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Promissory Estoppel in the Supreme Court of Canada

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I. Introduction

In 1972, Viscount Hailsham of St. Marylebone said:

... the time may soon come when the whole sequence of cases based on promissory estoppel since the war ... may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent exposition which have never been systematically explored.¹

Promissory estoppel has yet to receive serious attention from the Supreme Court of Canada, in spite of the fact that it has had several opportunities to provide a coherent exposition of this doctrine. The attitude of the Supreme Court is perplexing in light of the frequency with which this doctrine is raised in the lower courts. Both trial and appellate courts have disagreed over the nature of the doctrine and its availability as a cause of action.² In spite of this discord, the Supreme Court has not used the opportunities that have arisen to provide guidance to the lower courts. The Supreme Court is not alone in this benign neglect of promissory estoppel. There is little discussion of the doctrine in the academic literature.³

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1. *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.*, [1972] A.C. 741 at 758.

2. Promissory estoppel has been raised fairly often in the Supreme Court of Canada. See: *Conwest Explorations Ltd. v. Letain*, [1964] S.C.R. 20, 41 D.L.R. (2d) 198; *J. Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607; 68 D.L.R. (2d) 354; *Canadian Superior Oil v. Padden-Hughes Development Co.*, [1970] S.C.R. 932; 12 D.L.R. (3d) 347; *Sohio Petroleum Co. et al v. Weyburn Security Co. Ltd.*, [1971] S.C.R. 81; 74 W.W.R. 626; 12 D.L.R. (3d) 340; *Boise Cascade Canada Ltd. v. The Queen in Right of Ontario; The Town of Fort Frances v. Boise Cascade Canada Ltd.*, [1983] S.C.R.; 46 N.R. 108; 143 D.L.R. (3d) 193; *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641; 146 D.L.R. (3d) 577; *Scotsburn Co-op Services v. W.T. Goodwin Ltd.*, [1985] 1 S.C.R. 54; 57 N.R. 81; *V.K. Mason Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271.

As examples of decisions in which lower courts have disagreed over the exact ambit of promissory estoppel, see: *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 585 (Ont H.C.); *M.L. Baxter Equipment Ltd. et al v. Geac Canada Ltd.* (1982), 36 O.R. (2d) 150, 133 D.L.R. (3d) 372; *Edwards et al v. Harris-Intertype Canada Ltd.* (1983), 40 O.R. (2d) 558.

3. There is very little Canadian academic literature on the topic. See: Hickling, M.A., *Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?* (1983), 17

The purpose of this article is twofold. In the first part of this article, I will discuss the role of doctrines which are commonly defined as equitable in our legal system. Then, I will discuss the doctrine of promissory estoppel in order to show how it serves the same function in contract law. In light of this analysis, I will describe the ambit of the doctrine. In the second part, I will discuss three recent decisions of the Supreme Court of Canada⁴ in light of the general discussion of estoppel. These decisions show, in my opinion, that the highest court is unduly superficial in its analysis of promissory estoppel. This superficiality reveals the extent to which judicial reasoning follows formulae without addressing the important legal controversies. The result is decisions that lack rigour and do not provide effective guidance to the lower courts. I believe that if the courts were more sensitive to the role of equity in contract law, their decisions would be more coherent and more convincing.

II. *The Role of Equitable Doctrines in Contract Law*

The doctrine of promissory estoppel can only be satisfactorily defined in light of its origins in Equity and the purposes which equitable doctrines serve in our legal system.⁵ The common lawyer traditionally regards equitable doctrine as some sort of intruder into the logical structure of the law. This hostility is archaic and hard to justify.⁶ Equitable rules or

U.B.C. L. Rev. 183; Shepherd & Turco, *Promissory Estoppel and the Supreme Court of Canada* (1966), 2 U.B.C. L. Rev. 564; Waddams, S.M., *The Law of Contracts*, (2nd ed. Toronto: Canada Law Book, 1984) at 143-153. See also: Thompson, M.P., *From Representation To Expectation: Estoppel As A Cause Of Action* (1983), 42 Cambridge L.J. 257 and Lindgren, K.E., and Nicholson, K.G., *Promissory Estoppel in Australia* (1984), 58 Aust. L.J. 249.

4. *Engineered Homes Ltd. v. Mason*, *supra*, note 2; *Scotsburn Co-op Services v. W.T. Goodwin Ltd.*, *supra*, note 2; *V.K. Mason Ltd. v. Bank of Nova Scotia*, *supra*, note 2.

5. For traditional analyses of equity, see generally: Baker & Langan, *Snell's Principles of Equity*, (28th ed. London: Sweet & Maxwell Ltd., 1982); Hanbury & Maudsley, *Modern Equity*, (12th ed. by J. Martin, London: Stevens & Sons, 1985); Spencer Bower & Turner, *Estoppel by Representation*, (3rd ed. London: Butterworths, 1977).

6. Lord Diplock recently stated:

My Lords, if by "rules of equity" is meant that body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly of the Statutes of Uses or of *Quia Emptores*. Historically all three have in their time played an important part in the development of the corpus juris into what it is today; but to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years.

Your Lordships have been referred to the vivid phrase traceable to the first edition of Ashburner, *Principles of Equity* where, in speaking in 1902 of the effect of the

doctrines are not intruders into the common law which must be limited in order to protect the integrity of the common law. Equitable rules and doctrines are integral components of the substantive and adjectival law existing today and, moreover, they are necessary elements of a whole. Thus, their availability is not limited to the situations in which equity was willing to intervene prior to 1873. Equitable doctrines have continued to evolve in light of changing social mores and conditions, and have taken on new meaning in the context of the development of the whole legal system. There is no reason why they should not continue to do so.

Equity plays two equally important but not necessarily identical roles in our legal system. First, as some have argued, Equity acts as the conscience of the law.⁷ Therefore, it is rooted in conceptions of natural justice dictated by morality rather than on technical legal rules.⁸ Equity, in its widest sense of “. . . a liberal and humane interpretation of law in

Supreme Court of Judicature Act he says (p. 23) “the two streams of jurisdiction” (sc. law and equity) — “though they run in the same channel, run side and do not mingle their waters.” My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and courts of Chancery (as well as those administered by admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhone and Saone, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner’s fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904 at 924-925.

Later in the same judgement he speaks of “. . . the danger of treating the use of the expression ‘rules of equity’ today as anything more than an indication of the source to which a current rule of the substantive or adjectival law of England can be traced” (at 927). Calling a doctrine ‘equitable’ does not mean that it has to have the same form today as it had in 1875. There is “. . . no ban upon further development of the rules by ‘judicial decision’ ” (at 927). For a critical discussion of this viewpoint, see Hanbury & Maudsley, *Modern Equity*, (12th ed.) *supra*, note 5 at 22-26.

7. Equity then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed and *rational* law is made by it. In this Equity is synonymous to justice in that, to the true sense and sound interpretation of the rule.

Blackstone, *Commentaries on the Laws of England*, Vol. 3 s. 27, at 429.

8. Now Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, harshness and edges of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtilities, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assist it.

Lord Dudley and Ward v. Lady Dudley (1705), Prec. Ch. 241 at 244.

See also Newman, R.A., *Equity and the Law: A Comparative Study* (New York: Oceana Pub. 1961).

general . . .”, runs through all legal doctrines enjoining the courts to be thoughtful and considerate in their application of rules. The oft-quoted maxims of Equity show how equitable doctrines are tied into rough and ready notions of community morality¹⁰ and proper behaviour. Because they have no specific content, these maxims provide a means whereby existing community standards can be taken into account in decision-making without being transformed into rigid rules.¹¹ Thus, it is true that Equity is, in this very general sense, the conscience of the law. But this definition is not, in itself, complete. Equity also has a more precise meaning in that it designates a set of doctrines intended to mitigate the rigours of common law rules when their application would result in injustice in the particular and exceptional case. These doctrines, which have evolved out of the general principles of Equity, have their own rules and standards of application. They are not necessarily co-extensive with the dictates of morality or of natural justice. For that matter, to the extent that Equity in the general sense permeates the entire legal system, it is wrong to suggest that common law rules ignore all considerations of morality or natural justice.¹²

The evolution of equitable doctrines in the nineteenth and twentieth centuries illustrates tension between a very general notion of Equity as conscience and the content of Equitable doctrines. Liberal thought in the eighteenth and nineteenth centuries believed that justice could only be achieved through a ‘scientific’ legal system constructed on the foundation of abstract rules of universal application. As this ideal gained popularity, the Courts of Chancery themselves strove to codify Equity and limit judicial discretion. By the mid-nineteenth century, the Courts of Chancery had become so rule-obsessed and the procedure so technical that their reform became a popular cause.¹³ After the fusion of Equity

9. Allen, C.K., *Law in the Making*, (7th ed. Oxford University Press, 1964) at 385.

10. For a summary of the maxims of equity see Hanbury & Maudsley, *Modern Equity*, (12th ed.) *supra*, note 5 at 26-31.

11. The concept of community standards is inherently controversial because it assumes that the community speaks with one voice. The legal system seldom defines the community in whose name it purports to speak. Nor does it acknowledge that society is made up of numerous communities — religious, political social, economic, sexual — which are in a constant state of flux. The notion of community is used to suppress difference and divergence. To the extent that it is the powerful who define the community voice, Equity can be an ideological tool. However, the legal system cannot allow its definition of community standards to diverge too far from the diverse popular forms of morality if it is to maintain its legitimacy in the eyes of the many communities that make up society.

12. Baker & Langan, *Snell's Principles of Equity*, (28th ed.), *supra*, note 15 at 5-7. As Blackstone points out in volume 3 of his commentaries, there are many injustices which Equity does not correct.

13. “The history of the Court of Chancery is one of the least creditable in our legal records. Existing nominally for the promotion of liberal justice, it was for long corrupt, obstructive, and reactionary, prolonging litigation for the most unworthy motives and obstinately resisting all

with the Common Law in 1873, the appeal of the ideal of a 'scientific' legal system did not diminish. Lawyers, whether trained in Equity or the Common Law, continued the attempt to confine and codify Equity so that its doctrines have become complex and hedged-in by technical rules which restrain judicial discretion.

This evolution of a technical, rules-oriented version of Equity has led lawyers to lose sight of the purpose of discretion in a legal system. These doctrines exist in order to provide the judge with tools whereby she/he can remedy a problem which every system of general rules must resolve. The application of general rules will inevitably produce unjust results in some exceptional cases. No matter how hard a legal system strains to achieve the ideal of a set of abstract general rules that can be applied dispassionately and even mechanically to all cases, there will always be gaps and injustices because reality is complex and unpredictable. A legal system can respond in two ways to these exceptional cases: it can create new rules which are exceptions to the existing rules or it can give the judge the power to grant discretionary relief which mitigates the harshness of the general rule.¹⁴ Both approaches have their advantages

efforts at reform. At no period was the common law open to the same changes in the same degree." Allen, *Law in the Making*, (7th ed.), *supra*, note 9 at 420.

Modern trust law provides a good example of the way in which Equity has been reshaped through the evolution of rules as technical as any of the common law. Obviously the rules governing trusts serve many useful purposes but there are many arbitrary distinctions and peculiar results that suggest that the purpose of trusts has been forgotten. See generally: Hansbury & Maudsley, *Modern Equity*, (12th ed.), *supra*, note 5, for an account of the law of trust.

14. *Id.* at 5, and also Blackstone, *Commentaries on the Laws of England*, Vol. 1, Section 3 at 91-92.

These are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberty of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law are not of a positive kind) there are also courts of equity established for the benefit of the subject, to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.

For another discussion of the tension between rules and discretion see: Wasserstrom, R.A. *The Judicial Decision* (Stanford: Stanford University Press, 1961); Unger, R.M. *Law in Modern Society* (New York: Free Press, 1976) especially at 203-216; Kennedy, D. *Legal Formality* (1973), 2 *Journal of Legal Studies* 351. Another dimension to this debate is the relationship between the preference for rules and male domination of the legal system. Recent feminist work suggests that the male psyche feels much more comfortable with general principles and abstractions than the female psyche. As a result, men tend to believe that the most just result is determined by the application of general rules. Women, on the other hand, tend to make much more contextual moral judgments. (See generally: Gilligan, C., *In a Different Voice*:

and disadvantages. A system based on rules promotes certainty of legal rule and predictability of result. The elaboration of new exceptions attempts to preserve certainty and predictability. But the elaboration of exceptions for all cases risks undermining the very existence of the system of general rules. Carried to its logical extreme, this would lead to a rule for each particular case. More importantly, such a system would become a labyrinth of rules which would be so complex that certainty and predictability would be undermined by the very attempt to preserve them. Thus, the creation of innumerable exceptions would eventually undermine the general rule entirely. Finally, it is doubtful that all exceptional cases could be foreseen and a rule created to cover each case.

Judicial discretion to grant relief that mitigates the harshness of the general rule provides the means whereby a judicial system based on rules can avoid sclerosis. It is no longer necessary to attempt the impossible task of predicting all exceptional cases because the novel situation can be dealt with on its own merits. The judicial system remains flexible, can identify the exceptional case when necessary and, if a trend in the cases is identified, evolve new rules. Paradoxically, judicial discretion helps preserve the general rule by ensuring that it is not used to perpetuate injustice. Thus, the legitimacy of the rule and of the legal system is protected. Of course, judicial discretion has its own dangers. Judges may tend to treat all cases as exceptions and, thereby, undermine the general rule by rendering it superfluous. As a result, predictability and certainty would evaporate and the law would no longer serve as a guide to private planning. Furthermore, discretion can allow idiosyncratic value judgments to determine the results in cases. Most judges strive to prevent their personal prejudices from influencing their decision-making but there is a minority which could potentially abuse discretion in order to advance particular causes or to impose personal beliefs. Perhaps the greater danger is the possibility that perceptions of justice will vary so greatly amongst the judges that the result in any particular case will depend more on the identity of the judge than the merits of the case.¹⁵

This tension between the need for rules and the need for discretion is inevitable in any legal system. Both general rules and discretionary

Psychological Theory and Women's Development (Cambridge: Harvard Univ. Press, 1982)). If these studies accurately describe the differences in the psychological development of the sexes, the domination by men of the legal system until recent times may be one factor that helps us to understand the suspicion with which discretionary remedies have been regarded. As women begin to play an increasingly important role in the legal system, the importance of discretion may be more easily acknowledged. Of course, it is hard to predict whether women will have a greater influence on the legal system than the legal system will have on the women who choose to become lawyers.

15. For an argument that discretion should be 'confined, structured and checked' see: Davis, K.C. *Discretionary Justice* (Chicago: Univ. of Illinois Press, 1969).

remedies are necessary to prevent injustice. A rule-based system of law alone or a discretion-based system would eventually break down. Only a hybrid system can avoid the problems of over-rigidity and arbitrariness of result. However, the proper mix of rules and discretion will always be controversial because there is no mathematical formula whereby it can be calculated. Thus a legal system will move away from one pole and closer to the other according to the economic, social and political context. What cannot happen is the elimination of one pole or the other.

In the early stages of its development, the common law was extremely technical both in procedure and in substantive doctrine.¹⁶ The results were often harsh whether in private law where errors of form could result in substantial losses or in criminal law, where the death penalty was omnipresent. Discretion, whether royal or judicial, was necessary to mitigate the rigours of the legal system. Without it deserving parties could be denied a remedy because of the rules rather than the merits of their case. The Court of Chancery provided one alternative forum in which to seek justice.

For a number of reasons, the English political system in the mid to late nineteenth century opted for a reform of the legal system that led to a differing balance between rules and discretion. Only a few can be suggested here. Ideologically, discretion came to be associated with royal pretensions to rule by divine right and with the arbitrary exercise of royal prerogatives. In the struggle for power between Parliament and the Crown, the Courts of Chancery were associated with the King. In liberal thought and, hence, classical legal thought, justice dispensed according to rules was the means whereby arbitrary power would be confined, democracy ensured, and the industrious rewarded according to their merit. As well, liberal thinkers sought to secularize society. The Court of Chancery was closely associated with the Church and the early Chancellors were often religious officials trained in Canon Law.¹⁷ A legal

16. For an excellent history of the development of contract law and a description of classical legal thought see generally: Atiyah, P.S., *The Rise and Fall of Freedom of Contract*, (Oxford: Oxford Univ. Press, 1979) see also: Simpson, A.W.B., *A History of the Common Law of Contract* (Oxford: Oxford Univ. Press, 1975). This is not the place to attempt a complete history of the Courts of Chancery but it is important to remember that the hostility to equity may also have its roots in the struggles for power between Parliament and The King. Thus, suspicion of equitable doctrine and discretionary justice may have become an accepted tenet of democratic thought in England, because the kings such as King James used these courts as a weapon against opposition to their pretensions to rule by Divine Right. For a highly readable, if anecdotal, account of Sir Edward Coke's role in the conflict between the common law courts and Parliament, on one side and the Crown and the Courts of Chancery on the other, see: Bowen, C.D., *The Lion and the Throne*, (Boston: Atlantic-Little Brown, 1956). See also Newman, *supra*, note 20. In note 33 at 29, the author states that between the reigns of Richard II and Henry IV the Commons petitioned for the abolition of the Courts of Chancery 10 times.

17. See Allen, *Law in the Making*, (7th ed.), *supra*, note 9 at 408-09.

system based on a claim of privileged access to moral knowledge most certainly appeared to liberal thinkers as indefensible.

During the nineteenth century, this suspicion of discretion may have been confirmed by the apparent sclerosis of the Courts of Chancery. Once the forms of action had been abolished, lawyers and reformers, with the optimism of their times, may have felt that the ideal of a logical system of abstract and impersonal rules was close to realization. Thus, there was no longer any need for such discretionary remedies. The availability of common law remedies would now be determined by the application of general rules providing equal justice for all.¹⁸ Certainly jurists involved in the quest for objective, neutral principles of law could only view equitable doctrines based on judicial discretion with suspicion.¹⁹

Finally, Equity had played an important role as a mechanism of social reform. The device of the trust was evolved to allow the devise of land before it was possible to do so by will. The trust mechanism was used to allow married women to hold property before they could do so in their own name. Equity also anticipated the need for joint-stock companies for economic expansion. These social experiments may well have appeared to usurp the role of Parliament.²⁰ Given the dominant belief that society could be structured, organized and regulated through the use of scientific principles, such piecemeal and back-door reforms would most certainly have appeared undesirable.²¹

18. For example:

"This Court is not, as I have often said, a Court of conscience, but a Court of Law." Per Sir George Jessel, M.R. in *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118 at 128 and

"The Doctrines of this court ought to be as well settled, and made as uniform almost, as those of the Common Law" per Lord Eldon in *Gee v. Pritchard* (1818), 2 Swan 402 at 414.

These attitudes persist:

"... Equity, if it is considered in its judicial meaning as an historic counterpart to common law, is not applied as an equivalent to fairness. It applies only according to a set of rules and body of jurisprudence which are as demanding as those of the common law." Per Veit, J. in *F.B.D.B. v. Lakeland Drilling* (1985), 61 A.R. 381 at 387.

19. Hence the objection that decisions in the Court of Chancery varied accordingly to the length of the chancellor's foot. It is not clear to me that the length of the chancellor's foot was any more arbitrary than, for example, the common law judge's definition of consideration. After all the size of the human foot varies within fairly strict parameters and I would wager that the feet of the chancellors were selected out of a relatively homogeneous pool. For a discussion of the doctrine of consideration see Atiyah, P.S., *supra*, note 24, and *Consideration in Contracts: A Fundamental Restatement* (Canberra: Australian National University Press, 1971) and Swan, J. "Consideration and the Reasons for Enforcing Contracts" in Reiter & Swan, *Studies in Contract Law*, (Toronto: Butterworths, 1980)) and Dalton, C., *An Essay in the Deconstruction of Contract Doctrine* (1985), 94 Yale L.J. 997.

20. See Allen, *Law in the Making*, (7th ed.), *supra*, note 9 at 415.

21. See generally: Foucault, M., *Surveiller et Punir*, (Paris: Gallimard, 1975) and Dreyfus and

Whatever the reasons for the shift, it is clear that the English legal system by the end of the nineteenth century, had moved along the continuum away from discretion and towards rules. The subsequent history of contract law in the twentieth century is one of disillusionment and return. Through their relentless critique of classical legal doctrine, the Realists demonstrated that the faith of classical legal thinkers in the possibility of creating a pure system of rules of general application was mistaken. No system of rules, no matter how logical, can eliminate discretion from decision-making. Judges are inevitably faced with choices. Nor can a system of rules eliminate all possibility that the strict application of the rules will sometimes result in injustice. Thus, the scope for judicial discretion and the availability of discretionary remedies can be reduced but it can never be done away with in an imperfect world.

III. *The Role of Promissory Estoppel in Contract Law*

Promissory estoppel is one example of the many equitable doctrines that run through contemporary contract law. Its role, like that of the other doctrines, is, generally to act as the conscience of contract law and, specifically, to mitigate the rigours of the legal rules, especially the consideration requirement. It acts as a conscience because it is used to prevent both unjust enrichment, and unscrupulous manipulation of the rules. Unjust enrichment violates the conscience of Equity because unearned gain offends our common sense notions of legitimate profit. Unscrupulous manipulation of legal rules allows the well-informed to take advantage of the less wary in ways that offend our common sense notions of fair play. Without the belief that unmerited advantage is being gained, there would be no reason for Equity to intervene. This is as true of promissory estoppel as of any other equitable doctrine.

Promissory estoppel is one of the doctrines that allows the courts to intervene when the rules of contract law become obstacles to justice. The rules can hinder justice when one person makes a representation to another upon which the latter has relied in organizing his affairs. In the eyes of the Common Law, unless an enforceable contract has been negotiated, the lack of consideration means that the representation is not binding in any way upon the representor. Yet if the representee has relied on the representation, then he may well have transferred some benefit to the other party, or spent time, money and effort in organizing his affairs. Losses have been suffered that would not otherwise have been incurred.

There are two ways in which a court can deal with these cases, both of which involve judicial discretion. The first is to continually redefine the

concept of consideration so as to render the promise enforceable.²² This approach has the nebulous virtue of, at least formally, preserving the rule. The second strategy is to use the tools that Equity places at the disposition of the court in order to mitigate the harshness of the requirement of consideration. This approach has the benefit of maintaining the relative coherence of the rule while ensuring that justice is achieved. When examined in this light, it becomes clear that the general purpose of the doctrine of promissory estoppel is to make promises or representations enforceable that would otherwise not be through lack of consideration in circumstances where the dictates of justice require that an exception be made to the legal rule.

When the purpose of the doctrine is stated in this way, it becomes clear that promissory estoppel should not be used as a means whereby the general rule is abolished. The relief is discretionary, as is true for all forms of equitable relief, and, by definition, exceptional. To use promissory estoppel as a basis for liability in all cases would defeat its purpose. The doctrine supplements rather than supplants the rule of contract law. On the other hand, it also becomes clear that the objection to the doctrine of promissory estoppel which decries the enforcement of promises unsupported by consideration is quite mistaken. Promissory estoppel must intervene when there is no consideration. The court enforces the representation because there are equally compelling grounds for enforcing the promise other than the presence of consideration.

The final point to remember, before turning to the doctrine, is that in attempting to describe the doctrine, one should not turn the broad standards that govern its availability into a new set of technical rules. Judicial discretion must be protected for otherwise the purpose of the doctrine would be defeated. Thus, courts should avoid imposing doctrinal fetters on the exercise of judicial discretion. The availability of the remedy should be decided on the basis of clearly enunciated standards applied to the facts of the case in light of the requirements of justice in that context.

22. I will use two examples to support this point but, since it is impossible to analyze the doctrine of consideration in this article, the reader should consult the discussions of the doctrine referred to *supra*, note 19.

The first example is the case of *Loranger v. Haines* (1921), 50 O.R. 268 (C.A.) in which the court ordered the specific performance of an alleged contract for the sale of land even though the plaintiff paid no money to buy the lot. Consideration was found in the sacrifice entailed in moving from Detroit to Windsor, the construction of a house and the pleasure derived from his company. While specific performance is just in the circumstances, the concept of consideration has been stretched so far that it is dangerously close to exploding.

The second example is the more recent case of *The Queen in Right of Ontario v. Ron Engineering and Construction Ltd.*, [1981] 1 S.C.R. 111 in which the Supreme Court of Canada found that a tender on a contract could not be withdrawn in spite of notice of an error

IV. *The Criteria of Application of the Doctrine of Promissory Estoppel*

The doctrine of promissory estoppel was first stated in its modern form by the House of Lords in *Hughes v. Metropolitan Railway*²³ in 1877. It was, then, lost in obscurity until rescued from the law books by Lord Denning in his controversial decision in *Central London Property Trust v. High Trees House*. In that case, Lord Denning summarized the doctrine as follows:

There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel, are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases, the courts have said that the promise must be honoured.²⁴

Since that broad statement, courts and commentators have attempted to provide a more satisfactory statement of the doctrine. One statement that has been quoted by Canadian courts, goes as follows:

Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. It is essential that the representor knows that the other party will act on his statement.²⁵

This definition of the doctrine highlights its basic requirements: a legal relationship, the making of a representation intended to affect that relationship, and an action by the representee on the basis of the representation. However, because it is a summary distilled from a large number of cases, it glosses over a number of doctrinal difficulties. These issues can be addressed under the following six headings: What kind of relationship must exist between the parties before one can invoke the doctrine of promissory estoppel? Can promissory estoppel be used as a

in the price calculation prior to its acceptance because the tender itself constituted acceptance of an offer of unilateral contract on the terms set out in the call for submissions. These conditions were unilaterally imposed by the Ontario government. The consideration furnished was the right to participate in the competition. Once again the result may be reasonable but the concept of consideration comes out bruised and battered.

23. (1877), 2 App. Cas. 439; 46 L.J.C.P. 583.

24. [1947] K.B. at 131.

25. Baker & Langan, *Snell's Principles of Equity* (28th ed.), *supra*, note 5 at 556 cited in *Edwards v. Harris Intertype Canada Ltd.*, *supra*, note 2. See also: *Halsbury's Laws of England* (4th ed.), Vol. 16, Para. 1514, at 1017 cited by Mr. Justice McIntyre in *Engineered Homes supra*, note 2 and Chapter XIV of Spencer Bower and Turner, *Estoppel by Representation*, (3rd ed.), *supra*, note 5.

cause of action? What kind of representation will give rise to an estoppel? Must the promisor intend to induce reliance? What must the promisee do in reliance on the promise before the promisor will be estopped? What is the effect of the estoppel? The result of this more detailed discussion will not be a rejection of the brief definition set out above but a better understanding of its content.

1. *What kind of Relationship must exist between the parties?*

The issue of the nature of the relationship which must exist between the parties before a representation can give rise to an estoppel is closely related to the issue of promissory estoppel as a cause of action. But these two questions are not identical. Even if it is accepted that promissory estoppel creates no new cause of action, it is necessary to decide whether promissory estoppel can be invoked by parties who are not contractually bound but are in some other type of legal relationship. The cause of action would then be the rights and obligations arising out of this legal relationship. The application of the doctrine will simply prevent the promisor from asserting her non-contractual legal rights. If the rule is that there must be a legal but not necessarily contractual relationship, it is clear that promissory estoppel creates new rights that are contractual in nature in the sense that they would ordinarily require consideration. The promissory estoppel operates as a compromise of legal rights. A compromise is a contract by which the parties bind themselves not to litigate rights whether they arise in tort, contract or from some other source.²⁶

The classic statement of the doctrine in *Hughes v. Metropolitan Railway*²⁷ refers to rights arising under a contract but does not exclude the possibility of other forms of legal relationship. In many other cases where there were contracts, the court simply uses the expression "parties to a contract" without analyzing the issue of the types of legal relationship that must exist before estoppel can be involved.²⁸ This has led some

26. *A.G.B.C. v. Deeks Sand & Gravel*, [1956] S.C.R. 336. Of course not all rights can be compromised by agreement between the parties. In *Combe v. Combe*, [1951] 1 All E.R. 767, the difficulty that the wife had to overcome was not really proof of the agreement but rather the public policy against exclusion of recourse to the Divorce Court. In spite of what the court said, both parties did make promises and did intend to be bound. It is the policy that prevents their agreement from binding not any lack of consideration. There is certainly as much consideration present in this case as in *A.G.B.C. v. Deeks Sand & Gravel*.

27. (1877), 2 App. Cas. 439; 46 L.J.C.P. 583.

28. See e.g. *A.I.P. v. Texas Commerce*, [1981] 3 W.L.R. 565; [1981] 3 All E.R. 577 per Lord Denning at 574-5 (W.L.R.) at 583-4 (All E.R.) and *W.J. Alan & Co. Ltd. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 184 (C.A.) per Lord Denning at 213. Lord Denning is the last person to try to limit the availability of promissory estoppel. See also *J. Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 per Ritchie, J. at 613.

courts to hold that there must be a pre-existing contractual relationship.²⁹ This view has been carried to the conclusion that, even where there is a contractual relationship, promissory estoppel is not available if the rights the promisee is attempting to assert no longer exist because the option period expired before the representation was made.³⁰ At the other extreme, some courts have suggested that it is not necessary that the underlying transaction constitute a binding legal relationship.³¹

The actual position in Canada probably lies somewhere between these two extremes. There must be a legal relationship of some sort although it is not necessary that it be a contractual relationship.³² Unfortunately, the Canadian courts have seldom directly addressed the issue and judges often refer to a subsisting contractual relationship without considering whether another type of legal relationship might not suffice. In England, on the other hand, legal relationships of other types have supported the promissory estoppel. Thus, where a war veteran had a statutory right to a pension if injured during the war, the Minister of Pensions was estopped from arguing that the health problems were not related to war injuries by the representation made by a Ministry official that the injuries were war-related which led the plaintiff not to seek additional medical evidence in support of the claim.³³ This rule has been applied in cases involving liabilities arising under legislation relating to corporations³⁴ and to redundancy payments.³⁵

29. *Reed v. Sheehan* (1982), A.L.R. 257 (Fed. Ct. of Aust.) per Deane, J. at 277.

30. *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 315; 22 R.P.R. 297, 132 D.L.R. (3d) 430 (H.C.). In this case the court holds that promissory estoppel is not available but that waiver is because the landlord waived the right to refuse to renew by negotiating. It is submitted that this distinction is purely semantic. There was a representation which induced reliance and therefore it should be enforced. This case is distinguishable from *Canadian Superior Oil Ltd. v. Padden-Hughes*, *supra*, note 2, and *Conwest Exploration Co. Ltd. v. Letain*, *supra*, note 2, because in those cases the entire legal relationship had come to an end and not merely the right to renew. See also *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 585.

31. *A.I.P. Co. Ltd. v. Texas Commerce International Bank*, [1981] 1 All E.R. 923 (Q.B.D.) per Robert Goff J. at 938. See also *Celona v. Royal Canadian Legion*, [1972] 6 W.W.R. 257 in which a contract for the purchase of land which was not binding because it was not approved according to the purchaser's constitution became binding because the purchaser acted as if it would approve the contract. The result is clearly just but promissory estoppel is creating the rights. See also *Lawson v. Utan*, (1979), 10 B.C.L.R. 163. *Contra* see *Hastings Minor Hockey Assoc. v. P.N.E.*, [1981] 6 W.W.R. 755; 129 D.L.R. (3d) 721 reversing [1981] 6 W.W.R. 514; 31 B.C.L.R. 230.

32. *Canadian Superior Oil v. Padden-Hughes*, *supra*, note 2; *Re Co-op Trust Co. of Cda and Atlantic Steel Buildings Ltd. et al* (1982), 50 N.S.R. (2d) 609; 98 A.P.R. 609, 134 D.L.R. (3d) 316 (C.A.); *Paul Whittaker Logging Ltd. v. British Columbia Hydro & Power Authority* (1985), 65 B.C.L.R. 384 (S.C.); *Wilway Lumber Sales Inc. v. Bank of Nova Scotia* (1984), 54 B.C.L.R. 336 (S.C.).

33. *Robertson v. Ministry of Pensions*, [1949] 1 K.B. 227.

34. *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.*, [1968] 2 Q.B. 839 at 847.

35. *Evenden v. Guilford City Football Club*, [1975] 3 All E.R. 269, [1975] Q.B. 517 per Lord Denning at 273.

This position appears to be the most logical, given the purpose of estoppel which is to prevent abuse of legal rights. The nature of the pre-existing legal rights should not determine the availability of the plea of promissory estoppel. To premise availability on the nature of the legal right would burden the doctrine with precisely the type of technicality that equitable doctrines were created to circumvent or remedy. Of course, this difficulty could be avoided if promissory estoppel were available as a cause of action. If it is not so available, then it should be possible to invoke the doctrine any time where enforcement of legal rights will give rise to an injustice regardless of the nature of those legal rights.

2. Promissory Estoppel as a cause of action

In 1957, Lord Denning sought to calm the storm of criticism provoked by his decision in *Central London Property Trust Ltd. v. High Trees Trust Ltd.* in which he formulated the doctrine of promissory estoppel in very broad terms.³⁶ Critics suggested that the doctrine as formulated did away with the need for consideration.³⁷ All promises would be enforceable regardless of the absence of bargain or exchange. In *Combe v. Combe*³⁸ the English Court of Appeal held that the doctrine of promissory estoppel creates no new cause of action where none existed before. This decision has been cited repeatedly with approval in the Supreme Court of Canada.³⁹ It has also been followed in numerous cases in the lower courts,⁴⁰ although some trial courts have attempted to distinguish

36. *Supra*, note 24.

37. See: Wilson, J.F., *Recent Developments in Estoppel* (1951), 67 L.Q.R. 330; Bennion, F., *Want of Consideration* (1953), 10 M.L.R. 441.

38. [1951] 1 All E.R. 767 (C.A.). Quare whether this case can be distinguished in any way on its facts from *Robertson v. Ministry of Pensions*, *supra*, note 33 or the compromise cases. (See e.g. *A.G.B.C. v. Deeks Sand & Gravel*, *supra*, note 26.) If the only meaningful distinction is based on the public policy against preclusion of recourse to the divorce courts then the reason given for the decision (that there was no consideration for the agreement between husband and wife) clearly wrong. There was as much or as little consideration as in any compromise case. (Quare whether consideration in these cases is not always notional). The real ground is public policy. If this is true, all the requirements of either a contract or promissory estoppel (statutory right plus representation and reliance) are present. It is a curious case for holding that promissory estoppel creates no new right of action. Lord Denning appears to have since changed his mind, see *Discipline of the Law*, (London: Butterworth's, 1979) at 197-223 and *A.I.P. v. Texas Commerce*, *supra*, note 28. See also: *Beesley v. Hallwood Estates Ltd.* (1960), 2 All E.R. 314; *Brikom Investments Ltd. v. Carr*, [1979] 2 All E.R. 753 (C.A.); *Reed v. Sheehan*, *supra*, note 29; *Legione v. Hateley* (1983), 46 A.L.R.I. (H.C.); and *DeWhirst v. Edwards*, [1983] 1 NSWLR 34 (N.S.W.D.C.).

39. See the cases referred to in *supra*, note 2.

40. See e.g.: *M.L. Baxter Equipment Ltd., et al v. Geac Canada Ltd.* (1982), 133 D.L.R. 372 (Ont H.C.); *Gilbert Steel v. University Construction* (1976), 12 O.R. (2d) 268, 67 D.L.R. (3d) 606 (C.A.); *Edwards v. Harris Intertype*, *supra*, note 2; *Pentagon Construction* (1969), Co. Ltd.

*Combe v. Combe*⁴¹ and use promissory estoppel as a cause of action.⁴² The majority position is clear, however, and it seems unlikely that trial judges will disagree with the consensus of the higher courts throughout the Commonwealth that promissory estoppel cannot be used as a cause of action.

The rule that promissory estoppel creates no new cause of action is often confused with a rule that only defendants can invoke the doctrine.⁴³ Perhaps the aphorism that states that promissory estoppel is a shield and not a sword is responsible for this confusion. Clearly the second rule does not follow from the first and accepted rule. A plaintiff can indeed invoke promissory estoppel if her action is founded on an independently existing right, contractual or otherwise. The case of *Charles Richards Ltd. v. Oppenheim*⁴⁴ provides an example. The plaintiff agreed to build a body on a Rolls-Royce chassis owned by the defendant. The completed car was to be delivered by a stipulated date. It became clear that delivery in conformity with the contract would be impossible. The defendant agreed to a number of extensions until, in frustration, he refused any further extensions. When the car was finally ready, he refused to accept delivery. While recovery was denied because the defendant had brought the estoppel to an end, the plaintiff clearly could have invoked promissory estoppel if the defendant had not revoked the promise. The plaintiff would sue on the basis of the contract. The defendant would then argue that delivery was late under the original contract. The plaintiff could use promissory estoppel to prevent the defendant from invoking his right to delivery on the date stipulated in the contract. Promissory estoppel can only be used as a defense but both plaintiffs and defendants have need of defenses.

If this argument is valid, then it would appear that the controversial decision in *Gilbert Steel Ltd. v. University Construction Ltd.*⁴⁵ is wrongly v. *United States Fidelity and Guaranty Co.* (1977), 77 D.L.R. (3d) 189; [1977] 4 W.W.R. 351 (B.C.C.A.); *Petridis v. Shabinsky*, *supra*, note 30; *Causeway Shopping Centre Ltd. v. Thompson & Sutherland Ltd.* (1965), 54 D.L.R. (2d) 649 (N.S.S.C.); *Bank of Montreal v. Glendale (Atlantic) Ltd.* (1977), 76 D.L.R. (3d) 303, 20 N.S.R. (2d) 216, 1 B.L.R. 279; *McLuskie v. Sakai*, [1985] 6 W.W.R. 258; 66 B.C.L.R. 217 (B.C.S.C.); *Cornerbrook City Council v. Pinsent* (1984), 47 Nfld. & P.E.I.R. 46 (Nfld. S.C.).

41. *Supra*, note 38.

42. See *Watson v. Canada Permanent Trust Co.*, [1974] 4 W.W.R. 406; 27 D.L.R. (3d) 735, affirmed 66 D.L.R. (3d) 85 (B.C.C.A.); *Celona v. Royal Canadian Legion*, *supra*, note 31; *Lawson v. Ulan*, *supra*, note 31; *Voyageur Petroleum Ltd. v. Vanguard Petroleum Ltd.*, [1982] 2 W.W.R. 36; 17 Alta L.R. (2d) 212 (Q.B.). See also *A.I.P. Ltd. v. Texas Commerce Int'l Bank*, *supra*, note 31.

43. For example, see the discussion of promissory estoppel in *Edwards v. Harris Intertype*, *supra*, note 2.

44. [1950] 1 All E.R. 420; [1950] 1 K.B. 616 (C.A.). See also *Conwest Explorations Ltd. v. Letain*, *supra*, note 2 and *Re Tudale Explorations Ltd. and Bruce*, *supra*, note 2.

45. (1976), 67 D.L.R. (3d) 606 (C.A.).

decided on the issue of the availability of promissory estoppel. At issue was the validity of an agreement to pay a higher price for steel which the plaintiff was already bound to deliver. The Ontario Court of Appeal held that this agreement was not binding on the purchase because the seller had not furnished any additional consideration. Madame Justice Wilson discussed the doctrine of consideration briefly and held that promissory estoppel was not available for two reasons. Firstly, promissory estoppel "... can never be used as a sword but only as a shield."⁴⁶ Secondly, the promisee must act to its detriment. The second argument will be discussed below. The first reason for rejecting promissory estoppel is not applicable in the *Gilbert Steel* case because the plaintiff was not using promissory estoppel as the cause of action but rather the original contract. The defendant would plead the original price clause as its defense. The plaintiff then would respond to this argument by invoking promissory estoppel. The requirement of an independent cause of action is met. Promissory estoppel is simply used to prevent the defendant from asserting rights under the original contract.

It may be argued that promissory estoppel is creating new enforceable rights when a plaintiff can invoke the doctrine but promissory estoppel always operates to the benefit of the promisee if the promise is enforced. Whether this means that the promisee pays less rent,⁴⁷ gets more time to exercise an option,⁴⁸ is allowed to pay in different and less valuable currency,⁴⁹ or is allowed extra time to make a payment,⁵⁰ makes no difference. Promissory estoppel necessarily creates new rights that the promisee can enforce. The requirement that there be another independent cause of action does not mean that the doctrine never creates new rights. Whenever promissory estoppel is applied, the court is necessarily allowing the promisee to enforce obligations that would not be binding otherwise. Requiring an independent cause of action merely limits the number of situations in which the doctrine can be invoked.⁵¹ Thus, there seems to be no reason to hold that a plaintiff cannot use promissory estoppel as a defense against an attempt by the defendant to enforce her strict legal rights.

46. *Id.* at 609.

47. *Central London Property Trust v. High Trees Trust Ltd.*, *supra*, note 24.

48. *Conwest Explorations Ltd. v. Letain*, *supra*, note 2; *Re Tudale Exploration Ltd. and Bruce*, *supra*, note 2.

49. *W.J. Alan & Co. Ltd. v. El Nasr Export and Import Co.*, *supra*, note 28.

50. *D. & C. Builders Ltd. v. Rees*, [1966] 2 Q.B. 617 (C.A.). Approved by the Ontario High Court of Justice in *Edwards v. Harris Intertype Co.*, *supra*, note 2.

51. Obviously, there are good reasons for arguing that the requirement of consideration be abolished in contract variation situations. See Swan, J., *supra*, note 19. The protection against undue pressure can be provided by the doctrines of duress or unconscionability. This objective can be attained either through abolition of consideration or the application of promissory estoppel, which amounts to the same thing in this context.

3. *What kind of Representation will give rise to an Estoppel?*

The Canadian courts have, at least superficially, differed from their English counterparts on the issue of the kind of representation that will give rise to an estoppel. The English courts have held that there must be a representation of future intention that is clear and unambiguous.⁵² The promisee cannot misconstrue a statement and then hold the other party liable for his reliance.⁵³ Nor will mere indulgences support an estoppel.⁵⁴ Silence will not amount to a representation unless the silence acquires a positive content in the circumstances.⁵⁵ However, there is no requirement that there be actual discussions or that the representation be made either orally or in writing. The representation can be inferred from the conduct of the parties. If a party to a legal relationship so conducts himself that the other reasonably believes that he will not assert his strict legal rights and the promisee acts in reliance on that implied representation, the promisor will be bound.⁵⁶ Thus, where the seller in a contract of sale which requires payment by letter of credit in Kenyan currency, accepted a non-conforming letter of credit even though it was in pounds sterling, the court held that he was bound by that acceptance even though there was no negotiation on the question of the currency of payment. The behaviour of the seller was sufficient to constitute a representation⁵⁷ even though neither party turned its mind to the issue of the currency of payment. The control over the extent of liability is exercised when determining whether reliance was reasonable.⁵⁸

52. The distinction between estoppel by conduct, a common law doctrine, and promissory estoppel is traditionally based on the type of representation which will give rise to the estoppel. The leading case is that of *Jordan v. Money* (1854), 5 H.L.C. 185, 23 L.J. Ch. 865 in which it was held that estoppel by conduct was not available as a plea when the representation was not a statement of fact but one concerning future intention. See generally Ch. 3 Spencer Bower and Turner, *Estoppel by Representation* (3rd ed.), *supra*, note 5 and *Nippon Menkwa Kabushiki Kaisha v. Dawson's Bank Ltd.* (1935), 51 Ll. L. Rep. 147 (P.C.).

Cases discussing the need for a representation include: *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. China Pacific S.A.*, *supra*, note 1; *Reed v. Sheehan*, *supra*, note 29 and *Legione v. Hateley*, *supra*, note 38. Canadian cases requiring a representation include: *Kelly Douglas & Co. Ltd. v. Ladner Shopping Centre Ltd et al* (1980), 22 B.C.L.R. 343, 16 R.P.R. 201, 114 D.L.R. (3d) 139 (C.A.); *Scotsburn Co-op Services v. W.T. Goodwin Ltd.*, *supra*, note 2; *Engineered Homes Ltd. v. Mason*, *supra*, note 2; *Canada v. Cdn Air Traffic Controllers Assn.* (1984), 52 N.R. 196 (Fed. C.A.).

53. *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. China Pacific S.A.*, *supra*, note 1.

54. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 1 W.L.R. 761; [1955] 2 All. E.R. 657 (H.C.).

55. *Kelly Douglas & Co. Ltd. v. Ladner Shopping Centre Ltd et al*, *supra*, note 52; *Scotsburn Co-op Services v. W.T. Goodwin Ltd.*, *supra*, note 2; *Capital Crane Ltd. v. Atlantic Insurance Co.* (1985), 55 Nfld. & P.E.I.R. 174, 162 A.P.R. 174 (Nfld. T.D.).

56. See *Snell's Principles of Equity*, *supra*, footnote 5; Spencer Bower & Turner, *Estoppel by Representation*, *supra*, note 5; *Halsbury's Laws of England*, *supra*, note 25.

57. *W.J. Alan Co. Ltd. v. El Nasr Export and Import Co.*, *supra*, note 28.

58. Additional cases in which the English Courts have adopted this objective approach

The state of the law in Canada on this issue is ambiguous because of the decision of the Supreme Court of Canada in *J. Burrows Ltd. v. Subsurface Surveys Ltd.*⁵⁹ In his judgment, Mr. Justice Ritchie states, after quoting from *Hughes v. Metropolitan Railway Co.*⁶⁰ and *Combe v. Combe*,⁶¹ that

. . . this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a *course of negotiation* which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the *negotiations*.⁶²

This passage is confusing and has created difficulties for lower courts in subsequent cases.⁶³ The term 'negotiations' may be used to designate two types of activities. The dictionary meaning is that of a process of bargaining to reach an agreement. This process entails meeting, discussing and arranging the terms of the agreement. In this sense, negotiations would require express verbal representations. Popular usage may sometimes extend the meaning to cover conduct from which a representation can be implied. The second meaning is not in the dictionary.⁶⁴

It is unclear what type of negotiations the Supreme Court intended to require in this definition of the doctrine. Does Ritchie, J. mean that there must be negotiations in the sense of bargaining? If so, must the

include: *A.I.P. Co. Ltd. v. Texas Commerce Int'l Bank*, *supra*, note 28; *Birmingham & District Land Co. v. London and North Western Railway Co.* (1888), 40 Ch. D. 268 (C.A.); *Braithwaite v. Winwood*, [1960] 3 All E.R. 642 (CH.D.); *Charles Rickards Ltd. v. Oppenheim*, *supra*, note 44; *Hughes v. Metropolitan Railway*, *supra*, note 23; *Spiro v. Lintern et al.*, [1973] 3 All E.R. 319 (C.A.); *Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd.*, [1952] 1 Lloyd's Rep. 527 (C.A.); *Painchaud Freres S.A. v. Etablissement general grain Co.*, [1970] 1 Lloyd's Rep. 53.

59. [1968] S.C.R. 607.

60. *Supra*, note 23.

61. *Supra*, note 38.

62. [1968] S.C.R. 607 at 613. (Emphasis added)

63. Some judges seem to require actual negotiations: See: *Gillis v. Bouchard* (1983), 41 O.R. (2d) 107, 145 D.L.R. (3d) 570 (C.A.); *Edwards v. Harris Intertype Ltd.*, *supra*, note 2. Some infer a representation from conduct if the doctrine is applicable: *Conwest Exploration Ltd. v. Letain*, *supra*, note 2; *Costa et al. v. Co-op Trust Co. of Canada* (1983), 23 Sask. R. 191, 144 D.L.R. (3d) 164 (Q.B.); *Great Plains Development Co. of Co. Ltd. v. Hidrogas Ltd.*, [1982] 1 W.W.R. 1; 17 Alta. L.R. (2d) 17, 20 A.R. 483 (C.A.); *Gilbert Steel*, *supra*, note 40; *Wauchope v. Maida*, [1972] 1 O.R. 27; 22 D.L.R. (3d) 142 (C.A.). Some judges have expressed their confusion or acknowledged that the cases go both ways: *Owen Sound Public Library Board v. Miall Developments Ltd. et al* (1979), 102 D.L.R. (3d) 685 (C.A.); *Re Tudale Explorations Ltd. and Bruce*, *supra*, note 2.

64. I consulted Black's Law Dictionary (5th ed.) and Webster's Deluxe Unabridged Dictionary (2nd ed.).

negotiations be on the subject of the precise legal rights that will be suspended by the estoppel? Or will it suffice to prove that the parties engaged in some other general form of negotiations from which a representation can be implied? The use of the word 'negotiations' suggests that the Court is requiring proof of express verbal representations or bargaining. But, the Court contradicts this interpretation. Ritchie, J. quotes with approval the passage from *Combe v. Combe*⁶⁵ in which Lord Denning speaks of a promise made by words or conduct and, then, suggests that the intention to be bound can be inferred from the evidence. If this is true, then the requirement of negotiations is unreasonable because many forms of conduct can implicitly create a representation regardless of whether there are actual negotiations.

This confusion may have arisen because of a misreading of the decision in *Hughes v. Metropolitan Railway Co.*⁶⁶ Lord Cairns, in an oft-quoted passage, states:

. . . it is a first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeitures — afterwards by their own act or with their consent enter upon a *course of negotiation* which has the effect of leading one of the parties to suppose that the strict legal rights arising under the contract will not be enforced, or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the *dealings* which have thus taken place between the parties.⁶⁷

In isolation from the facts of the case, it may appear that Lord Cairns is requiring that the parties negotiate about the suspension of rights. This is not what occurred in the case. Hughes was the owner of certain houses leased to the railway. In the lease the railway was required to repair the houses within six months of expiry if it wished to renew. Six months prior to expiry Hughes notified the railway of its obligation to repair. The railway then contacted Hughes and offered to sell the leasehold back to the landlord. Negotiations on the subject of sale continued over a short period. There was no actual discussion of the effect of these negotiations on the period which the railway had to repair the houses. However, the railway made no move to repair the houses. Finally, negotiations for the sale of the leasehold were broken off.

The House of Lords held that Hughes was estopped from asserting his rights under the lease because his acquiescence in discussions about the sale of the leasehold led the railway to believe that the running of the

65. *Supra*, note 26.

66. *Supra*, note 26.

67. *Id.* at 488 (Emphasis added).

notice period was suspended. Thus, the House of Lords infers the representation from the conduct of Hughes and not from any negotiations over the suspension of the notice period. Hughes was estopped in spite of the fact that he never once suggested that the railway not repair the houses. The railway waited for longer than was necessary and could have easily completed the repairs in the original time period even if it had waited until the breaking off of negotiations to begin them.

It is unfortunate that the Supreme Court did not examine either the *Hughes* case or any of the many other cases in which courts have held that conduct can create an estoppel. It would appear the the position taken in the great majority of English cases is most consistent with the purposes of this doctrine. Promissory estoppel should not be limited to cases where there are negotiations. A requirement that there be negotiations on the subject of the suspension of rights would be unduly restrictive. Conduct can result in clear and unambiguous representations upon which it is reasonable to rely. Justice requires that there be a remedy and promissory estoppel ensures that one is available. If the real concern is with the danger of unduly wide liability, control can be exerted through the requirement that the reliance be reasonable. It is not reasonable to rely on ambiguous words or actions open to more than one interpretation in deciding how to carry out one's affairs. If the meaning of conduct is unclear, the party wishing to rely has the responsibility to clarify the other party's intentions before acting.

If, however, the Supreme Court of Canada is merely saying that there must be some negotiations from which a representation can be inferred, the requirement of negotiations is illogical. Negotiating is not the only form of behaviour from which we can infer a representation that legal rights will not be enforced. The distinction between negotiating and other conduct is arbitrary. It may well be true that the meaning of other forms of conduct is more likely to be ambiguous. However, the greater likelihood of ambiguity does not mean that other forms of conduct can *never* amount to a clear and unambiguous representation. There is no reason why the courts should refuse to give effect to such a promise simply because it is inferred from conduct other than negotiating.⁶⁸ Protection against unintended waiver of rights can be effectively ensured through the requirement that reliance be reasonable. Doctrines such as promissory estoppel should not be saddled with arbitrary distinctions and technical rules that defeat its purpose.

68. The S.C.C. gave effect to one such representation in *Conwest Explorations Co. Ltd. v. Letain*, [1964] S.C.R. 20. Ritchie, J. dissented from that decision. It is unfortunate that in his later judgment in *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, he did not attempt to distinguish or reconcile the two cases.

4. *Must the Promisor be aware of the Rights which are being suspended or varied?*

The importance attached to the actual knowledge that the promisor has of her rights will vary. If one wants to limit liability then actual knowledge may seem necessary. If, on the other hand, one wants to protect reasonable reliance then actual knowledge on the part of the promisor will be less crucial. There is little discussion of this issue in the case law. It has been held that a party unaware of her rights cannot lose them simply because she does not assert them.⁶⁹ While that proposition seems logical, it does not necessarily follow that a party who is unaware of her rights will always retain them regardless of how she acts. If the promisor can easily discover what her legal rights are, it would be inequitable to allow her to act without making a reasonable effort to do so. In other words, reliance on conduct will be reasonable if the promisee can reasonably infer from the circumstances and the promisor's conduct, that the promisor knows of her strict legal rights and has decided to waive them.⁷⁰ The degree of actual knowledge required will obviously vary with the circumstances but the requirement of actual knowledge would present an insurmountable hurdle in most cases. The promisor would always deny actual knowledge unless there was awfully strong proof to the contrary. Knowledge necessarily must be inferred from conduct in the form of words and actions.

5. *Must the Promisor intend to induce reliance?*

Closely related to the issue of knowledge of rights is that of the intention of the promisor. Must he intend to induce reliance? If so, is the test for intention subjective or objective? The requirement of an intention to induce reliance⁷¹ or, alternatively, intention to alter the legal relations existing between the parties⁷² is designed to protect the promisor from the inadvertent loss of legal rights. Both the English⁷³ and Canadian⁷⁴ courts have stressed that mere indulgences granted will not create an estoppel. The creditor who generously allows a debtor extra time to make a payment will not be thereby prohibited from asserting rights. A casual remark made during discussions of matters only obliquely related to the

69. *Reed v. Sheehan*, *supra*, note 29; *Canadian Superior Oil v. Padden-Hughes Development Co.*, *supra*, note 2.

70. *Taylor Fashions v. Liverpool Victoria Trustees Co.*, [1981] 1 All E.R. 900 (Ch.); *Conwest Explorations Ltd. v. Letain*, *supra*, note 2.

71. *Central London Property Trust v. High Trees Trust*, *supra*, note 24.

72. *J. Burrows Ltd. v. Subsurface Surveys Ltd.*, *supra*, note 2; *Edwards v. Harris Intertype Ltd.*, *supra*, note 2; *Pentagon Construction Ltd. v. U.S. Fidelity & Guaranty Co.*, *supra*, note 40.

73. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, *supra*, note 54.

74. *J. Burrows Ltd. v. Subsurface Surveys Co.*, *supra*, note 2.

legal rights in question cannot be reasonably relied on so as to create an estoppel.⁷⁵

The justifiable desire to protect against inadvertent loss of legal rights does not necessarily lead to the conclusion that the promisor must subjectively intend to induce reliance or to alter legal relations. Further, promissory estoppel is not intended to protect promisees solely against fraud. It is, rather, designed to protect against losses caused by reasonable reliance on innocent or negligent misrepresentations of intention. The promisor is not held responsible solely because of a culpable state of mind. Subjective intention is unknowable and intention can only be inferred from words and actions or, in other words, the objective manifestations of intent. One of the objective factors to be considered in determining the reasonableness of reliance is the nature of remarks made. Thus, where a bank says to the armoured truck company hired to transport money, that its investigation into a theft is finished and that there is no proof that the latter is responsible, it is unreasonable for the armoured truck company to assume that the bank is promising never to sue. The armoured truck company must raise the issue of the settlement of any claims⁷⁶ and ascertain whether or not the bank reserves the right to sue.

The case law clearly supports the view that the intentions of the promisor are to be discovered through an objective analysis. Even where the parties never discuss the suspension of legal rights, the representation will be inferred from the conduct.⁷⁷ Where there are negotiations it will obviously be easier to infer the requisite intention⁷⁸ but it is not necessary that the subject of the legal rights ever be discussed.⁷⁹ The promisor may, indeed, be surprised to find out that he is bound by a representation he never actually knew he had made but, if the promisee's interpretation of the promisor's conduct is reasonable in the circumstances, it hardly seems relevant that the promisor never actually turned his mind to the question of his legal rights.

6. What must The Promisee do in Reliance on the Promise before the Representation will bind?

The essential element that justifies the invocation of promissory estoppel

75. *Boise Cascade Ltd. v. Town of Fort Frances*, *supra*, note 2; *Bank of Montreal v. Loomis Armoured Car Service Ltd.* (1982), 21 B.C.L.R. 247 (S.C.).

76. *Bank of Montreal v. Loomis Armoured Car*, *id.*

77. *Hughes v. Metropolitan Railway Co.*, *supra*, note 26; *Painchaud Frères S.A. v. Etablissement General Grain Co.*, *supra*, note 58; *Spiro v. Lintern*, *supra*, note 58; *W.J. Alan Co. Ltd. v. El Nasr Export & Import Co. Ltd.*, *supra*, note 28.

78. *J. Burrows Ltd. v. Subsurface Surveys Ltd.*, *supra*, note 2.

79. *Conwest Exploration Ltd. v. Letain*, *supra*, note 2; *Owen Sound Public Library Board v. Miall Developments Ltd.*, *supra*, note 63.

in these cases is the fact that the promisee has acted in reliance on the promise. It is the action that makes it inequitable for the promisor to assert her legal rights.⁸⁰ Therefore, it is clear that the promisee must act in reliance on the representation.⁸¹ It does not matter that the promisee may well have acted in exactly the same way even without the representation.⁸² Speculation over what the promisee might have done had the promise not been made would simply divert attention from what actually happened. Action does not necessarily mean the actual alteration of the promisee's position.⁸³ *Not* repairing,⁸⁴ *not* obtaining a confirming letter of credit,⁸⁵ or *not* exercising an option⁸⁶ have all been held to be actions in reliance. In other words, not doing something may be as damaging as actually doing something.

The issue of the type of action is complicated by the assertion found in many cases⁸⁷ that the promisee must act to his detriment. It is not at all clear what the requirement of detriment adds to that of action in reliance.

80. For a discussion of the importance of reliance for contract law, see Fuller & Perdue, *The Reliance Interest in Contract Damages* (1936), 46 Yale, L.J. 52, where the authors argue that reliance is a higher or more easily justified basis for awarding damages than the expectation interest because there is an actual loss. This view may help understand the ethical basis for promissory estoppel. For a theory of contract obligation based on reliance see Waddams, *supra*, note 3 and Atiyah, *supra*, note 16; see also Atiyah, P.S. *Promises, Morals and Law*, (Oxford: Clarendon Press, 1981)

81. For English cases on this point see: *Emmanuel Ayodeyi Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, [1964] 3 All E.R. 556 (P.C.); *W.J. Alan Co. Ltd. v. El Nasr Export & Import*, *supra*, note 28; *Bremer Handels Gesellschaft M.B.H. v. Vanden A. Venne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109 (H.L.); *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co.*, *supra*, note 70; *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, *supra*, note 54. The Canadian cases include: *Bank of N.S. v. Terry* (1982), 141 D.L.R. (3d) 438 (Ont. H.C.); *Boise Cascade Ltd. v. Town of Fort Frances*, *supra*, note 2; *Bojtar v. Parker* (1979), 26 O.R. (2d) 705, 103 D.L.R. (3d) 577 (C.A.) affirming (1979), 24 O.R. (2d) 694; *Sohio Petroleum Co. v. Weyburn Security Co. Ltd.*, *supra*, note 2; *Wauchope v. Maida*, *supra*, note 63; *Edwards v. Harris Intertype Ltd.*, *supra*, note 2.

82. *Brikom Investments Ltd. v. Carr*, *supra*, note 38.

83. *Commissioner of Inland Revenue v. Morris*, [1958] N.Z.L.R. 1126; *Duncan v. Keenaway & Co.*, [1900] 1 Ch. 833 per Farwell, J. at 838.

84. *Hughes v. Metropolitan Railway*, *supra*, note 23.

85. *W.J. Alan Co. Ltd. v. El Nasr Export & Import Co. Ltd.*, *supra*, note 28.

86. *Re Tudale Exploration Ltd. and Bruce*, *supra*, note 2.

87. *A.I.P. Co. Ltd. v. Texas Commerce Int'l Bank*, *supra*, note 28; *Crab v. Arun D.C.*, [1976] Ch. 179 (C.A.); *Spiro v. Lintern*, *supra*, note 58; *Greenwood v. Martins Bank Ltd.*, [1933] A.C. 51; [1932] All E.R. 318, affirming [1932] 1 K.B. 371 cited with approval in *Canadian Superior Oil Ltd. v. Padden-Hughes Dev. Co.*, *supra*, note 2 and the *Scotsburn Dairy* case. In Canada see: *Edwards v. Harris Intertype Ltd.*, *supra*, note 2; *Gilbert Steel v. University Construction Ltd.*, *supra*, note 40; *M.L. Baxter Equipment Ltd. v. GEAC Canada Ltd.*, *supra*, note 40; *Pentagon Construction Ltd. v. U.S. Fidelity & Guaranty Co.*, *supra*, note 40; *Re Co-op Trust Co. of Cda and Atlantic Steel Buildings Ltd.*, *supra*, note 32; *Re Tudale Explorations Ltd. and Bruce*, *supra*, note 2; *Re Westmorland Home Insulators; Perma Therm Insulators Ltd. v. Bank of Montreal* (1981), 35 N.B.R. (2d) 385; 88 A.P.R. 385; *Viau v. Savard* (1984), 31 Alta. L.R. (2d) 150 (Q.B.); *Wilway Lumber Sales Inc. v. Bank of Nova Scotia*, *supra*, note 32.

It seems obvious that the promisee would not act in reliance on the representation if he was going to automatically suffer a loss by so acting. The promisee is induced to act because it is in his interests to do so. As Lord Denning has pointed out⁸⁸ the tenant who pays less rent, suffers no detriment. The optionee who has additional time to exercise the option, suffers no loss. The tenant who has additional time to repair, benefits from the estoppel. Thus, the action in reliance will always be to the advantage of the promisee.

If we are going to talk about detriment, then we must refer to the detriment which will be suffered if the promisor can now assert her legal rights. The tenant will now have to pay a large sum in back rent which may not be readily available. The optionee will lose rights under the original agreement. The tenant will forfeit the lease because repairs were not made in time. The promisee does not act to its detriment when acting in reliance on the representation. The promisee invokes promissory estoppel so as to avoid a detriment or loss that will necessarily result if the promisor can assert her legal rights. It appears, therefore, that the requirement of action to the promisee's detriment is not logical and, if applied literally, would have prevented the promisee from using promissory estoppel in many of the cases in which the doctrine has been successfully invoked. Fortunately, even the courts that seem to require a detriment interpret that requirement so as to include any action or inaction in reliance on the representation which will lead to a loss if the promisor can subsequently reassert her legal rights.⁸⁹

7. What is the effect of an Estoppel?

Promissory estoppel can operate either to temporarily suspend legal rights or it can permanently prevent their enforcement. The effect of the representation will depend on the circumstances of each case. Generally, it is said that the representation can be revoked with notice which is reasonable in the circumstances unless the promisee cannot resume its original position.⁹⁰ Litigation over rights under the original agreement may amount to notice that in the future the contract must be respected

88. *W.J. Alan Co. Ltd. v. El Nasr Export & Import*, *supra*, note 28; see also *Egan v. State Transport Authority* (1982), 31 S.A.S.R. 481 (S.A.S.C.).

89. See *Snell's Principles of Equity*, (28th ed.), *supra*, note 5 for a similar argument.

90. *Bentsen v. Taylor, Sons & Co. (No. 2)*, [1893] 2 Q.B. 274 per Bowen J. at 283. See also: *Charles Rickards Ltd. v. Oppenheim*, *supra*, note 44; *D. & C. Builders v. Rees*, *supra*, note 50; *Emmanuel Ayodesi Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, *supra*, note 81; *Panoutsos v. Raymond Harley Corp. of N.Y.*, [1917] 2 K.B. 473; *Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd.*, *supra*, note 58; *Reed v. Sheehan*, *supra*, note 29; *Tool Metal Manufacturing Ltd. v. Tungsten Electric Co. Ltd.*, *supra*, note 54; *W.J. Alan Co. Ltd. v. El Nasr Export & Import Co. Ltd.*, *supra*, note 28; *Legione v. Hateley*, *supra*, note 38.

even though those rights cannot be enforced for the period prior to litigation.⁹¹ The estoppel may also come to an end automatically according to the terms of the representation. Thus, where the promise was to accept a lower rent for the period of the Second World War, when tenants were seeking refuge outside of London, the promise ceased to bind when those conditions no longer prevailed.⁹² So too, where the time for repairs was suspended by negotiations over purchase of the leasehold, the time began to run again when the negotiations were broken off.⁹³

However, where necessary, the courts will give permanent effect to the estoppel. If a creditor freely accepts a smaller sum in satisfaction of a debt, the creditor will be precluded from suing for the full amount owed.⁹⁴ If payment is accepted in sterling when the contract stipulates payment in another currency, payment of the lesser amount constitutes payment for the purposes of the contract.⁹⁵ Each time the court allows an optionee to exercise his rights out of time, the effect of the decision is to give the optionee additional binding rights that cannot be brought to an end except in conformity with the contract.⁹⁶ Of course, the optionee could always decide not to exercise those rights but then there would be no point in litigating the estoppel issue. The estoppel will not, however, affect any future rights and obligations arising out of the continuing relations of the parties.

8. Summary

My account of the doctrine of promissory estoppel has been premised on the view that its role is to ensure that representations, otherwise unenforceable for lack of consideration, can be enforced when the dictates of justice so require. The dictates of justice are defined in the context of the facts before the court. Therefore, rules which would govern the availability of relief, cannot be formulated. The doctrine must be governed by flexible standards which allow the courts great discretion in its application. Thus, I have stressed the need to avoid rigid rules and technical obstacles to the enforcement of promises which induce reliance. Sensitivity to the purposes of promissory estoppel is as necessary to its successful application as an understanding of the case law. In the

91. *Tool Metal Manufacturing Ltd. v. Tungsten Electric Co. Ltd.*, *supra*, note 54.

92. *Central London Property Trust Ltd. v. High Trees Trust*, *supra*, note 24.

93. *Hughes v. Metropolitan Railway Co.*, *supra*, note 23.

94. Assuming that the debtor actually pays the smaller sum. See *D. & C. Builders v. Lee*, *supra*, note 50. In some jurisdictions in Canada, this problem is dealt with by statute. See s. 16, *Mercantile Law Amendment Act*, R.S.O. 1980 c. 265.

95. *W.J. Alan Co. Ltd. v. El Nasr Export and Import Co. Ltd.*, *supra*, note 28.

96. *Conwest Exploration Ltd. v. Letain*, *supra*, note 2; *M.L. Baxter Equipment Ltd. v. Geac Canada Ltd.*, *supra*, note 40; *Re Tudale Explorations Ltd. and Bruce*, *supra*, note 2.

following section of this article, I will use three recent decisions of the Supreme Court of Canada to illustrate how the requirements of justice can only be defined in the context of the particular case and how a clear understanding of the role of Equity would improve decision-making in this area.

V. *The Recent Cases in the Supreme Court of Canada*

The very nature of the doctrine under scrutiny requires that its discussion be rooted in an analysis of particular fact situations. The application of promissory estoppel in any particular case is left to the discretion of the court. In other words, the existence of the estoppel will depend on the requirements of justice in the circumstances of the particular case. Therefore, the facts of each case are extremely important because the result will be dictated by the judge's analysis of the most just solution in the context rather than by the abstract application of general rules. The contextual nature of justice in cases in which promissory estoppel is applied or rejected also means that the holdings will often be controversial because universal consensus on the dictates of justice is unlikely in a legal system in which a variety of legal and moral value systems compete. The cases decided by the Supreme Court of Canada provide interesting examples of the complex fact patterns that can give rise to litigation in which a court must decide whether promissory estoppel is applicable. The decisions show how difficult it actually is to apply the doctrine.

The first of the cases which will be discussed is *Engineered Homes v. Mason* (hereinafter *Engineered Homes*).⁹⁷ This case conforms most closely to the paradigmatic promissory estoppel situation of contractual rights which are varied by a representation. The second case is *Scotsburn Co-operative Services Ltd. v. Goodwin (W.T.) Ltd.* (hereinafter *Scotsburn Co-op*).⁹⁸ In this case the plaintiff company argued that the defendant company which was owned and controlled by the same person as the ostensible purchaser of the goods was liable under the contract on the basis of promissory estoppel. The third is the case of *V.K. Mason Construction Ltd. v. Bank of Nova Scotia et al* (hereinafter *V.K. Mason*)⁹⁹ where promissory estoppel was argued unsuccessfully in order to preclude the exercise of statutory rights independent of any contractual obligation. In *Engineered Homes* and *Scotsburn Co-op* the issue of promissory estoppel was central to the question of liability. In *V.K. Mason* promissory estoppel was raised as a secondary argument but its

97. *Supra*, note 2.

98. *Id.*

99. *Id.*

rejection in favour of negligent misrepresentation raises questions about the kinds of representations that will support an estoppel.

1. *The Facts*

(a). *Engineered Homes Ltd.*

This litigation was brought by a construction company against the trustee administering a bankrupt company. Juniper Lands Ltd. began a major land development scheme near Kamloops, B.C.. Engineered Homes Ltd. was one of three building contractors. The developer went bankrupt and Mr. Mason was named trustee in bankruptcy. The mortgagor of the land, I.A.C., exercised its rights whereupon the contractors initiated legal actions. An agreement was negotiated as a compromise of that dispute whereby I.A.C. and the contractors agreed to continue the project. Under this agreement Mason was named trustee of the building project and authorized to obtain interim financing. In addition, each building contractor bound itself to buy 14 lots at \$15,000 per lot subject to substantial completion of the first two phases of the project. On receipt of this money, I.A.C. was to transfer title to the contractor.

The outline of the facts in the decision does not set out clearly the exact nature and terms of this agreement. The property in the Trust was, presumably, that of the bankrupt developer. The beneficiaries of the Trust are not named but, presumably, they were I.A.C. and the three construction companies. Mr. Justice McIntyre does not state whether there were any other creditors. If there were, then there is a possible conflict of interest arising when the the same person acts as trustee of the bankrupt estate for all creditors and as trustee under an agreement amongst a sub-group of creditors. This issue is not discussed.

Mason, the trustee, operated the sales office and paid the salary of the person employed in that office out of his firm's funds. It is not clear from the report but it would appear likely that Mason, as trustee, expected to be reimbursed for all expenses out of the trust funds. In 1977 at a meeting with the contractors Mason let it be known that his firm was owed considerable amounts of money and that his firm could no longer afford to maintain the sales office. Obviously, it was in the interests of the contractors to have a sales office because they had to sell as many houses as possible in order to recoup their losses. The appellant company offered to purchase its 14 lots earlier than required under the agreement in order to ease the financial squeeze on Mason. Mason accepted this offer.

The appellant company sent a cheque to Mason for the amount of \$52,500 or 25% of the purchase price. Rather than paying this money into the trust account and notifying I.A.C. of its obligation to transfer title to Engineered Homes, Mason paid the money into his firm's account and

used it to cover the operating costs of the sales office which he continued to run. Mason testified that I.A.C. had consented to this arrangement but there was no corroborating evidence. Mr. Ross, the I.A.C. representative at the time, did not testify but his replacement, who was not involved in the project, testified that such consent would be unlikely.

The appellant company asked for conveyance of title some two months later. I.A.C. made no offer to convey the lots until August, 1978 when the market value of the individual lots had dropped to \$8,000. There is no indication of the reason for this delay but the appellant presented no proof that I.A.C. denied its obligation to convey. The appellant refused to accept the conveyance of title because the price of the lots set in the agreement was far above market value. Eventually the mortgages on the lots were foreclosed and the lots were sold. Then the appellant sued Mason to recover \$52,200, which it alleged that Mason had wrongfully converted to his own use. Mason argued in his defense that the appellant company was estopped from denying his right to the money because he had acted in reliance on the representation made by the appellant company.

(b). *Scotsburn Co-operating Services Ltd.*

Like the *Engineered Homes* case, the *Scotsburn Co-op* case also presents a fact situation in which the evidence is not entirely satisfactory. The plaintiff-appellant sold (and, to my knowledge, still sells) dairy products to supermarkets including one in Amherst, Nova Scotia. For some reason, the name of the supermarket was not clearly established in the testimony but it was probably known in the community as Goodwin's Supermarket although this was not the name of the company operating the store. Photographs of the storefront showed a sign reading simply Goodwin's. Goods were delivered to the Amherst Store by Scotsburn over a long period of time beginning prior to 1965; \$25,252.89 remained unpaid on this account when the company, Goodwin's Discount Food Store Ltd., went into receivership in 1980. Presumably because there were insufficient funds to pay the creditors in full, Scotsburn decided to sue W.T. Goodwin Ltd., a real estate holding company owned and controlled by the same person as Goodwin's Discount Food Store Ltd. It is not clear from the report whether or not that individual, Mr. Chapman, was sole or majority shareholder.

In order to understand why Scotsburn sued W.T. Goodwin Ltd. it is necessary to give the corporate history of the Goodwin companies. In 1939 a company called W.T. Goodwin Ltd. was incorporated to operate the Amherst store. In 1965 the name of this company was changed to Goodwin's Supermarket Ltd. In the same year, the real estate holding

company was incorporated and took the former name of the supermarket company, W.T. Goodwin Ltd. It owned the supermarket building and had its offices therein. In 1969 a third company called Goodwin's Discount Food Store Ltd. was incorporated to operate a store in Sackville, New Brunswick. In 1972 Goodwin's Supermarket Ltd. sold its assets to Goodwin's Discount Food Store Ltd. In 1980 this latter company went into receivership.

Scotsburn, which had dealt with the original W.T. Goodwin Ltd., did not know about these corporate changes nor was it advised of them. Scotsburn continued to deliver dairy products to the store. On the delivery slip the employees wrote the name of the supermarket but Scotsburn made out the invoices to W.T. Goodwin Ltd. The invoices were paid without protest with cheques upon which were printed the names of both supermarkets but not that of the real estate company. There is no evidence as to the source of the funds in the account upon which the cheques were drawn. There was no written or oral contract between Scotsburn and W.T. Goodwin Ltd. The issue was whether or not W.T. Goodwin Ltd. was estopped from denying liability given its acquiescence over 15 years in delivery of goods billed to its name.

(c). *V.K. Mason*

V.K. Mason involves a dispute between V.K. Mason Construction Ltd. and the bank providing the financing for a building project. Courtot Investments Ltd., the developer, hired Mason Construction as general contractor for the construction of an office complex. Mason Construction insisted on proof of the company's ability to pay and Courtot referred the construction company to the bank. The trial judge concluded that Mason Construction would not have signed the contract if it had not received assurance of the financial viability of the project from the bank. Mason Construction did begin the work before receiving the assurance but it did not sign the contract until the Bank sent it a letter confirming that financing was sufficient to cover the cost of building the complex. Mason Construction substantially completed its part of the bargain.

In April of 1974, it became clear to the Bank and to Courtot that, due to Courtot's inexperience, the project had been badly planned and that Courtot could not pay Mason Construction. The Bank never advised Mason Construction that Courtot no longer had the funds to pay. Courtot delayed payment and sued Mason Construction on a number of frivolous pretexts in order to avoid paying. By August 30, 1974, Mason Construction had virtually completed all work but had not been paid since July 10, 1974. At that point Mason Construction filed liens against the property. In August, 1975 the Bank demanded payment of its loans

to Courtot and then exercised its power of sale. Eventually Mason settled its claim against Courtot but the Bank asserted its priority as mortgagee over the proceeds of sale. After it was paid in full there were insufficient funds to pay Mason. Mason then sued the Bank. The issue is whether or not the Bank can be held liable either in contract or on any other basis.

2. *The Decisions*

In each of these cases, it was argued that there was a representation made by word or conduct upon which one party relied to its detriment. The issues raised by this plea are both factual and legal. First, the court must decide whether there was a representation, an issue of fact. Second, the court must decide whether, assuming there was a representation, the party making it is estopped thereby from asserting strict legal rights. This issue is one of law. In all of the cases under discussion, the Supreme Court of Canada decided that promissory estoppel was not available. In *Engineered Homes* the appeal was allowed and Mr. Mason was held liable. In *Scotsburn Co-op*, the appeal was denied and the plaintiff company did not recover damages. In *V.K. Mason*, the construction company was allowed to recover damages on the basis of negligent misrepresentation and the argument based on the doctrine of promissory estoppel was rejected. The holding upon which each case turned was that there was no representation. Thus, the factual hurdle rather than the legal hurdle was the one which caused the party arguing promissory estoppel to stumble.

3. *The Analysis of the Doctrine in the Supreme Court*

In its decisions, the Supreme Court of Canada analyzes the doctrine of promissory estoppel in a very perfunctory manner. In each of the three cases under discussion, the highest court insists that the issues are basically factual. In *Engineered Homes*, Mr. Justice McIntyre begins his judgment by stating:

In my own view the case turns on the facts and findings thereon in the trial court and the Court of Appeal . . .¹⁰⁰

Mr. Justice Dickson states in the *Scotsburn Co-op* case that the trial judge and the appellate court differed on the issue of the existence of a contract which is, according to Dickson, C.J., an issue of fact.¹⁰¹ Finally, in *V.K. Mason*, Madame Justice Wilson states at the outset of her judgment:

100. *Id.* at 642 (S.C.R.) and 577 (D.L.R.).

101. *Id.* at 63 (S.C.R.) and 86 (N.R.). He also discusses the role of the S.C.C. in deciding issues of fact.

The principle source of dispute in the case is on the facts. There is relatively little disagreement over the applicable legal principles and counsels' presentations were substantially directed to the application of those principles to the facts as they say them.¹⁰²

This preoccupation with facts would pose no problems if the facts were analysed in light of a thorough account of the doctrine. As stated at the outset, a real sensitivity to context is essential to the application of equitable doctrines. However, in these cases the focus on the facts appears to divert judicial attention away from questions of law so that the decisions provide little guidance to the state of contract doctrine. It also means that the Supreme Court's decisions are based on factual conclusions. But surely its role is not to decide cases on their facts. It does not hear the witnesses and cannot judge credibility. The highest court can only hear a limited number of appeals and, at a time when the court's resources are strained by the number of cases relating to constitutional issues, it has a responsibility to choose the private law appeals carefully. It should grant leave to appeal in cases which raise important issues of law. Even more important, it should carefully study the case law and attempt to provide guidance to the lower courts which must apply the legal rules and legal doctrines in the huge number of cases in which there will be no appeal.

Clearly, there may be exceptional cases where the trial or appellate decision is so unjust in light of the facts that the Supreme Court must intervene. But these cases are extremely rare. Where the trial and appellate courts have adopted two differing but reasonable interpretation of the facts, a third interpretation of those same facts will not be self-evidently more correct unless it is supported by a thorough analysis of the case law. Of course, if the Supreme Court has canvassed the issues and the precedents in a leading case, it need not repeat the exercise each time the question comes before it. However, if such a case does not exist, reading the decisions is like entering a hall of mirrors in which there is an infinite regression of self-referential images lacking any identifiable point of origin.

The suggestion that the Supreme Court of Canada should choose the cases in which it grants leave to appeal carefully so that the cases heard provide opportunities to discuss and resolve controversial issues, is obviously neither new nor, in itself, controversial. I am sure that the Court takes great care when granting leave to appeal and wants to hear important cases that will allow it to resolve disputes and provide guidance to lower courts. The role of the Supreme Court is clear. Unfortunately, the decisions do not actually achieve the goal the Court

102. *Id.* at 275 (S.C.R.).

has set. The reasons for the failure of the Court to play its role as successfully as one would wish are undoubtedly complex. The large volume of cases and the lack of resources are both factors that can deny judges the time to explore fully a legal issue. The lawyers arguing the cases may be ill-prepared so that they do not provide the guidance to the judge that is necessary. Cases which may appear to raise controversial issues during the hearing on leave to appeal may turn out to be far less challenging during the actual argument. None of these possible reasons is the fault of the court itself.

However, the rigour of the jurisprudential analysis is one aspect of decision-making that the Supreme Court can control. Unfortunately, rigorous analysis of the doctrine of promissory estoppel is precisely what is lacking in the cases under discussion here. This is, in part, due to the approach the court takes to doctrinal analysis. The Supreme Court judges employ what I shall call the "invocation of doctrine" method.¹⁰³ When a court uses this method, it quotes an authoritative source which states the rule which the court intends to apply. The citation is usually brief and it glosses over doctrinal difficulties and conflicting precedents. Having invoked the rule in this ritualistic fashion, the court then goes on to decide the case on its facts without any analysis of the rule itself. Precedents are mentioned simply *en passant* and the social policy underlying the doctrine is never even mentioned.

The analysis of the doctrine of promissory estoppel set out in the *Engineered Homes* case provides an excellent illustration of this approach to legal reasoning. Mr. Justice McIntyre begins his discussion of the law by quoting from Halsbury's Laws of England.¹⁰⁴ He then quotes from the judgment of Mr. Justice Ritchie in *John Burrows Ltd. v. Subsurface Surveys Ltd.*¹⁰⁵ in which Ritchie, J. himself cites from Lord Denning's judgment in *Combe v. Combe*.¹⁰⁶ Mr. Justice McIntyre does not acknowledge that the definition of the doctrine suggested by Mr. Justice Ritchie appears, at least superficially, to be quite different from the formulation of the doctrine in *Combe v. Combe*. He does not discuss any of the numerous lower court decisions from Canadian jurisdictions nor the English and Commonwealth precedents. He simply does not acknowledge that the doctrine has been formulated differently in other cases. Having invoked the doctrine without analysis, Mr. Justice

103. See Feinman, J., *Promissory Estoppel and Judicial Method* (1984), 97 Harv. L. Rev. 678 especially at 708-709. For an interesting history of the Supreme Court, see Snell & Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: U. of T. Press, 1985). This history confirms the view stated *infra* that the Court is very aware of its role.

104. (4th ed.), Vol. 16 para. 1514, 1017

105. *Supra*, note 2.

106. *Combe v. Combe*, [1951] 1 All E.R. 767.

McIntyre then states that if Mr. Mason is to succeed on appeal he will have to show an unambiguous promise by the plaintiff that it would not insist on its strict legal rights.

Thus, when using invocation of doctrine method, the court acts as if the doctrine of promissory estoppel is already defined to everyone's satisfaction. There are no controversial issues and the crux of the appeal is an interpretation of the facts. The facts are set out in detail and the court concludes that it is obvious that the rule or doctrine is either applicable or not. The suggestion is that the answers are all found in the facts themselves. One is left wondering why, if the answer depends solely on the proper understanding of the facts, the trial and/or appellate judges had so much difficulty in reaching the right conclusions.

The use of the invocation of doctrine method may be understandable in lower courts. Trial courts must deal with a huge volume of cases which often will turn on the judge's findings of facts. Many of them are routine and raise no important issues of law. A trial judge must choose between the routine cases and those which are controversial in order to take the care necessary in deciding the difficult issues. Otherwise, the judicial system would work much more slowly. However, once the case has reached the highest court in the land, the process of sifting the routine from the controversial should be complete. Therefore, the Supreme Court cannot use this method of decision-making and effectively fulfill its important role in the legal system.¹⁰⁷ The Supreme Court is obviously aware of this and many of its decisions, especially those involving constitutional issues, show that the court can do an excellent job in the proper circumstances. However, some areas of private law are not receiving the same careful attention.

After reading the three decisions, one would have only a very superficial understanding of the doctrine of promissory estoppel and none whatsoever of the purposes it is to serve in modern contract law. In each case, the Supreme Court says that there must be a representation made by word or conduct upon which the other party must act to its detriment. While the statement of the requirements of the doctrine is not mistaken, its brevity means that the difficulties entailed by their definition are simply not acknowledged and jurisprudential controversies are not resolved. Once, the doctrine is briefly stated, the Supreme Court then turns its attention to the facts of the cases to reach its decision. A more

107. Obviously, the distinction between a routine case and a controversial case can, in itself, be problematic. The lower courts can, and do, use the invocation of doctrine method to avoid dealing with important legal and political issues. However, that does not mean that there are no cases which are routine. Given the volume of cases coming before them, lower courts have to treat a large number of cases as routine if they are to render any decisions.

rigorous approach would begin with a discussion of the role of equitable doctrines in contract law and then discuss the criteria of application of the doctrine of promissory estoppel.

4. *Applying the Doctrine to the Cases*

The question which must be addressed now is whether or not the outline of the doctrine set out in the first part of this article would have altered the results in the three decisions of the Supreme Court of Canada under discussion. The answer is, of course, not necessarily. I have stressed repeatedly the discretionary nature of the remedy. A rigorous discussion of the case law would not automatically lead to a change in the judicial perceptions of the needs of justice. It would, however, oblige the court to explain its decisions more carefully. A look at the cases will explain why.

(a). *Engineered Homes*

In its discussion of the facts in the *Engineered Homes* case, the Supreme Court focused on the factual issue of the existence of a representation without looking at any of the other potential issues. The conclusion which is key to the result in this case was that there was no evidence of a representation upon which Mr. Mason relied in appropriating the money to the use of his firm. On this basis, the defence of estoppel was rejected and the appeal allowed. Therefore, Mr. Mason was held liable for conversion of the money. Unfortunately, this factual finding is not very convincing and seems to hide the real basis for the decision.

As Mr. Justice McIntyre himself notes, the consensus of the case law is that the party who invokes the defence of promissory estoppel must show that the other party, by words or conduct, made an unambiguous representation. Thus, a representation can be implied from *conduct* and, even though the party making the representation did not subjectively intend to induce reliance, reasonable reliance on words and actions can give rise to an estoppel. The issue is whether or not Mason could reasonably believe that Engineered Homes had consented to the use of the money to defray the costs of running the sales office.

When the facts of the case are analyzed from this point of view the conclusion of the Court of Appeal is not self-evidently wrong nor is the decision of the Supreme Court obviously correct. Engineered Homes paid \$52,500 to Mason before it was bound to under the contract which created the trust and there was no reason for making early payment except an agreement of the type alleged by Mason. Mason would never have received the money nor deposited it in his account if Engineered Homes had not made its offer. He did not extort payment or hide his intentions. The evidence in the case is not very satisfactory, but there is

no suggestion that Mason acted fraudulently. Thus, all of the elements of a promissory estoppel appear to be present in this case. Mason is using the doctrine as a defense against the accusation that he acted in breach of the agreement whereby he was named trustee. He is not using it as a cause of action. During a meeting called to discuss Mason's financial difficulties, Engineered Homes offered to pay money to help him out. Engineered Homes knew that it was not required to pay the money before the date set in the agreement. Engineered Homes knew or ought to have known that Mason would act in reliance on this representation. Mason acted in exactly the way he said he would. Upon receiving the money, Mason acted to his (and his firm's) detriment by continuing to spend money out of the firm's account to operate the sales office. Indeed, Engineered Homes benefited from Mason's reliance because the more sales there were, the more likely it was that the whole project would be salvaged from bankruptcy.¹⁰⁸ If Mason had been a management consultant whose firm had been hired to administer the project on behalf of Engineered Homes, it seems obvious that Mason could have successfully invoked promissory estoppel.

If this analysis is convincing, the key issue is not that of the existence of the representation. Rather, it is whether or not the parties are in the kind of relationship in which it is appropriate to use the doctrine of promissory estoppel. In this case, the Court must resolve a dispute between a trustee and a beneficiary of the trust. In the case of a trust, a beneficiary can consent to the use of the trust funds which goes against the terms of the trust. Thus, in trust law, the issue would be whether or not the beneficiary consented to the use made of the trust funds.¹⁰⁹

108. There is no indication as to whether or not there actually were sales as a result of Mason's efforts. Even if there were none, Engineered Homes still obtained the service - a sales office - that it was seeking.

109. It is not clear from the case what the terms of the agreement between Mason and the other parties were. It seems likely that Mason would not agree to act as trustee unless provision were made for adequate remuneration and reimbursement of expenses. However, Mason was not acting within the terms of the agreement in appropriating the money or he would have so argued. As Prof. Waters states:

A breach of trust occurs when the trustee's duty to act precisely within the terms of his obligations is not fulfilled. If he fails in this, it is of no significance that he had no intention of departing from his duty . . . If the letter of the trustee's obligation has not been adhered to for whatever reason, he is liable to his beneficiaries for any loss which has occurred as a result. *Id.* at 987-18

However,

if a beneficiary consents to, or concurs in, a breach of trust prior to its being carried out, or he releases the trustee from liability, or in some other way acquiesces in the breach after it has been carried out, he may not subsequently claim from the trustee any compensation to the trust for the loss arising, *Id.* at 1009.

See also *Re McNeil* (1911), 19 W.L.R. 691 (B.C.) and *Re Pauling's Settlement Trusts*, [1964] Ch. 303, [1963] 3 All. E.R. 1 (C.A.). See also pages 619-622 Hanbury and Maudsley,

Promissory estoppel would appear to be irrelevant to the issue of consent because the trustee is adequately protected by the rules of trust law. There is no reason to use promissory estoppel because it is not necessary to make an otherwise unenforceable promise binding. The parties are not attempting to vary the terms of the trust agreement. At this point the lack of information regarding the terms of the trust becomes particularly disturbing because it is unclear to what use Mason was supposed to put the funds paid by Engineered Homes. Either the money was to be paid into the trust for the benefit of all the beneficiaries or else it was paid to Mason in trust for I.A.C. Thus, the situation is complicated by the fact that there are four beneficiaries of the first agreement, all of whom are potentially affected by the consent to the appropriation of the funds by the trustee.

Assuming first that the money was to be paid into the trust for the benefit of all of the beneficiaries, then the use of Engineered Homes' \$52,000. to defray the trustee's costs may result in the unjust enrichment of the other beneficiaries. Each construction company was to pay \$52,000. into the trust for a total of \$156,000. Each beneficiary must pay a proportionate share of the trustee's costs.¹¹⁰ If the other two construction companies never pay their contribution and the trustee reimburses himself for expenses as authorized by the Trustee Act,¹¹¹ the two beneficiaries avoid paying their share of the costs. For example, if the three companies had paid their \$52,000 into the trust, and for some reason I.A.C. was unable to transfer title to the lots so that the construction companies were entitled to reimbursement out of the trust, the trustee could pay his expenses and reimburse them proportionately. If there were \$21,000 expenses, \$135,000 would remain in the trust to be paid out to the beneficiaries, each of whom would get \$45,000. If Engineered Homes, alone, contributes to the trust fund and the trustee

Modern Equity, (12th ed.), *supra*, note 5. This principle suggests that, indeed, Engineered Homes could be prevented from claiming compensation by its consent to the appropriation of the funds. The only party who may not have acquiesced is I.A.C. in which case it seems peculiar that Engineered Homes is allowed to recover damages when the only beneficiary who has a strong claim decided not to sue.

110. See Waters, D.W.M., *Law of Trusts in Canada*, (2nd ed. Toronto: Carswell, 1984). The author states at 956 that

Remuneration is a first charge or lien on the trust property, as are expenses. All the beneficial interests must proportionately contribute to the obligation to pay remuneration, as they must equitably bear the expenses.

111. Section 97 of the Trustee Act, R.S.B.C., ch. 414 amended reads:

A trustee without prejudice to the provisions of any instrument creating the trust, . . . may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers.

As well s. 90 provides that a trustee is entitled to a fair and reasonable allowance.

can reimburse himself, then it would get only \$31,000 after payment of the trustee's expenses.

If the second hypothesis is correct and the money was paid in trust for I.A.C., then the use of the funds to defray Mason's costs clearly affects I.A.C.'s rights. Whether I.A.C. would have any right to contest such a use of the funds is not clear. Trustees have important fiduciary obligations to the beneficiaries of the trust and they cannot unilaterally appropriate trust funds to their own benefit.¹¹² But, as pointed out above, trustees don't need the consent of the beneficiaries to reimburse themselves for expenses incurred. Nor would a trustee need the consent of the beneficiaries for any reimbursement of expenses authorized by the trust agreement.

Mr. Justice McIntyre never directly discusses the issue of whether a trustee can invoke promissory estoppel in order to prevent one of the beneficiaries of the trust from asserting his or her equitable rights under the trust agreement. However, in his decision, Mr. Justice McIntyre seems preoccupied by the fact that the finance company, I.A.C., may not have consented to the allocation of the trust funds to the payment of the trustee's legitimate expenses, even though the trustee may not have even needed the beneficiary's consent for such an appropriation. The evidence of I.A.C.'s consent was ambiguous and this led Mr. Justice McIntyre to the conclusion that there was no representation that could give rise to an estoppel. He does not explain why the lack of consent on the part of I.A.C. should affect the nature of the representation made by Engineered Homes. The Supreme Court seems to conclude that one party could not be estopped because the trustee may have violated the rights of a third party. The denial of the plea of promissory estoppel is used to punish a potential breach of trust.

The conclusion that promissory estoppel was not available would be much more convincing if the Court had, first, analyzed the terms of the trust agreement to determine what formula had been agreed upon for the payment of the trustee's expenses. The second step would be to decide whether Mason had indeed violated the terms of the trust agreement or his powers under the Trustee Act. If not, then it would be difficult to understand how a beneficiary could sue the trustee for conversion of the trust funds. If, on the other hand, Mason had indeed violated the terms of the trust agreement, a third issue is raised: is it appropriate to allow a trustee to invoke the doctrine of promissory estoppel to prevent a beneficiary from enforcing equitable rights under the trust agreement. Does the doctrine of promissory estoppel do anything that the defense of consent does not already accomplish? Given that the role of the doctrine

112. See *supra*, note 109.

of promissory estoppel is to mitigate the harshness of the consideration requirement in contract law, it seems unlikely that it has any useful role in trust law. The trust is a creation of Equity and, even if courts have tended to elaborate technical rules in the area of trust, the use of an equitable doctrine to relieve against the results of the rules of Equity would appear contradictory and unnecessary. The appropriate approach to the resolution of the issues is the application and refinement of the rules of Equity governing trusts. The use of promissory estoppel in this context can only lead to greater confusion about the ambit of the doctrine and the appropriate circumstances of its application.

If, however, the Supreme Court had decided that the doctrine of promissory estoppel did have a useful role to play in trust law, then an analysis of the equitable nature of the doctrine would have enabled the Court to make a more persuasive case for the rejection of Mason's argument. The problem in this case is not the lack of a representation. It seems clear that Engineered Homes told Mason both in words and by its conduct in making early payment that he could use the money to defray his expenses. The issue is one of breach of trust. One of the maxims of Equity is that the person who seeks Equity must do Equity. Another is that the person who seeks Equity must come with clean hands.¹¹³ Assuming that Mason violated the terms of the trust (for otherwise promissory estoppel would be redundant), the protection afforded by the doctrine of promissory estoppel should not be available because Mason, himself, has not acted according to Equity. He is in breach of his trustee obligations.

Unfortunately the Supreme Court does not do the kind of analysis that is outlined above. It does not analyse the trust agreement and show that Mason was in breach. The Court seems to assume implicitly that Mason had no basis on which to use the money to reimburse his disbursements. The Court addresses the dispute solely in terms of the availability of the plea of promissory estoppel. It doesn't, however, analyze the doctrine in any detail. It focuses its attention on the facts and denies that an essential element of promissory estoppel — a representation — was present. The conclusion in law — that Mr. Mason did not come before the Court with clean hands — is presented as a factual conclusion — that there was no representation. As a result, the decision is not very convincing.

(b). *Scotsburn Co-op*

In *Scotsburn Co-op* the Supreme Court rejected the appeal of the plaintiff company. Mr. Justice Estey dissented. As in *Engineered Homes*, the

113. For the maxims of equity see chapter 3 of Baker & Langan, *Snell's Principles of Equity* (28th ed.), *supra*, note 5 and reference *supra*, note 10.

majority held that there was no representation made by the defendant company upon which the dairy relied to its detriment in delivering the products to the supermarket. Furthermore, there was no evidence to support the trial judge's conclusion that W.T. Goodwin Ltd. was contractually bound to pay for the dairy products delivered. It is surprising to find the discussion of the rules governing estoppel by conduct in the *Scotsburn Co-op* case because Mr. Justice Dickson frames the issue at the outset as whether or not a contract was entered into between the two parties.¹¹⁴ Given the issue, one would expect a discussion of offer, acceptance and consideration. Estoppel, whether at common law or in equity, cannot create a new cause of action where one did not already exist.¹¹⁵ Therefore, there must be some independent legal relationship upon which the suit could be based. Thus, the argument should stumble on the initial hurdle. Yet the majority chooses not to consider the issue of whether estoppel can be a cause of action.¹¹⁶

The majority does briefly consider the issue of the existence of a contract. The trial judge, Hallet, J., held that W.T. Goodwin Ltd. was liable for the monies owing. After 15 years of receipt of, and payment for, dairy products billed in its name without any effort to disabuse the dairy of its false belief that it was contracting with W.T. Goodwin Ltd., the latter company could not deny that it was a party to the contract with Scotsburn Co-op. The Nova Scotia Court of Appeal reversed this decision holding that there was no evidence to support the conclusion that the defendant company was, in fact, the purchaser of the goods. Mr. Justice Dickson states that no specific written or oral contract was alleged in this case. The plaintiff asked that the courts infer a contract between the parties on the basis of their conduct. The rule set out by the Chief Justice is that, while a court may look to conduct to determine whether all the elements of an enforceable contract are present,

In general, such agreement is manifested by an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration.¹¹⁷

One of the authorities for this statement is *St. John's Tugboat Co. Ltd. v. Irving Refinery Ltd.*¹¹⁸ This case underlines the contractual issue raised by Scotsburn's argument because the Supreme Court held the defendant refinery liable in contract in spite of the absence of any express

114. *Supra*, note 2 at 57 (S.C.R.) and at 83 (N.R.).

115. See *supra*, at 22-24, Spencer Bower & Turner, *Estoppel By Representations* (3rd ed.), *supra*, note 5, chapter 1 and chapter 14 especially at 383ff. and Cross, R., *Cross on Evidence* (5th ed. London: Butterworths, 1979) at 346-353.

116. *Supra*, note 2 at 67 (S.C.R.) and at 88-9 (N.R.).

117. *Supra*, note 2 at 63 (S.C.R.) and at 86 (N.R.).

118. [1964] S.C.R. 614.

acceptance. At this point, one would expect to find a discussion of the circumstances in which silence can amount to an acceptance. An alternative approach would be to distinguish the two cases in order to show why silence in the *Scotsburn Co-op* case does not amount to an acceptance. The distinction offered is that in the *St. John's Tugboat* case the contract was executed while, here, there is no evidence that the real estate company benefitted from any services rendered or received any of the goods. This distinction just begs the question because, if the contract requires guarantee of payment for goods delivered to the supermarket, the benefit obtained could only be indirect.

The majority does not address the issue of silence as acceptance. Rather Mr. Justice Dickson characterizes the disagreement between the trial and appellate courts as a question of fact. He, then, holds that, since a second appellate court should only reverse a judgment on the facts where the judgment on the first appeal is erroneous either on the grounds of intervention or in the interpretation of the record, there are no grounds for granting the appeal. This would appear to dispose of the case but the Chief Justice does not stop there. He goes on to characterize the decision of the trial judge as holding that the defendant company was estopped from denying liability for the contract price by its conduct. This argument based on estoppel is rejected as well.

The first basis for the rejection is procedural. Scotsburn did not plead the material facts in its statement of claim. Nor did it attempt to amend those pleadings following examination for discovery. The burden of proof was on Scotsburn to show that all the elements of an estoppel were present. It would be inappropriate for the Supreme Court of Canada to attempt to determine the facts capable of supporting the estoppel. Given the lack of evidence and the difficulty of knowing what representations Scotsburn relied upon, the court should reject the appeal on this ground.

In spite of these evidentiary problems, Mr. Justice Dickson holds that, even if procedural deficiencies had not been present, he would have rejected the argument based on estoppel. At this point, the need for careful analysis of the various forms of estoppel becomes obvious. The Chief Justice begins his short discussion of estoppel by quoting Spencer Bower and Turner's definition of estoppel by representation.¹¹⁹ This definition describes common law estoppel which requires a statement of fact. After this quote, several authorities which deal with estoppel in pais are referred to without discussion. Thus, the argument being dealt with is one based on the assertion that W.T. Goodwin Ltd. had made a statement of fact upon which Scotsburn relied to its detriment.

119. *Supra*, note 5 at 4.

The proper characterization of the representation is crucial to the choice of the relevant case law. Scotsburn is trying to estop the defendant from denying liability on the basis of a contract. There are two ways of interpreting the representation. Firstly, one could argue that the conduct amounted to a statement of fact. Secondly, one could argue that it was a statement of future intention. If the argument is that the company by its conduct represented that it was liable for goods delivered, this could be interpreted as a statement of fact that there was a contract. This would be a statement of fact in the same way that a statement that goods belong to one's brother,¹²⁰ or that three consignments of goods have been delivered¹²¹ would be. Statements of fact can be made by conduct and even by silence.¹²² This interpretation of the conduct of the respondent company might be convincing if there was a single contract between Scotsburn and the supermarket to which the assertion could relate. But this is not a case where the supermarket was bound by a contract and W.T. Goodwin's Ltd. explicitly or impliedly said, in effect, "Don't worry. Even though the two companies are distinct corporate entities, W.T. Goodwin is bound by the contract". It is hard to see how a promise to pay for future deliveries can amount to a statement of fact in the absence of a global agreement.

The more normal way of structuring relations between a supplier and a merchant is to have one contract for each delivery. The supermarket would not be obliged to order more dairy products. The dairy would not be obliged to deliver more if, for some reason, it was unable to do so. Thus, the only possible representation that could be implied here would be "if you continue to deliver goods to the supermarket, W.T. Goodwin Ltd. will guarantee payment." This is a statement of future intention. If so, it cannot give rise to an estoppel in pais.¹²³ The only circumstances in which a statement as to future intention will give rise to liability on the basis of estoppel are those governed by the doctrine of promissory estoppel.

If I am right in arguing that the only possible representation is one of future intention, then Mr. Justice Dickson is mistaken when he holds that there was no representation because the facts show only that W.T. Goodwin Ltd. remained silent and silence can only constitute a representation where the alleged representor owes a legal duty to the

120. *Freeman v. Cooke* (1848), 2 Exch. 654.

121. *Carr v. London & Northeastern Rail Co.* (1875), L.R. 10 C.P. 307.

122. *Greenwood v. Martin's Bank*, [1933] A.C. 51 (H.L.); *Willmott v. Barber* (1880), 15 Ch.D. 96; 49 L.J. Ch. 292; and *Baker and Langan*, *Snell's Principles of Equity* (28th ed.), *supra*, note 5 at 558-563.

123. *Jorden v. Money*, *supra*, note 52 and *Nippon Menkwa Kabushiki Kaisha v. Dawson's Bank*, *supra*, note 52.

other party to speak out and inform him of the true situation. He is mistaken because the notion of legal duty has no place in the equitable doctrine of promissory estoppel. It is a technical requirement which would fetter unnecessarily the discretion of the judge. The appropriate question is whether or not it was reasonable to rely on the silence as constituting an unambiguous representation.

Reformulating the issue as one of promissory estoppel brings us back to the issue of promissory estoppel as a cause of action. As stated above, the majority opinion in the case law is that promissory estoppel does not create new causes of action where none existed before.¹²⁴ However, it is possible to argue that Scotsburn Co-op is not using promissory estoppel as a cause of action even though it acquires new rights through the estoppel. Scotsburn Co-op sues in contract. W.T. Goodwin Ltd. invokes the corporate structure as a means of denying liability. As a defense or shield against this argument, Scotsburn, then, invokes the estoppel. Thus, Scotsburn does not have to base its action on the rights created by promissory estoppel.

Having gotten over the hurdle created by the rule that promissory estoppel creates no new causes of action, the issue becomes that of the nature of the representation. Was it reasonable for Scotsburn to rely on the silence of W.T. Goodwin Ltd. as a positive affirmation that it would not invoke the rights created by its legal status as an independent corporate entity? This question raises the basic policy issue on the case. The same person, Mr. Chapman, was the controlling or sole stockholder¹²⁵ in all three companies involved in Goodwin's Supermarket. Presumably he made all the important decisions. The real estate holding company owned the building in which the supermarket was located and, in all probability, benefitted directly from the supermarket operation in the form of rent. The name over the supermarket read simply "Goodwin's"¹²⁶ and could as easily refer to the real estate holding company as to the supermarket. The real estate assets of the supermarket were transferred to the real estate holding company in 1965. There may have been other transfers of assets. The question is whether or not the owner of these companies should be allowed to hide behind corporate form now that one of the companies has gone bankrupt. Clearly there are

124. *Supra*, note 2 at 12-15.

125. This crucial fact was never made clear. In their judgments the Supreme Court Justices refer to Mr. Chapman as "sole or controlling" shareholder. The presence of 3rd party investors could possibly affect the equities in this case. For example, it may arguably be unfair to lift the corporate veil if the result would be to impose losses on parties who had invested in the real estate company without any knowledge of the supermarket's operations.

126. Per Estey, J., *supra*, note 2 at 75 (S.C.R.) and at 93 (N.R.).

no legal rules against a one-person company¹²⁷ but if a business person acts as if all his assets are available to pay debts while hiding the fact that corporate structure may actually protect some assets from the creditors, it may be necessary to lift the corporate veil in order to do justice to the creditors.

Mr. Justice Dickson chooses not to deal with this question in spite of its apparent relevance to the issue of the reasonableness of reliance. The majority, in holding that silence does not amount to a representation, appears to be saying that Mr. Chapman acted reasonably and did not induce reliance on all of the assets of the three companies. Because the evidence before the court is so incomplete and the majority does not confront the policy issue head-on, it is impossible to decide whether this conclusion is justified.

Mr. Justice Estey, in his dissenting judgment, seems to be more conscious of the policy issue¹²⁸ but he chooses to avoid it as well. After asserting that the issue is primarily one of fact and stressing the inadequacies of the evidence before the Court, he argues that the respondent company is liable on the basis of a unilateral contract. The respondent, Mr. Chapman, had arranged for the delivery of goods to the Amherst store over a long period. The pattern of purchase and payment amounted to an offer to Scotsburn Co-op that if it continued to deliver dairy products, it could look to the respondent company for payment either directly or indirectly in one of its other corporate guises. The respondent company, after benefitting from this arrangement over many years, cannot deny its existence. Scotsburn Co-op had accepted the offer by continuing to deliver the goods. It is now too late to bring this contractual arrangement to an end.

Mr. Justice Estey's solution to the main issue of the existence of a contract is initially attractive but ultimately not very convincing. If a person cannot make a representation of the sort that will give rise to an estoppel through silence why should the same silence and/or inaction be sufficient to constitute an offer? Surely an offer needs to be even less ambiguous than a representation that will give rise to an estoppel. If the court must imply an offer from the conduct of the parties, then the court itself must infer all the contractual obligations. In this case, the use of the concept of a unilateral contract appears to be a device for achieving a policy goal — preventing the abuse of corporate structure — while avoiding the admission that the court is imposing obligations that have not been voluntarily negotiated by the parties. The argument in favour of

127. See *Salomon v. Salomon & Co.*, [1897] A.C. 22.

128. See *supra*, note 2, especially at 77-8 (S.C.R.) and at 94-5 (N.R.).

liability would be much more convincing if the policy issue was addressed head-on.

(c). *V.K. Mason*

The plaintiff company argued four grounds for the imposition of liability upon the Bank, including unilateral contract and negligent misrepresentation. Promissory estoppel was raised, as a secondary issue, to prevent the Bank from relying on its priority as mortgagee in the distribution of the proceeds from the sale of property. Madame Justice Wilson rejected both the unilateral contract and the promissory estoppel arguments. The contract argument was rejected because the interpretation of the letter to Mason as an offer would require implication of a contract into a course of conduct in which the exact nature of the Bank's obligations was never made clear. Negligent misrepresentation constituted the appropriate basis for liability because contracts require certainty which would be undermined if the parties had to organize their business relations on the basis of their understanding of the promises implied from conduct. Negligent misrepresentation avoids this problem. If, as in this case, there is an untrue statement which is made negligently in the context of a special relationship that creates a duty of care and upon which the other party relies, then the party making the representation will be held liable.

Having reached the conclusion that the Bank was liable on the basis of negligent misrepresentation, Madame Justice Wilson was relieved of the necessity of analyzing promissory estoppel with any great care. She concludes that the Bank cannot be estopped from relying on its priority status as mortgagee because it never made any representation that it would not rely on its priority as mortgagee. Therefore, Mason Construction Ltd. was unable to show that it relied to its detriment in delaying the registration of its mechanic's lien. Because the analysis is so superficial it is not very satisfying although, given that liability had already been imposed, Madame Justice Wilson probably felt that extensive analysis was unnecessary.

However, her conclusion raises many questions. It is clear that there was a representation. The Bank said that there was sufficient financing to ensure payment of Mason's account. The representation was made in the letter and forms the basis of liability. Mason Construction acted in reliance on this representation in that it did not register its lien. Obviously, if the only reasonable explanation is that Mason did not register because it believed that there would be no difficulty in being paid, this belief was induced by the representation. All of the elements of an estoppel appear to be present. The only reason given for holding that this representation was not sufficient to create an estoppel was that the Bank

did not expressly state that it would not rely on its priority as mortgagee. The requirement of an express mention of the priority status appears to be a reversion to the *John Burrows*¹²⁹ position that suggests that there must be express negotiations over the rights being affected. As was shown above, the requirement of negotiations is based on a misreading of the case law. It seems anomalous that, in this case, the letter is a sufficient representation for the purposes of negligent misrepresentation but not for an estoppel when the result is that the Bank is held liable for precisely the same losses as the lien would have protected. Perhaps, the reluctance to find an estoppel has its origins in the parallel desire to avoid the use of unilateral contract because it would require the implication of obligation into ill-defined representations. Liability in tort openly acknowledges that the obligation to compensate is imposed by the legal system.

Ultimately, the conclusion of Madame Justice Wilson is very pragmatic. She argues that a remedy in tort is preferable to any remedy based on promissory estoppel because liability in tort will be more comprehensive. The injured party will have a claim against all the assets of the tortfeasor rather than just the proceeds of the sale of the property of the debtor. While it is undoubtedly true that the plaintiff does not give a hoot about the basis of recovery as long as he or she is adequately compensated, this doesn't provide an adequate doctrinal basis for the rejection of promissory estoppel.

VI. Conclusion

The analysis of these recent decisions of the Supreme Court of Canada in light of the general Anglo-Canadian case law demonstrates that the highest court cannot play its role as court of final appeal effectively until it has a more rigorous approach to the analysis of legal doctrine. The cases discussed above are frustratingly difficult to analyze. There is little critical discussion of the case law. A few precedents are cited in a ritualistic invocation of doctrine without any attempt to provide coherent account of the law. It is difficult to say whether one agrees with the version of the doctrine being applied because the court never states what version it is employing. The focus on facts at the expense of doctrine is not entirely misplaced because the availability of the plea of promissory estoppel depends on the requirements of justice in the particular context. Unfortunately, the application of the doctrine to the facts is not as convincing as one would wish because the court does not clearly identify the issues and provide a persuasive justification for its conclusions.

The doctrine of promissory estoppel deserves more thorough consideration. And it deserves this treatment not merely because the

129. *Supra*, note 2.

doctrine is used often by lower courts, although that, in itself, would justify it. Rather it deserves serious analysis because promissory estoppel is one particular application of a general principle that permeates Canadian law. The general principle is that one person cannot be allowed to use technical legal rules to avoid liability when he or she has induced someone else to act on the basis of beliefs that he or she knew, or ought to have known, were false. The purpose of this general principle is to prevent the exploitation of legal rules to gain an advantage that is not merited. Promissory estoppel applies this general principle to the problem of losses caused by representations that reasonably induce reliance made in the context of contractual relations. The legal rules governing contractual obligation result in no liability because the promise, whether express or implied, is gratuitous. Promissory estoppel, thus, is intended to mitigate the potential harshness of the application of the rules governing the creation of contractual obligation by allowing the courts, through the exercise of judicial discretion, to compensate innocent parties for losses that, otherwise, would be suffered if the legal rules were strictly applied. The doctrine of promissory estoppel is a means (but not the only means!) whereby a system of impersonal, abstract rules can be infused with humanity and common sense morality.¹³⁰

The availability of relief through the doctrine of promissory estoppel is discretionary and will depend on the reasonableness of the conduct of both parties. But the fact that relief is discretionary does not mean that the application of the doctrine must be arbitrary. The Supreme Court of Canada should attempt to enunciate standards which operate as guidelines for the lower courts. The Supreme Court should also apply these standards to the facts of the case before it so as to explain why the requirements of justice entail a particular result. It has not done so in its recent decisions. If it begins to do so, the importance of discretionary justice in our legal system will be made clear and the court will begin to play its role as highest appellate court more effectively.

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130. Of course, promissory estoppel or any other similar doctrine will not make our legal system perfectly just. The general rules, and even contract law itself, may need radical re-thinking. Judicial discretion is not a substitute for substantive reform. But discretionary justice can be very important to individual litigants and the value of just results to the real people who find themselves involved in litigation, should not be denigrated. Major substantive reform can be an ephemeral goal for which people's lives cannot be put on hold.