OF WHAT PRACTICAL BENEFIT IS PRACTICAL BENEFIT TO CONSIDERATION?

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INTRODUCTION

Modification of ongoing contractual transactions is an everyday occurrence both in commercial and consumer contracts, especially consumer contracts involving the provision of services to consumers, as well as in relation to contracts of employment whose terms inevitably change over time. Differences of opinion between parties to these agreements as to precisely what was promised by one party to the other by way of modification is inevitable as is the possibility that one party might make a promise to modify an obligation and then renege on that promise once the other party has performed by declining to pay. Thus, the reluctance of courts to enforce modified promises is understandable from a non-legal perspective, and notwithstanding the commercial frequency and social desirability of permitting parties to adjust their contractual relationships to changed and unforeseen circumstances.

The law of contract has traditionally approached the dilemma posed by contract modification by devising legal principles which both permit and refuse judicial enforcement of modified promises. Refusal has typically been expressed in the rule that performance of a pre-existing duty is not good consideration for a new promise in return, as established in *Stilk v Myrick*[1] and confirmed in *Gilbert Steel Ltd. v University Construction Ltd.*[2] The rule that past consideration is not good consideration,[3] can also be conscripted by a court intent on refusing to enforce a modified promise. On the other hand, courts have also been prepared to enforce modified promises not only on the ground that there is actually consideration in the modified promise because

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1 (1809), 2 Camp 317, 170 ER 1168 (KB) [*Stilk*]. See also the earlier case, Harris v Watson (1791) Peake 102, 170 ER 94 (KB).

2 (1970), 67 DLR (3d) 606 (Ont CA) [*Gilbert*].

3 *Lampleigh v Braithwait* (1615), Hobart 105, 80 ER 255 (KB).

the promisor has promised to do substantially more in the modified promise[4] but also on the alternative grounds that there may be consideration in a forbearance to sue to enforce the original promise once the promisor has asked for a modification on the threat of potential breach of contract; or in detrimental reliance by the promisee who has accepted the modified contract at the insistence of the promisor;[5] or in a mutual agreement to rescind the original contract and replace it with a new contract containing the modified promise.[6]

Another principle for the enforcement of modified promises was proposed some two decades ago by the English Court of Appeal in *Williams v Roffey Bros. & Nicholls (Contractors Ltd.)*,[7] in that there could be said to be a "practical benefit" to the promisee in a promise to perform a pre-existing legal duty which could constitute consideration in certain factual circumstances. Without even knowing what "practical benefit" means, *prima facie, Roffey* flatly contradicted the rule against finding consideration in the performance of a pre-existing duty set out in *Stilk*, notwithstanding the assertions of the court to the contrary.[8] Nevertheless, *Roffey* has settled into the law of contract in England,[9] although some English commentators have uneasily accepted it and argued to constrain its application.[10] Until recently, it has been ignored by Canadian courts although Canadian contract texts have discussed it since the early 1990's[11] and a generation of Canadian lawyers have studied it in first year contract courses.[12] However, it has now been applied, apparently for the first time, by a Canadian appellate court in *Greater Fredericton Airport Authority Inc. v*

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[4] *Hartley v Ponsonby* (1857), 7 El & Bl 872, 119 ER 1471 (KB).

[5] These two possibilities were identified by the Ontario Law Reform Commission in *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney-General, 1987) at 14.

[6] *Raggow v Scougall & Co.* (1915), 31 TLR 564 (KB); *Morris v Baron & Co.* [1918] AC 1 (HL); *Deluxe French Fries Ltd. v McCardle* (1976), 10 Nfld & PEIR 414 (PEI SC).

[7] [1990] 1 All ER 512 (CA) [*Roffey*].

[8] *Ibid*, per Russell L.J. at 524; per Purchas L.J. at 525.

[9] See for example: *Chitty on Contracts*, 30th ed, (London: Sweet & Maxwell, 2008) vol. 1 at 3-065 to 3-071 and Edwin Peel, *Treitel's The Law of Contract*, 12th ed (London: Sweet & Maxwell, 2007) at 101-106. But see *Collier v P.M.J. Wright (Holdings) Ltd.* [2008] 1 WLR 693 (CA). And for a comment, M.H. Ogilvie, "Part Payment, Promissory Estoppel and Lord Denning's 'Brilliant' Balance", (2010) 47 *Can. Bus. L.J.* 293. The English C.A. restricted *Roffey's* application to cases about services and not part payment.

[10] John Adams and Roger Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 Mod L Rev 536 and Mindy Chen-Wishart, "Consideration: Practical Benefit and the Emperor's New Clothes" in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995), ch. 5.

[11] See the standard Canadian textbooks on contract since then. For specific consideration of "practical benefit", see, John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at ch.7 and John & Angela Swan, *Canadian Contract Law*, 2d ed (Toronto: LexisNexis, 2009) at ch 2.2.5.

[12] See the standard Canadian published casebooks for first year Contract courses since then.

NAV Canada[13] a decision in which significant new approaches were taken both to consideration and economic duress.[14]

For the past two decades, the story of *Roffey* in Canadian courts has been a story about absence. The purpose of this paper is to suggest some reasons for that absence. Normally, law review articles are about presence, the reception of particular principles and their analysis. Instead, after an initial discussion of *Roffey*, this paper will turn to the recent *NAV Canada* decision, and then speculate about why Canadian courts have not followed their English counterparts until now and about whether that reluctance is well justified.

THE "PRACTICAL BENEFIT" OF WILLIAMS V ROFFEY

In *Roffey*, a general contractor retained a subcontractor to do some carpentry work in relation to the refurbishment of a building for £20,000. The subcontractor would receive interim payments for work completed. After receiving interim payments for £16,200 worth of work, the subcontractor found that he was in financial difficulty because the price was too low and he had not supervised his workmen sufficiently. The general contractor was liable under a penalty clause in the main contract if the project was not completed on time and was aware of the subcontractor's problems. The general contractor called a meeting with the subcontractor and suggested a further £10,300 to ensure the completion of the work on time. Further work was done but the subcontractor stopped work and sued for £10,847. The general contractor argued that the sum was not payable because there was no consideration for the promise to pay more than the original contract provision. The trial judge awarded the additional payments less a small deduction for defective and incomplete items. The English Court of Appeal upheld this decision on the basis that there was consideration for the promise to pay more but found that consideration in the novel concept of "practical benefit."

The general contractor's argument was based on *Stilk* and Glidewell L.J. considered *Stilk* through the lens of several later cases[15] so as to present the law in relation to the performance of a pre-existing duty in a set of six propositions which can be re-stated thus: where two parties have entered a contract and where it becomes unclear that one party will be able to perform his promises under the contract, when one party promises to make an additional payment in return for the other party's promise to perform his obligation under the contract, provided this promise was not procured by

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[13] (2008), 290 DLR (4th) 405 (NBCA) [*NAV Canada*].

[14] The judgment is neatly divided between the two principles. For an analysis of the economic duress part see: M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution" [2011] JBL forthcoming.

[15] *Ward v Byham* [1956] 2 All ER 318 (CA); *Williams v Williams* [1957] 1 All ER 305 (CA); *Pao On v Lau Yiu* [1979] 3 All ER 65 (PC).

economic duress or fraud, then the promise to pay extra is enforceable because there is practical benefit to the promisor capable of being consideration for the promise to pay more.[16] In concurring judgements, Russell and Purchas L.J.J. agreed, and all three found practical benefit constituting consideration in the continued performance, avoidance of the trouble and expense of finding a substitute subcontractor, avoiding the penalty for late performance under the head contract, and the establishment of a payment schedule which required more orderly performance by the subcontractor. All three justices conceptualized the practical benefit principle as a refinement of *Stilk* and upheld the rule that performance of a pre-existing contractual duty does not constitute consideration for a promise to pay more in return. Russell L.J. opined that consideration was still required but that it could be found in the intention of the parties which he thought to be, on the facts, to take a pragmatic approach to ensure the completion of the contract.[17] Purchas L.J. wondered whether *Stilk* should be confined to its own facts on public policy grounds of protecting shipmasters on the high seas from extortion, and noted that economic duress might have been a better approach, but in the end he agreed that *Stilk* still stood.[18]

Roffey remains a controversial case. Several obvious observations can be made about it. Firstly, it casts considerable doubt on *Stilk*, especially if the court's finding of consideration is doubted as being "real" consideration adding something new to the original bargain. By analogy, it also casts doubt on the rule in Pinnel's Case[19] and *Foakes v Beer*[20] by suggesting that part performance of a promise to pay an indebtedness may be good consideration for a promise to accept part payment in full settlement. Secondly, it seems to relax the consideration requirement so that technical consideration requirements may be overtaken by issues of equity, fairness, reasonableness or commercial efficacy. It also shifts the burden of regulating the enforcement of promises from consideration to economic duress and fraud, and challenges courts to clarify how these operate. Thirdly, it is in line with reliance-based justifications for enforcing promises since there is no need for a detriment to the promisee provided there is a requested benefit conferred on the promisor. Fourthly, it casts doubt on the role of the doctrine of frustration which tends not to favour enforcing modified promises made in light of unforeseen circumstances, and, again, challenges the courts to clarify the nature and operation of frustration. Fifthly, the meaning of "practical benefit" is unclear and potentially threatens the underpinning doctrinal role of consideration in contract law. If merely avoiding having to find an alternative contractor constitutes practical benefit, then that is characteristic of all attempts to modify contracts and would result in enforcement of all such attempts except where there is economic duress or fraud. This may be in accord with the expectations of the

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[16] *Supra* note 7 at 521-522.

[17] *Ibid* at 524.

[18] *Ibid* at 526.

[19] (1602), 5 Co Rep 117, 77 ER 237 (CP). Recently upheld in *Collier, supra,* note 9.

[20] (1884), 9 App Cas 605 (HL) [*Foakes*].

parties but then such cases are unlikely to result in litigation. The meaning and role of consideration in distinguishing enforceable from unenforceable contracts is again cast into considerable doubt. To accept that a practical benefit can be consideration in contract modification cases is to substantially dilute and distort consideration as traditionally understood.

Yet, the possibility of ensuring that contracts can be performed substantially as originally promised under the rubric practical benefit makes the decision in *Roffey* an attractive one, despite the inherent ambiguity in the phrase and the substantial discretion it seems to bestow on the courts to uphold modified contracts in certain circumstances as yet to be defined. The difficulty of fitting *Roffey* into the pre-existing doctrine of consideration has been addressed by the English Court of Appeal in *Re Selectmove Ltd.*,[21] a case about part payment in full settlement of a debt. In that case, a company owing substantial taxes suggested that it pay all future taxes monthly as they came due and that it repay arrears at a monthly rate commencing approximately six months hence. The company did not hear whether the tax authorities would accept this proposal but commenced to pay the first month's taxes when it heard that the tax authorities required payment of all arrears in full. Subsequent payments pursuant to the alleged agreement were late. The tax authorities presented a winding-up petition and the company argued that the petition should be dismissed on the ground that the proposal had been accepted by silence and that the promise to pay an existing indebtedness constituted good consideration since the authorities would derive practical benefit from the agreement. The trial judge rejected both arguments and ordered the winding-up of the company. The Court of Appeal agreed.

On the acceptance by silence point, the court found there can be no such acceptance where an agent has made clear to the offeror that he must confirm acceptance with his principal before accepting the offer. Thus, there was no agreement to accept part payment in full settlement.[22] On the consideration point, the company argued that there was practical benefit in that there was additional benefit in ensuring that the company remained in business so that some of the indebtedness could be recovered which would not be recoverable by putting the company into liquidation. However, the court declined to accept that the *Roffey* principle could be extended from contracts involving goods and services to contracts providing for the repayment of an indebtedness. The court implicitly accepted the *Roffey* principle but stated that if it was to apply in debt cases, *Foakes v. Beer* would be left without any application; this outcome should be left to the House of Lords to correct or to Parliament.[23]

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[21] [1995] 2 All ER 531 (CA) [*Selectmove*].

[22] *Ibid* per Peter Gibson L.J. at 535-536.

[23] *Ibid* at 538.

While there have been few cases since *Roffey* in England,[24] probably because this has never been a frequently litigated corner of contract law, a subsequent acceptance of the principle of practical benefit by the Court of Appeal in *Selectmove* and in the textbooks suggests that it has found a place in the law although the content and scope of application remain uncertain. That uncertainty may well have spilled over to Canada until the decision of the New Brunswick Court of Appeal in *NAV Canada.*

THE RECEPTION OF WILLIAMS V ROFFEY IN CANADA

Before the appellate decision in *NAV Canada, Roffey* appears to have been applied in only one other decision, a trial decision in *Chahal v Khalsa Community School,*[25] involving an employment contract, which will be discussed below in the specific employment contract context. *NAV Canada* was the first decision involving a commercial agreement. In that case, the airport authority entered into an agreement with NAV to provide various services, including navigational services at Fredericton airport. A decision was made by the authority to extend one of the two runways and relocate the instrument landing system to that runway. NAV thought it made better economic sense to upgrade one of the components of the landing system and took the position that it was not responsible for the upgrade costs under the services agreement. It so informed the authority in writing and stated that it would make no budgeting provision for the costs until the airport authority agreed to pay. With several days only within which to decide, the authority agreed to pay "under protest". NAV completed the installation, the authority refused to pay and NAV sued to enforce the modified agreement. An arbitrator found that the authority should pay pursuant to its written promise to pay but the N.B. Queen's Bench disagreed, construing the letter as a willingness to pay only if found contractually liable to pay. The N.B. Court of Appeal dismissed NAV's appeal because: (i) there was no new consideration since NAV was already bound by the services contract to pay if it decided to install new equipment; (ii) but there was a practical benefit to the airport; (iii) however, the agreement was procured by economic duress since the airport authority had no practical alternative since NAV had a monopoly over the provision of aviation services to public airports in Canada.

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[24] See for example *WRN Ltd. v Ayris* [2008] EWHC 1080 (QB) in which the court searched for but could find no practical benefit where non-competition clauses in an employment contract were extended.

[25] (2000), 2 CCEL (3d) 120 (Ont S CJ). Although considered in several cases since, *NAV Canada* has not been adopted or applied. It was considered in two cases in relation to economic duress: *Burin Peninsula CBDC v Grandy,* 2010 NLCA 69 and *Process Automation Inc. v Norstream Intertech Inc,.* 2010 ONSC 3987 in which Harris J. at para. 73 described *NAV* as "compelling" but felt constrained to follow Ontario decisions. In *River Wind Ventures Ltd. v British Columbia,* 2009 BCSC 589, Meikle J. at para. 36 said he would follow *NAV* on the consideration issue but for the absence of benefit on the facts, and in *Matchim v BGI Atlantic Inc.*, 2010 NLCA 9, Green C.J.N.L. at para 83 found it was not necessary to consider it on the facts.

Robertson J.A., writing for an unanimous court, began his analysis of the consideration issue with the reminder that a contract is a consensual exchange, so that a party seeking to enforce a contractual modification must provide something more in exchange for the agreement to modify the contract; the promisee must suffer some detriment in return for the promisor's promise.[26] Since NAV was already under a contractual obligation to pay, it had promised nothing new in return for the authority's promise.[27] The court then considered two further approaches in classical contract law in an attempt to find consideration for the airport's promise to pay, in forbearance and in detrimental reliance. The court found that NAV could not succeed by arguing that consideration lay in the forbearance to exercise its legal right to breach the contract because it had no such legal right in the first place. Again, the court found that NAV could not succeed on the detrimental reliance argument that it incurred losses as a result of reliance on the airport's promise to pay because promissory estoppel can only be invoked as a shield and not as a sword; NAV cannot rely on its own detrimental reliance on the airport's gratuitous promise.[28]

Implicit in the forbearance and detrimental reliance arguments, although rejected on the facts, is the position that both principles offer alternative grounds for the enforcement of modified contracts, provided there is a legal right of breach and a defensive estoppel argument respectively. Robertson J.A. also noted other legal principles which can be used to enforce modified promises including extra consideration, and a mutual agreement to rescind the old agreement in favour of a new one.[29] Then, he further noted two recent cases in which courts took more flexible approaches to consideration, *Roffey,* and the Ontario Court of Appeal decision in *Techform Products Ltd. v Wolda.*[30] In *Wolda,* an independent contractor who performed research on behalf of a company in yearly contracts terminable with 60 days' notice on either side signed an agreement which provided that he assign all inventions to the company in consideration of the company continuing to employ him. Four years later he invented a patentable device but the company refused to compensate him for it. The contract was terminated and the legal right to the invention was disputed. The trial judge held that the original agreement failed because of an absence of consideration but the Court of Appeal found that the employment continued because there was consideration in an implied forbearance to dismiss for a reasonable period of time, notwithstanding the 60 day termination period in the contract. Since there was no

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[26] *Supra* note 13 at 418-419.

[27] *Ibid* at 420, relying on *Stilk, Gilbert Steel,* and *Modular Windows of Canada v Command Construction* (1984), 11 CLR 131 (Ont HCJ).

[28] *Ibid* at 420-421.

[29] *Ibid* at 421.

[30] (2001), 206 DLR (4th) 171 (Ont CA) [*Wolda*], leave to appeal refused, (2001), 213 DLR (4th) vi (SCC). See also M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's LJ 809.

economic duress, the court enforced the agreement and the employer had the right to the patent.

Robertson J.A. took *Roffey* and *Wolda* as signals that a less rigid and technical application of the *Stilk* consideration requirement might be considered and characterized the changes he proposed as incremental.[31] He gave three reasons for the changes. First, he adopted the position of Professor McCamus[32] that the *Stilk* rule is both over inclusive in that it includes renegotiated contracts induced by coercion provided there is consideration and under inclusive in that it excludes voluntary agreements where there is no economic duress. Since contract modification is a common occurrence, the law should protect legitimate expectations that modifications will be enforceable if necessary. Secondly, he adopted the position of Professor Waddams[33] that even in the absence of consideration as normally understood, the courts ought to recognize that there may be other sound reasons for enforcing contract modifications rather than to find "fictional" consideration and then to attempt to reconcile apparently irreconcilable decisions. Thirdly, Robertson J.A. thought that the doctrine of consideration should not be frozen in time particularly in light of the evolving doctrine of economic duress.[34]

Thus, he concluded that a post-contractual modification for which there is no consideration may be enforceable provided it was not procured by economic duress.[35] He characterized this assertion as an incremental change in the law.[36] He also stated that he was not in favour of abrogating *Stilk,* rather preferred to regard that rule as not determinative as to whether a gratuitous promise is enforceable. The presence of consideration may be evidence of consent to a contract modification and that the modification was not the result of economic duress.[37] On the facts, the court found there to be a practical benefit to the airport authority in upgrading the landing system but that the agreement was procured by economic duress and so was unenforceable at the instance of NAV.

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[31] *Supra* note 13 at 424.

[32] *Ibid.*

[33] *Ibid* at 424-425.

[34] *Ibid* at 425.

[35] *Ibid.*

[36] *Ibid.* This incremental approach has found favour with Rick Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v Greater Fredericton Airport Authority Inc.*" (2010) 49 Can Bus LJ 256 at 265-269.

[37] *Supra* note 13 at 426.

RECENT CANADIAN APPROACHES TO CONTRACTUAL MODIFICATION

But for the ultimate finding of economic duress, it appears (although not entirely certainly) that the N.B. Court of Appeal would have enforced the modified agreement against the airport authority on the ground that there was a practical benefit to it in the improved landing system. This would have occurred anyway under the original services agreement since NAV was obliged by the agreement to upgrade the systems. The challenge of justifying this outcome in law on the facts must, therefore, be addressed since it appears that the authority would have had to pay more than under the initial services agreement.

The first observation flowing from a finding of practical benefit is that it is not clear what practical benefit would have accrued by enforcement of the modified agreement, particularly in light of an absence of definition of "practical benefit" in the decision. Not only does the court not offer a definition but it also does not provide guidance or guidelines for future courts considering different factual situations. It does not even precisely state what would have been the practical benefit in *NAV Canada.* Secondly, it is not clear whether the practical benefit in the transaction is understood to be consideration or an alternative ground to consideration for enforcement as in the *Roffey* decision. This distinction is important because it predicts what a court ought to look for, that is, consideration in addition to the original consideration or something different from the original consideration. "Practical benefit" seems to suggest that something different is required, but precisely what is uncertain.

Thirdly, whether practical benefit is or is not consideration, it is clear that in *NAV Canada*, the court thought that the technical requirements for consideration could be relaxed on the ground that commercial efficacy and the commercial expectations of the parties required such relaxation. Again, it is unclear when such relaxation should occur or to what extent, particularly in light of the fourth observation, that is, it is unclear how *Stilk* and *Roffey* can be the law in relation to modified contracts concurrently as *NAV Canada* suggests. Either new consideration is required or it is not required. Either a practical benefit in addition is required or it is not required. If practical benefit is tantamount to "new consideration", then the cases are reconcilable and the only factual issue is whether there is genuinely new consideration in the practical benefit. If practical benefit is an alternative ground for enforcement of the modified contract to consideration, then the question is whether this "new" alternative ground contradicts the traditional consideration requirement: both can be grounds for the enforcement of modified contracts provided the objective consent of both parties to the modification is present. But if practical benefit means the mere advantage to the promisee in having the promisor perform the original agreement, then there exists in the law an irreconcilable contradiction between *Stilk* and *Roffey,* so that if both

rules are to stand, practical benefit must mean something more, but what more is the question.

Finally, it may simply be appropriate that the two contradictory principles should be permitted to coexist in contract law as happens in other situations (consideration-detrimental reliance, exclusion clauses - factors overriding exclusion clauses), and in that case, the question is knowing which to apply when. Additional judicial guidance is clearly required, if only to declare authoritatively that both principles should stand and that judicial discretion should determine when each is to be applied in the absence of choice as to which should be the sole rule.

One way in which to discern how Canadian courts might look upon the formal reception of *Roffey* into Canadian contract law in *NAV Canada* is to look at some recent contract modification cases to determine whether there are identifiable trajectories of principle similar to *Roffey* running through them. Conversely where there are other principles on the basis of which courts will enforce modified contracts, the case for adding practical benefit to their number becomes stronger, provided reasons for doing so can be articulated.

Following the lead of the Ontario Law Reform Commission, Robertson J.A. noted, as observed earlier, that there are at least four situations in which the common law will enforce modified contracts: the presence of additional consideration; changed circumstances resulting in the original promise being a promise to do more in exchange; detrimental reliance; and mutual agreement to rescind and replace the old contract with a new one.[38] While the first two are encompassed by the classical requirement for additional consideration to enforce additional promises, the last two are not.

Detrimental reliance, or at the very least, reliance founds a defensive argument in promissory estoppel by a defendant who seeks to resist the restoration of an original contract in favour of enforcement of the modified contract. Thus, promissory estoppel constitutes an example of a situation in which courts enforce modified contracts in the absence of consideration and in which they do not regard the reliance as a form of consideration but rather as a completely alternative ground for enforcement of the varied promise. Although this brief comment is not an appropriate forum for reviewing promissory estoppel and the various issues relating to its jurisprudential nature, two observations seem opposite. First, the courts remain reluctant to enforce modified promises at the instance of the promisor on the grounds of an absence of consideration,[39] that is, a modified promise can only be used as a shield and not a sword. Secondly, the same Ontario Court of Appeal, not long after *Gilbert Steel*, upheld promissory estoppel as a grounds for enforcing a modified contract by finding in favour of the owner who

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[38] *Ibid* at 421.

[39] *Combe v Combe* [1951] 1 All ER 767 (CA).

relied on the contractor's conduct which strongly suggested that payment need not be made until an architect's certificate was presented.[40] So promissory estoppel is a true exception to the consideration rule at least as a defence.

The fourth exception identified by the O.L.R.C. of rescission and replacement by a new contract is usually explained on consideration grounds. In the case which established the principle, *Raggow v Scougall,*[41] an employer persuaded his employees to accept a wage reduction for the duration of the First World War on the understanding that after the war, wages would revert to their original level. When an employee sued to restore his original wages after accepting the reduction for some months, the court decided there was an implied agreement to rescind the old contract and make a new one. Consideration for the new agreement was said to be found in the mutual abandonment of rights under the old contract. But this is tautologous and now stretches the consideration requirement into the realm of fiction and it is hardly surprising that in *Gilbert Steel,* the Ontario Court of Appeal expected very clear evidence of intention to replace the old agreement and found, on the facts, nothing beyond replacement of the pricing term. Nevertheless, *Raggow* continues to be accepted as an exceptional situation in which a modified contract is enforceable but it is difficult to fit either under the consideration rule or to justify on the basis of some other principle beyond the parties' agreement to rescind and replace.

In addition to promissory estoppel and mutual rescission and replacement, a third exception to the requirement for consideration can be found in the unique case of *Robichaud v Caisse populaire de Pokemouche Ltée,*[42] about part payment, which is a specific variation of the pre-existing duty rule in which a promisor promises to take less and then relies on an absence of consideration to escape the promise on which the promisee had relied. In *Robichaud*, the promisor, who was one of several creditors, obtained a judgment against the promisee-debtor and then agreed to take about 25% of the original indebtedness in full settlement of a judgment debt. The promisor subsequently sought the full amount of the judgment and at trial succeeded on the ground of an absence of consideration. The N.B. Court of Appeal reversed this decision on the ground that the immediate receipt of the payment and the saving of time and expense constituted consideration. An application of *Pinnel* and *Foakes*, as well as *Stilk*, ought to have yielded the result that full settlement be made. Yet, the court appears to have adopted a practical benefit approach in all but name. Although the court in *Robichaud* could have enforced the promise to accept part payment because it was given in the context of composition agreement, the decision is otherwise difficult to reconcile with the classical doctrine of consideration, leaving practical benefit as the only possible explanation. *Robichaud* appears, to date, to be *sui generis*.

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[40] *Owen Sound Public Library Board v Mial Developments Ltd.* (1979), 102 DLR (3d) 685 (Ont CA).

[41] *Supra* note 6.

[42] (1990), 69 DLR (4th) 589 (NBCA).

Since it is possible to characterize these three situations, promissory estoppel, contractual rescission and replacement, and *Robichaud* practical benefit, as situations outside the doctrine of consideration, and therefore as a challenge to the orthodox requirement of consideration and to knowing when consideration is required for the enforcement of promises, it remains to ask whether there are other factual situations closer to the contractual modification paradigm where slight changes to existing ongoing contracts are at issue of the sort associated with *Gilbert Steel* when the price change was the only issue, as was the case in *Roffey* also.[43] One such cluster of cases are those concerned with contracts of employment in which remuneration and/or termination provisions were at issue, and it is to these, this paper now turns.

In *Francis v Canadian Imperial Bank of Commerce,*[44] an employee accepted a written offer of employment and on the first day on the job was also presented with an "employment agreement" which he signed. This document limited the termination period to three months. Some nine years later, the employee was dismissed on a basis found by the trial judge to be shoddy and biased and the question of the required amount of notice arose. The employee argued that the contract was in the original letter, and in the absence of a termination provision, reasonable notice at common law was implied.[45] The Ontario Court of Appeal agreed on the ground that there was no consideration because there was no benefit to both parties in the modification. The employer ought to have enclosed a copy of the employment contract with the original letter to ensure that its terms constituted the contract of employment.

A similar result occurred in *Watson v Moore Corp.*,[46] where an employer also sought to rely on subsequent contract modifications in relation to notice when it terminated an employee. After some 31 years of employment, the employee signed an employment contract which provided for termination without cause or notice on payment in lieu of one week's salary for every two years of service; she signed because she assumed she might otherwise be dismissed. Not long after, she was summarily dismissed and offered 20 weeks pay in lieu of notice. The majority in the B.C. Court of Appeal found that there was no consideration for the contract in either continuation for employment or in forbearance by the employer from dismissing the employee for refusing to sign since there was no evidence of forbearance on the employee's part. The employee was entitled to reasonable notice and awarded 18 months' salary. The majority thought that something more was required to justify the employee agreeing to less notice than the common law norm of reasonable notice but, in dissent, Gibbs J.A. thought there was consideration in the tacit understanding of the parties that the

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[43] That consideration is firmly fixed is shown by two decisions of the Ontario Court of Appeal: *Trigg v MI Movers* (1991), 84 DLR (4th) 504 and *Gregorio v Intrans-Corp.* (1994), 115 DLR (4th) 200.

[44] (1994), 120 DLR (4th) 393 (Ont CA).

[45] *Wallace v Toronto-Dominion Bank* (1983), 145 DLR (3d) 431 (SCC).

[46] [1996] 7 WWR 564 (BCCA).

employee would be dismissed if she did not sign.[47] This approach was adopted by the Ontario Court of Appeal unanimously in *Wolda* where the court found that the employer's implicit promise to forbear for a reasonable period of time from exercising a contractual right to dismiss constituted consideration for an employee's signature to an agreement to assign all rights to inventions while employed.

Several years later, that court distinguished *Wolda* and applied *Francis* in *Hobbs v TDI Canada Ltd.*,[48] in which an employer agreed orally to commission rates for a commissioned sales position during negotiations and then subsequently required the employee to sign both a contract of employment and a "solicitor's agreement", all of which stipulated different commission rates and which had to be signed if the employee was to be paid at all. The employee later resigned and sued for unpaid commissions on the basis of the oral agreement. The court declined to accept the employer's argument that there was one contract comprised of all three parts because of the inconsistencies among them. The contract was the original oral contract and there was no consideration for signing the subsequent arrangements in the continuing employment of the salesman and there was neither express nor implied forbearance to dismiss if he did not sign. The employee was the top biller and the employer had no intention to dismiss him. The court restricted *Wolda*[49] to cases where the employee receives some additional consideration such as increased security of employment in agreeing to new terms of employment.

A similar result prevailed in *Wronko v Western Inventory Service Ltd.*,[50] in which the employer's new president attempted to reduce a 17 year employee's entitlement on termination to 30 weeks pay from two years. The employee refused to sign the new agreement but after a further two years was informed that the termination provision was in effect. The employee understood his employment to be terminated and did not report for work. Although the trial judge decided that the employer could unilaterally amend the contract, the Ontario Court of Appeal decided otherwise. It found that the notice of intention to amend the agreement amounted to a repudiation but the employer permitted the employee to work for a further two years and so acquiesced to the employee's position with the result that the original agreement remained in force and the employee was therefore, entitled to two years termination pay.

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[47] Following on earlier decision: *Maguire v National Drug Co.* [1935] 3 DLR 521 (SCC).

[48] (2004), 246 DLR (4th) 43 (Ont CA).

[49] The court also expressly distinguished a much earlier case, *Maguire v Northland Drug Co.*, *supra* note 47 on the ground that the employer made an express forbearance to terminate, thereby enhancing the employee's security of employment.

[50] (2008), 292 DLR (4th) 58 (Ont CA).

Finally, the B.C. Court of Appeal again found in *Kornerup v Raytheon Canada Ltd.*[51] that merely continuing to work does not constitute consideration. In that case, the employer was downsizing its workforce and gave assurances to its employees, including the plaintiff, that certain specialized skills would be kept and that the practice of paying one month's salary for each year of service would continue to apply in the future. In September, the employee was told that her employment would terminate the following June and that she was entitled to 9.4 months notice. In May, she commenced an action for severance. The trial judge found that the assurances of continuing employment were given with the intention of creating legal relations and constituted an offer accepted by continuing to work. Therefore, there was a contractual obligation to pay severance as well as working notice and severance was awarded. The Court of Appeal disagreed, finding that the assurances were given to encourage key employees to stay but in the absence of additional consideration from the employee beyond continuing to work, did not constitute an offer leading to a contract. Rather, at best, the assurances were an unilateral offer which could not have been accepted until the employment contract was terminated or by working to the June termination date; they could be withdrawn at any time prior. When notice was given in September, the offer was withdrawn, and at that time, no severance was in place. Thus, until May, the employee continued to perform the original contract and did not provide consideration for any offer of severance, so that the employer was not obliged to pay severance.

In none of these cases was *Roffey* cited in support of finding some practical benefit in continuing employment. However, in one employment case, *Chahal*,[52] it was considered. In that case, the principal of a small school associated with a Sikh temple accepted employment on the basis of assurances from the representative of the governor's committee that the temple would cover any short falls in salary promised to him. The principal was subsequently dismissed on grounds that the trial judge found to be entirely fabricated and the result of a conspiracy to dismiss him. Disagreement arose as to whether a contract was formed in an oral agreement allegedly entered prior to the start of the school year or in a written agreement executed three months into the school year in which a larger salary was promised. The trial judge found that there was an oral agreement made in the summer for the higher salary and that was reflected in the later written agreement, as indicated by the payment of the salary at the higher rate. In his view, there had been agreement orally only in relation to the salary and the later written contract constituted the entire employment contract between the parties. The court found no issue of contract modification but had there been by virtue of an earlier oral agreement subsequently modified by the later written one, *Roffey* could be applied to find practical benefit in relation to the length and stability of employment of a principal of a new school as well as in the security and stability of employment for the principal of a new school. This application of *Roffey* was clearly *obiter dicta*.

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[51] (2008) 294 DLR (4th) 162 (BCCA).

[52] *Supra* note 25.

The net result of the employment contract modification cases may be briefly stated: the courts continue to look for consideration where employers attempt to vary contracts of employment by reducing termination and remuneration clauses, and finding none, decline to enforce the varied agreements, thereby protecting employees. The courts look for "new" consideration in the sense of a new benefit to the employee in exchange or in an express forbearance to dismiss where the employee declines to execute the modified agreement. The finding of an implicit forbearance as consideration in *Wolda* is exceptional and likely wrong. In the only employment case to consider *Roffey*, the court applied it *obiter dicta* in a fact situation where there was no contract modification on the facts because there was no contract to begin with and even if there was, the modification would have amounted to consideration under the classical doctrine of consideration.

Until the adoption of *Roffey* in *NAV Canada*, the willingness of Canadian courts to enforce modified agreements was effectively non-existent in the absence of new consideration. The situations in which they had done so were limited to promissory estoppel, forbearance to sue, one application of *Raggow*,[53] and a reading of *Robichaud* as explicable only on practical benefit grounds. Yet, of these situations, only promissory estoppel is a true exception because the other situations are explained on consideration grounds. So the question becomes whether practical benefit can be added to their number or not, and further whether it is a true exception like promissory estoppel or another situation in which a court must stretch the classical doctrine of consideration by finding a practical benefit to be consideration.

The decision to add practical benefit requires a prior decision as to what it means. Both *Roffey* and *NAV Canada* show that it means some extra benefit to the promisor as determined by the facts of each case, that is, the courts appear to look for consideration in the modified contract in addition to the original consideration. Yet, in neither case could it be said that there was anything substantially new or incremental. For *Roffey*, the practical benefit was continued performance, avoidance of the trouble and expense of finding a substitute and of a penalty for late performance, and in *NAV Canada*, it was getting a new navigation system. Yet, both practical benefits were already present in the original agreements, so it is difficult to justify the payment of additional sums under the rubric of practical benefit when what the courts so designated was really the original benefits in the original contracts.

This suggests that in the absence of some truly new factor, practical benefit understood as consideration is rare - as rare as the number of cases since *Roffey* applying *Roffey*. Thus, the absence of *Roffey* and of practical benefit from the law of contract suggests that the courts still require consideration in order to enforce commercial exchanges and need not resort to economic duress in order to decline enforcement. The doctrinal purity and role of the classical concept of consideration remains unchanged

[53] *Supra* note 6.

and seems likely so to remain in the foreseeable future. Once practical benefit is seen to be little more than a restatement of the benefits of the original agreement, genuinely new consideration, or a forbearance to sue, or a detrimental reliance on a modified agreement remain as the only reasons to enforce modified agreements on the basis of contractual principle. If the story of practical benefit is a story of absence in contract law, that absence is significantly telling: practical benefit adds nothing to and should play no role in contract law notwithstanding its mysterious appeal.

CONCLUSION

If practical benefit is little more than a restatement of the consideration in any contract, it is unlikely to have much future as a reason for enforcing modified agreements as long as consideration remains. If practical benefit means something new, then it is consideration and should be so denominated. While it is commendable that the N.B. Court of Appeal has opened up the debate in *NAV Canada,* it is submitted that the discussion proceed slowly and carefully. Consideration is the cornerstone of the common law of contract and its removal might have a momentous impact on that impressive edifice and its fundamental role in economic exchange.