I. INTRODUCTION

In the 40-year period since 1970 there have been a number of important developments in Anglo-Canadian contract law, many representing significant changes from former law, and some representing a marked departure from the law in other common law jurisdictions.

II. TENDERS FOR CONSTRUCTION CONTRACTS

Before 1981 the usual analysis of tenders was that the owner invited offers, the bidders made offers, and no contract came into existence until acceptance of the successful bid. But in *Ron Engineering & Construction Eastern Ltd. v. Ontario*¹ it was held that a contract (called by the court a unilateral contract) binding upon the tenderer came into existence on submission of the tender. Subsequent cases held that the owner also was bound by contractual obligations to tenderers, but there was considerable

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uncertainty about the source of these obligations, and how they followed from the reasoning in *Ron Engineering* (which implied, by speaking of a unilateral contract, that the obligations were on one side only). The Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction*\(^2\) established that a contract normally comes into effect on submission of tenders, with obligations on both sides. The decision made it clear that the source of the obligation was contractual. Iacobucci J., giving the judgment of the court, said that the precise obligations would depend in each case “upon the terms and conditions of the tender call.” The analysis of unilateral contract was doubted.\(^3\) The clarification of these two points was an important addition to this area of the law, making it clear that the source of the obligations was a contract between the owner and each tenderer, and, since there were obligations on both sides, a bilateral contract. The terms of the contract are that each party will abide by the rules of the tender process, and these will normally be found in the call for tenders.

Proposals, or calls, for tenders usually contain a clause designed to protect the owner from liability to unsuccessful tenderers. In its simplest form, often called a privilege clause, the clause provides that “the lowest or any tender will not necessarily be accepted.” The defendant in the *M.J.B.* case sought to argue that such a privilege clause relieved it of any obligation: this was the argument that had succeeded in the lower courts. The Supreme Court of Canada, as has been mentioned, took the documents, principally the call for tenders, as the primary source of the owner’s obligations. It followed that a clause in the document clearly limiting these obligations ought, on this reasoning, to be given effect, and the court accepted this. But the privilege clause, on its proper interpretation, the court held, did not entitle the owner to accept a non-conforming tender. It is well established that documents may be strictly construed against the interests of the party which draws them up, and in this case it was possible to give a reasonable meaning to the clause without giving it the interpretation favoured by the defendant. The meaning was that the defendant might in some circumstances legitimately reject a conforming tender (because of a tenderer’s poor business reputation, or inadequate capacity, for example), but that it was not permitted by the clause to accept a non-conforming tender.


This seemed to be a reasonable interpretation in the circumstances, and again it is to be noted that the conclusion depended on the intention and reasonable expectation of the contracting parties.

In Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)\(^4\) the Supreme Court of Canada had to interpret a much more explicit clause purporting to exclude liability to unsuccessful tenderers. The court divided on the question of interpretation, the majority holding that, in the very unusual circumstances of the particular case (where there was a breach of a specific undertaking to consider bids only from a small number of named tenderers) the clause could not be interpreted to exclude liability. But the whole court held that an appropriately worded clause, if sufficiently clear, could effectively exclude liability. This was a natural conclusion from the premise that the only source of obligations was the ordinary law of contracts, and it was in this spirit that the court rejected the doctrine of fundamental breach, a matter to be discussed below.

In a purely private law context it is difficult to see what objection there is to the owner excluding contractual obligations, provided it is done so clearly as not to create contradictory expectations. There is no principle of contract law by which an obligation could be imposed on a party that clearly rejected the obligation, and the invalidation of such exclusion clauses would not be in the long-term interests of either owners or tenderers, because if the courts created non-excludable obligations, or complicated the law by artificial and adverse construction of clauses designed to protect the owner, the effect in the private sphere would be to deter owners from issuing calls for tenders. Such a development would remove from the marketplace a useful commercial device, and in the long run would be to the detriment of owners and potential contractors, particularly small contractors not previously known to owners.

In the public sphere other considerations apply, because public policy, sometimes incorporated in legislation or regulation, may require a public call for tenders before the expenditure of public money. It might well be thought to be undesirable that this requirement should be evaded or diluted, but, if so, the obvious remedy would be for the legislature to impose an appropriate obligation, for example, by clarifying that government procurement contracts must be by a process of public tender that

treats all tenderers fairly.\textsuperscript{5} Possibly it might be argued that such an obligation is already implicit in relevant legislation, but then the natural route to explore that line of thought would be through some appropriate branch of public law with the object, if necessary, of compelling compliance with the law. It seems very doubtful that what is fundamentally a public objective can be satisfactorily achieved by application of principles of ordinary contract law. On the contrary, the attempt to achieve public law objectives through the manipulation of private law principles is likely to fail to achieve its public object (as ever more explicit exclusion clauses, successively tested by expensive litigation, eventually succeed in their object) while complicating and distorting the ordinary law of contracts.\textsuperscript{6}

\section*{III. IMPLIED TERMS AND GOOD FAITH}

The \textit{M.J.B.} case affirmed and perhaps extended\textsuperscript{7} the power of the court to imply terms in contracts. The power is an important and flexible tool of justice. All contracts are negotiated in some sort of context, and express words, however many and however clear they may be, can never be exhaustive of the parties’

\begin{itemize}
  \item This suggestion is made by Jassmine Girgis, "Tercon Contractors: The Effect of Exclusion Clauses on the Tendering Process" (2010), 49 C.B.L.J. 187.
  \item A tension between public objectives and contract law is evident also in the decision of the Supreme Court of Canada in \textit{Double N Earthmovers Ltd. v. Edmonton (City)}, [2007] 1 S.C.R. 116, 275 D.L.R. (4th) 577, where the majority of the court held that the city, having accepted a bid that apparently conformed on its face with the call for tenders could, without liability to the unsuccessful bidders, subsequently waive or vary the contractual obligations of the successful tenderer. The majority thought that there were “good policy reasons” for the result (para. 73), by which they meant the public interest in the freedom of the city to renegotiate contracts from time to time should it judge it beneficial to do so. The dissenting judges held that the result “completely nullifies the protection afforded by the implied obligation to accept only a compliant bid” (para. 83). In support of the majority it may be remarked that it is difficult to see how an obligation never to vary the final contract can be plausibly derived from private law contractual principles, particularly as substantial construction contracts are almost always varied in some respects in the course of performance. The majority invoked “good policy reasons.” Evidently the dissenting judges were also influenced by a policy consideration, but a quite different policy, \textit{i.e.}, the public interest in the maintenance of a fair and open tendering process that should not be amenable to manipulation (see para. 123).
  \item Some of the narrower formulations of the power to imply terms were scarcely satisfied in this case. It is not clear that the implication was “necessary,” nor that the parties, if asked whether the term was included would certainly both have said, “Oh, of course.” On the contrary the traditional view was that, if the call for tenders was silent, no contractual obligation was implied: \textit{Spencer v. Harding} (1870), L.R. 5 C.P. 561.
\end{itemize}
obligations. In the context of tenders for construction projects the whole object of the process is to compare like bids with like, and so it is a reasonable implication that only bids that conform to the invitation are contemplated and that only such bids will be considered. It is to be noted that the theoretical source of this obligation is firmly rooted in the presumed intentions of the parties, and is not derived from any extra-contractual source.

A number of previous cases, including some cases in provincial appellate courts, in imposing obligations on tenderers, had relied on the concept of good faith. This presented two difficulties. First, it was unclear what was the source of the obligation of good faith: if contractual, it was unclear how it could override — as it seemed to do in the reasoning of some of the cases — the terms of the call for tenders. Second, the phrase “breach of an obligation of good faith” suggests bad motive, but the motive of a party in breach of contract is usually irrelevant. Putting the two points together they amount to this: either the plaintiff has a contractual right, or it does not. If it does, and if the defendant infringes the right, the plaintiff is entitled to a remedy however much the other party may have acted in good faith. If the plaintiff has no contractual right, there is no remedy, however much the other party might be said to have acted for selfish motives: people are entitled to be selfish so long as they do not infringe the rights of others. The Supreme Court of Canada did refer to good faith in the M.J.B. case, but not as a source of the defendant’s obligations. The defendant honestly believed that it was dealing with a compliant bid, and that it was entitled to act as it did. So in the ordinary sense of the words it did act in good faith. But this was no excuse for breach of what the court found to be a contractual obligation:

The respondent’s argument of good faith in considering the Sorochan bid to be compliant is no defence to a claim for breach of contract: it amounts to an argument that because it thought it had interpreted the contract properly it cannot be in breach. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.8

The Supreme Court of Canada here affirmed that good faith cannot operate as an excuse for breach of a contractual term, though the concept is clearly relevant to the prior question of what terms should be implied. Other courts have indicated that the concept of good faith cannot satisfactorily be used to create

obligations inconsistent with the parties’ intentions and reasonable expectations, inconsistent, that is, with the underlying principles of contract law itself. Some Canadian courts have employed the phrase “good faith” with approval in various contexts, but others have sounded a note of caution. The Ontario Court of Appeal said in Transamerica Life Canada Inc. v. ING Canada Inc.:  

Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for, rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into. 

This approach accepts the idea of good faith in support of the parties’ agreement, but not in contradiction or in opposition to it. Good faith is a concept that has been used in different senses to address several distinct questions in contract law. These questions include, among others, whether pre-contractual negotiations can be broken off, whether material facts known to one party must be disclosed to the other in pre-contractual negotiations, whether contracts are enforceable if induced by misrepresentation or mistake, whether and to what extent the courts should imply terms into contracts, whether terms that are very unfair can be enforced, whether non-performance by one party excuses the other, whether deliberate breaches of contract justify punitive damages, and whether the exercise of contractual rights may in some circumstances be restrained or precluded. The concept of good faith, as applied to these various problems, necessarily varies substantially in meaning and significance, and for that reason it is not possible to assign a single meaning to the concept, nor is it plausible to call “good faith,” when applied to such disparate questions, a single principle. Selfish motives could not, in all contractual disputes, be conclusive against a party entertaining them; nor could pure unselfish motives in themselves enlarge

contractual rights, or (as the *M.J.B.* case shows) excuse a party who was actually in breach of a contractual obligation. Neither could the motives of either party be conclusive on the question of whether contractual terms were unfair. It may seem attractive, or innocuous, to embrace an overriding principle of good faith, but the effect of doing so on the scope of contractual rights and obligations would be far from clear: a contractual right that could only be exercised for unselfish reasons would, to the extent that it could not be exercised, lack the usual characteristics of a “right.”¹¹

It would, indeed, be possible to conceive of the whole of contract law as the embodiment of the idea of good faith. Frederick Pollock wrote in his third edition in 1881 and repeated in subsequent editions that “[t]he law of Contract is in truth nothing else than the endeavour of the sovereign power, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness.”¹² Evidently Pollock was thinking of good faith primarily as supplying a reason for enforcement of promises, not as a limit on enforcement. He meant that the rules of contract law, taken as a whole, themselves reflected the community’s sense of what good faith required — an idea that Pollock associated with protection of reasonable expectations — not that good faith should be deployed to modify or displace the actual rules of English contract law: a contracting party must defer to the other party’s interests insofar, but only insofar, as the contract, properly interpreted, requires such deference.

Good faith in this sense has nothing to do with the state of mind of a party seeking to exercise a contractual right. Whether as a reason for enforcement or as a limit on enforcement, the adoption of good faith as a general principle could not eliminate the need for particular rules in the various contexts in which it has been invoked, and it seems probable that such particular rules would develop in Anglo-Canadian law if a general concept of good faith were adopted by it, or imposed upon it.

IV. CONSIDERATION, MODIFICATION OF CONTRACTS, AND PROMISSORY ESTOPPEL

Modification of contracts has, since the early 19th century, given rise to much difficulty in English and Canadian law. In a number of 19th-century cases sailors, having agreed to serve during a voyage for a certain wage, found themselves in a position, during the course of the voyage, to demand higher wages. Promises to pay higher wages in these circumstances were generally set aside. Sometimes judges were reported as reaching this conclusion on the basis of public policy, but Campbell’s report of Stilk v. Myrick\(^{13}\) gave the reason as lack of consideration, and this reason came in the 20th century to be accepted as the orthodox view, and was followed by the Ontario Court of Appeal in Gilbert Steel Ltd. v. University Construction Ltd.,\(^{14}\) where a promise to pay an increased price to a supplier of steel beams was held not to be enforceable.

However, in Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.\(^{15}\) (1990) the English Court of Appeal held a contractual renegotiation to be enforceable. In that case, a subcontractor had contracted to perform carpentry work at an agreed price. When the work was partly done it became clear that the subcontractor would not complete it at the contract price, and the head contractor, who was subject to a penalty clause in the main contract for delay in completion, agreed to pay a higher price for completion of the carpentry work. This latter agreement was held to be enforceable. The court held that performance of an existing obligation might constitute consideration. References to “principle” were prominent. Glidewell L.J., who gave the leading judgment, rejected the argument that this conclusion was contrary to principle:

If it be objected that the propositions above contravene the principle in Stilk v. Myrick, ... I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed ... It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.\(^{16}\)

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16. *Id.*, at p. 16.
But Glidewell L.J. added the very significant proviso that the
renegotiation would be liable to be set aside if there were economic
duress, which he called “another legal concept of relatively recent
development,” thereby suggesting that the result in Stilk v. Myrick might be supported, though not on the reasoning given in
Campbell’s report. Many have welcomed the demise of
consideration in this context, but it is not easy to say precisely
what has replaced it.

The Canadian position on this point is also unclear. In Greater
Fredericton Airport Authority Inc. v. NAV Canada, the New
Brunswick Court of Appeal said that, in the absence of duress, a
modification might be enforceable without consideration, but that
an implied threat to break the contract could amount to duress. In
River Wind Ventures Ltd. v. British Columbia detrimental reliance
by the plaintiff or a gained benefit by the defendant was said to be
a requirement of enforceability. As the idea of detrimental reliance
suggests, another possible approach to the question is by way of
the concept of promissory estoppel. The English Court of Appeal
has held that promissory estoppel may apply in the analogous
context of a promise to accept part payment of a debt in
satisfaction of the whole, but uncertainty remains on several
aspects of the scope of promissory estoppel, notably whether and
what “intention” is needed, and whether the doctrine gives rise to
an independent cause of action. It was recently held by the Ontario
Superior Court, interpreting the Mercantile Law Amendment Act,
that acceptance of part payment in full satisfaction of a debt was
not binding on the creditor if the debtor’s threat not to pay the full
amount constituted duress.

V. THIRD-PARTY BENEFICIARIES

Cases of contracts for the benefit of third parties have given rise
to much trouble over several centuries in Anglo-Canadian law. In
the old case of Dutton v. Poole, a father, wishing to give money to
his daughter and proposing to cut down trees to raise the money,
agreed with his son and heir that he would refrain from cutting
down the trees if the son would pay the daughter a sum of money.
The son inherited the land with the timber intact, but refused to
honour his promise. The promise was held to be enforceable.

Until Tweddle v. Atkinson\textsuperscript{23} (1861) it was generally accepted that
this case was rightly decided, though it was evidently an exception
to the idea of privity of contract. The reason for the conclusion in
Dutton v. Poole plainly had much to do with general considerations
of justice, including unjust enrichment. As the report puts it, "[T]he
son hath the benefit by having of the wood, and the daughter hath
lost her portion by this means."\textsuperscript{24} Of course, the precise phrase
"unjust enrichment" was not in use in the 17th century, but plainer
language could scarcely have been found to express the idea that
the son had been unjustly enriched at the expense of the daughter.

In a parallel modern case, Beswick v. Beswick, an uncle transferred
a coal business to his nephew in exchange for the nephew’s promise
to pay an annuity to the uncle’s widow. The promise was held to be
enforceable, but only because the widow happened to be the
administratrix of the uncle’s estate, and so entitled, in the opinion
of the House of Lords, to a decree of specific performance. Again
it is plain that general considerations of justice were in play. Lord
Reid described the possibility of there being no remedy as “grossly
unjust.”\textsuperscript{25} This was an issue where English law, contrary to its
usual habits, allowed the apparent requirements of logic to
override general considerations of justice and commercial
convenience. Statutory reform of English law was recommended
by the Law Revision Committee in 1937, but nothing was done
until the enactment of the Contracts (Rights of Third Parties) Act,
1999.

In Canada the English law of the late 19th and 20th centuries
was strictly followed, leading to a result in Greenwood Shopping
Plaza Ltd. v. Neil J. Buchanan Ltd.\textsuperscript{26} that many commentators
considered absurd. The lessor of business premises had covenanted
with its tenant to insure against fire. A loss by fire occurred,
allegedly caused by the negligence of two of the tenant’s
employees, and the Supreme Court of Canada held that the
lessor (and its insurer) was entitled to sue the two employees
individually for the whole of the loss, even if the proper

\textsuperscript{23}. (1861), 1 B. & S. 393, 121 E.R. 762 (Q.B.).
\textsuperscript{24}. Dutton v. Pool, supra, footnote 22, p. 212 (Lev.).
interpretation of the contract was that it had promised not to do so. As the Chief Justice of the Nova Scotia Court of Appeal commented, this result flew in the face of common sense, modern commercial practice and labour relations.27

When the issue arose again in London Drugs Ltd. v. Kuehne & Nagel International Ltd.28 the court took a very different view. The facts were quite similar to those in the Greenwood case. The plaintiff stored a valuable transformer with the defendant warehouser, agreeing to limit liability to $40. The transformer was damaged by the negligence of two employees, and, as in Greenwood, the owner sued the employees personally. The plaintiff's counsel relied on “longstanding, established and fundamental principles of law,” no doubt with some confidence of success in view of the quite recent decision of the court in Greenwood.

However, Iacobucci J., giving the judgment of the majority of the court, decided in favour of the employees. Iacobucci J. could easily have found that the case fell into one of the established exceptions to the doctrine of privity, but he chose instead to deal with the issue directly, saying that “I prefer to deal head-on with the doctrine of privity and to relax its ambit in the circumstances of this case.”29 He considered that the strict rule should be relaxed for reasons of “commercial reality and common sense.”30 Similar expressions were repeated: “sound commercial practice and justice,”31 “the reasonable expectations of all the parties to the transaction,”32 “the underlying concerns of commercial reality and justice,”33 “commercial reality,”34 a result that made “sense in the modern world,”35 “sound policy reasons,”36 “commercial reality and justice,”37 and “modern notions of commercial reality and justice,”38 ideas that were contrasted, to their advantage, with “a strict application of the doctrine of privity,”39 and “the rigid

30. Id., at p. 342.
31. Id., at p. 348.
32. Ibid.
33. Ibid.
34. Id., at p. 360.
35. Id., at p. 364.
36. Ibid.
37. Id., at p. 365.
38. Id., at p. 370.
39. Id., at p. 361.
retention of a doctrine that has undergone systematic and substantial attack.” He said that it would be “absurd in the circumstances of this case to let the appellant go around the limitation of liability clause by suing the respondent employees in tort.”

In the subsequent case of Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., Iacobucci J., giving the judgment of the whole court, extended the London Drugs case to a case involving waiver by an insurer of subrogation rights. The decision shows that the recognition of third-party rights in contracts is not limited to any particular class of contract, and there seems no reason why third-party rights should not be recognized in any case where considerations of justice require it. Iacobucci J. described the London Drugs case as having introduced a “principled exception” to the doctrine of privy. Some cases have held that third parties can only rely on this exception as a defence, not as a cause of action, but the very general nature of the Supreme Court of Canada’s appeal to considerations of justice suggests that, when justice requires it a third party may enforce a contract made for that party’s benefit.

VI. PAROL EVIDENCE RULE

The parol evidence rule purports to say that, where a contract has been reduced into writing, extrinsic evidence is inadmissible to modify the writing. There are many exceptions to the rule, and setting them out is a difficult task, because there is no authoritative precise definition of the rule, so that what are from one point of view exceptions may, from a different perspective, be described as instances in which the rule, properly understood, does not apply. The House of Lords held in 1971 that evidence of the factual setting of the contract is admissible in interpreting it, and later English decisions held that all relevant evidence is admissible on

40. Id., at p. 358.
41. Id., at p. 363.
43. Id., at para. 24.
45. As in Beswick v. Beswick,, supra, footnote 25, for example, or Vandepitte v. Preferred Accident Insurance Corp. of New York, [1933] 1 A.C. 70, 49 T.L.R. 90 (P.C.), which was expressly overruled by the Supreme Court of Canada in Fraser River, supra, footnote 42, at para. 40.
questions of interpretation, except, possibly, evidence of prior negotiations.

In *Eli Lilly and Co. v. Novopharm Ltd.* the Supreme Court of Canada, in a case not involving a dispute between the actual parties to the contract, held that evidence of the subjective intention of the parties should be excluded. The court said “The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time.” The concluding words just quoted appear to indicate that evidence of surrounding circumstances is generally admissible, but some other passages in the judgment might be read to support a more rigid rule excluding all extrinsic evidence, and some lower Canadian courts have so interpreted them.

Courts have often suggested that the “true” meaning of contractual words can be determined simply by perusing the document and that extrinsic evidence is only admissible in case of ambiguity. But it is doubtful if this is a workable test, for words cannot be determined to be ambiguous or unambiguous without considering (expressly or by implication) their context. As the Ontario Court of Appeal said in *Dumbrell v. Regional Group of Companies Inc.*, citing Professor John McCamus,

> A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 710-11.

Evidence of custom or trade usage has long been held to be admissible, even if it modifies or contradicts the meaning of words

50. *Id.*, para. 54.
51. *E.g.*, para. 57.
that are, in their ordinary sense, or in other contexts, unambiguous. In *Brown v. Byrne*\(^{53}\) Coleridge J. said:

Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous . . . What words more plain that “a thousand,” “a week,” “a day”? Yet the cases are familiar in which “a thousand” has been held to mean twelve hundred, “a week” a week only during the theatrical season, “a day” a working day.\(^{54}\)

Almost all fields of human activity use words with specialized meanings, and the admissibility of evidence to prove such meanings in case of dispute is essential in order to give effect to the intentions (as reasonably understood according to the usual objective test) of the parties.

Where a writing, signed by the parties, contains a recital that it is the final and conclusive expression of their agreement (a “merger,” “integration,” or “entire agreement” clause) the case for excluding extrinsic evidence is strengthened. But a merger clause, like any other set of contractual words, itself takes its meaning from its context. Sometimes the context will show that the parties can reasonably be taken to have intended to exclude all extrinsic evidence, but often this will not be a reasonable inference. It will not usually be reasonable to suppose that the parol evidence rule, with or without the assistance of a merger clause, excludes evidence that words have a specialized trade meaning, or that it prevents the courts from implying terms, a process that always has the effect of adding to or varying the express written terms of a document. It will be reasonable in many commercial cases to suppose that the parties intended to exclude evidence of prior negotiations — that is the obvious purpose of a merger clause.\(^{55}\) But it will not usually be reasonable to suppose that the parties intended to exclude implied terms necessary for the business efficacy of the contract, or

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55. The reservation in *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 4 All E.R. 677, for prior negotiations might possibly be defended on this basis.
evidence of trade usage that both had tacitly assumed and acknowledged.

Where there is no express merger clause, the parol evidence rule may be said to operate as an implied merger clause: where the parties impliedly agree that extrinsic evidence shall be excluded their agreement will be effective, but (as with an express merger clause) only insofar as it can reasonably be supposed to have been intended to apply. Looked at from this point of view (i.e., as an implied merger clause) it will be apparent that the parol evidence rule cannot be more stringent in scope and effect than would have been an express merger clause.

VII. MISTAKE

Before the Judicature Acts the courts of equity exercised a broad, but rather ill-defined, power to set aside contracts entered into under the influence of a fundamental mistake relating to relevant facts (a kind of mistake sometimes called “mistake in assumptions”). The House of Lords in 1932 took a very narrow view of relief for this kind of mistake. In 1950, Lord Denning attempted to revive the more flexible equitable approach in Solle v. Butcher and this decision was followed in a number of cases in England and Canada, but rejected by the English Court of Appeal in 2003 in The Great Peace. The United Kingdom Supreme Court has yet to consider the effect on English law of The Great Peace, but the retention in Canadian law of a flexible power to grant relief for mistake (though not a power necessarily to be linked with the history of the courts of equity) was affirmed by the Ontario Court of Appeal in 2007, again adopting the persuasive arguments of Professor John McCamus.

56. See Cooper v. Phibbs (1867), L.R. 2 H.L. 149 (H.L.).
57. G. Palmer, Mistake and Unjust Enrichment (Columbus, Ohio State University Press, 1962).
VIII. EXEMPTION CLAUSES

The attempt of the courts to deal with unfair exclusions of liability has a convoluted history, both in England and in Canada. In the mid-20th century, largely under the influence of Lord Denning, the English courts developed a doctrine, usually known as "fundamental breach," to the effect that, in case of a fundamental breach of contract (or breach of a fundamental term) a clause excluding liability was ineffective. This concept, although it served what may be regarded as a useful purpose in enabling courts to avoid unfair clauses in some cases, had many defects. Its theoretical basis was unclear (was it a rule of construction or a rule of law?), and, since it did not directly address the question of fairness it resulted in the striking down of clauses that were fair and reasonable, and in the failure to strike down clauses that were unfair. The House of Lords rejected the doctrine in 1966, and then, after a rear-guard action by Lord Denning, again, definitively, in 1980. The Supreme Court of Canada ostensibly approved these House of Lords cases in 1980 and 1989, but uncertainty remained: while many lower Canadian courts enforced clauses limiting liability, others did not, uncertainty persisting into the first decade of the 21st century on the existence and scope of the doctrine of fundamental breach.

All these cases must now be read in the light of the recent decision of the Supreme Court of Canada in *Tercon Construction Ltd v. British Columbia*, Cromwell J. said, for the majority:

On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.* . . . I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J.™

71. *Id.*, at para. 62.
Binnie J., stating the view of the whole court on this point, said that

On this occasion we should again attempt to shut the coffin on the jargon associated with “fundamental breach.” Categorizing a contract breach as “fundamental” or “immense” or “colossal” is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff . . . can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties . . . There is nothing inherently unreasonable about exclusion clauses.\(^72\)

In the light of this decision, the proper approach is first to interpret the clause (the question on which the court divided in the Tercon case). Then, “[i]f the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, ‘as might arise from situations of unequal bargaining power between the parties’. . .”\(^73\) If the clause is applicable and valid on these tests, it should be enforced unless contrary to an overriding public policy.\(^74\) This decision marks a definitive preference for Dickson C.J.C.’s view in Hunter: the nature of a breach may be relevant to the interpretation of an exclusion clause, but, no matter how grave the breach, there is no rule of law that clauses limiting or excluding liability are invalid, provided that they are not grossly unfair (unconscionable) at the time of the agreement, and that they do not contravene an overriding public policy.

IX. UNCONSCIONABILITY

One effect of the Tercon case was to confirm the existence in Canadian law of a general doctrine of unconscionability. Another recent case to the same effect is the decision of the Supreme Court of Canada in a matrimonial case, Rick v. Brandsema.\(^75\) A residual power to set aside contracts that are very unfair, though minimalized in the 19th and 20th centuries, is probably a

\(^{72}\) Id., at para. 82.
\(^{73}\) Id., at para. 122, quoting from Hunter Engineering Co. v. Syncrude Canada Ltd. supra, footnote 68, at p. 462 (S.C.R.).
\(^{74}\) Id., at para. 123. Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd. (2004), 245 D.L.R. (4th) 650, 2004 ABCA 309, leave to appeal to S.C.C. refused 250 D.L.R. (4th) vii. [2005] 1 S.C.R. ix, where the defendant was found to have engaged in deceptive conduct, was approved on this basis. Other examples given of overriding public policy were selling products known to be dangerous to life.
necessary feature of every system of contract law. Whether “unconscionability” is the best word to describe that power is debatable. The word has certain advantages: it has a long history in equity, it has been used in many statutes, and it implicitly indicates that relief from an otherwise valid contract must be highly exceptional. On the other hand, the word has certain disadvantages. It has sometimes been taken to suggest wrongdoing, but many cases, old and modern, have held that proof of wrongdoing is not a requirement for relief. The cases on penalty clauses and exemption clauses do not involve any wrongdoing on the part of the party seeking enforcement. Another difficulty is that unconscionability suggests the need to prove inequality of bargaining power, but in some kinds of case, including relief against penalty clauses, inequality of bargaining power, in the ordinary sense of the words, has not always been required. A simpler general concept, therefore, as a synonym for unconscionability might be something like gross unfairness: a contract may be set aside if it produces consequences that are very unfair. Nevertheless, it is “unconscionability” that now has the approval of the Supreme Court of Canada.

X. NON-JUSTICIABLE CONTRACTS

Certain kinds of contract may be unenforceable not because their formation or their performance would be contrary to public policy, but because they deal with matters that ought not to be the subject of judicial proceedings. Election promises have been held to be unenforceable, not because the substance of what is promised is in any way contrary to public policy, but because deployment of

contract law would interfere with the political process.\textsuperscript{80} Some contracts to perform religious duties might be unenforceable as unduly restrictive of personal freedom, either on ground of public policy, or as non-justiciable, but the mere fact that a contract involves performance of a religious duty will not prevent enforcement, as was shown by the decision of the Supreme Court of Canada in \textit{Bruker v. Markovitz}.\textsuperscript{81} A husband agreed, as part of a separation agreement with his wife, that he would grant her a Jewish divorce, or \textit{get}. For a long time he refused to do this, but eventually, after 15 years, he delivered the \textit{get}. Ms Bruker brought an action for damages for the delay, and the Supreme Court of Canada, restoring the decision of the Québec Superior court, held that the action was (by Québec law) maintainable.

In considering the scope of the decision it is important to note that the contract in question was not a standard or formal contract that was part of a religious ceremony or of a religious requirement preceding marriage, as in some of the earlier cases. The parties were dealing with each other at arm’s length, and had full access to independent advice when the agreement in question was made. In considering the scope of the decision from a common law perspective, the question of intention is significant. Religious agreements between spouses might sometimes be dealt with in common law courts by reference to the concept of “intention to create legal relations.” There has been said to be a presumption that agreements between spouses are not intended to give rise to legal relationships.\textsuperscript{82} This is not an absolute rule, but a presumption that can be displaced.

From this perspective the facts of \textit{Bruker v. Markovitz} would readily lend themselves to the analysis that any presumption against enforceability of religious obligations in an agreement between spouses had been displaced by the context in which this agreement was made. Clearly the context was one of arms-length negotiations expected to have legal consequences, made on legal advice, with the defendant’s attention drawn to the particular promise, and with value given in exchange for it. These are powerful reasons in support of the Supreme Court of Canada’s decision on the facts of the case, and they also serve to distinguish such cases mentioned by the dissenting judges as standard

contractual words contained in formal religious agreements before marriage, or included in the ceremony itself. The dissenting judges in Bruker also gave examples of promises to wear religious clothing, to participate in religious ceremonies, or to raise children in a particular faith. Such promises might raise questions of public policy not present in the Bruker case.

XII. ILLEGALITY AND SEVERANCE

In Transport North American Express Inc. v. New Solutions Financial Corp. the Supreme Court of Canada held, in a case where the maximum interest rate provisions of the Criminal Code had been accidentally infringed, that the lender was entitled to recover the maximum legal rate of interest (60%). Arbour J., for the majority of the court, restoring the judgment of Cullity J. at first instance, and approving the dissenting judgment of Sharpe J.A. in the Ontario Court of Appeal, applied what she called “notional severance,” in effect a reading down of the contract so as to reduce the agreed interest rate to the maximum allowable. She rejected the view of the majority of the Ontario Court of Appeal, called the “blue pencil” test, that severance was only permissible as an “all or nothing” excision of a contractual clause that could be identified in distinct and separate words. In Shafron v. KRG Insurance Brokers (Western) Inc. the court held that “notional severance” was not applicable to a covenant against competition. The court was evidently afraid that if covenants against competition were enforceable to the extent that the court later found them to be reasonable, there would be no incentive on employers to put reasonable limits on such clauses in employment contracts.

XII. PUNITIVE DAMAGES

In 1970 it would have been said with confidence that punitive damages were not available for breach of contract, but in Whiten v.

83. Abella J., referring to one of these cases (Morris v. Morris (1973), 42 D.L.R. (3d) 550, 14 R.F.L. 163 (Man. C.A.), leave to appeal to S.C.C. granted 51 D.L.R. (3d) 77n, (1974) 3 W.W.R. 479 (C.A.)) involving a Jewish marriage contract, or ketubah, said (para. 46) that this question was not in issue in the Bruker case, though she also said that “I find the dissenting reasons [in Morris] compelling.”


Pilot Insurance Co. 86 the Supreme Court of Canada, restored a $1 million jury award of punitive damages against an insurer for failure to pay a claim under a fire insurance policy. The court held that an award of punitive damages required “an independent actionable wrong” 87 but found this requirement to have been satisfied by the breach by the insurer of the obligation of good faith which the court found to be “independent of and in addition to the breach of contractual duty to pay the loss.” 88 It is not clear to what other kinds of contract this reasoning would extend. Obligations of good faith have been particularly associated with insurance contracts. They have also, as mentioned above, been implied in other contracts for a variety of purposes having to do with the substantive obligations of the parties, but it does not necessarily follow that all such contracts ought to attract punitive damages.

There were features of the Whiten case not common to ordinary commercial contracts, notably a public, quasi-regulatory, interest in inducing insurers to investigate claims fairly and to meet their obligations, and the fact that the defendant’s breach of contract involved not a simple failure to pay a debt but also an opprobrious and defamatory 89 accusation of arson. Another feature of the Whiten case was that the insured had suffered exceptional personal hardship, including loss of her home and much mental distress pending resolution of the dispute. Aggravated damages were not claimed, 90 and the court, while stressing that punitive damages were not compensatory, added that “there is a good deal of evidence of emotional stress and financial cost over and above the loss that would have been incurred had the claim been settled in good faith within a reasonable time.” 91 It is possible therefore that some members of the majority were partly influenced, in restoring the award, by compensatory considerations.

Other factors suggesting that breaches of contract ought not always to attract punitive damages are the insistence in the Whiten case and in a companion case decided on the same day 92 that

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88. Whiten, supra, footnote 86, at para. 79.
89. Id., at para. 25.
90. Id., at para. 91.
91. Id., at para. 92.
punitive damages must serve a rational purpose, together with the statement by the unanimous court two months later in another case that “efficient breach [of contract] should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.”

Punitive damages were refused in *Fidler v. Sun Life Assurance Co. of Canada* and in *Keays v. Honda Canada Inc.* Awards have been made against insurers, banks, franchisors, utility companies, and the Crown, for breach of a duty of good faith, and against a lawyer, but in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* the Ontario Court of Appeal emphasized, in a case approved by the Supreme Court of Canada, that disputing a meritorious claim is not in itself bad faith and that “[i]n a general sense, insurers and insureds have a common interest in ensuring that only meritorious claims are paid.” The mere fact that a breach of contract is deliberate does not justify an award of punitive damages.

### XIII. MENTAL DISTRESS

Damages for mental distress in actions for breach of contract were generally thought to be excluded until a decision of the English

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Court of Appeal in 1972.\(^\text{106}\) In *Fidler v. Sun Life Assurance Co. of Canada*\(^\text{107}\) the Supreme Court of Canada reviewed the question at length. The court stated that damages for mental distress were in principle recoverable for breach of contract subject to the rule of remoteness in *Hadley v. Baxendale*.\(^\text{108}\) The court added, however, that “in normal commercial contracts” damages for mental distress would not ordinarily be within the reasonable contemplation of the parties: “[i]t is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration.”\(^\text{109}\) “But,” the court continued, “[t]he matter is otherwise . . . when the parties enter into a contract, an object of which is to secure a particular psychological benefit.”\(^\text{110}\) In such a case damages for mental distress, if within the parties’ reasonable contemplation, could be awarded, and in the *Fidler* case itself an award of $20,000 was upheld for breach by an insurer of a disability insurance contract. In the later case of *Mustapha v. Culligan of Canada Ltd.*\(^\text{111}\) the court held that damages for mental distress caused by seeing a dead fly in a bottle of drinking water were not recoverable because not within the reasonable contemplation of the parties. As these decisions suggest, it will not always be easy to distinguish readily between contracts to secure a particular psychological benefit and ordinary commercial contracts: many contracts might seem to fall into both categories, or into neither.\(^\text{112}\) In *Keays v. Honda Canada Inc.*\(^\text{113}\) the Supreme Court of Canada, denying liability for mental distress for breach of a contract of employment, said, quoting another phrase from the *Fidler* case, that in order for damages to be justified the parties must contemplate that “the promise in relation to state of mind is a part of the bargain.” This is likely to be a difficult test to apply.

**XIV. SPECIFIC PERFORMANCE**

Specific performance is, conceptually, an exceptional remedy, available only if an award of damages would be inadequate, but,

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108. (1854), 9 Exch. 341, 156 E.R. 145.
113. *Supra*, footnote 95, para. 58.
until 1996, specific performance was available “as of course” to a purchaser of land. There were good reasons for the distinction, because many of the difficulties of specific performance in other contexts do not apply to sales of land: the decree is unlikely in land sale cases to be oppressive to the defendant; there is no difficulty in defining the obligation; there are no difficulties of supervision; and the cost of enforcing the decree is minimal, since the court itself can, if the defendant refuses, itself effect the transfer of the defendant’s interest. However in Semelhago v. Paramadevan\textsuperscript{114} the Supreme Court of Canada held that specific performance was only available if the purchaser could show that the land was unique. Specific performance has been given in a number of subsequent cases to commercial purchasers,\textsuperscript{115} and is now, oddly enough, more readily available in practice to a commercial purchaser, which can often show that no other comparable land is available, than to an individual purchaser, who can rarely incur the risk and expense of litigation to attempt to establish that a personal preference will be sufficient to qualify the land as unique.

XV. CONCLUSION

There is no simple way of summarizing the changes that have occurred in Canadian contract law since 1970. No overarching philosophy or overriding policy can be discerned. It is impossible to say whether “progress” has been made, or even to define the meaning of “progress” in this context. Some of the decisions of the Supreme Court of Canada seem to tend in opposite directions. The line of cases culminating in the \textit{M.J.B.} case enlarges the scope of contractual obligation by imposing such obligations where there was formerly thought to be no contract, but this burden is to some extent counterbalanced by the \textit{Tercon} case emphasizing the power of the contracting parties to exclude liability. The \textit{Semelhago} case diminishes the burden of contractual liability by removing the obligation (formerly generally recognized) to render specific performance of land sale contracts; on the other hand the \textit{Whiten} case drastically enlarges the potential liability of contracting parties by opening the door to unlimited awards of punitive damages, and the case, allowing unlimited damages for mental distress, also substantially increases the potential burden of contractual


obligation. Probably it is a mistake to expect to find any simple consistent trends. Contract law involves an almost infinite variety of human inter-relationships, and a complex interaction between principle and policy, and, like other aspects of the law, responds, sometimes in unpredictable ways, to what have been perceived by the courts from time to time to be the changing needs of society.