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# Doctrinal reform and post-contractual modifications in New Brunswick: *Nav Canada v. Greater Fredricton Airport Authority Inc.*

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# DOCTRINAL REFORM AND POST-CONTRACTUAL MODIFICATIONS IN NEW BRUNSWICK: *NAV CANADA v. GREATER FREDERICTON AIRPORT AUTHORITY INC.*

## 1. Introduction

It frequently happens, especially with enduring contracts, that either or both contracting parties wish to change the contract as they go. Where the contract itself does not provide a procedure for making variations (or, if it does, the parties for whatever reason omit to follow that procedure), the parties can always vary their contract informally. Informal variations, however, can generate some thorny legal issues, especially if the variation privileges one party only (for example, the variation is that the contractor will be paid more simply to finish what the original contract already requires of him), or if the promisor assented to the variation because the promisee had the promisor “over a barrel”, so to speak. To be sure, a number of technical legal rules potentially come into play in post-contractual modification situations. Two such rules are the “pre-existing duty rule”, inside contract law’s consideration doctrine, and “economic duress”.

The application of both sets of rules was recently tested by the New Brunswick Court of Appeal in *Nav Canada v. Greater Fredericton Airport Authority Inc.*<sup>1</sup> The Court<sup>2</sup> ultimately abandoned altogether the “classical” requirement for fresh consideration in support of an informal post-contractual modification, leaving the enforceability of such modifications to be determined instead by the modern doctrine of economic duress. In that connection, the Court propounded a new analytical framework for adjudicating economic duress claims, and one that discards, at least for restitutionary or declaratory remedial purposes, the need for proof of “illegitimacy” in the pressure applied. With respect, neither move is self-evidently correct or desirable. While abandonment of the pre-existing duty rule might well prove to be theoretically unobjectionable, all things considered, the Court’s reform of the economic duress rules was, with respect, unconvincing in terms of principle and policy, and it was unnecessary for resolving the litigation in any event. Such a reform initiative, if followed by future courts, will leave Canada with an analytical framework for duress that is conceptually inferior to the prior, and relatively stable, Anglo-Commonwealth jurisprudence on the subject, which jurisprudence had, at least until the *Nav Canada* decision, achieved general, if not universal, acceptance among Canadian intermediate courts and legal commentators.

## 2. The Facts and Reasoning in *Nav Canada*

### (a) *The Facts and Issues*

Nav Canada and the Greater Fredericton Airport Authority (“the Airport”) entered into an Aviation and Services Facilities Agreement (“the ASF Agreement”) under which

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<sup>1</sup> (2008), 290 D.L.R. (4th) 405, (2008), 229 N.B.R. (2d) 328 (*Nav Canada*).

<sup>2</sup> Turnbull, Larlee and Robertson J.J.A., the judgment of the Court being delivered by Robertson J.A.

the former agreed to supply the latter with aviation services and equipment. By federal prerogative, Nav Canada had the exclusive right to provide such services to the Airport, hence affording it monopoly status relative to that party.

The Airport chose to extend one of its runways and asked Nav Canada to relocate the existing instrument landing system to the runway under extension. Nav Canada decided that in moving the system it would make better economic sense to replace an old part of the system with a new navigational aid called a “DME” (distance measuring equipment). The acquisition of the DME would cost \$223,000 and a dispute arose between the parties as to which of them should bear that cost. Nav Canada impliedly refused to provide the DME unless the Airport agreed to pay the \$223,000. This was something that, on the proper construction of the AFS Agreement, the Airport was not contractually bound to do. The Airport, who insisted that it had no obligation to pay, was nevertheless concerned that the extended runway became operational. In order to ensure that result, it agreed “under protest” to pay the amount demanded by Nav Canada. On the strength of that post-contractual modification of the parties’ original agreement, Nav Canada went ahead and installed the necessary equipment. The Airport, however, subsequently refused to pay the agreed amount and the parties, at first instance, agreed to arbitrate the dispute.

By the time the matter reached the New Brunswick Court of Appeal, the parties’ dispute had essentially reduced to two questions governing the enforceability of the post-contractual modification: (1) Was the modification supported by consideration moving from the promisee, Nav Canada, in support of the promisor’s, the Airport’s, undertaking to pay? (2) If consideration did exist, was the modification nevertheless unenforceable (*i.e.*, voidable at the promisor’s option) on the ground of economic duress?

In answering those questions, the Court in *Nav Canada* engaged in so-called “incremental” doctrinal reform, both to the consideration doctrine (by abandoning the requirement for consideration in support of an executory bilateral contract of variation) and to the doctrine of duress (by refusing to recognize “illegitimacy” of pressure as an essential component of economic duress in cases involving a post-contractual modification of an executory contract, and developing instead a new, distinctively “consent”-focused, analytical framework for adjudicating such claims). The Court’s reasoning in support of each reform initiative is now explained, before it is critically examined in the closing section of this comment.

(b) *The “Consideration” Issue: Reforming the Pre-Existing Duty Rule by Abandoning It*

Because the Court construed the Airport’s promise to pay for the DME as an informal variation to an existing contract (and not, as the arbitrator had found, a “separate contract”), it had to be asked, at least according to the traditional rules, whether that promise was supported by consideration on the part of Nav Canada as promisee. That question followed *ex necessitate* because, since an informal variation of an existing contract is itself a contract,<sup>3</sup> it must conform to the usual prerequisites for the assumption

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<sup>3</sup> See, *e.g.*, *British and Benningtons Ltd. v. N.W. Cachar Tea Co.*, [1923] A.C. 48 (H.L.), at pp. 62 and 69; *United Dominion Corp. (Jamaica) Ltd. v. Shoucair*, [1969] 1 A.C. 340 (P.C.), at p. 347; *Commissioner of Taxation v. Sara Lee Household & Body Care (Australia) Pty. Ltd.* (2000), 201

of a legal contractual commitment, including the requirement that consideration, in the form of a bargained-for legal detriment, must move from the promisee. However, what Nav Canada was offering here in return for the Airport's undertaking to pay — a promise to acquire and install the DME — was something that, as a matter of the Court's construction of the ASF Agreement, Nav Canada was itself obligated to fund, that is, once it had exercised its contractual right to insist on purchasing new navigational equipment rather than relocating the old. On orthodox principles, this raised a legal problem for Nav Canada, in the form of the well-known "pre-existing duty rule" from *Stilk v. Myrick*<sup>4</sup> — a rule that has been recognized and applied many times by intermediate appellate courts in Canada.<sup>5</sup> According to that rule, Nav Canada's purported consideration could not function as "legal" consideration, because what it was promising to do in return for the Airport's agreement to modify the contract as requested did not exceed that to which the Airport was already entitled (or at least from which it was in law already immune) under the ASF Agreement.<sup>6</sup> There was, in other words, no *legal* detriment moving from the promisee in support of the promisor's undertaking. Nav Canada was offering the Airport nothing in return for the latter's promise to pay for something that it, the Airport, was not contractually bound to pay, and the purported assumption of obligation by Nav Canada was, therefore, in legal contemplation a "mere tautology"<sup>7</sup> — a case, as it were, of the promisee "selling the same thing twice".<sup>8</sup>

Having enumerated the "classical" pre-existing duty rule, Robertson J.A. then proceeded to note a number of familiar techniques by which Canadian (and other British Commonwealth) courts have managed to circumvent the rule, typically in a fiction-creating way, because of judicial perceptions of its defects.<sup>9</sup> His Honour<sup>10</sup> then contrasted the English Court of Appeal's more overt "relaxation" of the consideration requirement in relation to informal contract variations in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*<sup>11</sup> Although there was, in that case, clearly no legal detriment in the contractor's promising to pay more than the original contract price in exchange for the subcontractor's simply performing his obligations to complete the carpentry work stipulated for under the subcontract, the promisee's new obligation being indistinguishable from the old, all three members of the Court agreed that consideration

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C.L.R. 520 (H.C.A.), at p. 533.

<sup>4</sup> (1809), 2 Camp. 317, 170 E.R. 1168. The rule states that performance by the promisee of a pre-existing legal obligation *inter se*, or a promise by that party to perform such an obligation, is not sufficient (*i.e.*, "valid") consideration to support a contract variation in favour of the promisee. Consideration must be "fresh", for example by the promisee exceeding his or her original obligation.

<sup>5</sup> See, *e.g.*, *Smith v. Dawson* (1923), 53 O.L.R. 615 (C.A.); *Gilbert Steel Ltd. v. University Construction Ltd* (1976), 12 O.R. (2d) 19 (C.A.), [1976] O.J. No. 2087 (QL) *Modular Windows of Canada v. Command Construction*, [1984] O.J. No. 1340 (QL), *aff'd* [1986] O.J. No. 437 (C.A.) (QL).

<sup>6</sup> *Supra*, footnote 1, at para. 19.

<sup>7</sup> See B. Coote, "Consideration and Benefit in Fact and in Law" (1990–91), 3 J.C.L. 23 at p. 27; P. Benson, "The Unity of Contract Law", in P. Benson (ed.), *The Theory of Contract: New Essays* (Cambridge, Cambridge University Press, 2001), ch. 4, at pp. 154–55 and 177–79.

<sup>8</sup> *Cf.* C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass., Harvard University Press, 1981), at p. 34.

<sup>9</sup> *Supra*, footnote 1, at paras. 23–24.

<sup>10</sup> *Ibid.*, at paras. 25–26.

<sup>11</sup> [1991] 1 Q.B. 1 (C.A.), [1990] 1 All E.R. 512 (*Williams v. Roffey Bros.*).

could subsist in the form of incidental “factual” or “practical” benefits or advantages accruing (or expected to accrue) to the promisor from his or her continued contractual relationship with the promisee. However, rather than simply following *Williams v. Roffey Bros.*, Robertson J.A. advanced what he described as an “incremental change”<sup>12</sup> in the law that “built upon”<sup>13</sup> the English Court of Appeal’s decision in that case. His new rule is this:

[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.<sup>14</sup>

Now, in support of this so-called “refinement”<sup>15</sup> to the classical consideration doctrine, Robertson J.A. offered several of what he accepted as “valid policy reasons” for a rule-change. First,<sup>16</sup> the *Stilk v. Myrick* pre-existing duty rule is unsatisfactory because it is both over-inclusive (capturing renegotiations induced by coercion so long as consideration is present) and under-inclusive (excluding gratuitous agreements not induced by economic duress). Basically, the rule offends reality and lacks “commercial efficacy” because it ignores the practical necessity, at times, for reasonable parties to adjust their bargains to deal with unanticipated post-contractual contingencies and, because it does that, it fails to protect such parties’ “legitimate expectations” that their voluntary adjustments will be recognized in law as enforceable. Second, the consideration doctrine (together with the defensive-only doctrine of promissory estoppel) works “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”.<sup>17</sup> Courts have sought to avoid this consequence by disingenuously inventing consideration in support of what really is a gratuitous promise, whereas they would do better to openly recognize that there might be other sound reasons, besides the presence of bargained-for consideration, for legally enforcing gratuitous promises. Manipulative and “fictitious” attempts by courts to find consideration where “justice” demands enforcement does nothing to promote legal certainty or to strengthen the law of contract. The advocated change in the law, therefore, would “relieve[...] the courts of the embarrassing task of offering unconvincing reasons why a contractual modification should be enforced”.<sup>18</sup> Third, the *Stilk v. Myrick* rule is merely a product of “the commercial realities of another era” and should not be permitted to ossify the law and commercial activity in the face of

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<sup>12</sup> *Supra*, footnote 1, at para. 28.

<sup>13</sup> *Ibid.*, at para. 27.

<sup>14</sup> *Ibid.*, at para. 31. See also *ibid.*, at paras. 7, 27 and 33.

<sup>15</sup> *Ibid.*, at paras. 7 and 27.

<sup>16</sup> *Ibid.*, at para. 28, relying on J.D. McCamus, *The Law of Contracts* (Toronto, Irwin Law, 2005), at pp. 381–82. I am myself unaware of any cases where the technical presence of consideration has saved an agreement from unenforceability where, as a separate matter, it has been found that agreement was induced by improper coercion. Professor McCamus provides no example. He merely says that “there may be cases” of that nature (*ibid.*, 382). I cannot, with respect, conceive of such a case properly being decided.

<sup>17</sup> *Ibid.*, at para. 29, relying on S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto, Canada Law Book, 2005), at p. 83.

<sup>18</sup> *Supra*, footnote 1, at para. 32.

modern policy objectives, that is, to the extent that the pre-existing duty rule currently interferes with those objectives.<sup>19</sup>

As with the English Court of Appeal's view of its own decision in *Williams v. Roffey Bros.*, Robertson J.A. saw his Court's move as merely "refining" the consideration doctrine to the extent of the new rule, and not as abrogating the authority of *Stilk v. Myrick*. He said: "... 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."<sup>20</sup> Hence, the Court's reform initiative is described as an "incremental", rather than "major", change in the law, in order to circumvent the Supreme Court's earlier admonition as to the role of the courts versus that of the legislature.<sup>21</sup>

(c) *The "Economic Duress" Issue: A New Framework of Analysis*

Since Nav Canada's claim for payment under the post-contractual modification of the ASF Agreement could not, *ex hypothesi* the reformed pre-existing duty rule, fail for want of fresh consideration, the Airport's liability to pay the promised amount now turned on whether Nav Canada<sup>22</sup> could show that the promise had not been extracted by economic duress on its part. In addressing the economic duress issue, Robertson J.A. began by noting the paucity of Supreme Court of Canada decisions in the field.<sup>23</sup> This dearth of authority has resulted in Canada's intermediate courts largely adopting the English jurisprudence on the subject,<sup>24</sup> particularly as expressed by Lord Scarman in two leading cases, *Pao On v. Lau Yiu Long*<sup>25</sup> — where duress was defined as "a coercion of the will so as to vitiate consent"<sup>26</sup> — and *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation (The "Universe Sentinel")*,<sup>27</sup> where, just

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<sup>19</sup> *Ibid.*, at para. 31.

<sup>20</sup> *Ibid.*, at para. 32.

<sup>21</sup> *Ibid.*, at para. 31, citing *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] S.C.J. No. 94 (QL), at para. 13 and *R. v. Salituro*, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97 (QL), at para. 37.

<sup>22</sup> Note the shift of the usual legal or persuasive burden here, necessitated no doubt by the Court's abandonment of the classical consideration requirement for post-contractual modifications. Robertson J.A. held that the enforcing party (here Nav Canada) must establish either that the modification was not procured by economic duress or that the other party is precluded from disaffirming the contract for duress by subsequent affirmation of the modification. The orthodox position, however, as with other affirmative defences (such as unconscionability and undue influence), is that the burden of making out the defence is generally on the party asserting it; see, e.g., *Royal Bank of Scotland plc. v. Etridge (No. 2)*, [2002] 2 A.C. 773 (H.L.), at para. 13, *per* Lord Nicholls of Birkenhead. Robertson J.A., however, is correct about the onus of proof for affirmation, as the allegation of affirmation rendering purported rescission of a transaction nugatory raises a separate legal issue; see, e.g., *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, [1971] A.C. 850 at p. 878, 878–88, *per* Lord Pearson (waiver); *Coastal Estates Pty. Ltd. v. Melevende*, [1965] V.R. 433 at p. 444–45, *per* Sholl J.

<sup>23</sup> *Supra*, footnote 1, at paras. 36–37.

<sup>24</sup> Most notably in *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (C.A.), [1988] O.J. No. 134 (QL); *Gordon v. Roebuck* (1992), 9 O.R. (3d) 1 (C.A.), [1992] O.J. No. 1499 (QL), and *Techform Products Ltd. v. Wolda* (2001), 206 D.L.R. (4th) 171, (2001), 15 C.P.R. (4th) 44, [2001] O.J. No. 3822 (QL).

<sup>25</sup> [1979] 3 All E.R. 65, [1980] A.C. 614 (P.C.) (*Pao On*).

<sup>26</sup> *Ibid.*, at p. 78, p. 635.

<sup>27</sup> [1982] 2 All E.R. 67, [1983] 1 A.C. 366 (H.L.) (*The Universe Sentinel*).

two years later, Lord Scarman re-orientated the doctrine away from the apparently<sup>28</sup> victim-centred formulation in *Pao On*, toward a two-element test for duress that implicated both the victim's and the alleged coercer's rights, interests and liberties in the inquiry: "The authorities ... reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted."<sup>29</sup>

In the subject case, however, Robertson J.A. declined to recognize "illegitimacy" of the pressure as an essential element of economic duress, at least with respect to cases involving post-contractual modifications to executory contracts when the nature of the claim is declaratory or restitutionary only: "It is not the legitimacy of the pressure that is important but rather its impact on the victim, unless, perhaps, one is attempting to establish that a finding of economic duress qualifies as an independent tort."<sup>30</sup> His Honour viewed the "true cornerstone" of the duress doctrine as "the lack of 'consent'"<sup>31</sup> and was puzzled as to why Lord Scarman chose to introduce "illegitimacy" of the pressure exerted into the analytical framework for duress.<sup>32</sup> He lamented the fact that "the criterion of illegitimate pressure has been absorbed into the fabric of the Canadian jurisprudence without comment",<sup>33</sup> and considered it to "add[...] unnecessary complexity to the law of economic duress".<sup>34</sup> Justice Robertson also opined that the criterion "lacks a compelling juridical justification",<sup>35</sup> at least regarding its application in connection with the enforceability of post-contractual modifications. Outside situations of actual or threatened tortious or criminal conduct, and perhaps "bad faith" demands for a contract variation, he asserted that the law provides no "workable template for distinguishing between legitimate and illegitimate pressure",<sup>36</sup> that is, where the pressure applied in support of the particular demand is not itself unlawful. "Regrettably", he declared, "no one, judge or commentator alike, has been able to explain how one goes about answering that question."<sup>37</sup> (It is salient, in this connection, to record his Honour's operative legal premise here that "a threatened breach of contract is not only lawful but in fact constitutes a right which can be exercised subject to the obligation to pay damages and possibly to an order for specific performance".<sup>38</sup>) For these reasons, and for the purposes of deciding the appeal, Robertson J.A. held that "illegitimate pressure is not a condition

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<sup>28</sup> I say "apparently" here because Lord Scarman viewed his conception of duress in *Pao On* (*supra*, footnote 25, at p. 635) as being "in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] A.C. 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale", which decision emphasized illegitimacy of the pressure as well.

<sup>29</sup> *Supra*, footnote 27, at p. 88, p. 400.

<sup>30</sup> *Supra*, footnote 1, at para. 7. See also *ibid.*, at para. 50, agreeing with M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004), 29 Queen's L.J. 809, at p. 821.

<sup>31</sup> *Supra*, footnote 1, at para. 7.

<sup>32</sup> *Ibid.*, at para. 49.

<sup>33</sup> *Ibid.*, at para. 44.

<sup>34</sup> *Ibid.*, at para. 47.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at para. 43.

<sup>38</sup> *Ibid.*, at para. 46. See also the discussion, *infra*, footnotes 75–78.



precedent to a finding of economic duress where the remedy being sought is declaratory or restitutionary in nature”.<sup>39</sup>

Having rejected the “illegitimate pressure” requirement for determining the existence of economic duress in the post-contractual modification context, it remained for Robertson J.A. to erect an alternative general analytical framework that he could then apply to the facts of the dispute at hand. The framework he propounded is this:

First, the promise (the contractual variation) must be extracted as a result of the exercise of “pressure”, whether characterized as a “demand” or a “threat”.<sup>40</sup> Second, the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer’s demand to vary the terms of the underlying contract.<sup>41</sup>

Justice Robertson, however, made it clear that these two conditions precedent, while necessary for a finding of economic duress, are not conclusive or sufficient. They are “initial” or “threshold” conditions only, and a finding of economic duress “does not automatically follow” upon their being met.<sup>42</sup> Satisfaction of the first two conditions is still subject to the “ultimate question” of whether the alleged victim “consented to” the variation. In answering that supreme question, his Honour stated, the court should examine three further factors (the last two of which are more likely to affect the outcome of the case than the first):

(1) whether the promise was supported by consideration; (2) whether the coerced party made the promise “under protest” or “without prejudice”; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable.<sup>43</sup>

Applying this framework to the facts at hand, the Court held the parties’ post-contractual modification to be voidable on the ground of economic duress. First, the two threshold conditions precedent to a successful plea of economic duress were met: (1) Nav Canada exerted pressure by making an implicit threat to breach the contract by withholding performance unless the Airport promised to pay the \$223,000 cost of the DME; and (2) given that Nav Canada exercised a monopoly with respect to the provision of aviation services and equipment to public airports throughout Canada, the Airport was left with “no practical alternative” but to submit to Nav Canada’s demand for an agreement to pay. Moreover, the Airport did not “consent to” the variation despite the circumstances in which that party’s promise was made. The absence of “classical” consideration for the variation, as well as written protests made by the Airport at the time of its agreeing to the variation, supported a finding of absence of consent. So did the fact

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<sup>39</sup> *Supra*, footnote 1, at para. 49.

<sup>40</sup> Although space precludes pursuance of the point, I am confused as to how pressure is characterized here as a “demand” or a “threat”. Surely pressure by way of duress occurs by way of threat and demand, the threat being used to support a specific demand? The threat, however, might indeed be explicit or implicit, as Robertson J.A. validly recognized *ibid.*, at para. 54.

<sup>41</sup> *Ibid.*, at para. 53. It is perhaps unfortunate that Robertson J.A. here refers to the promisor as “the coerced party”, when we do not yet know whether the promisor is in fact the victim of legal coercion (duress) until all stated conditions and factors of his analytical framework for economic duress are met. It begs the question, therefore.

<sup>42</sup> *Ibid.*, at para. 53.

<sup>43</sup> *Ibid.*

that the Airport had done nothing to acquiesce in the modification through lapse of time. The variation being executory, the Airport had simply persisted in its original refusal to pay even after Nav Canada had fulfilled its obligations under the ASF Agreement.

### 3. Critique of the Court's Reasoning in *Nav Canada*

#### (a) *Reflections on the Court's Abandonment of the Consideration Requirement for Informal Contract Variations*

Contract lawyers are likely to differ over the extent to which the Court's abandonment of the consideration requirement for informal post-contractual modifications of executory contracts can really be described as a mere "refinement" to the classical consideration doctrine, or as an "incremental" (as opposed to a "major") change in the law. Certainly, 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. Still, experience or expedience reveals that logic can sometimes produce disutility, and so it is not surprising that, consistently with the Court's justifications for its initiative in the instant case, calls for reform of the consideration requirement, for example via statute,<sup>44</sup> have long been made. However, and with respect, it is difficult to comprehend how Robertson J.A. could sincerely state that he was not advocating a judicial "abrogation" of the rule in *Stilk v. Myrick* while in the same breath jettisoning altogether the need at common law for fresh consideration in support of an informal contract modification. To my mind, those are inconsistent propositions or moves. Certainly, it is difficult to see how *abandonment* of the consideration requirement for a post-contractual modification can be seen as merely "refining" a doctrine that logically commands such a requirement, or as a "minor" change in the law only, especially considering that the pre-existing duty rule has been long recognized and applied in Canada, at least up to the penultimate appellate level. It might have been just as well, if not considerably better, if Robertson J.A. had determined to assist Nav Canada's<sup>45</sup> claim for payment by repairing the rule that promissory estoppel can only be used as a shield and not as a sword<sup>46</sup> — a rule the existence of which his Honour openly regretted,<sup>47</sup> and

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<sup>44</sup> See, e.g., F.M.B. Reynolds and G.H. Treitel, "Consideration for the Modification of Contracts" (1965), 7 *Malaya L. Rev.* 1 at pp. 18–19 and 21–23; Ontario Law Reform Commission, *Report on Sale of Goods* (Ottawa, Ministry of Attorney General, 1979), vol. II at pp. 96–103, vol. III, Draft Bill at s. 4.8. Compare Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Ottawa, Ministry of Attorney General, 1987), p. 33.

<sup>45</sup> Although, in the light of his Honour's finding on economic duress, it is difficult to see how Nav Canada could have come to the court with "clean hands"; cf. *D. & C. Builders Ltd. v. Rees*, [1966] 2 Q.B. 617 at p. 625, *per* Lord Denning M.R. Also, the remedy in promissory estoppel situations is not guaranteed and is limited, at least in theory, to eliminating the detrimental reliance suffered by the promisee as a result of the promisor's unconscionable conduct. Nav Canada, therefore, even if had come with clean hands, could not have been certain that the Airport's promise would have been enforced via the device of a reformed law of estoppel in Canada.

<sup>46</sup> *Combe v. Combe* [1951] 1 All E.R. 767 (C.A.), [1951] 2 K.B. 215; and see the discussion of the state of promissory estoppel in Canada in *N.M. v. A.T.A.*, [2003] B.C.J. No. 1139, 2003 BCCA 279.

<sup>47</sup> *Supra*, footnote 1, at para. 22. Later in the Court's judgment his Honour stated (*ibid.*, at para. 29): "The notion that detrimental reliance can only be invoked if the promisee is the defendant to the

which is at least as untenable in policy and as unjust as the pre-existing duty rule that ultimately became the object of the Court's condemnation and reform in the case — as this move would have had the effect of not compromising an internal organ of contract (*i.e.*, by ensuring that the doctrine of consideration is not “overthrown by a side-wind”<sup>48</sup>), while allaying fears that a non-contractual promise can be enforceable as a contractual promise.<sup>49</sup> Moreover, is not unquestionably normatively correct that the law should demand no more as preconditions to the enforceability of informal post-contractual variations than contractual intention and genuine consent. Indeed, one judge of the Supreme Court of British Columbia, while accepting the need for modernization of the requirement of consideration in the context of variations of existing contracts, was recently prepared to follow the reasoning in *Nav Canada* “only so far as enforcing a post-contractual variation 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”.<sup>50</sup> He was “not persuaded that equity calls for enforceability where neither of those elements are present”.<sup>51</sup>

Yet for all that, one can understand why the Court in *Nav Canada* wanted to effectuate the reform it did, for the reasons it did, and to downplay the significance of the initiative so as to avoid the Supreme Court's admonition about courts not usurping Parliament's role. If credit is due to the New Brunswick court at all, it must lie in the fact that rather than adopting the English Court of Appeal's hopelessly misconceived “practical benefit” approach to consideration in *Williams v. Roffey Bros.*,<sup>52</sup> Robertson J.A.'s solution to the problems perceived to besiege the pre-existing duty rule was instead to recognize a contract of variation for which no consideration is required — a solution

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action (*i.e.*, as a shield and not as a sword) is simply unfair and leads to an unjust result if the promisor was not acting under economic duress.”

<sup>48</sup> *Combe v. Combe*, *supra*, footnote 46, at p. 770, p. 220, *per* Denning L.J.

<sup>49</sup> Generally, see Brennan J.'s judgment in *Waltons Stores (Interstate) Ltd v. Maher* (1988), 164 C.L.R. 387 (H.C.A.), at pp. 425 and 426–47. Of course, as soon as *Williams v. Roffey Bros.*, *supra*, footnote 11, was decided it was argued that equitable estoppel would have been a better solution to the perceived problems with the pre-existing duty rule, thereby leaving the traditional conception of consideration intact. See, *e.g.*, D. Halyk, “Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises In Light of *Williams v. Roffey Brothers*” (1991), 55 Sask. L. Rev. 393; M. Chen-Wishart, “The Enforceability of Additional Contractual Promises: A Question of Consideration?” (1991), 14 N.Z.U.L.R. 270 at pp. 280–82.

<sup>50</sup> *River Wind Ventures Ltd. v. British Columbia*, 2009 BCSC 589, [2009] B.C.W.L.D. 6237, [2009] B.C.W.L.D. 6346, at para. 33, *per* I.C. Meiklem J.

<sup>51</sup> *Ibid.*

<sup>52</sup> The many criticisms of the *Williams v. Roffey Bros.* approach are conveniently summarized in M. Chen-Wishart, “Consideration: Practical Benefit and the Emperor's New Clothes”, in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford, Oxford University Press, 1995), ch. 5. Brian Coote, in his “Consideration and Benefit in Fact and in Law”, *supra*, footnote 7, and in his “Consideration and the Variation of Contracts”, [2003] N.Z. Law Review 361, shows very effectively how the “practical benefit” approach to consideration is misconceived. Because an informal variation must be reached according to the usual rules for the formation of a simple contract, this requires consideration of the same *kind* required for contract formation. It cannot follow, therefore, that the consideration for an executory bilateral contract of variation can consist in the anticipated benefits of performance of the contract itself, as by hypothesis the results of that performance come too late.

that, on one view of the contract facility at least, is supportable in theory.<sup>53</sup> Nor is Robertson J.A.'s move without precedent in Anglo-Commonwealth contract law. In *Antons Trawling Co. Ltd. v. Smith*,<sup>54</sup> the New Zealand Court of Appeal was satisfied that *Stilk v. Myrick* could no longer be taken to control the enforceability of informal variations of existing contracts “where there is no element of duress or other policy factor suggesting an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected”.<sup>55</sup> Although the New Zealand court’s reasons for abandoning the consideration requirement in relation to modifying promises were not identical to Robertson J.A.’s reasons for doing likewise in *Nav Canada*,<sup>56</sup> the *Antons* case seems to have passed into New Zealand law with little adverse comment or consequences. Indeed, one prominent New Zealand contract-law scholar, writing shortly after *Antons* was decided,<sup>57</sup> concluded that if a solution had to be found for the problems perceived to infect the *Stilk v. Myrick* rule, abandonment of the consideration requirement for variations is the least-bad one, as although it creates an exception, it leaves the doctrine of consideration otherwise unscathed. Still, some might remain uncomfortable with such an abandonment being implemented, if not by Parliament, then in the common law by an intermediate appellate court as opposed to one of final resort.

(b) *Reflections on the Court’s New Analytical Framework for Adjudicating Economic Duress Claims in Post-Contractual Modification Situations*

Of course, in adjudicating the enforceability of contract variations, both the *Nav Canada* and *Antons* reform initiatives result in much greater stress now being placed on the policing function and discriminatory capabilities of the modern doctrine of economic duress.<sup>58</sup> This may be a lot to ask of a doctrine that some courts regard as still in the process of development,<sup>59</sup> although it should perhaps better be seen as an opportunity for courts and academics to now confront the challenge of defining, refining and understanding that particular exculpatory doctrine.

<sup>53</sup> Cf. Coote, “Consideration and the Variation of Contracts”, *ibid.*, at p. 376: “There can be no objection in theory to the notion of a contract without consideration, the concept of consideration being peculiar to the common law system.” Generally, on the contract facility, see B. Coote, *Contract As Assumption: Essays on a Theme* (R. Bigwood (ed.), Oxford, Hart Publishing, 2010), ch. 2 (“The Essence of Contract”).

<sup>54</sup> [2003] 2 N.Z.L.R. 23 (C.A.) (*Antons*).

<sup>55</sup> *Ibid.*, at para 93.

<sup>56</sup> In *Antons*, Baragwanath J. for the Court saw the importance of consideration “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” (*ibid.*).

<sup>57</sup> See Coote, “Consideration and the Variation of Contracts”, *supra*, footnote 52; “Consideration and Variations: A Different Solution” (2004), 120 L.Q.R. 19.

<sup>58</sup> Or, in *Antons*, other “policy reasons”, which may well envisage something less than fraud or duress sufficing to invalidate an apparent variation.

<sup>59</sup> See, e.g., *Musumeci v. Winadell Pty. Ltd.* (1994), 34 N.S.W.L.R. 723 at pp. 742–43; *Deemcope Pty. Ltd. v. Cantown Pty. Ltd.*, [1995] 2 V.R. 44 at p. 47; *A.N.Z. Banking Group v. Karam* (2005), 64 N.S.W.L.R. 149 (*Karam*).

Does the Court’s new framework for analyzing economic duress claims in *Nav Canada* represent the best comprehension and rationalization of economic duress in cases involving post-contractual modifications of executory contracts, even when the claim is merely declaratory or restitutionary in nature? Again with respect to the Court, I submit not. In my view the Court was wrong in principle (as well as on authority) to reject “illegitimacy” of pressure as a vital component of the claim, and to erect in consequence a unifocal, victim-sided, consent-based conception of legal coercion (duress). Although distinctive considerations might well apply to economic duress claims in particular,<sup>60</sup> and despite a history of canalization of various categories or “forms” of duress (duress to the person, duress to goods, duress *colore officii*, undue pressure in equity, and the like), the modern law of duress applies, as it should, a singular generic test for all private-law duress claims. For most legal systems of the British Commonwealth this is Lord Scarman’s two-element test from *The Universe Sentinel*<sup>61</sup> — the very test rejected, ultimately unconvincingly, by the Court in *Nav Canada*. In my view, Lord Scarman’s dual test for duress is superior to Robertson J.A.’s new analytical framework precisely because it responds to both the quality of the conduct of the promisee and the quality of its effect on the promisor’s contractual assent, acknowledging their respective roles in the reckoning. The test does not, in other words, like Robertson J.A.’s purely victim-sided account of duress, view each party’s rights and interests in isolation of the rights and interests of the other. Duress is treated normatively. The *legal* question of whether the claimant acted “under duress” is viewed as inseparable from the question of what each party’s respective background “rights” (including their respective liberties, privileges and immunities) were in the circumstances of the encounter that produced the impugned transaction.<sup>62</sup> It is, therefore, also consistent with highly developed rights-based philosophical accounts of coercion, such as Nozick’s<sup>63</sup> and Wertheimer’s.<sup>64</sup>

It might be thought curious, therefore, that Robertson J.A. in *Nav Canada* was so puzzled as to why Lord Scarman chose to incorporate the concept of “illegitimate pressure” into his twofold test for duress. First, it is notable that his Lordship introduced that test with the words: “The authorities upon which [*Barton v. Armstrong*<sup>65</sup> and *Pao*

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<sup>60</sup> See, e.g., the discussion by Mance J. (and he then was) in *Huyton S.A. v. Peter Cremer GmbH & Co.*, [1999] 1 Lloyd’s Rep. 620 at p. 636 (*Huyton*).

<sup>61</sup> *Supra*, footnote 27. See also *Dimskal Shipping Co. S.A. v. International Transport Workers Federation* (“*The Evia Luck*”), [1992] 2 A.C. 152 (H.L.), at p. 165G, *per* Lord Goff of Chieveley, and *Attorney-General of England and Wales v. R.*, [2004] 2 N.Z.L.R. 577 (P.C.), at p. 583, para. 15, *per* Lord Hoffmann (for the majority). For example, *The Universe Sentinel* test was adopted in New Zealand in *Shivas v. Bank of New Zealand*, [1990] 2 N.Z.L.R. 327 (H.C.), at p. 344–45, *per* Tipping J., and in New South Wales in *Crescendo Management Pty. Ltd. v. Westpac Banking Corp.* (1988), 19 N.S.W.L.R. 40 (N.S.W.C.A.), at p. 45, *per* McHugh J.A.

<sup>62</sup> For further discussion, see H. Stewart, “A Formal Approach to Contractual Duress”, (1997) 47 U.T.L.J. 175; “Economic Duress in Canadian Law: Towards a Principled Approach”, (2003) 82 Can. Bar Rev. 359.

<sup>63</sup> R. Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974), at p. 262; R. Nozick, “Coercion”, in S. Morgenbesser, P. Suppes and M. White (eds.), *Philosophy, Science and Method* (New York: St Martin’s Press, 1969), at p. 440 *et seq.*

<sup>64</sup> A. Wertheimer, *Coercion* (Princeton, N.J., Princeton University Press, 1987). See also G. Dworkin, “Compulsion and Moral Concepts” (1968), 78 *Ethics* 227 at p. 229; J. Raz, “Liberalism, Autonomy, and the Politics of Neutral Concern” (1982), 7 *Midwest Studies in Philosophy* 89 at p. 110.

<sup>65</sup> [1975] 2 All E.R. 465, [1976] A.C. 104 (P.C.).

On] were based reveal [the two elements of duress then stated].”<sup>66</sup> In other words, Lord Scarman viewed the requirement as an accepted part of the modern law of duress already, although granted one would not necessarily be left with that impression based on his Lordship’s rather victim-consent-focused presentation of the doctrine in *Pao On*.<sup>67</sup> In the earlier case of *Barton v. Armstrong*, however, Lord Wilberforce and Lord Simon of Glaisdale had stated in their dissenting<sup>68</sup> advice that “the pressure must be one of a kind which the law does not regard as legitimate”,<sup>69</sup> and Lord Scarman quoted these words as authoritative. Indeed, as a matter of intellectual history, the process of reception of the illegitimacy criterion into English and Commonwealth law has been well traced.<sup>70</sup>

Secondly, it will be recalled, Robertson J.A. also considered that the “illegitimacy” component of Lord Scarman’s formulation lacked a compelling juridical justification, at least in connection with merely determining the enforceability of contract variations. But surely the demands of corrective justice apply equally to parties renegotiating contracts as to other private-law transactions and encounters? Corrective justice, of course, presupposes a normatively persuasive, individualized reason for linking D to the plight (here involuntary assent) of P, thereby requiring, in turn, that the pre-existing equality between D and P be restored, typically in the present context by treating the transaction as revocable at P’s election, at least as against D (if not bona fide purchasers for value). Importantly, corrective justice links the individual parties in a *bipolar* relationship of “wrongdoer” and “victim”, and it “rejects all one-sided accounts, regardless of the particular side singled out”.<sup>71</sup> Lord Scarman’s formulation of duress in *The Universe Sentinel* conforms perfectly to this conception of justice because it purports to reveal something about the interaction between the parties that *both* excuses the promisor of her legal contractual obligation *and* legitimately deprives the promisee, the beneficiary of that obligation, of the rights that he was otherwise to enjoy thereunder.<sup>72</sup> Ordinarily, under the various exculpatory doctrines of contract law, there is insufficient reason for disappointing the contractual expectations of a promisee unless that promisee ought to bear some responsibility for the promisor’s inability to bring a genuine consent to the transaction.<sup>73</sup> That the promisee’s expectations happened to result from some substantial impairment of bargaining capacity or opportunity on the part of the promisor cannot plausibly supply the reason, since, on a liberal corrective justice view of contract at least, this would fail to afford sufficient weight to the promisee’s liberty to order, as best he

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<sup>66</sup> To be fair, his Honour is not the only one to be mystified in this regard. See, e.g., M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-end?” (2000), 34 Can. Bus. L.J. 194 at pp. 219–220 and 224 (cited by Robertson J.A. at para. 45 of the Court’s judgment, *supra*, footnote 1); S.A. Smith, “Contracting Under Pressure: A Theory of Duress”, [1997] C.L.J. 343 at p. 345.

<sup>67</sup> But see also my comments *supra*, footnote 28.

<sup>68</sup> Their Lordships dissented not as to the legal principles involved, only as to their application to the facts at hand. The majority appeared to be in agreement with the minority’s observations on the governing law, as Lord Scarman recognized in *Pao On*, *supra*, footnote 25, at p. 78f–g, p. 635C.

<sup>69</sup> *Supra*, footnote 65, at p. 476–77, p. 121.

<sup>70</sup> See, e.g., M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: Law Book Co., 1985), ch. 3.

<sup>71</sup> E.J. Weinrib, “Restitutionary Damages as Corrective Justice” (2000), 1 *Theoretical Inquiries in Law* 1 at p. 6.

<sup>72</sup> Compare also Stewart, “A Formal Approach to Contractual Duress”, *supra*, footnote 62, at p. 200.

<sup>73</sup> This is a major theme in R. Bigwood, *Exploitative Contracts* (Oxford, Oxford University Press, 2003).

sees fit, his affairs through cooperative private exchange with the promisor, which liberty is as much at stake as the promisor's equivalent liberty in free competitive bargaining situations. Accordingly, Lord Scarman's emphasis on "illegitimacy" of pressure reflects the correlative structure of a corrective justice claim, and supplies the reason *in justice* for linking the promisee to the promisor's plight (or objections) and for disappointing the promisee's expectations that are normally founded juridically upon the promisor's objective assent to the impugned transaction. Justice Robertson's new framework for adjudicating economic duress claims, in contrast, by rejecting the illegitimacy of pressure requirement, pays too much attention to the promisor's claim (or "lack of consent") while paying no, or at least insufficient, attention to the promisee's own legitimate interest as an agent in freedom of action functioning within a liberal institution of contract.

Thirdly, Robertson J.A.'s rejection of the "illegitimacy of pressure" requirement was unnecessary for deciding the case anyway. It will be recalled that his Honour regarded the criterion as adding "unnecessary complexity" to the economic duress inquiry, and that the law lacked a "workable template for distinguishing between legitimate and illegitimate pressure".<sup>74</sup> However, this was because, relying on his own judgment in an earlier case concerning the assessment of damages for "anticipatory repudiation" of a contract for the sale of goods,<sup>75</sup> he treated the dispute before him as one involving "lawful" pressure: "a threatened breach of contract is not only lawful but in fact constitutes a right which can be exercised subject to the obligation to pay damages and possibly to an order for specific performance".<sup>76</sup> This "option" view of contractual obligation, notice, has been consistently rejected by the senior courts of other major Commonwealth legal systems,<sup>77</sup> but even if Robertson J.A. were correct in his

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<sup>74</sup> Robertson J.A.'s remark that "no one, judge or commentator alike, has been able to explain how one goes about [distinguishing legitimate from illegitimate pressure when one has a 'right' to breach one's contract]" (*supra*, footnote 1, at para. 43) is disappointing given that the Court's judgment does not reveal a wide-ranging survey of the sizeable literature in the field, whether in Canada or abroad. The Court might have considered, for example: R.A. Hillman, "Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress" (1979), 64 Iowa L. Rev. 849; V.A. Aivazian, M.J. Trebilcock and M. Penny, "The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability" (1984), 22 Osgoode Hall L.J. 173; R. Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991), 107 L.Q.R. 649; R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996), 46 U.T.L.J. 201, especially at pp. 238–51; and the commentary and jurisprudence under §176(1)(d) and (2) of the *Restatement (Second) of Contracts* (1981).

<sup>75</sup> *Hillspring Farms Ltd. v. Leland Walton & Sons Ltd.*, (2007), 312 N.B.R. (2d) 109, [2007] N.B.J. No. 19 (QL), 2007 NBCA 7 (*Hillspring Farms*). However, all his Honour there says (*ibid.*, at paras. 14 and 36) is that, in deciding the case, he begins with the premise that, generally at least, the law does not, by means of punishment, discourage parties from deliberately breaching a contract for the purpose of profit-maximization. But clearly it does not follow from this premise that parties therefore have a juridical *right* to deliberately breach their contracts for that purpose (or any other).

<sup>76</sup> *Supra*, footnote 1, at para. 46.

<sup>77</sup> See, e.g., *South Wales Miner's Federation v. Glamorgan Coal Company Ltd.*, [1905] A.C. 239 (H.L.), at p. 253 *per* Lord Lindley ("Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages."); *Zhu v. Treasurer of N.S.W.* (2004), 218 C.L.R. 530 (H.C.A.), at para. 129; *Tabcorp Holdings Ltd. v. Bowen Investments Pty. Ltd.*, [2009] HCA 8 (H.C.A.), at para. 13. See also *Frye v. Hubbell*, 374 A. 325 (1907), at p. 333; *Goldsbrough Mort & Co. Ltd. v. Quinn* (1910), 10 C.L.R. 674 (H.C.A.), at p. 691, *per* Isaacs J.; *C. Czarnikow Ltd v. Koufos*, [1966] 2 Q.B. 695 at pp. 730–31, *per* Diplock L.J.; *Coulls v. Bagot's Executor and Trustee Co. Ltd.* (1967), 119 C.L.R. 460 (H.C.A.), at p. 504, *per* Windeyer J.; *George*

(unsubstantiated<sup>78</sup>) outlook on the nature of contractual rights,<sup>79</sup> by the premise's own qualifications Nav Canada's proposal ought to have been regarded as "illegitimate" pressure, either because Nav Canada was, as is typical in economic duress situations, conditionally proposing to withhold its performance under the ASF Agreement *without an offer of compensation* to the Airport,<sup>80</sup> or else because, owing to the bilateral situational monopoly status of Nav Canada, this was a case where, had the service-provider actually withheld its performance under the contract, the Airport might well have expected an order for specific performance from the court.<sup>81</sup> Nav Canada's threat was not, therefore, one of "lawful action" after all; hence one of the Court's premises for rejecting the illegitimacy requirement was flawed from the start. Justice Robertson, however, was correct to acknowledge the awesome task that judicial officers face when presented with lawful-act duress claims. It is inevitable, given the nature of such claims, that courts will be forced to wrestle with the justifiable limitations on otherwise unrestrained rights, privileges or freedoms, and there is no a priori test that can guide judges to the right answer in advance of the facts of individual cases they might encounter. Surely no one expects (economic) lawful-act duress claims to be uncontroversial and easy, or to command or generate greater certainty than their nature or subject matter can realistically afford. Indeed, it might well be thought that judges are paid precisely to perform such difficult evaluative analytical tasks, and that they cannot absolve themselves of such a responsibility by the simple device of surgically excising whatever doctrinal criteria happen to tax them. Interestingly, the New South Wales Court of Appeal recently recommended abandonment of the terms "economic duress" and "illegitimate pressure" in connection with lawful-act duress claims, in favour of the adoption of "equitable principles relating to unconscionability".<sup>82</sup> However, if vagueness is indeed an insurmountable problem in relation to doctrinal criteria like "illegitimate pressure" in the (economic) duress inquiry, are they really any more vague than the

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*Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*, [1983] Q.B. 284 (C.A.), at p. 305, *per* Oliver L.J.; *Butler v. Countrywide Finance Ltd.*, [1993] 3 N.Z.L.R. 623 (H.C.), at 635, *per* Hammond J.

<sup>78</sup> In neither *Hillspring Farms* nor *Nav Canada* does Robertson J.A. even cite the opinion of Major J., for the Supreme Court of Canada in *Bank of America v. Mutual Trust Co.*, [2002] S.C.R. 601 at para. 31, that "[e]fficient breach should not be discouraged by the courts". But neither is Major J.'s support for this idea substantiated by full and robust reasons in that case. No consideration is given, for example, to the growing body of literature and case law taking the contrary view.

<sup>79</sup> Notice, as well, that Robertson J.A. seems to contradict himself later in his judgment, *supra*, footnote 1, at para. 62: "[T]he supposed good faith of the coercer should not impact on the victim's contractual right and expectation to receive performance in accordance with the original terms of the contract" (emphasis added).

<sup>80</sup> For this reason I am not convinced by Robertson J.A.'s assertion/belief that "[i]f we apply Lord Scarman's approach it should follow that most contractual variations will be classified as having been procured through the exercise of legitimate pressure" (*ibid.*, at para. 46). That would only follow if it were true that promisees, in support of their demands for a contract modification, threatened to commit a *compensated* harm against their promisors, but the reality, based at least on the decided cases, is that they never do!

<sup>81</sup> *Cf.*, e.g., *Sky Petroleum Ltd. v. VIP Petroleum Ltd.*, [1974] 1 All E.R. 954, [1974] 1 W.L.R. 576 (Ch.).

<sup>82</sup> See *Karam*, *supra*, footnote 59, at paras. 57 and 62.



standards, criteria and qualifying thresholds of the equitable (or statutory) alternatives preferred by the New South Wales court?<sup>83</sup>

Finally, what Robertson J.A. describes in the Court's judgment as the "ultimate question" — namely, whether the promisor "consented to" the impugned variation — is in truth inseparable from what is envisaged by Lord Scarman's notion of "compulsion of the will of the victim" under the first limb of his two-pronged test in *The Universe Sentinel*. There was absolutely no need for the Court in *Nav Canada* to formulate a new analytical framework for adjudicating economic duress claims apart from Lord Scarman's prior test. To be sure, "legal compulsion" (or "lack of consent") in connection with duress means that D's (illegitimate) pressure had the effect of reducing P's menu of options to the point where P had "no reasonable (practical, acceptable) alternative" but to succumb to D's pressure, by complying with his demand, which P did in fact do for that (significant?)<sup>84</sup> reason. The compulsion arm of Lord Scarman's test has two intellectually distinct (but practically interactive) dimensions, as is now being recognized in modern English<sup>85</sup> and New Zealand<sup>86</sup> authorities on economic duress, for example. First, there is the question of whether the victim *actually* submitted to the other party's illegitimate pressure, rather than, say, for reasons that the victim herself deemed sufficient.<sup>87</sup> This refers merely to factual inducement or subjective causation. Second, assuming there has been causation in fact, there is then the notionally *normative* inquiry into whether, given the victim's individual circumstances, she or he *ought* to have been subjectively induced by the pressure to agree to whatever the other party demanded, a negative answer to that question functioning, in theory at least, as a substantive limitation on the duress claim. The second step involves the court making a *judgment* as to the "acceptability" of the victim's post-threat alternatives, or concerning the "reasonableness" or "justifiability" of his or her decision to succumb to the (illegitimate) pressure rather than, say, pursuing a legal or extra-legal alternative that would have been at least as effective, practicable and efficient a means of deflecting the pressure as the action or remedy based on the duress itself. The two dimensions are forensically interactive, of course, because a lack of "reasonable" ("practical", "acceptable") choice for the victim resulting from the pressure can support a permissible inference that the victim did in fact agree to the impugned

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<sup>83</sup> Generally, see R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008), 27 U.Q.L.J. 41.

<sup>84</sup> The standard of causation appropriate to duress claims is still the subject of discussion in the case law. It is, however, unnecessary to discuss the various possibilities for present purposes. Further discussion can be found in Bigwood, *supra*, footnote 73, at pp. 347–51.

<sup>85</sup> *Huyton*, *supra*, footnote 60, at p. 638, *per* Mance J. ("[A] simple inquiry whether the innocent party would have acted as he did 'but for' an actual or threatened breach of contract cannot ... be the hallmark of deflection of will. ... [R]elief must ... depend on the Court's assessment of the qualitative impact of the illegitimate pressure, objectively assessed. ... [The illegitimate pressure must be] of a nature or quality, or sufficiently significant in objective terms in deflecting the will, to justify relief.").

<sup>86</sup> *Pharmacy Care Systems Ltd. v. Attorney-General* (CA 198/03, 16 August 2004), at para. [96]; *McIntyre v Nemesis DBK Ltd.*, [2009] NZCA 329, at paras. 66–67.

<sup>87</sup> This is recognized by Robertson J.A. *supra*, footnote 1, at para. 55, and it can explain the result in a number of cases, even though "illegitimate" pressure could be said to have been applied by the other party: *e.g.*, *Pao On*, *supra*, footnote 25; *The "Siboen and the Sibotre"*, [1976] 1 Lloyd's Rep. 293. Hence, his Honour is correct that the absence of practical alternatives is not conclusive evidence of a lack of consent (by which he really means "legal compulsion").

transaction because of the pressure, thus shifting to the alleged coercer an evidential or tactical burden on what is a pure question of fact. However, that the claimant did in fact submit because of the pressure does not necessarily show that she had no reasonable alternative but to do so, although equally a permissible inference on that question might well operate, the more so when we consider that, according to Lord Scarman's two-pronged test for duress, the alleged coercer would have already been shown to have acted wrongly by applying *illegitimate* pressure to the claimant.<sup>88</sup>

With respect, it is also unfortunate that, in answering the "ultimate question" of whether the allegedly coerced party "consented to" the impugned variation, the Court in *Nav Canada* included, as one of the factors to be considered if that party had not submitted to the demand "under protest" or "without prejudice", the question of "whether the [claimant] took reasonable steps to disaffirm the promise as soon as practicable [after the pressure has been removed]".<sup>89</sup> In the course of elaborating this factor inside his analytical framework, Robertson J.A. said: "In the absence of a promise made under protest, the law *insists* that the victim take reasonable steps to repudiate or disaffirm the promise as soon as practicable."<sup>90</sup> Although I suppose it is possible that a court might treat a failure to disavow an allegedly coerced agreement reasonably promptly once fear of the threat had been removed as subsequent-conduct circumstantial evidence of the alleged victim's state of mind as it existed at the time of entry into the impugned transaction, it is clear from the context of his discussion<sup>91</sup> that Robertson J.A. contemplated instead such a failure speaking to the question of whether, despite duress having been adjudged to have occurred between the parties, the victim could be treated in law as having affirmed the contract, which, by dint of the election doctrine, would thereby legally preclude him from subsequently disaffirming the contract without a fresh reason.<sup>92</sup> In other words, the question of affirmation concedes that the complainant has already established, to the appropriate standard of proof, that transaction-tainting duress occurred *inter se*, yet the coercer is arguing that the victim should be denied relief because of consent (or estoppel) after the event. Affirmation, therefore, is a separate question that has nothing to do with whether duress can be found to have transpired between the parties or not; hence it should be excised from any framework of analysis that is dedicated, ostensibly exclusively, to the adjudication of economic duress claims.

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<sup>88</sup> Cf. *Barton v Armstrong*, *supra*, footnote 65, at p. 475–76, p. 120B–C, *per* Lord Cross of Chelsea (for the majority).

<sup>89</sup> *Supra*, footnote 1, at para. 53.

<sup>90</sup> *Ibid.*, at para. 58 (emphasis added).

<sup>91</sup> See *ibid.*, at paras. 58–59.

<sup>92</sup> It is therefore odd that Robertson J.A. should describe the law as "insisting" that the victim take reasonable steps to repudiate or disaffirm the promise as soon as practicable after the pressure is removed. In all cases where a party is empowered to disaffirm a contract, "he has in the end to make his election, *not as a matter of obligation*, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him or sometimes by holding him to have elected to exercise it"; see *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The "Kanchenjunga")*, [1990] 1 Lloyd's Rep. 391 (H.L.), at p. 398, *per* Lord Goff of Chieveley (emphasis added).

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