COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rosas v. Toca,*
2018 BCCA 191

Date: 20180518
Docket: CA44016

Between:

Enone Rosas

Appellant
(Plaintiff)

And

Hermenisabel Guarin Toca and Gener Pentecostes Visaya

Respondents
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated September 26, 2016 (*Rosas v. Toca*, 2016 BCSC 1754, Vancouver Registry S156337).

Counsel for the Appellant:	T. Goepel G. Tedham
Counsel for the Respondents:	D. Moonje S. Chung
Place and Date of Hearing:	Vancouver, British Columbia December 8, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 18, 2018

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

Summary:

The appellant won the lottery and loaned $600,000 interest-free to her friend. Approximately one year after the loan was formed, the appellant's friend told her "I will pay you next year", and the appellant agreed to the extension on payment and declined to bring suit. This request was repeated for several years, but the loan was never repaid. Eventually, the appellant brought a claim against her friend. At trial, the judge found that the original term of the loan was for one year, and, based on the original repayment date, the limitation period had expired. The judge held that the subsequent promises from the friend to repay a year later were unenforceable for lack of consideration as the friend was already under an obligation to pay. The appellant's claim was therefore dismissed as statute-barred. On appeal, the appellant argued that the trial judge erred in finding that the loan was originally repayable within a year, that the subsequent promises were unenforceable, or erred in not finding that the appellant had a property interest in her friend's home through a resulting trust. Held: appeal allowed. There has been an evolution in the doctrine of consideration in the context of contract modifications. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. The parties repeatedly agreed to modify the repayment date each time the appellant's friend told her "I will pay you next year", and there is no suggestion that the modifications were procured under duress, were unconscionable, or were unenforceable on the basis of public policy. Since those modifications are enforceable, the limitation period has not expired and the claim is granted.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] It has been famously said that "hard cases make bad law"; sometimes, however, hard cases make new law. Or, at least, they very much encourage the court to do so lest we give credence to Mr. Bumble's lament in *Oliver Twist*: "If the law supposes that…the law is a ass".

[2] Here Ms. Rosas loaned $600,000 of her lottery winnings to her friend Ms. Toca to allow her and her husband to buy a home. The trial judge found that it was to be repaid without interest in one year's time. In the ensuing years, Ms. Toca asked for more time to pay—essentially she said "I will pay you next year". Ms. Rosas, patient as well as generous, acceded to the requests and more than once from year to year. When Ms. Rosas finally came to court for relief, Ms. Toca

successfully resisted judgment on the debt in the trial court on the basis of a limitations defence—Ms. Rosas had waited too long—seven years had lapsed; she was out of luck.

[3] Is it the law that Ms. Rosas cannot rely on Ms. Toca's various promises to pay "next year" because Ms. Toca gave no consideration for Ms. Rosas's forbearance to sue? That is the effect of the judgment before us on appeal. In the trial judge's view, Ms. Rosas's patience was "nothing more than a 'voluntary abstention' from exercising her rights to enforce repayment of the loan which did not affect the running of the applicable limitation period" (at para. 65).

[4] In my view that is not the law, or at least not what the law should be for variations of existing contracts. The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule, as so many commentators and several courts have suggested. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice.

Facts

[5] The facts of this case are relatively straightforward. The appellant, Ms. Rosas, moved to Canada from the Philippines in 1990 to work as a nanny. In 2004, Ms. Rosas and her husband became close friends with the respondents, Ms. Toca and her husband Mr. Visaya, who would often drive Ms. Rosas and her family around as they did not have a vehicle.

[6] On 8 January 2007, Ms. Rosas discovered that she had won $4.163 million in the lottery. On 10 January 2007, Ms. Rosas collected her lottery winnings and

travelled to her bank to deposit the money along with her husband, Ms. Toca, and Mr. Visaya. Ms. Rosas then requested three bank drafts be drawn from the money. Two of the drafts were gifts to friends in the amounts of $100,000 and $40,000 respectively. The third draft was for Ms. Toca in the amount of $630,000. At the time, Ms. Rosas told the bank manager that this money was a loan to a friend so that she could buy a house.

[7] Shortly afterwards, Ms. Toca and Mr. Visaya purchased their current home for $700,000. They used $480,000 from the bank draft from Ms. Rosas and obtained mortgage financing for the balance.

[8] Ms. Rosas and Ms. Toca rarely saw each other during the rest of 2007 as Ms. Rosas travelled often. They rekindled their friendship in early 2008. Ms. Toca and her husband continued to provide Ms. Rosas with assistance regarding transportation, as they had prior to the lottery win. Additionally, after Ms. Rosas purchased a convenience store, Mr. Visaya helped out regularly without being paid.

[9] However, the friendship between Ms. Rosas and Ms. Toca eventually waned and they did not see each other from 2013 until after Ms. Rosas commenced this action.

[10] On 17 July 2014, Ms. Rosas filed her notice of civil claim seeking payment of the loan she provided to Ms. Toca, more than seven years after Ms. Rosas transferred the money.

Decision Under Appeal

[11] At trial, before Justice Church, Ms. Rosas alleged that $600,000 of the money that she gave to Ms. Toca was a loan to enable Ms. Toca and Mr. Visaya to purchase their home. Ms. Rosas admitted that $30,000 of the advance was a gift. Ms. Rosas claimed that the loan was never repaid and sought judgment against both respondents for the $600,000 in debt. In the alternative, Ms. Rosas sought relief in

unjust enrichment, or a declaration that the respondents hold a portion of their home on a resulting trust for her benefit.

[12] The respondents argued that the entire amount that Ms. Toca received from Ms. Rosas was a gift. In the alternative, the respondents argued that the loan was a term loan and that the limitation period had expired before Ms. Rosas filed her claim.

[13] On the question of whether the money was a gift or a loan, the judge preferred the evidence of Ms. Rosas and found as a fact that she did loan the $600,000 to Ms. Toca. For this conclusion, the judge relied on the evidence of the disinterested bank manager and the inconsistencies in Ms. Toca's testimony. The judge also found that Mr. Visaya was not a party to the loan, since Ms. Rosas testified that her negotiations and agreement were with Ms. Toca only.

[14] The trial judge noted that because of her earlier conclusion, she was not required to consider the claim for a purchase money resulting trust. However, even if the bank draft was a gratuitous transfer, Ms. Rosas's intention to make a loan rather than a gift was sufficient to displace the presumption of a resulting trust.

[15] The judge then turned to consider the terms of the loan agreement. She first found that there was either an express or an implied agreement that the loan would be interest-free.

[16] The trial judge then went on to discuss the terms of repayment. Based on the testimony of Ms. Rosas herself, the judge concluded that the initial agreement included a term of one year for the loan. Ms. Rosas repeatedly testified that Ms. Toca had agreed to repay the loan "next year", "in a year", or "after a year". Ms. Rosas testified through a Tagalog interpreter, and because of translation difficulties was cross-examined rigorously on what she meant when describing the terms of the loan. Ms. Rosas confirmed that she meant that the loan was to be repaid in 12 months. In particular, Ms. Rosas was asked in cross-examination how she supposed Ms. Toca would be able to repay the money within one year if it was

tied up in the house. Ms. Rosas replied that she didn't know, but that Ms. Toca "had to find a way to provide it."

[17] The trial judge then examined whether the claim was statute-barred. Both parties agreed that the former *Limitation Act,* R.S.B.C. 1996, c. 266*,* applied and that the limitation period for an action in debt under that statute is six years. If the loan was payable within a year, the limitation period would have begun to run on 10 January 2008, and would have expired on 10 January 2014, seven months before Ms. Rosas filed her claim.

[18] To avoid the limitation defence, Ms. Rosas argued that the parties entered into multiple forbearance agreements to extend the timeline to repay the debt. Ms. Rosas testified that each year until 2013 Ms. Toca came to her and said words to the effect of "I will pay you back next year", and that Ms. Rosas always agreed to extend the term. Ms. Rosas was content to wait for repayment because there was no real emergency for the money. There were no negotiations surrounding the forbearance, just a request each year from Ms. Toca to forbear, to which Ms. Rosas agreed. Ms. Rosas testified that Ms. Toca did not make any payments on the loan, and that Ms. Toca did not provide anything to Ms. Rosas in exchange for extending the time for repayment.

[19] The judge concluded that without any additional consideration, these forbearance agreements were invalid. In this case, Ms. Rosas's agreement was simply a "voluntary abstention" from exercising her rights. The trial judge held that in the absence of a valid forbearance agreement, the claim was filed outside the limitation period and was therefore statute-barred.

Submissions

[20] Ms. Rosas submits that the trial judge erred in finding that the loan was to be repaid within a year and therefore that her claim was brought outside the limitation period. The use of the words "next year" or "after a year" do not imply a binding term that payment was due on the one-year anniversary of the loan since the objective

economic reality was that the money was tied up in a specific property. An objective interpretation of the contract would have instead implied a term that the loan was to be repaid within a reasonable time.

[21] Ms. Rosas further submits that the trial judge erred in finding that there was not an enforceable forbearance agreement. The fact that Ms. Toca requested Ms. Rosas to forbear is sufficient consideration to make their agreement enforceable. It would also be inconsistent with the duty of honest performance of contractual obligations for Ms. Toca to repeatedly say that she would repay Ms. Rosas so as to dissuade her from seeking repayment until the limitation period expired on the debt claim. In addition, the trial judge failed to consider whether the tasks and personal favours performed by Mr. Visaya constituted consideration for the forbearance agreement.

[22] Ms. Rosas argues that the trial judge also erred in failing to find in the alternative that a resulting trust arose on the basis that no consideration was provided for the original loan agreement because it was interest-free. Where property is advanced without consideration a resulting trust is presumed, and the trial judge did not find that Ms. Rosas intended to advance the money as a gift so as to defeat the presumption. Ms. Rosas submits that it would be unfair for the Court to conclude that there was sufficient consideration to prevent the application of trust principles, but not sufficient consideration when the parties agreed to forbear the loan.

[23] Ms. Rosas originally raised the issue of estoppel in her written submissions, but abandoned this submission at the hearing.

[24] The respondents submit that there was ample evidence on the record for the trial judge to find that the loan was to be repaid within one year. The respondents point to Ms. Rosas's own testimony that the loan was to be repaid within a year, and her acknowledgement that while such a term of repayment may have been difficult

for Ms. Toca, it was Ms. Rosas's understanding that Ms. Toca would have to find a way to pay within that timeframe.

[25] The respondents further submit that the trial judge properly rejected Ms. Rosas's alternative argument based on a resulting trust. The trial judge found that there was a valid loan contract, and as such the transaction between the parties could not give rise to a resulting trust. The trial judge found that Ms. Rosas's intent was not to retain a beneficial interest in the house the respondents bought with the money advanced, a finding which defeated any presumption of resulting trust.

[26] With respect to the forbearance agreement, the respondents submit that the trial judge was correct to find that no consideration was provided to make the forbearance enforceable and reset the limitation period. While on appeal Ms. Rosas points to the tasks performed by Mr. Visaya as providing consideration, she did not argue this at trial and there was no evidence linking his favours to the extension of the loan payment deadline.

[27] After the initial hearing of the appeal, the Court asked the parties for further submissions on the need for consideration for the variation of existing contracts following the English Court of Appeal's decision in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, [1989] EWCA Civ 5, [1991] 1 Q.B. 1 (citations to Q.B.), and the New Brunswick Court of Appeal's decision in *Greater Fredericton Airport Authority Inc. v. NAV Canada*, 2008 NBCA 28, among others.

[28] In response to that request, Ms. Rosas submits that those cases support her original submission that Ms. Toca's request for forbearance was sufficient to make Ms. Rosas's promise to forbear enforceable. She submits that those cases find modifications to existing contracts enforceable despite a lack of traditional consideration, because the evidentiary function of consideration which is served by the existence of mutual promises is not essential. Because the parties are already involved in a legal contract, the intention to make a binding promise is otherwise evident.

[29] Ms. Rosas also submits that the promisor was actually Ms. Toca, and there was adequate consideration for the enforcement of Ms. Toca's promise to pay a year later. It is unnecessary to consider whether Ms. Rosas would have been prevented from bringing an action within the forbearance period.

[30] Finally, Ms. Rosas submits that while some cases require detrimental reliance by a plaintiff upon a promise, Ms. Rosas detrimentally relied in that the limitation period ran during the time she forbore.

[31] The respondents submit that to reform the doctrine of consideration as in *Williams v. Roffey Bros.* or *NAV Canada* would be to avoid the certainty of the *Limitation Act*, which requires that the acknowledgment of debt be in writing, and allow passing remarks to result in enforceable forbearance agreements and become defences to claims for money owed.

Analysis

[32] Although there are a number of potential arguments open to Ms. Rosas, the obvious ones do not bear up under analysis.

Alleged error in interpreting the terms of the contract

[33] First, it is argued that the trial judge incorrectly construed the contract between the parties as requiring the monies to be repaid one year from the date of their advance. It is said that there was no fixed date for repayment and a term should be implied that the monies would be repaid within a reasonable time. This would avoid the limitations defence.

[34] Issues of contractual interpretation are questions of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50. It is not open to this Court to set aside the judgment simply because we might interpret the contract differently: *Robb v. Walker*, 2015 BCCA 117 at para. 41. The issues in this appeal are therefore reviewable on the standard of palpable and overriding error,

absent an extricable error in principle: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 37.

[35] The trial judge found that Ms. Rosas and Ms. Toca intended to enter into an agreement whereby Ms. Rosas would advance Ms. Toca $600,000 to be repaid within a year. In my opinion the trial judge did not commit a palpable and overriding error in coming to this conclusion, nor do I find an extricable error in principle in her reasoning.

[36] While the trial judge made no explicit mention of the objective theory of contractual interpretation and focused on Ms. Rosas's testimony as to her intention, the trial judge is presumed to know the law and there was ample evidence on the record for a reasonable person to conclude that the parties had entered into an agreement with repayment after a year. Ms. Rosas repeatedly testified that repayment was to occur within a year, and acknowledged that this was a term despite the practical difficulties it might cause Ms. Toca. This is also confirmed by the fact that Ms. Toca approached Ms. Rosas asking her to forbear from seeking payment a year after entering into the loan, and that Ms. Toca came back annually seeking forbearance. While the economic reality of the parties may suggest that a one-year repayment term is harsh, the outward manifestations of the parties support the trial judge's interpretation. I see no reason to disturb this finding.

Alleged error in failing to grant a resulting trust

[37] Next, it is submitted that the judge erred in law in finding that the advance was not subject to a resulting trust in favour of Ms. Rosas. A ten-year limitation period applies in respect of a claim in trust and that would answer the defence advanced. At trial, Ms. Rosas apparently argued that the $600,000 was a gratuitous transfer from her to Ms. Toca and her husband to enable them to purchase a home. Accordingly the equitable principle of a purchase money resulting trust would apply and Ms. Rosas was entitled to a beneficial interest in the home by virtue of the

presumption of resulting trust. The judge cited the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17, in this regard and then concluded:

> [37] Even if I had concluded that the $600,000 advanced to the defendants was a gratuitous transfer, a court can only rely on the presumption of resulting trust if the evidence is insufficient to establish the donor's actual intent at the time of the transfer. In this case, there is clear evidence of the plaintiff's intention at the time of the transfer. She testified that she intended the $600,000 to be a loan to the defendant Toca and there was no evidence that she intended to hold a beneficial interest in the defendant's house. The action of the plaintiff in advancing those monies to the defendant Toca was consistent with the plaintiff being a creditor rather than a purchaser. The evidence in this case would have been sufficient to displace the presumption of a resulting trust.

[38] Before this Court, Ms. Rosas has refined her argument somewhat. She does not seek a beneficial interest in the lands, rather she simply argues that in the case of an interest-free loan, no consideration passes and the transfer is accordingly gratuitous. While a debt has been created with its intended remedies, Ms. Rosas argues that she nevertheless should not be precluded from pursuing remedies provided by equitable trust principles.

[39] I do not accept Ms. Rosas's threshold premise that no consideration passed from Ms. Toca to her in the circumstances of the interest-free loan. Such loans are enforceable on the basis of valid consideration: see *Lee v. 1137434 Alberta Ltd.*, 2009 BCSC 284; *Cooper v. Grace*, [1998] O.J. No. 5385 (Ont. Gen. Div.); *Novatel Communications Co. v. Serink*, 1986 CarswellAlta 989 (Alta. Q.B.).

[40] A bargain was struck; Ms. Toca's promise to pay the loan back in one year's time was a promise in exchange for the advance by Ms. Rosas of $600,000. Until that point Ms. Rosas had no right to demand payment of $600,000 from Ms. Toca.

[41] Ms. Rosas responds (AF, at para. 68):

> In making this argument, the appellant says it would be greatly unfair for the court to conclude, as was done, that there was sufficient consideration to remove this transaction away from trust principles when the advance was made, but that there was not sufficient consideration when the parties agreed to a later repayment date of the loan.

[42] The difference is that in the case of the acceptance of a later payment date, Ms. Rosas faces the hurdle I will discuss below: a prior duty to repay a loan cannot be fresh consideration for the variation to the initial contract, at least on the basis of the orthodox view of consideration and enforceable bargains. After entering into the initial loan, Ms. Rosas already had the right to demand payment; the very same right that she claims Ms. Toca subsequently gave to her in exchange for the promise of forbearance.

[43] The advance under the original loan agreement was therefore not a gratuitous transfer and I would not give effect to the resulting trust submission.

Estoppel

[44] As discussed, in her factum, Ms. Rosas advanced an argument to the effect that Ms. Toca was estopped by her conduct from relying on the limitations defence. That argument was not put before the trial judge and in oral argument Ms. Rosas expressly abandoned reliance on it.

[45] Ms. Rosas may have chosen not to advance this argument out of concern that she could not overcome the law's reticence to acknowledge the use of promissory estoppel to ground a cause of action, to use it as a "sword", instead of simply as a "shield" in defence to an action. I would however note that the doctrine may apply in aid of an independent cause of action: see *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 102 D.L.R. (3d) 685 (Ont. C.A.). I would also observe that the Australian High Court has acknowledged that promissory estoppel may even create a cause of action: *Walton Stores (Interstate) Ltd. v. Maher*, [1988] HCA 7, 164 C.L.R. 387. As well, § 90 of the American *Restatement (Second) of Contracts* supports the enforcement of promises where there is detrimental reliance:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[46] And Professor Waddams in *The Law of Contracts*, 7th ed., (Toronto: Thomson Reuters, 2017) at para. 200, endorses the idea that these sorts of "non-bargain promises" involving reliance on the part of the promisee should be enforceable.

[47] While it remains unclear whether promises enforceable on the basis of reliance should be eligible for the traditional contract remedy of expectation damages (see Waddams, *The Law of Contracts*, at para. 200), in this case Ms. Rosas's reliance loss seems equal to her expectation loss: under either framework she has lost $600,000.

[48] Nevertheless, because Ms. Rosas failed to raise this point at trial, there is no proper record before us to evaluate a claim in estoppel. As Ms. Rosas has abandoned this submission, I will say no more of it.

Enforceability of the forbearance agreement

[49] Finally, we come to the critical submission in this appeal: Ms. Toca requested a number of extensions to the repayment date on the loan, on each occasion Ms. Rosas agreed and she forbore to pursue collection on the loan. If the extensions are enforceable they would obviate the limitations defence.

[50] There are several nuances to this argument. First one might argue that with each extension requested and granted, the "old" contract was rescinded and a "new" one arose; and it is enforceable just as the first promise to pay was: see *Raggow v. Scougall & Co.* (1915), 31 T.L.R. 564 (Eng. & W. Div. Ct.); *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 67 D.L.R. (3d) 606 at 608-610 (Ont. C.A.). Rescission cannot avail Ms. Rosas, however. The trial judge made none of the findings of fact necessary to support the conclusion that the parties rescinded the original contract. Angela Swan in *Canadian Contract Law*, 3rd ed. (Markham, Ontario: Lexis Canada Inc., 2012) at 74-75, summarized the legal framework for rescission in this context so:

> One argument which can be made to justify enforcement of the modifying promise is that the parties rescinded the old agreement and made a new one. The parties to any agreement can always rescind it at any time. Whether they intend to do so or not is as basic (and sometimes as difficult) a question as whether there was any agreement in the first place. Rescission requires an offer by one party to bring the contract to an end and to discharge the other from further obligations under it, in return for a discharge of the offeror's obligations, and an acceptance of that offer by the offeree. It is not possible to have rescission with reservations or strings attached: rescission has, like the making of a contract, either occurred or it has not; a contract cannot be a "little bit" rescinded, any more than, on the traditional approach to offer and acceptance, it can be a "little bit" made. A "little bit" of rescission, *i.e.,* the modification of a particular clause or an adjustment in the price, would be a modification so that in that situation rescission cannot offer a way around he problems created by the doctrine of consideration.
>
> Whether rescission occurs is, however, a question of fact — was there a time, however fleeting, when the parties regarded or were entitled to regard themselves as under no contractual obligation to each other? If there was no such time because the parties always regarded themselves as in some kind of contractual relation, then rescission has not occurred. When the court holds that there has been "rescission" when a contract has only been amended, it is more usually simply a device to avoid the problems that the doctrine of consideration has created and to offer a court a respectable peg on which to hang an argument that the (revised) promise is enforceable.
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> [Emphasis added. Footnotes omitted.]

[51] The trial judge simply did not find that the parties ever regarded themselves as under no contractual obligation to each other. In part this was because the issue of rescission was not raised at trial, and on appeal Ms. Rosas similarly took the

position that the forbearance agreements were in reality variations to the original contract, not entirely separate ones. It would also be difficult to find rescission in the circumstances as Ms. Rosas had fully performed her obligations under the loan by advancing the money. She was under no further obligation from which she could be released by rescission, and obviously Ms. Toca did not return the advance which would demonstrate that the original agreement was clearly at an end.

[52] This leads to the second aspect of the forbearance submission. It is quite simple: Ms. Toca requested, in effect, a variation in the existing contract (as to the date of payment) and Ms. Rosas granted that request by forbearing to claim against Ms. Toca in respect of what would otherwise be a breach of the existing contract. Ms. Rosas now seeks to sue upon the varied contract. But this characterization of the legal relationship between the parties potentially founders (as I suggested above) on the lack of consideration flowing from Ms. Toca in exchange for the forbearance from Ms. Rosas. That was the view of the trial judge as I earlier outlined. The judge said this (at para. 65):

> Even if the defendant Toca told the plaintiff in January 2008 and in each subsequent year until 2013 that she could not repay the loan and would require another year to pay and the plaintiff agreed on each occasion that she could have a further year to repay the loan, the defendant Toca would have had to provide some additional consideration in return for the plaintiff's agreement to wait an additional year. Without that additional consideration, the plaintiff's agreement to extend the time for repayment was nothing more than a "voluntary abstention" from exercising her rights to enforce repayment of the loan which did not affect the running of the applicable limitation period.

[53] On this point the judge relied on the Supreme Court of Canada's decision in *Shook v. Munro et al.*, [1948] S.C.R. 539, rev'g [1947] 3 D.L.R. 271 (Ont. C.A.), which held that an agreement to forbear from exercising rights under a contract required valuable consideration in exchange to affect the running of the limitation period.

[54] This extract from Justice Rand's judgment for the majority gives a sufficient outline of the facts and the law applicable thereto (at 541):

> No doubt a mortgagor and a mortgagee can bind themselves to new times for the payment of the moneys, to be substituted for those provided in the mortgage. The effect would be to postpone the mortgagee's right to payment, extend the mortgagor's obligation to pay interest, and affect the times of both redemption and foreclosure. But the question here is not whether forbearance or a promise of it is good consideration: it is rather whether anything had been done or promised by the mortgagor to bind the mortgagees to forbear. If, for instance, the latter had in 1930 brought foreclosure proceedings, could they have been restrained on the ground that the mortgagor was not in default? Hope J.A. says yes, but I am forced to the conclusion that nothing had taken place that could have supported that plea: the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute.
>
> [Emphasis added.]

[55] In this Court Ms. Rosas relies on *Shook* and, in particular, the paragraph following the one just quoted for the principle that a mere request for forbearance can constitute the consideration for the forbearance itself, which Ms. Rosas says the trial judge failed to apply (at 542):

> Voluntary forbearance may too in appropriate circumstances be sufficient when performed to bind the person requesting it to a new obligation arising at that time: i.e. if you forbear for a year, I will then pay you: but at any time during the year action could be taken on the existing default. In such case, it is not whether, by reason of the performance of the requested forbearance, the estate has become liable then as on a new promise to pay, but whether, by operation of the statute the right of entry and the title to the property in the mortgagees have not in the meantime been extinguished, whether the mortgagees have not in fact forborne themselves into the statute. It may be that the personal obligation would in effect be preserved, but that is not the point here.
>
> On that view of the evidence, the question of the application of the *Statute of Frauds* does not arise.
>
> [Emphasis added.]

[56] Yet I do not read this part of Rand J.'s reasons in *Shook* the same way. While Rand J. seems to imply that "voluntary forbearance" can create a binding obligation, he also notes that despite the forbearance "at any time during the year action could be taken on the existing default." If in fact a party that has promised to forbear could

pursue action at any time, they cannot be said to be under a binding contractual obligation to forbear. In the preceding paragraph, Rand J. himself formulated the key question for determining whether there was a binding agreement as "could [the mortgagees] have been restrained on the ground that the mortgagor was not in default?"

[57] Instead, Rand J. appears to be engaging in an *obiter* discussion regarding a kind of estoppel argument that may arise as a result of voluntary forbearance, which prevents a defendant from raising the limitation defence. He writes that "in such case, it is not whether, by reason of the performance of the requested forbearance, the estate has become liable then as on a new promise to pay, but whether by operation of the statute the right of entry and the title to the property in the mortgagees have not in the meantime been extinguished". Justice Rand is in fact rejecting the characterization that in such a situation a party would "become liable then as on a new promise to pay", and instead characterizes it as whether the limitation statute might be said to apply.

[58] This interpretation is further supported by Rand J.'s subsequent observation that "[o]n that view of the evidence, the question of the application of the *Statute of Frauds* does not arise." Here Rand J. is responding to the concurring reasons of Justice Kellock who would have held that any subsequent agreement arising from the forbearance would have been unenforceable as it was not written down contrary to the requirements of the *Statute of Frauds*. On Rand J.'s view, a party would not be suing upon the subsequent oral agreement, but on the underlying written agreement, albeit relying upon the estoppel argument to defeat any limitation defence. As a result, the *Statute of Frauds* would not apply in such a hypothetical case. However, such an estoppel claim was not strictly at issue in *Shook*, and as discussed, Ms. Rosas has abandoned the estoppel claim she sought to raise for the first time on appeal.

[59] In support of her reading of this paragraph in *Shook*, Ms. Rosas relies on *Fullerton et al. v. the Provincial Bank of Ireland*, [1903] A.C. 309, [1903] 1 I.R. 483

(H.L.), *Crears v. Hunter* (1887), 19 Q.B.D. 341, 3 T.L.R. 756 (C.A.), and *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.*, 2016 ONSC 13. Ms. Rosas essentially submits that these cases support finding an enforceable bargain where the debtor simply requests an extension of time to pay and the creditor then forbears collection on the debt. It is said that nothing in the Supreme Court of Canada's decision in *Shook* purports to overturn this body of law, which in turn had been relied on in the Ontario Court of Appeal proceeding in *Shook*.

[60] In my view, *Fullerton* does not assist Ms. Rosas. In that case a debtor incurred an overdraft on his account with a bank, and approached the bank and undertook by letter to deposit a title deed to an Irish estate as security for his overdraft. It is not necessary to allude further to the facts there as the neat point is this: the bank was resisting the argument that the debtor's promise to lodge title deeds with the bank created an equitable charge in favour of the it, which the bank failed to register. If such an argument were successful then the bank would lose priority to another creditor. The bank argued that there was no consideration flowing from the bank for the promise by the debtor, because the bank did not undertake to forbear for any definite time. There would then be no enforceable equitable charge that needed to be registered. This point was rejected by the Court on the ground that it is enough if one can infer from the surrounding circumstances that forbearance for a reasonable time was in fact extended to the person who asked for it.

[61] Unlike the case of Ms. Rosas, the debtor in *Fullerton* unambiguously offered fresh consideration for the forbearance in the form of the pledge of title deeds to the Irish estate.

[62] I would analyze *Crears* in a similar way. There, the father of the defendant son was indebted to a creditor. The defendant son later signed a promissory note making himself jointly and severally liable with his father so as to induce the creditor to give his father further time to pay the debt. The creditor forbore to sue for several years. It was held that there was good consideration for the son's promise of liability on the note. Again, *Crears* is a case where fresh consideration, the son's

assumption of liability, was provided in exchange for the forbearance. The question was not whether the promise qualified as consideration for the forbearance, but whether the forbearance qualified as consideration for the promise. But here Ms. Rosas cannot point to Ms. Toca offering fresh consideration, at least on the orthodox analysis.

[63] Finally, Ms. Rosas relies upon *Employment Professionals* for her submission that a mere request for forbearance is sufficient consideration. In that case the Ontario Superior Court of Justice explicitly addressed the above passage from *Shook*, and wrote that it stood for the rule that "[a] voluntary forbearance by a mortgagee will not prevent the running of a limitation period unless a mortgagor has done or promised something in exchange for the forbearance" (at para. 14). This interpretation is consistent with the orthodox view of consideration.

[64] However, the Court, in *Employment Professionals*, at para. 15, relying on *Hutchison v. The Royal Institution for the Advancement of Learning*, [1932] S.C.R. 57, went on to write that "a request by a borrower for forbearance from an existing obligation may be sufficient consideration for a new repayment agreement". In *Hutchison*, the debtor had pledged a sum of money to McGill University to be paid in installments. The debtor made the first installments, but encountered financial difficulty and requested an extension of time from McGill for payment of the balance. McGill granted the extension, but crucially, at the time of the request, the debtor also offered a promissory note bearing interest for the balance. Again *Hutchison* is a case where valuable consideration was exchanged for forbearance, and does not stand for the authority that a mere request is sufficient.

[65] While the Court in *Employment Professionals* held that a mere request for forbearance qualified as valuable consideration for a promise to forbear, that result must be seen within the context of the facts of that case. At issue in *Employment Professionals* was whether the plaintiff could collect on invoices for labour supplied to the defendant company for construction of a bridge, or whether the claims were barred by the limitation statute. The defendant was late in making payments, but

requested that the plaintiffs forbear from suit in exchange for a modification to the contract terms to allow for invoices to be paid within a reasonable time after the defendant was itself paid by the owner of the bridge. Crucially, the contract in that case which otherwise governed the provision of labour did not oblige the defendants to actually hire the plaintiff's services: *Employment Professionals*, at para. 1. Yet after the plaintiffs agreed to forbear, the defendants continued to purchase labour services from the plaintiff. It may be argued that there was valid consideration in that case in the form of an implied promise by the defendant to purchase the services of the plaintiff in exchange for the forbearance.

[66] Thus I conclude that, contrary to what Ms. Rosas argues, *Shook* stands for the proposition stated by the trial judge, namely that there must be good consideration to make the forbearance enforceable, a principle recently reiterated by the Ontario Court of Appeal in *Hamilton (City) v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156 at para. 73:

> At common law, a creditor and debtor can agree to forbear enforcement of a debt, and such an agreement would suspend the limitation period for the period of forbearance. In order to achieve this result, the creditor must promise not to enforce the debt, and the debtor must provide some consideration in exchange for this promise. In other words, a creditor's promise to forbear will not suspend the limitation period unless the debtor provides consideration for that promise.

[67] In response to a question in oral argument, counsel for Ms. Rosas argued that it may be possible to characterize the agreement as one in which Ms. Toca actually promised to give up her right to raise the limitation defence. Ms. Rosas also put emphasis on the reasons of Justice Henderson in the Ontario Court of Appeal's judgment in *Shook* which speak to this point (at 273-274):

> Agreements extending the time for payment of indebtedness, whether payable under mortgage or otherwise, are of every-day occurrence and the effect of such an agreement is to prevent the *Statute of Limitations* from running against the creditor or in favour of the debtor. This constitutes the consideration, on both sides, for the agreement.

[68] Ms. Rosas submitted that this reasoning was undisturbed by the Supreme Court's decision on the basis that what motivated Rand J.'s conclusion was not the lack of consideration *per se*, but rather the lack of mutuality. As Rand J. observed "[i]f there was a binding injunction on the executors [to not seek payment under the mortgage] it was self-imposed, and I cannot consider it any more significant to the questions raised than the self-imposed restraint by the mortgagees during their lifetimes" (at 542-543).

[69] I would note first that the former *Limitation Act* is silent as to whether an agreement can vary or extend the statutory limitation period. While s. 5 states that a limitation period can be renewed by way of an acknowledgment in writing or part payment, that does not necessarily speak to whether the parties can agree to vary the limitation period. However, the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1073, a case involving choice of law and whether the limitation period in Saskatchewan or British Columbia governed the claim in that case, wrote that "a substantive limitation defence, such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement."

[70] Assuming without deciding that it is open to the parties to contract around the limitation period, even if Henderson J.A.'s line of reasoning was not explicitly rejected by Rand J., in my view the Supreme Court of Canada's decision in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, forecloses it in this case. In that case, the Court wrote that "[i]f one wishes to contract out of statutory protections this must be done by clear and direct language" (at 449-450). While *Hunter* dealt with a contractual waiver of a broad statutory warranty over the sale of goods, in *Boyce v. Co-operators General insurance Co.,* 2013 ONCA 298 at para. 20, the Ontario Court of Appeal relied on *Hunter* for the principle that "a court faced with a contractual term that purports to shorten a statutory limitation period must consider whether that provision in 'clear language' describes a limitation period, identifies the scope of the application of that limitation period, and excludes the operation of other limitation periods." Geoff Hall in *Canadian Contractual*

Interpretation, 3rd ed., (Toronto: Lexis Nexis Canada, 2016) at 307, writes that because the decision in *Boyce* is rooted in the general principle from *Hunter*, "there would appear to be no reason to limit the *Boyce* principle to Ontario."

[71] It would appear to me to be inconsistent with the idea that contractual terms modifying a limitation period should be strictly construed to suddenly adopt a liberal approach when interpreting whether Ms. Toca impliedly gave up her right to raise the limitation defence as consideration. All she said was "I will pay you next year" and she seemingly had no knowledge that the *Limitation Act* even existed at the time she made her promise.

[72] Moreover if it were true that delaying the running of the limitation period amounted to sufficient consideration, one wonders why the pre-existing duty rule would be such a vexing issue for the courts in cases involving payment of debts, as it would seemingly arise in almost every instance.

[73] So *Hamilton (City)* is recent appellate authority supporting the classic or orthodox legal analysis of these types of cases: hard cases. Harder still when we appreciate that unlike in many cases it is here the debtor who, having asked for, been granted and enjoyed years of forbearance by the creditor, raises her own failure to provide consideration for the benefit she has received to avoid her contractual obligation to repay the debt.

[74] However, the Court invited the parties to make further submissions on whether there has in fact been an evolution in the law of consideration possibly set in motion by cases like the English Court of Appeal's decision in *Williams v. Roffey Bros*.

"Practical benefits" and the genesis of reform: Williams v. Roffey Bros.

[75] A frequently cited definition of the traditional doctrine of consideration was given in *Currie v. Misa* (1875), L.R. 10 Exch. 153 (Eng. Exch.), aff'd (1876) 1 App. Cas. 554 (U.K.H.L.):

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given suffered, or undertaken by the other.

[76] G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed., (Toronto: Thomson Reuters Canada Ltd., 2011) at 84, observed that the requirement of consideration therefore established the idea of contracts as bargains:

> The act or promise of one party is, as it were, "bought" or "bargained for" by the act or promise of the other; each party exchanges something of value. To create an enforceable contract there must be, as Lennox J. said in *Loranger v. Haines*, "reciprocal undertakings." So if one party is neither giving anything, nor is promising to do or give anything, there is no consideration for the other party's act or promise.
>
> [Footnotes omitted.]

See also *Watson v. Moore Corp.* (1996), 134 D.L.R. (4th) 252 at 256 (B.C.C.A.).

[77] However, where one party promises something in exchange that they already owe to the other party, they have, in effect, given nothing in exchange, and courts have held that this does not amount to consideration. This so-called pre-existing duty rule is usually traced back to the decision in *Stilk v. Myrick*, [1809] EWHC KB J58, (1809) 170 E.R. 1168.

[78] In *Stilk v. Myrick*, two members of a sailing crew had deserted and the defendant captain promised the remaining crew members, of which the plaintiff was one, that he would increase their wages upon their return to London. The contract to pay additional wages was unenforceable for lack of consideration as the plaintiff crew member had already been under an obligation to do his utmost to allow the ship to reach her destination, including in the case of emergencies such as when crew members die or desert.

[79] Nevertheless, in *Williams v. Roffey Bros.*, the English Court of Appeal adapted the doctrine of consideration to encompass the situation where one party receives a "practical benefit" in exchange for a promise, thus avoiding the pre-existing duty rule. The plaintiff in that case was a sub-contract carpenter who

was performing work for the defendant general contractors as part of a project renovating a block of apartments. Partway through the project, the general contractors became concerned that the carpenter would be unable to finish his part of the work on time, resulting in penalties to the general contractors under the main renovation contract. In order to avoid the penalty clause under the main contract, the general contractors promised to pay the carpenter a further sum to finish the carpentry work on schedule. However, the general contractors made only one further payment and the carpenter later ceased working on the apartments. The carpenter then brought an action for breach of contract alleging that the general contractors breached their promise to pay an additional sum. The general contractors responded that there was no consideration for the promise and it was therefore unenforceable.

[80] The Court unanimously held that the contract was enforceable, though each member of the Court gave separate reasons. Lord Glidewell would have expressed the rule as follows (at 15-16):

> Accordingly, following the view of the majority in *Ward v. Byham* [1956] 1 W.L.R. 496 and of the whole court in *Williams v. Williams* [1957] 1 W.L.R. 148 and that of the Privy Council in *Pao On* [1980] A.C. 614 the present state of the law on this subject can be expressed in the following proposition:
>
> (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and
>
> (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
>
> (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
>
> (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
>
> (v) B's promise is not given as a result of economic duress or fraud on the part of A; then
>
> (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

[81] Lord Glidewell acknowledged that some may question whether this approach was in tension with the principle from *Stilk v. Myrick*, however he was of the view that his approach merely refined the principle:

> If it be objected that the propositions above contravene the principle in *Stilk v. Myrick*, 2 Camp. 317, I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where B secures no benefit by his promise. 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.

[82] Lord Glidewell based his refinement of the principle on the fact that the modern doctrine of economic duress, which renders contracts voidable where one party takes advantage of the circumstances of another, can respond to the policy concerns which motivated the "rigid adherence to the doctrine of consideration" in *Stilk v. Myrick*: *Williams v. Roffey Bros.*, at 13-14.

[83] Because counsel for the defendant general contractors had conceded that in promising to pay more they had secured benefits, Glidewell L.J. would have upheld the contract (at 16).

[84] Lord Russell affirmed that the doctrine of consideration was a fundamental requirement for a contract to be enforceable, but held that the law had developed since the decision in *Stilk v. Myrick*. He wrote (at 18):

> In the late 20th century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v. Myrick* is either necessary or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.

[85] Lord Russell went on to write that he did not intend to say that *Stilk v. Myrick* was wrongly decided, and in his view gratuitous promises not under seal were still unenforceable, but that he would articulate the principle as "where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage

arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration" (at 19).

[86] Lord Russell identified the benefits arising from the promise to perform the terms of the original contract as avoiding the need to employ another subcontractor to finish the work, and to replace what had been a haphazard payment system with a more formalized scheme (at 19).

[87] Finally, Lord Purchas would have held that the contract was enforceable on the basis that "as a result of the agreement the defendants had secured their position commercially" (at 23). While there was no additional obligation put upon the plaintiff carpenter which would, following *Stilk v. Myrick*, traditionally render the new agreement invalid, Purchas L.J. wrote (at 23):

> It was, however, open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation and comforted by the passage from the speech of Lord Hailsham of St. Marylebone L.C. in *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741, 757–758, to which I have referred, I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation, even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement.

[88] While the Court of Appeal in *Williams v. Roffey Bros*. recognized that a practical benefit from the provision of services already owed under contract can constitute valid consideration for a promise to pay an additional sum for those services, in *Re Selectmove Ltd.*, [1993] EWCA Civ 8, [1995] 1 W.L.R. 474 (citations to W.L.R.), the Court expressly declined to extend that reasoning to cases involving part payment of a debt. Instead the Court followed the principle from *Foakes v. Beer*, [1884] UKHL J0516-29, 9 App. Cas. 605, that part payment of a debt cannot be consideration for a new agreement to prohibit the creditor from collecting on the remainder of the debt.

[89] In *Selectmove,* the Inland Revenue brought a petition to wind up the company Selectmove Ltd. so as to collect on payroll tax debts. The company appealed on the basis that the Revenue had not established it was a creditor entitled to bring a petition because the debt to the Revenue was disputed in good faith and on substantial grounds. In particular, the company relied upon an alleged agreement with the Revenue that settled the debts for tax arrears, which the company said prevented the Revenue from making a demand for payment.

[90] Lord Gibson, writing for the Court, held that there was no acceptance of the alleged agreement, because the civil servant who engaged in discussions with the company did not have authority, and made no representation of authority, to bind the Revenue to the agreement (at 479).

[91] Nevertheless, Gibson L.J. went on to hold in the alternative that there was no valid consideration for the agreement in any event. He noted that the judge had applied *Foakes v. Beer*, a decision of the House of Lords which firmly rejected that a practical benefit might be enough to constitute consideration for a promise to forgive part of a debt (at 479):

> The judge held that the case fell within the principle of *Foakes v. Beer* (1884) 9 App.Cas. 605. In that case a judgment debtor and creditor agreed that in consideration of the debtor paying part of the judgment debt and costs immediately and the remainder by instalments the creditor would not take any proceedings on the judgment. The House of Lords held that the agreement was *nudum pactum*, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest on the judgment. Although their Lordships were unanimous in the result, that case is notable for the powerful speech of Lord Blackburn, who made plain his disagreement with the course the law had taken in and since *Pinnel's Case* (1602) 5 Co.Rep. 117a and which the House of Lords in *Foakes v. Beer*, 9 App.Cas. 605, decided should not be reversed. Lord Blackburn expressed his conviction, at p. 622, that
>
> > "all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole."
>
> Yet it is clear that the House of Lords decided that a practical benefit of that nature is not good consideration in law.

[92] While the company in *Selectmove* had tried to argue that the Court could rely upon the rule in *Williams v. Roffey Bros.* and find that some benefit was afforded to the Revenue in order to justify enforcing the agreement, Gibson L.J. declined to do so. In the view of Gibson L.J., extending the principles from *Williams v. Roffey Bros.* to the situation of part payment would in effect overturn the decision in *Foakes v. Beer* (at 480-481):

> Mr. Nugee however submitted that an additional benefit to the revenue was conferred by the agreement in that the revenue stood to derive practical benefits therefrom: it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation. He pointed to the fact that the company did in fact pay its further P.A.Y.E. and N.I.C. liabilities and £7,000 of its arrears. He relied on the decision of this court in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 for the proposition that a promise to perform an existing obligation can amount to good consideration provided that there are practical benefits to the promisee.
>
> ...
>
> Mr. Nugee submitted that, although Glidewell L.J. in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A, and he referred to an article by Adams and Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 M.L.R. 536, 539–540 which suggests that *Foakes v. Beer*, 9 App.Cas. 605 might need reconsideration. I see the force of the argument, but the difficulty that I feel with it is that, if the principle of *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer*, 9 App.Cas. 605 without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing. In the absence of authority there would be much to be said for the enforceability of such a contract. But that was a matter expressly considered in *Foakes v. Beer* yet held not to constitute good consideration in law. *Foakes v. Beer* was not even referred to in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of Williams's case to any circumstances governed by the principle of *Foakes v. Beer,* 9 App.Cas. 605. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.
>
> [Emphasis added.]

[93] While it might be said that Gibson L.J.'s comments regarding consideration were *obiter* given his finding on acceptance, the Court of Appeal in *Collier v. Wright*, [2007] EWCA Civ 1329 at para. 3, [2008] 1 W.L.R. 643, cited *Selectmove* as declining to apply the rule from *Williams v. Roffey Bros.* to cases of part payment of debts. In *Collier*, the defendant sought to rely upon a compromise agreement with the plaintiff, in which the defendant agreed to pay his one-third share of liability on a judgment debt under which the defendant was otherwise jointly and severally liable, in exchange for being released from further liability. While acknowledging that such a situation was distinct from both the facts of *Williams v. Roffey Bros.,* and *Selectmove*, the Court unanimously held that there was no consideration for the agreement, though agreed that there was a triable issue with respect to promissory estoppel in that case.

[94] The reading of *Selectmove* adopted in *Collier* is also adopted by Fridman, *The Law of Contract in Canada*, at 99, footnote 120, Waddams, *The Law of Contracts*, at para. 138, footnote 383, *Chitty on Contracts*, 31st ed., (London: Sweet & Maxwell Ltd., 2012) at 378, footnote 665, and John D. McCamus, *The Law of Contracts*, 2nd ed., (Toronto: Irwin Law Inc., 2012) at 260. McCamus notes however, that a Canadian court might feel less reticent than the Court in *Selectmove* to depart from *Foakes v. Beer*.

Canadian reforms to the doctrine of consideration

[95] Canadian courts have generally adopted the rule from *Stilk v. Myrick* that there must be additional consideration where the promise from one party is simply to do something they are already obligated to do under contract: see Waddams, *The Law of Contracts*, at para. 135. An example is the Ontario Court of Appeal's decision in *Gilbert Steel Ltd*.

[96] As discussed, courts have also required debtors to provide fresh consideration above their existing obligations under loans in order to render a promise to forbear enforceable: *Shook* at 541; *Hamilton (City)* at para. 73.

[97] In fact, a strikingly similar case to the one at bar is *Fenwick Brothers v. Gill* (1924), 52 N.B.R. 227 (S.C. App. Div.). In that case, the plaintiff sued the defendant for breach of both a promissory note, and an oral agreement by which the defendant agreed to pay back the money owing under the promissory note in installments over time in exchange for forbearance from the plaintiff. The issue was whether the second oral agreement regarding delayed payment was enforceable in order to avoid a limitations defence against the underlying debt claim. The Court unanimously held that the second oral agreement was not enforceable for lack of consideration, as the defendant provided nothing more to the plaintiff as consideration for the oral agreement than what the defendant was already obliged to provide. The decision in *Fenwick Brothers* is similar to the decision in *Foakes v. Beer*, in that the Court rejected the idea that part payment of a debt already owing is sufficient consideration for a new agreement, though none of the judgments in *Fenwick Brothers* cite to that case.

[98] However, *Fenwick Brothers* could arguably be seen as overruled after the decision of the New Brunswick Court of Appeal in *Robichaud c. Caisse populaire de Pokemouche Ltée.* (1990), 69 D.L.R. (4th) 589 (N.B.C.A.). In that case, the bank had obtained a judgment against Mr. Robichaud which it registered on the title of one of his properties. Mr. Robichaud later encountered financial difficulties and arranged with his creditors to have them accept only part payment of his obligations as satisfaction of their claims and otherwise consolidate his debts. As part of this plan the bank initially agreed to accept part payment, which Mr. Robichaud made by cheque. However, the bank subsequently reneged on that promise, did not cash the cheque and sought payment of the full amount of the judgment. Mr. Robichaud brought a claim seeking a declaration that the agreement with the bank was enforceable and discharging the debt against his property.

[99] The majority reasons in *Robichaud*, written by Justice Angers, discussed the prevailing rule from *Foakes v. Beer*, in which the House of Lords adopted the rule first laid out in *Pinnel's Case* (1602), 5 Co.Rep. 117a, that part payment of a debt

cannot constitute valid consideration, and noted that this was followed in *Fenwick Brothers*. However, Angers J.A. went on to hold that the law had developed since then and that there was valid consideration to make the agreement enforceable (at 595-596):

> I do not feel that the circumstances of this case call for a major reform of *Pinnel*. In my opinion, reform has already begun. Moreover, the facts in the case at bar leave no ambiguity as to the agreement reached between the parties.
>
> The Caisse Populaire, through its manager, made an agreement, which it confirmed in writing, to settle the debt of Mr. Robichaud for the amount of $1,000. It received a cheque for that amount, even though it did not cash the cheque.
>
> The effect of this agreement was as follows: The Caisse Populaire waived its judgment, which at that time constituted a first charge on the property of Mr. Robichaud, in return for part payment of the judgment. Avco, which was refinancing Mr. Robichaud, obtained in the process a first mortgage on the properties of Mr. Robichaud. Mr. Robichaud obviously benefitted by the reduction of a portion of his debts.
>
> It would be easy for the Court to decide that there is or is not consideration or to invent grounds, as several courts have done, to give effect to an agreement such as the one at issue here. However, it cannot be denied that a financial institution, of its own accord and knowing all the consequences of its action, entered into an agreement by which it agreed to waive the priority of a judgment in its favour in return for part payment of the debt due to it. This agreement constituted a full satisfaction. The consideration for the Caisse Populaire was the immediate receipt of payment and the saving of time, effort and expense. In my opinion, it is not up to the court to judge the reasons for entering into such an agreement but rather to determine that the agreement was reached with full knowledge and consent. The court must therefore recognize the validity of the agreement. It would be foolish to suppose that financial institutions disdain the old adage, “A bird in the hand is worth two in the bush.” Finally, I would go so far as to find that implicit in the agreement to settle for $1,000 is the proviso that if the lesser amount is not paid, the original debt again comes into force.

[100] Justice Rice gave concurring reasons which argued that the promise was enforceable under the doctrine of promissory estoppel. While the Court in *Robichaud* did not expressly overrule *Fenwick Brothers*, the reasons of Angers J.A. imply that the law has changed since that case. The Court did not refer to *Williams v. Roffey Bros.*, but that is likely due to the fact that *Williams v. Roffey Bros.* was not released until after the hearing in *Robichaud*.

[101] Even prior to *Robichaud* and *Williams v. Roffey Bros.*, the Nova Scotia Supreme Court, Appeal Division, in *Bank of Nova Scotia v. MacLellan* (1977), 78 D.L.R. (3d) 1 (N.S.S.C. App. Div.), was willing to enforce a promise by a bank to accept part payment of a debt where seemingly only a practical benefit was received in exchange. In that case the debtor owed money to the Bank of Nova Scotia on a promissory note she had signed with her ex-husband. She agreed with the bank to have her debt discharged by payment of a lesser sum in exchange for her cooperation in locating her ex-husband so the bank could collect on the balance of the debt. Chief Justice MacKeigan, writing for the Court, wrote that any agreement to accept part payment as satisfaction of the debt would require consideration, but held that the mere promise to cooperate, "though slight and of little real value, is enough to meet the legal test of consideration" (at 2).

[102] It is also important to note that while some Canadian cases do appear to adopt the rule in *Foakes v. Beer*, that part payment of a debt is not valid consideration for a promise from a creditor, the rule does not appear to have been expressly adopted in British Columbia. Moreover, s. 43 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, also abrogates that rule and states:

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

See also *Allen v. Bergen* (1995), 8 B.C.L.R. (3d) 127 (C.A.)

[103] The legislature has therefore signalled disagreement with the reasoning in *Foakes v. Beer*, at least to the extent that new consideration is not required to support an agreement by a creditor to accept part payment of a debt in satisfaction of the whole. However, Professor Waddams observes of the almost identical language in the Ontario *Mercantile Law Amendment* Act, R.S.O. 1990, c. M.10, s. 16, that the provision "does not apply to an outright forgiveness of an obligation": *The Law of Co*ntracts, at para. 140. As well, on its face, s. 43 does not appear to include mere promises to pay existing obligations, such as the ones at issue in this

case. Unless there is actual part payment received, the principle of "a bird in the hand is worth two in the bush" which seems to motivate the rejection of the rule from *Foakes v. Beer,* does not really apply.

[104] This brings us to the important decision of *NAV Canada*, where the New Brunswick Court of Appeal became the first, and so far only, Canadian appellate court to expressly approve of, and indeed build on, the reasoning from *Williams v. Roffey Bros.*

[105] In *NAV Canada*, the Greater Fredericton Airport Authority had extended a runway and asked Nav Canada, a federal monopoly required to provide aviation services and equipment to the airport, to relocate some navigational equipment to the extended runway. Nav Canada came to the conclusion that it made more economic sense to install new equipment, a "DME" or (distance measuring equipment), than relocate the old equipment, but refused to install the new equipment unless the Airport Authority agreed to pay the cost. The Airport Authority begrudgingly agreed, and noted that it did so "under protest". The Airport Authority took the position that they were not obligated to pay pursuant to the existing Aviation and Services Facilities Agreement ("ASF Agreement") between the parties.

[106] Writing for the Court, Robertson J.A. agreed with the Airport Authority that Nav Canada was under an obligation to install and pay for the new equipment pursuant to the ASF agreement, and that a strict application of the rule from *Stilk v. Myrick*, would prevent enforcement of the subsequent agreement obliging the Airport Authority to pay:

> [19] I return to the question whether the Airport Authority's subsequent promise to pay for the cost of the navigational aid was supported by "fresh" consideration. Accepting that the hallmark of every bilateral contract is a consensual bargain (a promise in exchange for a promise), it must be asked whether the party seeking to enforce the post-contractual modification (Nav Canada) had agreed to do more than originally promised (in the ASF agreement) in return for the agreement to modify the contract. It is a well-established feature of the traditional doctrine of consideration that consideration must move from the promisee (Nav Canada) or, in other words, the promisee must suffer a detriment in return for the promise of the promisor

> (the Airport Authority). That something more provides the consideration necessary to enforce what otherwise would be a gratuitous and unenforceable promise. But as we know, under the rule in *Stilk v. Myrick* (1809), 2 Camp. 317, 170 E.R. 1168 (Eng. K.B.), the performance of a preexisting obligation does not qualify as fresh or valid consideration and, therefore, such an agreement to vary an existing contract remains unenforceable. In this case, Nav Canada's pre-existing contractual obligation was to pay for the DME once it exercised its contractual right to insist on purchasing new equipment rather than relocating the old. In short, Nav Canada promised nothing in return for the Airport Authority's promise to pay for a navigational aid that it was not contractually bound to pay for under the ASF Agreement.

[107] However, the Court went on to discuss the rule from *Williams v. Roffey Bros.*, and build on it by holding that a variation to an existing contract, unsupported by consideration may be enforceable if not procured under economic duress. The Court's reasons on this point are quite extensive and I reproduce them in full:

> [26] In *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), Professor J.D. McCamus, at p. 249, explains the ratio of the Court of Appeal's decision in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* as follows: "For all three members of the court, then, it appears that the fact that the contractor would obtain a benefit, albeit one arising from the defendant's relationship with the owner of the flats, could serve as consideration rendering the promise to pay more an enforceable one." In short, the English Court of Appeal was prepared to "relax" the tenets of the consideration doctrine in order to render enforceable a gratuitous promise to pay more. Under English law, then, it is no longer necessary to look for an exchange of promises or detriment on the part of the promisee to enforce a variation of a contract, so long as the promisor obtains some benefit or advantage.
>
> [27] In my opinion, this is a proper case to consider whether this Court should build upon the English Court of Appeal's decision in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* in order to avoid the rigid application of the rule in *Stilk v. Myrick*. I am prepared to accept that there are valid policy reasons for refining the consideration doctrine to the extent that the law will recognize that a variation to an existing contract, unsupported by consideration, is enforceable if not procured under economic duress. I am not the first to advance this position: R. Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991), 107 Law Q. Rev. 649 and R. Halson, "The Modification of Contractual Obligations" (1991), 44 Curr. Legal Probs. 111, both cited in C. Boyle and D.R. Percy, Contracts: Cases and Commentaries, 7th ed. (Toronto: Thomson Carswell, 2004).
>
> [28] I offer several reasons for this incremental change in the law. First, the rule in *Stilk v. Myrick* is an unsatisfactory way of dealing with the enforceability of postcontractual modifications. As Professor McCamus points out, the rule is both overinclusive and underinclusive. It is overinclusive

because it captures renegotiations induced by coercion so long as there is consideration for the modification. It is underinclusive in cases where there is no consideration because it excludes voluntary agreements that do not offend the tenets of the economic duress doctrine (see pp. 381-382 of his text). The reality is that existing contracts are frequently varied and modified by tacit agreement in order to respond to contingencies not anticipated or identified at the time the initial contract was negotiated. As a matter of commercial efficacy, it becomes necessary at times to adjust the parties' respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.

[29] Second, the consideration doctrine and the doctrine of promissory estoppel work in tandem to impose an injustice on those promisees who have acted in good faith and to their detriment in relying on the enforceability of the contractual modification. The notion that detrimental reliance can only be invoked if the promisee is the defendant to the action (i.e., as a shield and not a sword) is simply unfair and leads to an unjust result if the promisor was not acting under economic duress. In *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at p. 83, Professor S.M. Waddams points out that some gratuitous promises have been enforced because of detrimental reliance on the part of the promisee. He notes that these cases should not be met by a fictional attempt to find consideration in the sense of a bargained exchange. Professor Waddams opines that courts should openly recognize that, while these promises are not bargains, there may be other sound reasons for enforcement. In my view, this reasoning is persuasive in the context of the enforcement of a post-contractual modification. I agree with Professor Waddams' exhortation that courts should avoid "fictional" attempts to find consideration. We should not be seduced into adhering to a hunt and peck theory in an effort to find consideration where none exists, nor should we manipulate the consideration doctrine in such a way that it is no longer recognizable. Frankly, law professors spend far too much time trying to explain to law students what qualifies as valid consideration and why the cases seem to be irreconcilable, except in result, while judges spend more time avoiding the rule in *Stilk v. Myrick* than they do in applying it. Parties to a contract and to litigation are entitled to expect that there is some certainty in the law and that it is not dependent on the length of the chancellor's foot. For courts to find consideration by holding, for example, that the parties implicitly agreed to a mutual rescission of the original contract or that they implicitly agreed to a new term is to weaken the law of contract, not strengthen it.

[30] My third reason for refining the tenets of the consideration doctrine is tied to the reality that it developed centuries before the recognition of the modern and evolving doctrine of economic duress. The doctrine of consideration and the concept of bargain and exchange should not be frozen in time so as to reflect only the commercial realities of another era. If the courts are willing to formulate and adopt new contractual doctrines, they are equally capable of modifying the old. To the extent that the old doctrines interfere with the policy objectives underscoring the new, change is warranted. In my view, this is precisely what the English Court of Appeal did in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*

> [31] For the above reasons, I am prepared to accept that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress. In reaching this conclusion, I am mindful that the Supreme Court has cautioned that it is not the role of the courts to undertake "major" reforms in the common law or those that may have "complex ramifications". That is the prerogative of the legislature. "Incremental" changes, however, are permissible: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] S.C.J. No. 94 (S.C.C.), para. 13 and *R. v. Salituro*, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97 (S.C.C.), para. 37.
>
> [32] In my view, the modernization of the consideration doctrine as it is tied to the rule in *Stilk v. Myrick* qualifies as an incremental change. It relieves the courts of the embarrassing task of offering unconvincing reasons why a contractual variation should be enforced. Again having regard to the Supreme Court's admonition, I wish to emphasize that I am not advocating the abrogation of the rule in *Stilk v. Myrick*. Simply, the rule should not be regarded as determinative as to whether a gratuitous promise is enforceable. Nor am I suggesting that the doctrine of consideration is irrelevant when it comes to deciding whether a contractual variation was procured under economic duress. There will be cases where the post-contractual modification is in fact and law supported by valid or fresh consideration. In my view, that type of evidence is important when it comes to deciding whether the contractual variation was procured with the "consent" of the promisor. After all, why would anyone agree to pay or do more than is required under an existing contract in return for nothing? But if the contractual variation was supported by fresh consideration, the argument that the variation was procured under economic duress appears, on the face of it, less convincing and the circumstances more in line with what one expects to see in every commercial contract: a "consensual bargain". On the other hand, for example, a person who agrees to pay more than the original contract price either in writing under seal or in return for a "peppercorn" is entitled to argue that the agreement was procured under economic duress.
>
> [Emphasis added.]

[108] Despite acknowledging that the agreement could be enforceable absent fresh consideration, the Court went on to find that Nav Canada procured the Airport Authority's agreement to pay the costs of the new equipment under economic duress, when it refused to install the equipment unless the Airport Authority agreed, and therefore the agreement was not enforceable (at paras. 64-67).

[109] It should be observed that the Court in *NAV Canada* appears to have expanded the doctrine of consideration even more radically than in *Williams v. Roffey Bros.*, as Robertson J.A. held that any "post-contractual modification" may be

enforceable though unsupported by consideration so long as economic duress was not made out. While the Court cited *Williams v. Roffey Bros.* and appeared to adopt its reasoning, there is no mention of the need for practical benefit and no discussion of what practical benefit the Airport Authority received from Nav Canada's performance of its pre-existing obligation. Nor did the Court reference *Selectmove*, though that may be explained on the basis that the agreement in *NAV Canada* was for provision of services, as opposed to a compromise agreement regarding debt as was the case in *Selectmove*.

[110] Interestingly, only a year after deciding *NAV Canada*, the New Brunswick Court of Appeal in *Kennedy v. Clark*, 2009 NBCA 60, with Robertson J.A. again writing the reasons for the Court, distinguished *NAV Canada* and held that a disclaimer of liability for misrepresentations in the sale of a yacht was unenforceable for lack of consideration. In *Kennedy*, the plaintiff bought a yacht, and signed an agreement of purchase and sale on the representation by an agent of the vendor that the engine was new. Nothing in the agreement of purchase and sale waived liability for misrepresentations. The sale was eventually completed and the vendor executed a bill of sale in favour of the plaintiff, to which was attached a disclaimer of liability for any misrepresentations made by the agent. However the engine in the yacht was not new, quickly broke down, and the plaintiff purchaser sued both the vendor and agent for negligent misrepresentation.

[111] One of the issues on appeal was whether the disclaimer was applicable to the agent to protect against liability, and in particular whether a provision of the New Brunswick *Law Reform Act*, S.N.B. 1993, c. L-1.2, which addressed rights of third parties to agreements, made it applicable. However, Robertson J.A. held that even if the disclaimer was applicable it was unenforceable for lack of consideration:

> [26] If, based on common law principles, the clause is unenforceable, it makes no difference whether s. 4 of the *Law Reform Act* is engaged. Neither Mr. Clark nor Mr. Harrity would be able to invoke the clause as a shield against liability for negligent misstatements. At the appeal hearing, we drew attention to the fact that the disclaimer clause was not part of the original agreement of purchase and sale but was entered into at the closing of the

> sale transaction. Hence, the question was posed whether the clause was enforceable according to the classical tenets of the doctrine of consideration. In short, what consideration did Mrs. Kennedy receive for agreeing to sign the disclaimer clause? As is well-known, the performance of a pre-existing duty does not qualify as fresh consideration. In the present case, the pre-existing duty was the duty to complete the sale transaction.
>
> [27] In *Greater Fredericton Airport Authority Inc. v. NAV Canada*, 329 N.B.R. (2d) 238, 2008 NBCA 28 (N.B. C.A.), this Court recognized the principle that a post-contractual modification to an executory contract may be enforceable although unsupported by consideration provided the modification was not procured under "economic duress" ... This Court held that although the subsequent promise to pay was unsupported by consideration it would have been enforceable but for the fact that the agreement was extracted under "economic duress". The present case does not fall within that principle. There were no discussions or negotiations leading up to the modification of an existing term of the contract. Nor does the record support the understanding that the disclaimer was the subject of discussion at the closing of the transaction. For some unexplained reason, Mrs. Kennedy agreed to a new term that extinguished legal recourse with respect to actionable misrepresentations but without receiving anything in return. The promise is not even under seal. Truly this case resembles one involving a post-contractual modification to an "executed" contract as opposed to an "executory" one.
>
> [Emphasis added.]

[112] With respect, it is difficult to reconcile the result in *Kennedy* with the clear statement from *NAV Canada* that "[a]s a matter of commercial efficacy, it becomes necessary at times to adjust the parties' respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable" (at para. 28). What appears to have motivated the Court in *Kennedy* is the lack of discussion of the new term, and the lack of any reason why Mrs. Kennedy would agree to it. The Court may have been concerned with whether Mrs. Kennedy was fully aware of the disclaimer when she signed the bill of sale, and whether she truly agreed to the variation and intended to be bound to it.

[113] *NAV Canada* is so far the only Canadian appellate case to have expressly built upon the approach taken in *Williams v. Roffey Bros.* However, those two cases have been considered, or at least referenced, by other courts faced with the challenges caused by the pre-existing duty rule: *River Wind Ventures Ltd. v. British*

Columbia, 2009 BCSC 589 [*River Wind, BCSC*], rev'd on other grounds 2011 BCCA 79; *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, Slatter J.A. dissenting; *Richcraft Homes Ltd. v. Urbandale Corp.*, 2016 ONCA 622.

[114] In *River Wind, BCSC*, the plaintiff sought to purchase a property for use as a facilities yard as part of a maintenance contract. While negotiating the purchase of the property, the plaintiffs were already occupying the property as tenants under a lease. The parties came to an agreement, but the sale was structured such that there was a delay in closing to allow for the completion of various environmental assessments and any remediation of the site. A clause in the purchase agreement also provided that if the sale did not complete within a designated time, the agreement would terminate absent the plaintiff purchasers requesting an extension. The closing of the sale was delayed considerably due to the environmental work, and the termination date passed without the parties seemingly being aware and the plaintiffs did not request an extension. Sometime after that point the defendant vendor made an offer to the plaintiffs to have them extend the purchase agreement on the condition that rental payments from the plaintiffs under the lease that was still in force could be applied to the purchase price. The plaintiffs agreed to extend on those terms, but the defendant vendor subsequently reneged, and refused to count lease payments towards the purchase price. The plaintiff completed the sale, but under protest.

[115] At a summary trial, Justice Meiklem adopted the reasoning from *NAV Canada* with some modification and would have held that a post-contractual variation may be enforceable "in the absence of consideration if the evidence established either detrimental reliance by the plaintiff or the gaining of a benefit or advantage by the defendant" (at para. 33). However, despite adopting that reasoning, Meiklem J. held that the contract was still unenforceable as the plaintiff had not demonstrated detrimental reliance upon the promise.

[116] On appeal, this Court overturned the result and held that there was valid consideration. While this Court acknowledged that Meiklem J. had adopted the

reasoning from *NAV Canada*, it instead considered that analysis unnecessary as there was sufficient valid consideration for the offer to credit rental payments to the purchase price due to the expiry of the original purchase agreement:

> [13] The summary trial judge concluded that the Credit Offer was unenforceable for failure of consideration at the time it was made and the law of promissory estoppel did not advance its position. His analysis was framed in terms of a promise made without consideration after an existing agreement that remained in force, and engaged a discussion of *Greater Fredericton Airport Authority Inc. v. NAV Canada*, 2008 NBCA 28, [2008] N.B.J. No. 108 (C.A.). In my view, that analysis overlooks the fact that there was no purchase agreement binding on the parties at the time of the Credit Offer because the Original Agreement had expired earlier for lack of notice to extend it. Thereafter there was no binding agreement of purchase and sale until the Extension Agreement was executed in 2005. The summary trial judge found as a fact that River Wind agreed to the Extension Agreement "in reliance on the credit offer and in the belief that the defendant would honour its offer." [para. 29] In my view, that agreement and the element of reliance found by the judge provided the minimal element of consideration formally required to support the Credit Offer.
>
> [Emphasis added.]

[117] While this Court did not adopt the reasoning from *NAV Canada* as modified by Meiklem J., it did not expressly reject that approach either. Justice Meiklem's modification of the principle also addresses the comments above regarding the lack of reference to practical benefit in *NAV Canada*.

[118] In *Globex*, a majority of the Alberta Court of Appeal found that non-competition clauses of employment agreements that were added after the defendant employees had begun working for the plaintiff company were unenforceable for lack of consideration. However, Justice Slatter, in dissent, would have held that the clauses were enforceable, and that the doctrine of consideration should not be applied in such a way that it frustrates the legitimate expectations of the parties to an employment agreement, citing *Williams v. Roffey Bros.* and *NAV Canada*. As he discusses the issue extensively, I reproduce the relevant sections of Slatter J.A.'s reasons on the consideration point:

> [129] Employment relationships, being of indefinite duration, must adapt to changing times and circumstances. Further, since many of the key terms of employment agreements are implied by law, it is not unreasonable for the law

also to imply the "tacit agreement" mentioned in *Maguire*. There is nothing unreasonable about either side seeking variations to the terms of an employment agreement from time to time. The employee may seek a raise in pay, or promotion, or transfer, or a different work schedule, or other changes. The employer may feel the need to change the arrangement to respond to competitive pressures or changing business conditions. It is unrealistic to establish a rule of law that prevents the parties to a long-term employment relationship from restating and reducing to writing, from time to time, the terms of employment. Both parties rely on the enforceability of the terms of employment, and should not have their expectations disappointed by an artificial rule of law which makes their covenants unenforceable after they have been relied on for years.

[130] The problems of applying the law of consideration to "going-transaction adjustments" are summarized by A. Swan in *Canadian Contract Law* (2nd ed.) (Markham: LexisNexis 2009):

> §2.142 The law surrounding going-transaction adjustments is needlessly confused and complicated. It is important to remember what Karl Llewellyn said of promises which modify the terms of an existing relation.
>
> > A third and hugely important class [of problems with the doctrine of consideration] is that of either additional or modifying business promises made after an original deal has been agreed upon. Law and logic go astray whenever such dealings are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management; and the line of legal dealing with them which runs over waiver and estoppel is based on sound intuition.
>
> §2.143 A preferable position for the law to adopt is that when such promises arise in a commercial setting there should be a strong presumption that they are enforceable. If one party alleges that there was improper economic pressure - or any other kind of improper or illegitimate pressure - that party should have the onus of showing that the promise should not be enforced. If there is no reason not to enforce the contract with the modified terms, it should be enforced.

These comments apply particularly to employment contracts, in which the relationship between the employer and the employee can subsist for many years. The importance of enforcing contracts which have been performed by both parties for a lengthy period was noted in Ronald Elwyn Lister at p. 745.

[131] In the United States, the rule relating to the enforcement of promises made in the context of an existing agreement is known as the "pre-existing duty rule". J. M. Perillo and H. H. Bender in *Corbin on Contracts* (rev. ed.) (St. Paul: West Publishing Co., 1995) at para. 7.1 note that the rule is in decline:

> The very frequently stated rule is that neither the performance of duty nor the promise to render a performance already required by duty is a consideration for a return promise. This rule is known as the "pre-existing duty rule." The pre-existing duty rule is undergoing a slow erosion and, as a general rule, is destined to be overturned. No part of the doctrine of consideration has done more to put the entire doctrine in disrepute. . . . It is clear that there is widespread doubt as to the soundness of the pre-existing duty rule as a matter of social policy. As a result, a court should no longer accept this rule is fully established. It should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case. . . .

The modification of arrangements respecting existing duties is something that frequently arises in the employment context.

...

[134] The purpose of the law of consideration must also be considered. Its primary purpose is to draw a line between gratuitous or morally based promises, and legally enforceable obligations. It was never intended to provide an easy escape mechanism for parties who have second thoughts about the covenants they agreed to, and that they intended to bind them. As Prof. G.H.L. Fridman states:

> . . . the rigid approach to consideration found in the early nineteenth century is no longer necessary or desirable. Courts are more ready to find consideration so as to reflect the intentions of the parties, unless there is an element of fraud, duress or inequality of bargaining power present.

(*The Law of Contract in Canada* (5th ed.), (Toronto: Thomson Canada, 2006) at p. 98, citing *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* (1989), [1991] 1 Q.B. 1 (C.A.) at pp. 18-9.) See *also Greater Fredericton Airport Authority Inc. v. NAV Canada*, 2008 NBCA 28 (CanLII), 329 N.B.R. (2d) 238 at paras. 27-8. In an arms-length, commercial context, like the law of employment, both parties clearly intend their obligations to be legally enforceable. Any element of fraud, duress or inequality of bargaining power found should be dealt with directly under the applicable doctrines, and not by an artificial application of the law of consideration.

[135] Consideration is a threshold issue to the enforcement of contracts, but it should not be extended or applied in a mechanical and artificial way. It should not be used to undermine the legitimate commercial expectations of the parties as to the enforceability of their obligations. The employees in *Maguire* and *Gestetner* could not ignore any valid covenant given not to compete, any more than the employer in *Maier* could disclaim the promise to grant stock options. The courts should not bend over backwards to find that agreements, believed by the parties to be enforceable, are essentially toothless because of the doctrine of consideration. Here the appellant and the respondents signed the non-competition agreements in full expectation that they were enforceable, and they thereafter continued with their business relationship on that assumption. The respondents acknowledged in their

evidence that they understood and believed the agreements to be binding on them. They even tried to respect the non-solicitation agreements. In applying the law of consideration, the courts should refrain, if possible, from relieving the parties of covenants freely entered into, absent some overriding public policy consideration: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69 at paras. 107, 120; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (CanLII) at paras. 2, 169. Where covenants are relied on for many years, at the least a promissory estoppel should arise.

[136] An appropriate approach to varying existing contracts by "going-transaction adjustments" was set out by Swan in *Canadian Contract Law*:

> §2.144 The results in cases like *Foakes v. Beer* and *Gilbert Steel* seem to serve no purpose other than to encourage trickery and sharp practice - a consequence recognized by the prompt legislative reversal of the result in the former. The effort to reconcile the results in [the leading cases] leads to great uncertainty and creates a very serious risk that those without access to good legal advice will be unfairly, unnecessarily and unpleasantly surprised.
>
> §2.145 More recent cases . . . show that the real problem which the law has to deal with is not the doctrine of consideration but whether the enforcement of the promise will catch one of the parties by surprise. It is both unnecessary and unrealistic to expect an employer to threaten its employees with dismissal if they do not agree to a modification of their employment contracts. It is, however, reasonable to expect the employer to make sure that its employees know the terms of the contracts that govern them and equally reasonable to expect the employees to tell the employer if the terms offered by the employer are unacceptable: if that means that the employee has to resign, he or she is protected by the law of constructive dismissal if the modification is unfair or unreasonable. It may be assumed that an offer by the employer to give an annual pay raise is acceptable to an employee so that nothing more is required of the employee to make his or her right to the increase effective. On the other hand, the employer should be entitled to expect that its employees have accepted some disadvantageous change from the fact that, after the employer made reasonable efforts to inform its employees of the change (and gave them time to consider it), the employees nevertheless stayed with the employer. Such an attitude to the problem of adjustments in the employment relation would not only reflect what has generally been accepted as the law but would also acknowledge that the important question is not whether there was or was not consideration or some legalistic ritual like a formal threat to dismiss an employee whom the employer would very much like to retain, but whether the employee was fairly informed of the terms governing his or her employment.

In this case none of the employees were "caught by surprise". They knew exactly what terms their employer was proposing for them, they agreed to them, and both the employer and the employees thereafter conduct their

> affairs as if the "going-transaction adjustment", in the form of the non-solicitation clause, was binding. Invoking the law of consideration after the fact is the invocation of a legal fiction in aid of a particular result.
>
> [Emphasis added.]

[119] In *Richcraft*, two property development companies, Richcraft and Urbandale, entered into an agreement governing sales of lots to build homes. Under that original agreement, one of the parties, Richcraft, was also a homebuilding company and had the right to purchase residential house lots from the development to meet its needs. However, the agreement did not specify exactly how many lots Richcraft would be entitled to purchase. The parties then entered into a subsequent agreement in 2005 that clarified that lot sales would be divided equally, and the parties would have the first right of refusal to purchase lots in the development before opening up sales to third parties. A dispute arose regarding allocation of lots, and on appeal Urbandale tried to argue that the 2005 agreement was unenforceable following the decision in *Gilbert Steel* because Richcraft had not provided consideration for the new promise from Urbandale relating to the division of lot sales. Richcraft argued that the rule in *Gilbert Steel* should be abandoned following developments in *Williams v. Roffey Bros.* and *NAV Canada*.

[120] Justice Lauwers, for the Court, wrote at para. 43 that "the developing case law outside Ontario suggests that the time might be ripe for this court to re-consider the role that consideration plays in the enforceability of contractual variations", though went on to distinguish *Gilbert Steel* and the rule in that case on the facts. He held that the agreement had clarified an unclear term in a long term contract which created certainty for Urbandale and thus constituted valid consideration (at para. 47). As a result of this, the Court did not engage in a substantive discussion of the case law discussed above.

[121] No Canadian court has so far adopted the reasoning from *Williams v. Roffey Bros.* and actually gone on in the result to find a promise enforceable, despite the applicability of the pre-existing duty rule. However, it can be seen that there is a

considerable amount of discussion of the problems caused by the rule, and signs of support for an evolution in the law.

[122] I would also observe that the "Report on Amendment of the Law of Contract" (1987) by the Ontario Law Reform Commission similarly criticized the pre-existing duty rule, and recommended that "an agreement in good faith modifying a contract should not require consideration in order to be binding": (at 33).

Reform outside Canada

[123] In *Richcraft*, the Court noted that the respondent in that case cited two New Zealand Court of Appeal cases that had adopted the practical benefit rule from *Williams v. Roffey Bros*.: *Antons Trawling Company Ltd. v. Smith*, [2002] NZCA 331, [2003] 2 NZLR 23 and *Teats v. Willcocks*, [2013] NZCA 162.

[124] In *Antons*, the plaintiff fisherman had been promised a certain percentage of any increased quota for catching fish that was allocated to the defendant fishing company. This promise was conditional on the fisherman engaging in exploratory fishing and proving the existence of a sufficiently large population of fish to justify establishing a commercial fishery, thereby leading the Fisheries Ministry to increase quotas generally. The Court held that the agreement was a unilateral contract in the sense that the fisherman did not assume any obligations, and bore no risk of liability if he failed to prove the existence of a sustainable fishery: (at para. 59). Before the promise to transfer any additional quota was made, the original agreement between the parties allowed the company at its discretion to direct the fisherman to conduct exploratory fishing. The defendant company thus raised the argument that the promise to transfer a percentage of the quota was without consideration.

[125] In response to that point, the Court held that *Stilk v. Myrick* was no longer the leading authority for cases involving pre-existing duties, and instead had been overtaken by developments in *Williams v. Roffey Bros.*, though the Court acknowledged that under either a more traditional view of consideration, or the view

expressed in *Williams v. Roffey Bros.*, they would have found the agreement enforceable:

> [92] The reasoning in [*Williams v. Roffey Bros.*], accepted by this Court in *Attorney-General for England and Wales*, has been trenchantly criticised by Professor Coote in (1990) 3 JCL 23. He argues with force that mere performance of a duty already owed to the promisee under a contract cannot constitute consideration and that the only principled way to such a result is to decide that consideration should not be necessary for the variation of contract. That is the approach of the Uniform Commercial Code, s.2-209(1) and it is vigorously supported by Reiter in Courts, Consideration and Common-Sense (1977) 27 U. Toronto L. J. 439 especially at 507, observing that a rigid requirement of consideration in the context of modern commercial contract modifications fails to recognise:
>
> > The illogicality of equating modifying with originating promises or to see that, insofar as consideration serves to exclude gratuitous promise, it is of little assistance in the context of on-going, arms-length, commercial transactions where it is utterly fictional to describe what is being conceded as a gift, and which there ought to be a strong presumption that good commercial "consideration" underlie any seemingly detrimental modifications.
> >
> > (see also [Chen]-Wishart The Enforceability of Additional Contractual Promises: A Question of Consideration? (1991) 14 NZULR 270; *Chitty on Contracts* Vol 1 (1999) Para 3-062 – 3-064.)
>
> As Professor Coote observes, such approach is not too dissimilar from that adopted by the High Court of Australia in *Trident General Insurance Co Ltd v McNiece Bros Ltd* [1988] HCA 44; (1988) 165 CLR 107.
>
> [93] We are satisfied that *Stilk v Myrick* can no longer be taken to control such cases as [*Williams v. Roffey Bros.*], *Attorney-General for England and Wales* and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement. Whichever option is adopted, whether that *of* [*Williams v. Roffey Bros.*] or that suggested by Professor Coote and other authorities, the result is in this case the same.
>
> [Emphasis added.]

[126] In *Teats*, the Court approved of the adoption of *Williams v. Roffey Bros*. in *Antons* and approved of the more radical principle expressed in that case, that consideration is not required to vary an agreement when the variation is voluntarily agreed without illegitimate pressure (at para. 54):

> Turning to the legal effect of the new term, we do not propose to discuss each of the alternatives identified by the Judge. On the basis that the term was that the parties would work together to see whether or not they could get on, as found by the Judge, the original agreement was, in our view, varied to include it. Although the position is not yet settled, we consider that consideration in the form of a benefit "in practice" is sufficient to support a binding variation. Further, we are attracted to the alternative view expressed by this Court in *Antons Trawling Co Ltd v Smith* that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure. This seems to us to reflect the reality of what happened in the present case – a variation was proposed and willingly accepted, and the parties proceeded on that basis. In the context of an existing agreement supported by consideration, that seems to us to be sufficient to constitute a binding variation.
>
> [Emphasis added. Footnotes omitted.]

[127] In that case, the parties had agreed to enter business together, with the defendant agreeing to transfer half of the shares in the company to the plaintiff. Subsequent to that agreement, the defendant delayed in transferring the shares. He told the plaintiff that his accountant had advised him to hold off on transferring the shares until they were certain they could work well together in the long term. The plaintiff agreed that was sound advice, and the Court considered that the effect of that conversation was to create a new term that the shares would only be transferred after a reasonable period of time. Following the rule in *Antons*, the Court found that the new term was enforceable and that the reasonable period had ended, resulting in a breach of contract.

[128] This rejection of the pre-existing duty rule in the circumstances of contractual modification is not limited to New Zealand. In the United States, § 2-209 of the Uniform Commercial Code states that "an agreement modifying a contract within this Article needs no consideration to be binding", though it should be noted that the

provision only applies to transactions in goods. Similarly, the *Restatement (Second) of Contracts*, § 89 reads:

> A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or (b) to the extent provided by statute; or (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

[129] At least one scholar has even argued that these attempts at reform have not gone far enough: see Robert A. Hillman, "Contract Modification Under the Restatement (Second) of Contracts" (1982) 67 Cornell L.R. 680; Robert A. Hillman, "A Study of Uniform Commercial Code Methodology: Contract Modification Under Article 2" (1981) 59 N.C.L.R. 335.

[130] Finally, the Court of Appeal of Singapore in an extensive *obiter* discussion it labelled "A coda on the doctrine of consideration" in *Gay Choon Ing v. Loh Sze Ti Terence Peter*, [2009] SGCA 3 at para. 117, has observed that the doctrine of consideration "almost certainly needs to be reformed". In particular, the Court noted that the doctrine causes difficulty in cases where a promise was already owed to the other party under an existing contract, and suggested that the most practical approach would be to maintain a diluted doctrine of consideration consistent with *Williams v. Roffey Bros.* while also relying upon other doctrines such as duress, and unconscionability to address the functions of a more robust version of contract (at para. 118).

Academic commentary on the pre-existing duty rule

[131] Several prominent academic commentators have also expressed dissatisfaction with the pre-existing duty rule and the strict application of the requirement for fresh consideration to make a variation to a contract enforceable.

[132] Professor Fridman in *The Law of Contract in Canada* acknowledges that the pre-existing duty rule has been criticized with respect to its application to modification of contracts, and that the concerns which the requirement of fresh

consideration appear meant to address in these situations can be dealt with through the use of doctrines like duress, fraud, or unconscionability (at 104):

> The doctrine derived from *Stilk v. Myrick* has been criticized as standing in the way of a realistic, sensible, modern method of dealing with what have been called "going transaction adjustments" or "contract modification". Although there is some purpose to the rule, namely to prevent the possibility that one party will take undue advantage of the comparatively weak, exposed position of the other party, there may be situations where modification is legitimate and excusable, for example, if the work to be done turns out to be more expensive and costly than the party providing the work originally conceived, as was the case in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, where, as previously noted, the Court of Appeal was prepared to modify the strictness of a doctrine applicable in Napoleonic times to then operative conditions on the high seas. Improperly forced modifications can be dealt with by doctrines of duress, fraud or unconscionability. Valid or justifiable modifications would not fall within such grounds for disapprobation or disavowal. Since the decision in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* it would seem then the law will give effect to such modifications, at least in some circumstances.
>
> [Footnotes omitted.]

[133] Professor Waddams, in *The Law of Contracts*, observes that *Williams v. Roffey Bros.* "suggests, though it does not quite clearly assert, that performance of a pre-existing duty is now capable of amounting to consideration" (at para. 138). However, the author goes on to note that in cases such as *Williams v. Roffey Bros.* and *NAV Canada*, "there was actual performance. It is doubtful whether the mere promise to perform a pre-existing duty (as opposed to the actual performance of it) could constitute consideration".

[134] While the law may be unsettled in terms of the enforceability of contractual variations, Professor Waddams argues that these promises should be presumed to be enforceable except where they are unconscionable, noting the variety of techniques courts already use to enforce them (at para. 136):

> Professor Reiter in an analysis of the *Gilbert Steel* case has drawn attention to a variety of techniques by which the court might well have enforced the buyer's promise. The Court might, for example, have found that the supplier had promised some extra value (the facts showed an agreement by the supplier to give the buyer "a good price" on future contracts). The court might have found that the changed circumstances (a dramatic increase in the supplier's own costs) released the parties from their original undertaking. The

> court might have set up an estoppel precluding the buyer from invoking the original agreement. The court might have found that the parties had rescinded the old contract and entered into a new one. Professor Reiter also pointed out that in case of doubt on any of these questions (and the variety of techniques available is almost always bound to raise some doubt) the new agreement could be upheld as a compromise of the supplier's rights. In view of this wide assortment of enforcement devices, all, on occasion, employed by the courts, there is a strong case for assuming *prima facie* enforceability of such promises and for concentrating attention on what Professor Reiter called the only substantive issue, namely unconscionability.
>
> [Emphasis added.]

[135] In "Courts, Consideration, and Common Sense", 27 U.T.L.J. 439 (1977), the paper cited by Professor Waddams above and also cited by the New Zealand Court of Appeal in *Antons*, Professor Reiter argues that the pre-existing duty rule should be abolished. In his view the rule does not promote desirable social policies, is inconsistent with sense and reason, and provides no help to courts making decisions (at 506-507):

> Legal rules should be retained only so long as they promote desirable social policies, only so long as they are consistent with sense and reason, and only so long as they help courts make decisions. Judged by any of these criteria, the pre-existing duty rule must go.

> The rule is too clumsy to be the sole instrument employed to test for exclusion from or inclusion within the realm of the legally enforceable. It can deny enforcement to perfectly fair and unobjectionable bargains by refusing to recognize the illogicality of equating modifying with originating promises or to see that, insofar as consideration serves to exclude gratuitous promises, it is of little assistance in the context of on-going, arms-length, commercial transactions where it is utterly fictional to describe what is being conceded as a gift, and in which there ought to be a strong presumption that good commercial 'considerations' underlie any seemingly detrimental modification. Too poorly refined to focus attention on the crucial issues raised in variation cases, the rule can direct courts to enforce socially meritless or repugnant promises, where enforcement would fly in the face of values esteemed elsewhere in the law and in society generally. The rule provides little guidance to courts which, over-all, tend to decide cases in accordance with sound policy and with commercial and common sense. The law's goal of guaranteeing reasonable reckonability to laymen, lawyers, and judges, is undermined as courts turn to avoidance techniques: the rule is conducive to the very opposite of 'certainty' as courts seem to employ or not to employ the techniques at will, in attempts to achieve sensible results through any available means. Use of these evasive methods impedes development of rational criteria for identifying which modifications should be enforced and which should not.
>
> [Footnotes omitted.]

[136] Instead, Professor Reiter argues that a functional approach focused on the pressures on the parties that may justify not enforcing the agreement is preferable (at 509):

> Reform of the pre-existing duty rule ought to be accomplished, therefore, by the courts' focussing direct on the evidentiary and pressure dangers potentially present in variation cases. In a commercial context, if the dangers are absent a modification promise ought to be enforced. What is required is a redefinition of the doctrine of consideration in terms of its underlying policies and an evaluation, in functional terms, of its relevance in any particular case. While this approach has been adopted in some variation cases, it has not been recognized generally, as providing the appropriate test.
>
> [Footnotes omitted.]

[137] Professor Reiter finds that while it has not been openly acknowledged as such, courts have already adopted this functional approach by looking to whether there is an absence of good reason not to enforce (at 443-444):

> The truth of the matter is that the judges, in their case-by-case deliberations, adopt a functional approach to the question of which promises shall be enforced. By this I mean to suggest that the judges reflect upon the policy

> considerations which underly the legal enforcement of *any* promises, and then ask whether enforcement of the promise in the case before them would further or hamper those policy considerations. While they might accept that the only promises enforced are contracts supported by consideration, the judges in practice adopt a functional definition of consideration. They hold that there is no consideration, and consequently no enforceability, only where it would be undesirable (in terms of the reasons for which any promises are enforced) to lend the law's assistance to the party requesting it, and because the reasons for enforcing informal contracts are many, an observable tendency in the judges is their straining to enforce promises.
>
> The functional definition of consideration adopted by the judges can therefore be described as the absence of a sufficiently good reason not to enforce a promise. What is such a sufficiently good reason must be determined in light of interests and policy factors present, relevant and valued differently in various fact situations. In this sense, consideration is not the major premise of an enforcement-non-enforcement proposition, but rather represents an evolving notion of the types of situation in which absence-of-good-reason-not-to-enforce has been found. The 'doctrine of consideration' is thus many doctrines: no definition can rightly be set up as the one and only correct definition and the law of contract is an evolutionary product that has changed with time and circumstance and that must ever continue so to change.
>
> [Emphasis in original. Footnotes omitted.]

[138] Angela Swan in *Canadian Contract Law*, 3rd ed., (Markham Ont.: Lexis Nexis Canada Inc., 2012) at 115-116, discusses the future of the doctrine of consideration following *Williams v. Roffey Bros.*, and welcomes any development in the law that would make modifications to contracts enforceable even if the effect may be wide ranging:

> The judgment of the Court of Appeal in *Williams v. Roffey Bros. and Nicholls (Contractors) Ltd.*, illustrates one important and interesting aspect of the attempt to reform the doctrine of consideration. It seems to be generally true that all attempts to reform consideration do so by offering a new basis for enforcing a promise – *i.e.*, a promise made without consideration under one formulation of that doctrine — that is so powerful that no obvious limit to its reforming power can be stated. As has been suggested, if the modifying promises in *Williams v. Roffey Bros.* and, perhaps, *Gilbert Steel*, are to be enforced, where can we stop? If it is now possible to show, *as a matter of fact*, that the promisor received a benefit when it made its promise and that there was no duress or fraud by the promisee, and then to have the promise enforced, what promises will be unenforceable? The foundation of *Foakes v. Beer* and the cases adopting the same arguments has been eroded if not destroyed, for that foundation was the refusal of courts to consider the facts and to assume, in the teeth of the evidence, that there could be no benefit to the promisor.

> If the result of this development were that, as has been suggested, all modifying arrangements or undertakings made in the context of a commercial relation were to be enforced (absent some real reason not to) that would be a significant improvement over the existing situation. If the further consequence of this development were that the capacity of the bargain theory and the doctrine of consideration to make promises *unenforceable* was significantly limited, it should not be seen as having any practical effect on the remaining problems with which the law has to deal. Those problems arise when the courts have to decide if the promise alleged by the plaintiff was sufficiently recorded and made with sufficient evidence of deliberation, or was part of a common or well recognized commercial arrangement.
>
> In practical terms, the usual effect of the application of the rule that a promise has to be "bought" with consideration is, in the commercial context, to make unenforceable a promise which, were it not for the doctrine, should be enforceable simply because there is no good reason, *i.e.*, a reason apart from the doctrine, not to enforce it. The assumption underlying the preceding sentence is, of course, that the need to protect the parties' reasonable expectations requires enforcement. If the promise is objectionable on some ground as, for example, having been made under duress or as the result of unconscionable behaviour by the promisee, the fact that it is dressed up as a bargain replete with consideration will not save it. If it is argued that the fact that the promise is gratuitous is a good reason for not enforcing it, then the focus shifts to what "gratuitous" means. It is clear after cases like *Williams v. Roffey Bros.* that what was formerly thought to be a "gratuitous" promise (in the sense that it was made without "technical" consideration) is no longer to be so regarded. The real question is not whether there is consideration but whether the promise is made in a commercial relation or is properly to be regarded as a gift, *i.e.*, something made or done with an intention to make a donation, the kind of promise that might be made to a charity or to a close family member. These promises have almost nothing in common with promises made in a commercial setting and, while it is possible that there are cases close to whatever line divides the commercial from the non-commercial, they are likely to be very few.
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> [Underline emphasis added. Footnotes omitted.]

[139] Professor McCamus in *The Law of Contracts*, at 254, also welcomes the decision in *Williams v. Roffey Bros.*, but notes that the reasoning is not entirely consistent with the traditional doctrine of consideration articulated in *Stilk v. Myrick*, despite the Court's insistence that it was not overruling that case:

> Moreover, the exception to the traditional approach crafted in *Roffey* does not appear to be a minor or trivial one. In many instances, promises to increase unilaterally the consideration being provided in an agreement will be given because there is considered to be some practical advantage to be gained by the promisor in doing so. Thus, *Roffey* can be interpreted as a rather substantial "refinement" of the rule in *Stilk v. Myrick*. Indeed, the decision

> opens up the attractive possibility that the principle in *Stilk v. Myrick* will be applied only in cases where the promise to provide additional consideration is induced by economic duress. On this basis, voluntary one-sided contractual variations would normally be binding, a proposition of law that would be more in accord with the likely understandings of the parties to such arrangements than the current rule.

[140] Professor McCamus goes on to argue that it may be too soon to predict the impact of the decisions in *Williams v. Roffey Bros.* and *NAV Canada*, in particular the importance of detrimental reliance to the test given the decision of Meiklem J. in *River Wind*, *BCSC*, but that the days may be numbered for the rule in *Stilk v. Myrick* (at 256-257):

> Although it is perhaps too early to confidently predict the ultimate impact of the decisions in *Roffey and Nav Canada*, their combined effect, in tandem with the traditional devices for avoiding the application of *Stilk v. Myrick*, may well be to substantially undermine, if not overwhelm that traditional rule. Certainly, the intent of the *Nav Canada* decision is to hold that, in the context of a unilateral contractual modification, the pre-existing duty rule should no longer stand in the way of enforcement. If the unilateral modification has not been secured by wrongful coercion — in particular, economic duress — it will be enforceable even though it has not been given for a fresh consideration. What is perhaps less clear is whether the new *Nav Canada* rule is applicable in the absence of detrimental reliance by the promisee on the unilateral promise to modify. Although the prevention of loss through detrimental reliance is mentioned by Robertson J.A. as a rationale for restricting the operation of *Stilk v. Myrick*, at no point does the *Nav Canada* court decision suggest that the existence of detrimental reliance is a prerequisite for the application of the new doctrine.
>
> Nonetheless, in the recent decision in *River Wind Ventures Ltd. v. British Columbia*, a trial judge concluded that the *Nav Canada* rule should apply only in circumstances where "the evidence established either detrimental reliance by the [promisee] or the gaining of a benefit or disadvantage by the [promisor]." The effect of this interpretation is to turn the *Nav Canada* rule into an innovative application of the doctrine of promissory estoppel, something not intended, it would seem, by the New Brunswick Court of Appeal in that case. This more modest approach would also have the desirable effect of substantially confining the rule in *Stilk v. Myrick*. While the ultimate fact of *Stilk v. Myrick* may fairly be considered uncertain, these recent developments both in Canada and England strongly suggest that its days are numbered.
>
> [Footnotes omitted.]

[141] However, some academic commentators have been more critical of the abandonment or "refinement" of the pre-existing duty rule in *Williams v. Roffey Bros.* and *NAV Canada*.

[142] Professor Chen-Wishart in "Consideration: Practical Benefit and the Emperor's New Clothes" in Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law* (1995) at 123, canvasses a number of criticisms of the approach adopted in *Williams v. Roffey Bros.* and argues that it fundamentally undermines the functions of bargain consideration in contract and unfairly expands contractual liability. In her view, "like the emperor's new clothes, the benefit described as 'practical' turns out to be a lot less than presented. The words 'illusory' and 'naked' would not be inapt" (at 124).

[143] Professor Chen-Wishart observes that one of the benefits said to be derived in the case was the increased chance of performance already due. But in her view to recognize this benefit as consideration in exchange for an additional promise results in a number of problems. If the benefit A receives from B in exchange for A's additional promise is simply the comfort A derives from B re-promising to perform their additional obligations under contract, then this would be to collapse motive and consideration and allow virtually every additional promise to be supported by consideration. Professor Chen-Wishart writes that (at 127):

> All promises, whether to perform an existing duty, to be loving, good or not complain, confer reassurance on the promisee (unless known not to be intended seriously)...Benefit is confused with motive, and consideration becomes meaningless as a criterion of enforceability. There is always a motive unless the promisor acts entirely irrationally.

[144] Even if the benefit is seen as "an objectively better chance of performance of the existing contract", something at least above mere motive, this can only be seen as something additional bargained for if the law were to recognize a distinction between a contract and performance of that contract. Essentially, to allow the better chance of performance to qualify as consideration would be to impliedly recognize that it is legitimate for a party to use the risk of not fulfilling their obligations to

bargain for additional benefits, something antithetical to the idea of contract as creating binding obligations. Professor Chen-Wishart observes that under such an approach (at 128):

> The practical benefit consists only of the promisor's hope that he or she will be put in as good a position as if the *original contract had been performed*. In the words of Professor Coote, this
>
> > provides nothing that is not already the promisor's right. It could constitute fresh consideration only if the law were to recognise some break in that link between a contract and its performance which is inherent in the concept of enforceable legal obligation.
>
> Such a break makes a contract no more than a point for further negotiation. This is no small problem of academic logic. Acceptance that an increased chance of performance of a contract is consideration for its variation reflects a disrespect for the very idea of contract as creating binding obligations.
>
> [Emphasis in original. Footnotes omitted.]

[145] Professor Chen-Wishart goes on to acknowledge that parties recognize the inadequacy of remedies for breach and that it may be of greater benefit to a party to receive actual performance instead of damages, but normatively this inadequacy of remedy should not be capable of supporting the enforcement of an additional promise and be "recognized as valid currency for the purchase of additional contract rights" (at 129).

[146] Even if the practical benefit described in *Williams v. Roffey Bros.* is seen as the chance of receiving something additional to performance of the existing obligation, Professor Chen-Wishart argues that this too causes difficulties, unless severely limited. If practical benefit is not just actually obtaining some benefit, but obtaining the chance of some benefit, how small must that chance be to constitute consideration? If a benefit can be merely speculative that again may collapse motive and consideration (at 131). Professor Chen-Wishart also points out that courts have recognized that practical benefit can simply be the chance that third parties may take action that benefits the promisor, and it may stretch the idea that consideration must "move from the promisee" to say that the promisee provides, in exchange for the additional promise, the benefits provided by third parties (at 131).

[147] Professor Chen-Wishart further argues that practical benefits are seemingly unenforceable if they do not materialize and therefore the doctrine unfairly creates a one-sided form of liability (at 133):

> If the promisee (of the additional payment) performs the existing contract there can be no remedy if the promisor's hopes of consequential benefits fail to eventuate. The promisor has got the chance bargained for. Thus, practical benefit in the second sense cannot be independently enforced. If the promisee ultimately fails to perform, the promisor's expectation of practical benefits, whether in the first or second sense (performance and the chance of consequential benefits) are either already protected by the original contract or, if not, derive no more protection from having been purchased twice.
>
> Consequential losses on breach (eg loss of profits or time penalties) are compensable within the rules of remoteness and causation. Where the loss is too remote and so uncompensable the promisor's position is not improved by paying more for it.
>
> [Footnotes omitted.]

[148] Fundamentally, Professor Chen-Wishart is concerned with the uncertainty that practical benefit brings to the doctrine of consideration, and the risk that individuals will be bound to promises too easily. She argues that "[r]ules of contract 'should not make contracting so easy that it hooks the unwary signer or the casual promisor'. It should protect parties' freedom to contract as well as freedom from contract" (footnotes omitted, at 132).

[149] In "Consideration and Serious Intention", 2009 Sing. J. Legal Stud. 434 at 443, Professor Chen-Wishart develops this point further in opposition to the idea that sufficiently serious intention should be enough to make contracts enforceable:

> Not only is the idea of respect and thus enforcement of every promise inaccurate as a matter of description of contract law, it is also normatively questionable. First, if we value freedom of choice then we should value equally highly an individual's subsequent abandonment of her initial choice. There is no reason to prioritise a past choice over a present one when both are equally valid expressions of her freedom. Second, it would be a very different world from the one we know if we were "bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience". An integral part of any valuable autonomous life is the ability to learn, change, mature and recreate oneself. This may entail the rejection or alteration of previous beliefs or goals. Even when account is taken of the value of learning from one's

> mistakes, coerced performance of one's regretted promises may unduly compromise one's integrity and self-respect (hence damages is the primary remedy for breach, rather than specific performance), or may jeopardise one's future autonomy (hence the invalidity of slavery contracts and unreasonable restraints of trade, and the facility of bankruptcy which allows a fresh start). Third, even if we believe that the promisor should do as she promises (for example, as a matter of self-consistency), it does not explain why contract law should weigh in on behalf of the *promisee* as a matter of justice. For this we need the doctrine of consideration.
>
> [Footnotes omitted.]

[150] As a doctrinal matter, Professor Chen-Wishart also rejects that consideration is limited to simply evidencing the parties' intentions, and that pure intention theories provide the most compelling descriptive account of the case law (at 441):

> Although the presence of consideration may evidence the parties' intention to be bound, its role is not reducible to this. First, an oral agreement may be very difficult to prove or be impulsively made, even if consideration is clearly present. Second, an informal undertaking (not contained in a deed) unsupported by consideration is unenforceable even if the promisor declares in front of witnesses and in writing that she seriously intends to be bound. Third, the absence of consideration does not necessarily, or even normally, indicate that a promise is perjured, incautious or unintended. The view that consideration merely performs the functions of formalities simply does not describe the contract law that we know.
>
> [Footnotes omitted.]

[151] Motivating Professor Chen-Wishart's criticism of practical benefit appears to be the recognition that contract rights allow full enforcement of a party's expectations, which is only justifiable due to the exchange of true bargain consideration, i.e., the payment of the equivalent of the promised performance. In Professor Chen-Wishart's view, expanding the doctrine of consideration to include the nebulous concept of practical benefit, in which a party does not seemingly give something enforceable in exchange, undermines the normative justification for the enforcement of that expectation (at 452):

> Phang J.A. (writing extra-judicially) said:
>
> > [T]he idea of consideration finds support in the everyday dealings of commercial people. It is, after all, the essence of standard commercial bargain that one party agrees to purchase something...from another. Promises are not made in the air...one reason for retaining

> consideration lies in the fact that it is not a mere legal construct. It serves the function it was designed to serve—marking off those promises which count as contractual promises from those which do not—*because it does reflect commercial reality. In commerce, to be entitled to enforce a promise you have to purchase it.*
>
> Accordingly, the bargain theory, unlike the will theory, also explains *who* can sue on the promise and the *extent* of the claimant's right. The expectation measure, the distinctive feature of a contractual action, gives the promisee the value of the promised performance *because* she has given the agreed equivalence of that performance.
>
> Other rules in private law reinforce the bargain-gift distinction. The equitable maxim that 'equity will not assist the volunteer' translates into a refusal to specifically enforce gratuitous bare promises contained in a deed. A deed tainted by mistake is easier to set aside than a contract made for good consideration. At law and in equity protection is given to good faith purchases (not donees) *for value* without notice of a prior proprietary interest in the property. A transfer without consideration comes up against the presumption *against* advancement barring specified exceptions. Similarly, whether a transaction is supported by consideration is relevant to whether it can be set aside on a party's insolvency. In these instances, consideration is not a proxy for formalities, but expresses our intuition that one who has provided consideration is more deserving that one who has not.
>
> [Underline emphasis added. Footnotes omitted.]

[152] Professor Benson is of the similar view that the only way to justify enforcement of expectation damages under contract law is to find that the parties struck a bargain by essentially transferring to each other ownership interests in the subject of their promises: see Peter Benson, "Contract as a Transfer of Ownership" (2007) 48 Wm. & Mary L.R. 1673. Only by recognizing that the parties have bargained, that the promisee now has an ownership interest in the subject of the promise, can it be said that, if the promise is not fulfilled, the promisee has actually lost something for which the promisee must be fully compensated.

[153] While the desire to protect a party's reliance upon a promise may seem a compelling rationale for expanding consideration, Professor Chen-Wishart argues that rationale should instead motivate a distinct type of enforcement, perhaps through the doctrine of promissory estoppel, and a distinct type of remedy tied to a party's reliance interest, not their expectation ("Consideration: Practical Benefit and the Emperor's New Clothes" at 148):

> Moreover, to expand consideration in this way dilutes the distinctiveness of a contract as an action which gives the promisee the value of the promised performance because he or she has paid the agreed equivalent for that performance. But, to advocate the retention of bargain enforcement, is not to deny some legitimate enforcement for non bargain promises such as that in *Roffey*. '[C]ontract does not exhaust the category of statements which are actionable or otherwise capable of producing legal effects.' But such enforcement should be regarded as an exception to the doctrine of consideration rather than an application of a redefined notion of consideration. In Professor Waddams' views:
>
> > It is surely simpler to follow the American Restatement in continuing the present usage of reserving 'consideration' for bargains leading to fully enforceable contracts and to recognise that though some promises may be enforceable without consideration the full 'normal' panoply of contract remedies, in particular damages measured by the value of the promised performance, may not always be appropriate.
>
> [Footnotes omitted.]

[154] Similar to Professor Chen-Wishart's view of *Williams v. Roffey Bros.*, Professor Bigwood in "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *Nav Canada v. Greater Fredericton Airport Authority Inc.*," 49 Can. Bus. L.J. 256 (2010), considers the decision in *NAV Canada* to be a fundamental change, rather than refinement, to the law of consideration. Professor Bigwood notes that Robertson J.A. went even further than *Williams v. Roffey Bros.* in recognizing the enforceability of all post-contractual modification promises unsupported by consideration in the absence of duress (at 260). In Professor Bigwood's view the pre-existing duty rule is a natural consequence of fundamental contract law principles since "to the full extent that a contractual variation is itself a contract, and that a contract upon its formation involves an immediate transfer of right, the pre-existing duty rule is a logical imperative consistent with contract law's own premises" (at 265).

How far should the doctrine of consideration be reformed?

[155] As detailed above there is significant case law and academic authority in support of adopting reforms to consideration in the context of going transaction adjustments or contract variations. However, courts have differed in how they articulate the requirements for consideration within this context.

[156] In *Williams v. Roffey Bros.*, the Court gave three different versions of ostensibly the same test. Lord Russell's may have been the most succinct (at 19): "where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration."

[157] In *Teats*, the Court supported a more radical position which it described as follows (at para. 54):

> Although the position is not yet settled, we consider that consideration in the form of a benefit "in practice" is sufficient to support a binding variation. Further, we are attracted to the alternative view expressed by this Court in *Antons Trawling Co Ltd v Smith* that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure.
>
> [Emphasis added.]

[158] In *NAV Canada*, Robertson J.A. wrote that, "[f]or the above reasons, I am prepared to accept that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress" (at para. 31).

[159] And in *River Wind, BCSC*, Meiklem J. held that a post-contractual variation may be enforceable "in the absence of consideration if the evidence established either detrimental reliance by the plaintiff or the gaining of a benefit or advantage by the defendant" (at para. 33).

[160] The reforms adopted by *Williams v. Roffey Bros.*, and *River Wind, BCSC* are on their face more conservative in that they require proof of at least some benefit, if only a practical one, to enforce the contract. *River Wind, BCSC* goes further in also allowing the consideration to be established by detrimental reliance by the plaintiff.

[161] In contrast, *Teats* and *NAV Canada* state that no consideration may be required so long as the variation was essentially entered into freely, or subject to avoidance under the doctrines of unconscionability or duress.

[162] When considering whether to reform consideration, it must also be acknowledged that the circumstances of this case involve a debtor/creditor relationship. The Court of Appeal in *Selectmove* declined to expand the principle from *Williams v. Roffey Bros.* to the situation of a part payment of a debt, or the acceptance of less for the same, on the authority of *Foakes v. Beer* which had previously decided the requirements for consideration in such cases. While *Foakes v. Beer* may have less weight in Canada, and British Columbia in particular, the Court in *Selectmove* observed that practical benefit would almost always be found in cases of part payment (at 481):

> I see the force of the argument, but the difficulty that I feel with it is that, if the principle of *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer*, 9 App.Cas. 605 without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing.

[163] Even if the more conservative articulation of the doctrine of practical benefit from *Williams v. Roffey Bros.* and *River Wind, BCSC* is adopted, in the case at bar, and ones like it, it might have the same effect as the more radical formulations in *Teats* and *NAV Canada*.

[164] This then raises the central theoretical debate in this case: on what theory should contracts be enforced and does that theory support more expansive enforcement? And what role should consideration play in that enforcement?

[165] The cases that have adopted reforms to the doctrine of consideration appear to focus on the seriousness of the parties' intentions and the legitimate expectations of business parties.

[166] In *Williams v. Roffey Bros.*, Purchas L.J. (at 21) wrote that the modern approach to the variation of contracts was captured by Lord Hailsham in *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741 at 757-758 (H.L.), who discussed the variation of a contract as follows:

> The buyers asked for a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was accepted and acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise. Business men know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence.
>
> [Emphasis added.]

[167] In *NAV Canada*, Robertson J.A. wrote (at para. 28):

> The reality is that existing contracts are frequently varied and modified by tacit agreement in order to respond to contingencies not anticipated or identified at the time the initial contract was negotiated. As a matter of commercial efficacy, it becomes necessary at times to adjust the parties' respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.

[168] Even in *Foakes v. Beer*, Lord Blackburn expressed reservation with the decision of the Court, and argued that contractual variations in cases of part payment should be recognized on the basis of commercial practice:

> What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.

[169] This focus on parties' intentions is consistent with an idea that consideration does not necessarily serve a substantive function, that it is not "an end in itself." This is clearest in the decision in *Antons* where the New Zealand Court of Appeal wrote (at para. 93):

> The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.

[170] Is it open to this Court to modify the law to the extent necessary to give effect to the reasoning in *Williams v. Roffey Bros*., *NAV Canada* and the theses advanced by Professor Waddams, Reiter and others?

[171] In *R. v. Salituro*, [1991] 3 S.C.R. 654 at 664, the Court recognized the power of judges to make changes to the common law, where there are sound policy reasons for making the proposed change. While complex changes to the law with uncertain ramifications should be left to the legislature, "the courts can and should make incremental changes to the common law to bring legal rules into step with a changing society": *Salituro* at 666.

[172] While the case here is not *Charter* litigation, I note the Supreme Court of Canada's direction in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42, that a "matter may be revisited if new legal issues are raised as a consequence of significant developments in the law": see also *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44; *R. v. Comeau*, 2018 SCC 15 at para. 29. In *Carter* the Court wrote:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis.

[173] The judicial and academic debate I have outlined at some length, that has centered on the result in such cases as *Stilk v. Myrick* and *Shook,* suggests to me that new legal issues have been raised as a consequence of significant developments in the law, namely the recent decisions both in Canada and other jurisdictions that have modified the doctrine of consideration for post-contractual variations following the ruling in *Williams v. Roffey Bros.*

[174] I would also note the similarities in this case with the Supreme Court of Canada's decision in *London Drugs v. Kuehne & Nagel International*, [1992] 3 S.C.R. 299, where the Court modified the doctrine of privity of contract to allow a third-party beneficiary to take advantage of a clause limiting liability. With respect to the need for an incremental change in the law the Court wrote (at 438-439):

> It is my view that the present appeal is an appropriate situation for making such an incremental change to the doctrine of privity of contract in order to allow the respondents to benefit from the limitation of liability clause.
>
> As we have seen earlier, the doctrine of privity has come under serious attack for its refusal to recognize the right of a third party beneficiary to enforce contractual provisions made for his or her benefit. Law reformers, commentators and judges have pointed out the gaps that sometimes exist between contract theory on the one hand, and commercial reality and justice on the other. We have also seen that many jurisdictions around the world, including Quebec and the United States, have chosen from an early point (as early as the doctrine became "settled" in the English common law) to recognize third party beneficiary rights in certain circumstances. As noted by the appellant, the common law recognizes certain exceptions to the doctrine, such as agency and trust, which enable courts in appropriate circumstances to arrive at results which conform with the true intentions of the contracting parties and commercial reality. However, as many have observed, the availability of these exceptions does not always correspond with their need. Accordingly, this Court should not be precluded from developing the common law so as to recognize a further exception to privity of contract merely on the ground that some exceptions already exist.
>
> While these comments may not, in themselves, justify doing away with the doctrine of privity, they nonetheless give a certain context to the principles that this Court is now dealing with. This context clearly supports in my view some type of reform or relaxation to the law relating to third party beneficiaries. Again, I reiterate that any substantial amendment to the doctrine of privity is a matter properly left with the legislature. But this does not mean that courts should shut their eyes to criticisms when faced with an opportunity, as in the case at bar, to make a very specific, incremental change to the common law.

[175] In my view, this Court could almost adopt that entire section of reasoning and apply it to this case, replacing only the word "privity" with "consideration."

[176] In the final analysis, I am persuaded that the legitimate expectations of the parties in the case of a modification to a going transaction should be protected. This is the motivating premise in the many cases where courts have struggled to find

"consideration" so as to do justice between the litigants. It is but an incremental evolution of the law to say that in these cases, in the absence of duress, unconscionability or other proper policy considerations, such modifications should be enforceable. I would modify the pre-existing duty rule to the extent necessary to accomplish this in the vein of the thesis advanced by Professors Waddams and Reiter. In my view, it is not necessary to justify such enforcement on the imaginative bases advanced by some—whether it be the theory of practical benefits or otherwise, which themselves amount to changes in the doctrine of consideration. Classic consideration is, as the cases have shown, something that the law recognizes as a legal right that can be enforced or compensated for in damages, but as Professor Chen-Wishart discussed, practical benefits cannot be so enforced or compensated. I agree with Professor Waddams when he says of the jurisprudence in this area of the law (*The Law of Contracts*, at para. 136):

> In view of this wide assortment of enforcement devices, all, on occasion employed by the courts, there is a strong case for assuming *prima facie* enforceability of such promises and for concentrating attention on what Professor Reiter called the only substantive issue, namely unconscionability.

[177] If one were driven to find consideration here, even in a modified form, there are practical benefits flowing to Ms. Rosas. Here Ms. Rosas clearly gained the benefit of maintaining her relationship with her friend Ms. Toca; indeed, it was that relationship that prompted the original advance of $600,000.

[178] Further, there was evidence that Ms. Toca and her husband provided services for Ms. Rosas including driving her about and working at times in her store on a volunteer basis. While these services were not explicitly promised as consideration for Ms. Rosas's forbearance, they can be seen as practical benefits accruing to Ms. Rosas by reason of that forbearance. Clearly, Ms. Rosas believed it to be in her interest to forbear collection of debt.

[179] Still in the search for consideration mode, one could also turn the pre-existing duty rule on its head and preserve a semblance of the bargain theory of contract by concluding that in these types of cases performance in accordance with a

pre-existing contract (i.e., duty) is legally operative as consideration absent duress or other appropriate considerations to the contrary. It could be said that what motivates the additional promise is the return promise of the original consideration, which is still something that the promisor is capable of putting to their use, (i.e., something the promisor is capable of exercising an ownership interest in) since it was enough to ground the original contract. But are such machinations necessary?

[180] Enforcement of the modification in cases like this reflects the notion in a going transaction situation that the parties are already in a contractual relationship and are simply adapting it to changed circumstances. This is not the case of the "unwary signor or the casual promisor" being "hooked" too easily into a contractual relationship as feared by Professor Chen-Wishart. Surely the fact of the existing contractual relationship in the going transaction scenario attenuates much of such concern. Further, as with any bargain, certainty of terms and proof of mutual intention to be bound will have to be proved by the party seeking to rely on the variation agreement. In any event, the bargain theory of contracts—the notion that contracts are enforced and expectation damages justified because the promisor has been paid the value of the thing promised—is inconsistent with the longstanding enforcement of contracts under seal, or based on nominal consideration of $1.00 or a peppercorn.

[181] While the rationale for the enforcement of going transaction modifications is often based on the realities facing commercial actors in business transactions, friends and neighbours who make significant loans and agreements face similar realities: circumstances change and contractual modifications may be desirable and beneficial to both parties.

[182] As the Court in *Antons* said, "[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself" (at para. 93).

[183] In my view, that is the case before this Court. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative.

[184] I conclude where I began by talking of hard cases, and I advance but a number of decades from Dickens to 1923 and Arthur Corbin's article "Hard Cases Make Good Law" (1923) 33 Yale L.J. 78. Coincidentally, Corbin was discussing the pre-existing duty rule and the need to reform consideration when he wrote (at 78):

> When a stated rule of law works injustice in a particular case; that is, would determine it contrary to "the settled convictions of the community," the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction. It is said that "hard cases make bad law;" but it can be said with at least as much truth that hard cases make good law. It was largely the crystallization of the rules of the common law that caused the constant appeals to the conscience of the king and his chancellor, and developed the system of law that we know as equity. Even the common law judges themselves had a "conscience." When their stated rules developed hard cases, the rules were modified by the use of fiction, by exceptions and distinctions, and even by direct overruling.

[185] In the circumstances, I would enforce the modifications as to the payment date made by the parties to this loan transaction as found by the trial judge. The parties agreed to vary the terms of their original loan each time Ms. Toca told Ms. Rosas, "I will pay you back next year", and Ms. Rosas agreed to extend the time for repayment. There is no suggestion that the variations to the repayment date were procured under duress, are unconscionable, or are otherwise invalid on the basis of public policy.

[186] The annual modifications extended the date on which payment was due from Ms. Toca by several years, and consequently delayed the running of the limitation period for that same time. The judge found that the original due date was 10 January 2008, and Ms. Rosas testified that Ms. Toca came to her seeking one-year

extensions until 2013. When those modifications are recognized, Ms. Rosas's cause of action did not arise until Ms. Toca failed to pay by 10 January 2013. Ms. Rosas's statement of claim was filed on 17 July 2014, which means it was well within the six-year limitation period under the former *Limitation Act*.

[187] I would not disturb the judge's conclusion that Ms. Toca alone is liable on the loan. Mr. Visaya was not a party to any negotiations, and Ms. Toca made no promises on his behalf. Since the trial judge made all the other necessary findings of fact to dispose of the claim I would therefore allow the appeal and grant judgment for Ms. Rosas in the amount of $600,000 plus prejudgment interest against Ms. Toca alone.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice Fisher"