. The Supreme Court of Canada allowed the appeal against the engineering firm, but not against the individual engineers. The problem arising in this case that is of interest in this context is whether the engineers, who were not a party to the contract, could claim the benefit of its exclusion of liability for the representations in the tender documents. That clause stipulated that any representations in the tender documents were “furnished merely for the general information of bidders and [were] not in anywise warranted or guaranteed by or on behalf of the Minister...”

McLachlin J. held as follows:

In *London Drugs* the fact that the work for which the exemption was given could only be done by the employees, taken together with other circumstances including the powerlessness of the employees to protect themselves otherwise, suggested that a term should be implied that the clause was intended to benefit them, or alternatively, that the intention of the parties manifested in the contract must be taken to limit the duty of care in tort. The facts in this case do not give rise to such an interference; rather, cl. 42 is entirely consistent with the conclusion that the protection was intended for the benefit of the province alone. Moreover, the engineering firm, unlike the employees in *London Drugs*, could have taken measures to protect itself from the liability in question. It could have placed a disclaimer of responsibility on the design documents. Alternatively, it could have refused to agree to provide the design without ongoing supervision duties which would have permitted it to make alterations as the contract was being performed... Finally, the engineering firm might have decided to accept the risk that tenderers would rely on its design to their detriment, and have insured itself accordingly. In short, the circumstances of the case, combined with the wording of the exclusion clause, negate any

⁵² [1993] 3 S.C.R. 206, 107 D.L.R. (4th) 169, 12 C.L.R. (2d) 161 (S.C.C.).

inference that the contractor should be taken as having excluded its right to sue the engineers for design deficiencies by its contract with the province. For these, reasons, I conclude that cl. 42 of the contract between the contractor and the province does not assist the engineering firm.

The 1995 case of *British Columbia v. R.B.O. Architecture Inc.*⁵³ also involved architects, professional negligence and duty of care. The contract between the architect and the housing project sponsor contained the following clause:

3.9.1. In consideration of the premises and of provision of services by the Architect to the Client under this agreement, the Client agrees that any and all claims which he has or hereafter may have against the Architect in any way arising out of or related to the Architect's duties and responsibilities pursuant to this agreement (hereinafter referred to in this Article 3.9 as "claims" or "claim"), whether such claims sound in contract or tort, shall be limited to the amount of \$250,000.00 each claim and \$500,000.00 for all claims during each period of coverage as provided by the Architect's professional liability insurance or indemnity against errors and omissions in effect at the date of execution of this agreement, including the deductible portion thereof, and to the extent only that such insurance or indemnity is available to the Architect to satisfy such claims.

The defendant engineer was retained by the architect to provide the structural design work. A structural design error as well as administration errors by the architect caused the project to overrun its budget. The British Columbia Supreme Court held that the contract between the architect and the sponsor was to be interpreted in the context of a more

complex contractual scheme in which the personal relationship between the parties was an important factor. The sponsor had retained the architect to design and supervise construction. The architect was to provide proof of insurance to the sponsor, and the sponsor was required to assert claims against others who might reasonably be liable for claims asserted against the architect. The sponsor was to promptly notify the architect of any “fault or defect in the project or any nonconformity with the requirement of the Contract...” Preston J. held that:

The circumstances of this case are markedly different from those before the court in *London Drugs*. There, the limitation clause was a simple one. The contract was not for provision of professional services of a personal nature. The extension of the liability clause was to employees, not to an independent contractor. Here, correlative duties are placed by the contract on the contracting parties which are inextricably bound up with the limitation. Apparently, that was not so in *London Drugs*. Paragraph 3.9.1 [...] does not expressly or impliedly extend the benefit of the monetary limitation on claims to the defendant [engineer].⁵⁴

The limitation clause was held not to implicitly extend to cover the engineer.

The last in a series of Supreme Court of Canada decisions establishing a principled approach to the doctrine of privity of contract was the February 25, 1999 decision in

⁵³ (1995), 20 C.L.R. (2d) 285 (B.C. S.C.).

⁵⁴ The Court of Appeal, when dismissing the appeal from the chamber judge’s dismissal of an application for summary dismissal, had arrived at a different conclusion in this respect. Preston J. argued that as this issue was not fully canvassed by the Court of Appeal, that Court’s words were an expression of its view on the limited material before it. For the appeal decision, see (1994), 20 C.L.R. (2d) 21.

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,⁵⁵ Justice Iacobucci, for the Court, dealt with the application of the doctrine of privity of contract to a waiver of subrogation clause in a contract of marine insurance. The facts are simple. Can-Dive chartered a derrick barge called the “Sceptre Squamish” from the owner, Fraser River Pile & Dredge Ltd.. Fraser insured the barge and as its charter contract shifted all risks to the charterer, it took waiver of subrogation protection in its full subscription policy. Can-Dive was an additional” un-named insured on the Fraser policy. The “Sceptre Squamish” sank in November, 1990. Fraser recovered the value of the barge from its insurer but, in settling with the insurer, Fraser expressly waived the benefit of the waiver of subrogation clause so as to let the insurer recover from Can-Dive. The insurer pursued a subrogated action against Can-Dive in Fraser’s name. Can-Dive pleaded the benefit of Fraser River Pile’s waiver of subrogation clause, which read as follows:

In the event of any payment under this Policy, the Insurers shall be subrogated to all of the Insured’s rights of recovery therefore, and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights, but it is agreed that the Insurers waive any right of subrogation against:

[...]

(b) any charterer(s) and/or operator(s) and/or lessee(s) and/or mortgagee(s).

Justice Iacobucci, for the Court, dealt with the privity issue head on. The Court chose to express a principled exception to the doctrine of privity of contract. This is entirely consistent with the same principled approach the Supreme Court of Canada has applied in many areas of the law over the last several years.⁵⁶ As Justice Iacobucci observed in

⁵⁵ (1999), 176 D.L.R. (4th) 257 (S.C.C.).

⁵⁶ See, for example, *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, (1992), 97 D.L.R. (4th) 261 (S.C.C.); *Canadian General Electric Co. v. Pickford & Black Ltd.* (1971), 14 D.L.R. (3d) 372 (S.C.C.),

Fraser River Pile & Dredge, the majority of the Court in *London Drugs* had stated that in circumstances where the traditional exceptions to privity of contract, such as agency or trust, do not apply, Courts may nonetheless undertake the appropriate analysis, bounded by both common sense and commercial reality in order to determine whether the doctrine of privity with respect to third party beneficiaries “should be relaxed in the given circumstances”.

Justice Iacobucci observed that is not the intention of the Supreme Court of Canada in the *London Drugs* case to limit the application of a principled approach to relaxing the strict rule of privity of contract to situations only involving an employer/employee relationship:

As a preliminary matter, I note that it was not our intention in *London Drugs*, supra, to limit application of the principled approach to situations involving only an employer-employee relationship. That the discussion focused on the nature of this relationship simply reflects the prudent jurisprudential principle that a case should not be decided beyond the scope of its immediate facts.

In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependant upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and (b)

Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd. (1980), 111 D.L.R. (3d) 257 (S.C.C.); *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* (1986), 28 D.L.R. (4th) 641 (S.C.C.).

are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intention of the parties?

In the final result, in the *Fraser River Pile & Dredge* case, the Court gave Can-Dive the benefit of the waiver of subrogation clause. With regard to the first inquiry, Can-Dive was said to have a very compelling case given the express reference in the waiver of subrogation clause to charterers, a term that on plain reading of the contract included Can-Dive. The second requirement was also fulfilled:

At issue is whether the purported third-party beneficiary is involved in the very activity contemplated by the contract containing the provision upon which he or she seeks to rely. In this case, the relevant activities arose in the context of the relationship of Can-Dive to Fraser River as a charterer, the very activity anticipated in the policy pursuant to the waiver of subrogation clause. Accordingly, I conclude that the second requirement for relaxing the doctrine of privity has been met.

This result was also thought to be much more in touch with commercial reality. It was held that the Court was required to consider “commercial reality” in establishing a principled exception.

Despite the Supreme Court of Canada's development of a principled approach to the doctrine of privity, the Ontario Court of Appeal, in its recent decision of *Van Patter v. Tillsonburg District Memorial Hospital*,⁵⁷ decided to adhere to a strictly doctrinal approach to the issue. The Court was faced with difficult equities. The third party releasee, Rawlins, was involved in a motor vehicle accident with the Plaintiff, Van Patter. Van Patter was injured, but quickly settled with Rawlins for a relatively modest cash payment. Rawlins' solicitors required and obtained a standard form of release, containing the following clause:

AND FOR THE SAID CONSIDERATION it is further agreed not to make claim or take proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise.

Van Patter's symptoms persisted and, indeed, worsened. She discovered that her neck had actually been broken in the accident and that she had been misdiagnosed. Faced with the fact of the release of Rawlins, Van Patter sued the Hospital at which she had been treated after the accident and the doctors who had attended her there. These Defendants promptly third parted Rawlins and the owner of the Rawlins' vehicle. The standard claims and defences between the Plaintiff and Defendant in negligence were made. In addition, the third party, Rawlins, counterclaimed against the Plaintiff for damages for breach of the release which counterclaim the Plaintiff defended on the basis that the release was void *ab initio* on grounds of mutual mistake.

⁵⁷ (1999), 45 O.R. (3d) 223 (Ont. C.A.).

The third parties then moved under rule 20.04(2) for summary judgment dismissing the Plaintiff's claim on the ground that there was no genuine issue for trial and, in the alternative, moved under rule 21.01(1)(b) to dismiss the Plaintiff's claim on the ground that it disclosed no reasonable cause of action.

Justice Killeen followed Justice Sutherland in *Ysselstein v. Tallon*⁵⁸ and granted the Rawlins' motion for summary judgment. The Plaintiff appealed. Justice Borins stated the issue for the Court of Appeal as:

...whether the Motions Judge was correct in concluding that the third party could enforce the Plaintiff's negative promise not to sue another person who might seek contribution or indemnity from the third party by precluding the Plaintiff in claiming damages from (the doctors)".

Justice Borins approached this issue on the basis of privity of contract. While recognizing that the doctrine of privity of contract had been challenged academically in recent years, the Court endorsed the view, as a general rule of law, that a contract can only be enforced by the parties to it. Rawlins could not, therefore, enforce its release for the benefit of the defendants, as it would not have been open to the defendants themselves to rely on such a release.

Justice Borins considered Sutherland J.'s 1992 *Ysselstein* decision and the line of authorities considered there, including *Athabasca Realty Co. v. Foster*,⁵⁹ and rejected the

Ysselstein line of argument on the ground that the authority relied on by Sutherland J. were cases in which injuries were subsequently discovered to be more serious than originally believed at the time a settlement had been reached. The issue before the Court in *Van Patter*, on the other hand, was whether the person who caused an injury was entitled to enforce a negative covenant not to sue another person. Having overruled *Ysselstein*, and having applied a monolithic view of privity of contract, Justice Borins proceeded to analyze the third parties' rule 20 motion in the context of rule 29.05(1), which limits a third party defence of the main action to defences that would otherwise be available to the defendant itself.

The remedy granted by Killeen at first instance in the *Van Patter* case, Justice Borins found, must have derived from an application of rule 29.05(2)(a) and rule 28.01(3) not, as Sutherland had ruled in *Ysselstein*, from rule 20.09, "which applies to a motion for summary judgment to dismiss a third party claim":

Although the Plaintiff has not moved to strike this defence (based on the Release the Plaintiff signed) as it was not a defence open to the third parties, it could provide neither a defence which they were entitled to plead, nor the foundation for the motion judge's dismissal of the main action. This is because rule 21.01(3) requires the delivery of a statement of defence as a condition precedent to bringing a motion for summary judgment.

The appeal was allowed and the Plaintiff was permitted to proceed in its action against the Hospital and doctors. The Court appears to have attempted to temper the effect of its

⁵⁸ (1992), 18 C.P.C. (3d) 110 (Ont. Gen. Div.).

decision on the third party Releasee by encouraging the third party to proceed with the second arm of its original motion under rule 21.01(1)(b), to strike out a pleading on the ground that it discloses no reason to cause of action or defence.

Justice Borins seemed troubled by the fact that the original result was a windfall for the medical Defendants. If the decision had stood, these Defendants would have benefited from a release extracted from the original tortfeasor prior to the time to the extent of the Plaintiff's damages were discovered and without having provided any consideration of any kind for the release.

Looked at from another perspective, that of Rawlins and its insurer, what else could they have done? Both parties to the original release had legal counsel. The words of the release are clear. The release language is in everyday use across the Province, even the Country. Consideration passed.

Had Van Patter sued Rawlins directly, the release would have been a complete answer. On the other hand, had the Defendants not third partyed Rawlins, could Rawlins have stayed the Plaintiff's action? On a literal reading of the release, this is possible.

A practical solution is to redraft the standard third party clause to go further and provide the releasee with the releasor's covenant to indemnify and exonerate to the full extent of any recovery a Defendant might make in such third party proceeding or proceeding

⁵⁹ (1982), 18 Alta. L.R. (2d) 385, 132 D.L.R. (3d) 556 (Alta. C.A.).

claiming contribution and indemnity, plus the cost of defence and conduct of the third party proceeding.

There must be many claims adjusters left puzzling over the effect of *Van Patter*. Will it re-open settled losses? Time will tell.

III. Warranties and Contribution

The Supreme Court of Canada, in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*,⁶⁰ dealt with the effect of exclusion clauses on contribution. In this case, the plaintiff had sued both the engineer and the contractor for damages for a defective roof. Both defendants were found at fault by the trial judge. The contractor's contract with the plaintiff, however, contained the following provisions:

Article 17. Correction after Final Payment. Neither the final certificate nor payment thereunder, nor any provision in the contract documents shall relieve the Contractor from responsibility for faulty materials or workmanship, which appear within a period of one year from the date of substantial completion of the work, and he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom which appear within such period of one year...

⁶⁰ [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 (S.C.C.).

Article 28. Certificates and Payments. [...] The issuance of the final certificate shall constitute a waiver of all claims by the Owner otherwise than under Articles 17 and 29 [dealing with liens] of these conditions and the acceptance of such final certificate by the Contractor shall constitute a waiver by him of all claims except those previously made and still unsettled if any [...].

Laskin C.J.C. held that:

I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case. It is, however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected itself cannot be said to have contributed to any actionable loss to any actionable loss by the plaintiff. This result must follow whether the claim for contribution is based on a liability to the plaintiff in tort for negligence or on contractual liability. In either case there is a contractual shield which forecloses the plaintiff against the protected contractor, and the other contractor cannot assert a right to go behind it to compel the former to share the burden of compensating the plaintiff for its loss.

It was held to be an essential condition of the right to contribution under s. 2 of the *Negligence Act*,⁶¹ that the person from whom the plaintiff sought contribution was liable to the plaintiff. This not being the case here because of the contractual exclusion of liability, no contribution could be sought. The Chief Justice of Canada addressed the issue of liability in both tort and contract, the very issue later decided in *Rafuse*. Laskin C.J.C. held that had the contractor been liable in tort, the contract provisions would have protected it:

I do not think that any comfort is available to Giffels from the “exculpatory clause” cases which hold that, unless negligence is expressly mentioned, exculpation from liability will not cover liability for negligent conduct if there is subject-matter for the clause without reference to negligence. Faulty material or workmanship is expressly covered in art. 17 and art 28 must be read to exclude all claims under or in respect of the performance of the contract, and hence it is immaterial whether they arise in contract or in tort. In the present case, it was the same negligence, whether regarded as breach of contract or as a basis for an independent tort claim, which lay at the base of any claim by the plaintiff against [the contractor] for damages.

In another roofing case, the Saskatchewan Court of Appeal addressed the issue whether a warranty given by the fabricator and supplier of a space frame system could exclude liability in tort. In *University of Regina v. Pettick*,⁶² Sherstobitoff J.A. interpreted *Giffels* to be an application, before the fact, of the *Rafuse* rules with respect to exclusion of liability to the effect that a tort claim cannot be used to overcome a contractual exclusion

⁶¹ R.S.O. 1970, c. 296, s. 2(1).

of liability. The appellant in the Saskatchewan case had given a one year warranty similar to the one used in *Giffels*. There was, however, no exclusion of liability clause. The Court held that:

There is nothing in a warranty in itself that suggests that further liability should be excluded. The warranty is a bargain that holds the contractor liable irrespective of negligence for a period of time. A tort claim requires proof of negligence. That it should continue beyond the warranty period does not interfere with the legitimate expectations of the parties as to their contractual relationship. Therefore, the 1-year warranty does not exclude further liability for negligence.

McLeod J., dissenting, would have held that the warranty afforded the appellant protection against liability, arguing as follows:

[The appellant] gave the University a guarantee whereby it undertook to correct faulty workmanship and materials discovered within 1 year after the final certificate. At the same time, the University became bound to the limitation of 1 year provided by the guarantee. The reasoning in *Giffels*, supra, applies.

IV. Pay-When-Paid Clauses

⁶² (1991), 45 C.L.R. 1 (Sask. C.A.).

The Ontario Court of Appeal, in *Timbro Developments Ltd. v. Grimsby Diesel Motors Inc.*,⁶³ allowed a general contractor to rely on a standard form clause providing as follows:

When used for sub-contract work the following terms will apply: Payments will be made not more than thirty (30) days after the submission date or ten (10) days after certification *or when we have been paid by the owner*, whichever is the later. Holdback will be retained in accordance with the Mechanics' Lien Act in effect at the time, and when released by owner all payments will be made in Canadian Funds and will be payable at par in Welland (emphasis added by the Court).

In a very short judgment, the Court held that:

The Court is divided on the interpretation of the underlined words which were added to the standard form used by Ontario contractors several months before execution by the subcontractors. The appellants contended that the added clause was ambiguous but the majority (Blair and Cory JJ.A.) reject this submission. In their opinion the clause clearly specifies the condition governing the contractor's legal entitlement to payment and not merely the time of payment. Under the clause, the subcontractor clearly assumes the risk of non-payment by the owner to the contractor. Since Timbro was not paid, it is not obliged to pay the subcontractors and the appeal must fail.

Finlayson J.A., dissenting, is of the view that the clause relates to the timing of payments due under the contract and in no sense puts the subcontractors at risk that they will not be paid if the contractor is not paid. They are not co-adventurers or partners in this

⁶³ (1988), 32 C.L.R. 32 (Ont. C.A.).

construction contract. Having done the work as found by the trial Judge, they are entitled to be paid. There is privity of contract between them and Timbro and the trial Judge was correct in awarding judgment in their favour. He would have allowed the appeal and restored the judgment of the trial Judge.

Leave to appeal to the Supreme Court of Canada was dismissed.⁶⁴ *Timbro* was followed by the Ontario General Division in *Kor-Ban Inc. v. Pigott Construction Ltd.*⁶⁵ However, Bell J., in that case, also quoted from the 1874 case of *McBrian v. Shanly*.⁶⁶ There, a subcontract had provided for payment to the subcontractor within 10 days after the general contractor was paid by the owner. However, the jury concluded that the owner had terminated the contract because of the general contractor's default. Hagarty C.J. held that:

I think the true intent and meaning of such a contract must be that at the best the defendant [general contractor] can say: "If I duly perform my contract with the company [the owners], and though I be entitled to the money from them, if from any cause, not arising from any act or default of mine, they [the owners] do not pay, you [the subcontractor] cannot call on me to pay."

In cases where default of the general contractor caused the non-payment by the owner, Bell J. concluded, the general contractor should not be allowed to rely on the pay-when-paid clause. This reasoning was used in *Applied Insulation Co. v. Megatech Contracting*

⁶⁴ (1989), 99 N.R. 400 (note).

⁶⁵ (1993), 11 C.L.R. (2d) 160 (Ont. Gen. Div.).

⁶⁶ (1874), 24 U.C.C.P. 28 (C.A.).

Ltd.,⁶⁷ where the defendant general contractor was in default and the plaintiff subcontractor had in no way contributed to the problems. The general contractor was not allowed to rely on the clause.

Other provinces' appeal courts decided not to follow *Timbro*. In *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.*,⁶⁸ the payment clause in a subcontract was summarized by the Court as follows:

After deduction for a 10% mechanics' lien holdback and previous payments the balance of the amount of the requisition as approved by the contractor "shall be *due* to the subcontractor on or about one day after receipt by the contractor of payment from the owners". The final payment under the subcontract is to be *made* on acceptance of the work "and *within* thirty (30) days *after* payment has been received by the contractor".

The Nova Scotia Court of Appeal argued that this was not clear enough language to impose a standard term on the subcontractor. Hallett J.A. held that:

In my opinion, in order for a general contractor to impose a term on a subcontractor pursuant to a standard form of contract, that payment for its work is conditional on the contractor being paid by the owner the contract would require much clearer language than that contained in the subcontract between [the respondent] and the appellant. An intention so important cannot be buried in obscure language that would not alert the

⁶⁷ (1994), 22 C.L.R. (2d) 251 (Ont. Gen. Div.).

⁶⁸ (1995), 19 C.L.R. (2d) 1 (N.S. C.A.), leave to appeal to the Supreme Court of Canada refused (1995), 22 C.L.R. (2d) 131 (note).

subcontractor that payment for the subcontract work was conditional on the owner paying the contractor...

Had [the respondent] intended that nothing would be owing or payable to a subcontractor upon completion of the work unless payment was received from the owner, the contract ought to have contained clear words to denote such an intention. Appropriate words would have been that the balance claimed by the subcontractor for the completion of the work pursuant to the terms of the subcontract would only be paid “if” the owner paid the contractor. The word “if” is defined in the Oxford Dictionary as meaning “on the condition or supposition that.” To impose on a subcontractor a term that payment was conditional on the contractor receiving payment from the owner would require the clear language of the nature I have identified.

In Nova Scotia, therefore, it appears that the use of the word “if” will imply a condition precedent.⁶⁹ The Manitoba Court of Appeal, after reviewing both *Timbro* and *Arnoldin*, preferred the latter. In *Winfield Construction Ltd. v. B.A. Robinson Co.*,⁷⁰ Scott C.J.M. held that:

I am also attracted to the reasoning of the Nova Scotia Court of Appeal in *Arnoldin* [...], in which the Court chose to limit the effect of the decisions in *Timbro* and *Kor-Ban* by concluding that it would require very clear and specific words before it could be said that a “pay-when-paid” provision could govern the sub-contractor’s entitlement to payment.

⁶⁹ On the distinction between condition precedent and terms of payment in the context of pay-when-paid clauses, see Harold J. Murphy, “Pay When Paid Clauses in Construction Subcontracts: Conditions Precedent or Terms of Payment?” (1992), 47 C.L.R. 288.

⁷⁰ (1996), 27 C.L.R. (2d) 78 (Man. C.A.).

In a 1997 decision, the Prince Edward Island Supreme Court chose to follow *Arnoldin* and *Winfield*.⁷¹ A clause in the contract between general contractor and subcontractor stated:

IV (b) The subcontractor shall make applications for payment together with supporting Statutory Declarations and/or other documents when required by the Contract Documents on or before the 25th day of each month to the Contractor for approval and due processing covering the value of the products delivered at the site and the work performed by the Subcontractor proportionate to the Subcontract Price up to the last day of the month, whereupon payment to the Subcontractor by the Contractor in the amount of 85% shall become due and payable not more than five (5) days after receipt of the monies by the Contractor from the Owner. Where the Contractor or the Consultant makes any changes to the amount of the applications for payment as submitted by the Subcontractor, the Subcontractor shall be so notified promptly in writing by the Contractor of changes and given the opportunity to defend his submission without delay.

DesRoches J. held that while being aware of jurisprudence tending to support the contractor's attempt to rely on this clause, the substantial weight of authority in Canada and the United States supported the conclusion that in order for a general contractor to be able to rely on a pay-when-paid clause, the language ought to be much clearer than that contained in Article IV (b). Based on *Arnoldin* and *Winfield*, the Court held that:

⁷¹ *R. & G. Masonry Ltd. v. Maxim Construction Inc.* (1997), 36 C.L.R. (2d) 300.

An intention so important cannot be buried in obscure language which would not alert the subcontractor that payment was subject to a condition precedent that the owner pay the contractor.

V. Notice Clauses

In *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*,⁷² a building contract contained the following provision:

22.1 If either party to this contract should suffer damage in any manner because of any wrongful act or neglect of the other party, then he shall be reimbursed.

22.2 Claims under this General Condition shall be made in writing to the party liable within reasonable time after the first observance of such damage, and may be adjusted by agreement or in a manner set out in G.C.7 – Disputes

Various delays and changes occurred. The plaintiff, at a site meeting, indicated that it would seek extra compensation. The minutes of meeting showed that the plaintiff intended to claim for extras for construction costs resulting from changes to the construction schedule made in order to allow the owners to install equipment. The defendant objected, and the issue was not resolved during the meeting. Three months after the meeting, the plaintiff claimed for extras and sued when the defendant refused to pay. The trial judge held that no detailed notice had been given until about two weeks

⁷² (1988), 27 B.C.L.R. (2d) 89 (B.C. C.A.).

before substantial completion, making it impossible for the owner to address cost reduction measures. The notice clause was held to be a bar to recovery. The Court of Appeal agreed, referring to the Supreme Court of Canada's decision in *Corpex (1977) Inc. v. The Queen*.⁷³ In *Corpex*, Beetz J. described the purpose of a notice clause as follows:

Both the contractor and the owner derive some benefit from such a clause. The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of cl. 12 [notice clause], and in particular, if he gives notice provided for in that clause. [...] An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position.

In *Doyle*, Locke J.A. held that:

The provision for notice is useless unless it gives some particulars to the owner as to what the complaint is. It must surely also be given in enough time so that he may take the guarding measures pointed out in *Corpex* if he so desires. An early notice also leaves the owner free to negotiate either under this provision or under any other provision of the contract which may assist in the resolution of the problem. From the standpoint of the contractor, he may not, of course, know precisely what the monetary effect of accumulation of delays might bring about, but an early notification of his concern will also enable him to get himself into a negotiating position as to the method of solution of the problem, and to raise his concerns under the contract.

⁷³ (1982), 6 C.L.R. 221 (S.C.C.).

The grumblings of this contractor, recorded though they may be in site minutes, display no intention to claim until December, 1983. Even then, no claim was actually advanced, but intent was indicated. But no details were given: An owner would be hard put to know exactly what it is to meet, and hence what it is to do. The purpose of the notice is to give the owner an opportunity of considering his position and perhaps taking corrective measures, and he is prejudiced by not being able to do it.

The Ontario Divisional Court, in 1996, heard an appeal from an arbitration award which held that adequate notice of a request for extra compensation had been given.⁷⁴ To begin with, the court held that the determination of whether or not adequate notice was given was a question of mixed fact and law and, in so far as the finding was based on fact, it was not appealable. The relevant clause in this contract read as follows:

GC 22 DAMAGES AND MUTUAL RESPONSIBILITY

22.1 If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom he is responsible in law, then he shall be reimbursed by the other party for such damage. The party reimbursing the other party shall be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party.

22.2 Claims under this General Condition shall be made in writing to the party liable within reasonable time after the first observance of such damage and may be adjusted by agreement or in the manner set out in GC7 – DISPUTES

The arbitrator had considered the following correspondence: First, the contractor submitted a demand for payment in an omnibus Change Notice CN #42. The owner reacted with a letter stating that:

You have indicated to me several times that your labour costs are out of line and your concern has manifested itself quite clearly in CN #42. You have also implied several times that work has been impeded by equipment deliveries and decisions on matters by Quebecor or the engineers.

The contractor responded as follows:

The point is that Campbell-Cox bid on this project based on the information provided at the time of tender and the items listed in same. When this information changes, then the costs have to be addressed... As for our superintendent's time showing up on quoted extras, contractually, we must agree but when you look at the amount of queries presented to (the owner) some consideration should be given.

Corbett J. for the Divisional Court held that:

In the case at hand, the arbitrator relied upon the site minutes which, taken by themselves, would constitute mere grumblings and would not be sufficient to constitute notice. The arbitrator also considered the correspondence. It is significant that this correspondence followed upon the demand for payment under omnibus CN #42. At the meeting of the parties' representatives, it was agreed, in effect, to negotiate this claim by removing the

⁷⁴ *Campbell-Cox Inc. v. Photo Engravers and Electrotypers Ltd.* [1996] O.J. No. 4177 (Ont. Div. Ct.)

claim on an on-going basis. The arbitrator found that there was an agreement to consider the matter when the contract was completed. Thus, the contractor made known the nature of the claim in writing, which claim was asserted initially in the omnibus change order. This claim quantified the cost and projected the ongoing cost by the factor of 14.5% plus the cost of a superintendent. This provided a guide as to the future cost or, rather, a basis for ascertaining the future cost, a time period for resolution, and a postponement of immediate payment. Accordingly, in our view, in all the circumstances there was sufficient evidence to constitute compliance with the contractual requirement to give notice in writing of the claim.

VI. Conclusion

Two things become clear upon reviewing the case law. Firstly, courts will still refuse to allow a party to rely on any exclusion or limitation clause where doing so would be blatantly inequitable. However, the courts seem to place more weight on the terms agreed to by the contracting parties than they used to do. What is clear, though, is that any party attempting to protect itself by drafting such a clause has to be very certain to use very clear and unequivocal terms in order to achieve the protection sought.