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MINORS' CONTRACTS

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## MINORS' CONTRACTS

### I. INTRODUCTION

The common law governs minors' contracts in Alberta and elsewhere in Canada outside Quebec. The Legislatures have intervened only sporadically and have dealt only with matters of detail.

The law has fallen into some confusion because of conflict between two different policies. The courts have been primarily concerned with the protection of minors against the consequences of their inexperience and immaturity, but they have also tried to avoid undue hardship upon adults who have dealt with minors. That confusion and the want of power in the courts to provide remedies for hard cases render the law unsatisfactory and in need of change.

In our Report on the Age of Majority we gave a brief description of the law relating to minors' contracts and said that we would in a later report make recommendations for reform. We thought that those recommendations should wait until the Legislature had settled the age of majority which it did by the Age of Majority Act, S.A. 1971, c. 1. We have now completed our research and in this Report will give a summary of it and will make our recommendations. We will deal also with a number of ancillary matters including guarantees of minors' contracts and torts of minors related to their contracts.

## II. LAW OF ALBERTA

1. BINDING CONTRACTS(1) Contracts for Necessaries

A minor is liable to pay for "necessaries" which he buys. "Necessaries" include the bare necessities of life. They also include things needed to maintain the minor in his ordinary social position,<sup>1</sup> and will therefore vary with the age, background and marital status of the minor.

A house has been held to be a necessary for a married minor with a child.<sup>2</sup> A means of transportation to work may be a necessary even if it is a racing bicycle,<sup>3</sup> and a second-hand sports car is not a necessary unless proven to be so.<sup>4</sup> Services can be necessities. Medical advice and legal advice have been so held.<sup>5</sup> So has basic education, though not a specialized accounting course,<sup>6</sup> and a college or university education must be considered doubtful.

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<sup>1</sup>Peters v. Fleming (1840), 151 E.R. 314 (Ex.).

<sup>2</sup>Soon v. Watson (1962), 33 D.L.R. (2d) 428 (B.C.S.C.).

<sup>3</sup>Clyde Cycle Co. v. Hargreaves (1898), 78 L.T. 296 (Q.B.).

<sup>4</sup>Coull v. Kolbuc (1969), 68 W.W.R. 76 (Alta. D.C.).

<sup>5</sup>Huggins v. Wiseman (1690), 90 E.R. 669 (K.B.); Helps v. Clayton (1864), 144 E.R. 222 (C.P.).

<sup>6</sup>International Accountants Society v. Montgomery, [1935] O.W.N. 364 (C.A.).

Trading contracts are not binding upon a minor.<sup>7</sup> However, a loan made to a minor for the purchase of necessary goods or services can be recovered from the minor<sup>8</sup> though he will not be required to repay the money unless he actually spends it for necessities;<sup>9</sup> historically the lender's rights arose only by way of subrogation to the rights of the supplier of the necessities.

The answer to the question whether goods or services are necessities depends upon the facts of the case. The test is uncertain and difficult to apply. The uncertainty makes it difficult for a supplier or a minor to assess his legal position. The supplier has the often difficult burden of proving that the goods or services are necessities.<sup>10</sup> He must establish not only that the goods are of the general class considered necessities but also that the minor did not already have an adequate supply.<sup>11</sup>

The burden upon the supplier is heavier if the minor lives with a parent or guardian who can and usually does supply him with necessities. It has been suggested that there is a presumption that a minor living with his parents is adequately supplied with necessities which arises because

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<sup>7</sup>Pyett v. Lampman, [1923] 1 D.L.R. 249 (Ont. App. Div.).

<sup>8</sup>Wong v. Kim Yee (1961), 34 W.W.R. 506 (Sask. D.C.).

<sup>9</sup>Marlow v. Pitfield (1719), 24 E.R. 516.

<sup>10</sup>Nash v. Inman, [1908] 2 K.B. 1 (C.A.).

<sup>11</sup>Barnes & Co. v. Toye (1884), 13 Q.B.D. 410.

the provision of necessities is normally a matter of parental discretion with which the courts will be reluctant to interfere.<sup>12</sup> The cumulative effect of the rule~~x~~ is to place an unusually heavy onus on the supplier to prove a negative on the basis of facts which are peculiarly within the knowledge of the other party.

The nature of a minor's liability under a contract for necessities is not settled. The Sale of Goods Act contains the following provisions:

- 4.(2) Where necessities are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.
- (3) "Necessaries" in this section means goods suitable to the condition in life of the infant or minor or other person and to his actual requirements at the time of the sale and delivery.

If the price which the minor must pay is a reasonable price (which is not necessarily the contract price) and if the goods do not become "necessaries" until they are delivered, it may be argued that a minor's liability is not contractual. A further argument is that a minor, like a lunatic, is incapable of making a contract;<sup>13</sup> but the argument is unsatisfactory because even a lunatic may make a valid contract under some circumstances<sup>14</sup>

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<sup>12</sup>Bainbridge v. Pickering (1779), 96 E.R. 776.

<sup>13</sup>Nash v. Inman, [1908] 2 K.B. 1 (C.A.) per Fletcher Moulton L.J. at p. 8.

<sup>14</sup>Imperial Loan Co. Ltd. v. Stone, [1892] 1 Q.B. 599 (C.A.).

and because a minor may understand a contract while a lunatic by definition cannot.

It can also be argued that the minor's liability is contractual in nature. Contracts relating to instruction and education, which are commonly regarded as a particular category of contracts for necessities, are enforceable even though executory.<sup>15</sup> And Buckley L.J. in Nash v. Inman<sup>16</sup> said that the defendant, who was a minor, "had a limited capacity to contract."

The question whether or not the minor's liability is contractual is of practical importance in the case of an executory arrangement for the purchase of necessities; such an arrangement will be enforceable only if the obligation is contractual. The question should be answered in order to avoid undesirable uncertainty.

## (2) Contracts of Service

A minor may be bound by a beneficial contract of service under which he can earn his livelihood or obtain training for some trade or profession. Beneficial contracts of service are much like contracts for instruction and education and appear to be a species of contracts for necessities. Regardless of whether it is executory or executed, a contract of this kind is as fully binding on a minor as if he were an adult.<sup>17</sup>

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<sup>15</sup>Roberts v. Gray, [1913] 1 K.B. 520 (C.A.).

<sup>16</sup>Supra, f.n. 13.

<sup>17</sup>Clements v. L.N.W.R. Co., [1894] 2 Q.B. 482 (C.A.).



The category has been interpreted broadly to include, for example, a contract under which a professional boxer obtained a necessary licence<sup>18</sup> and by analogy a contract for employment of a manager by a professional entertainer who was a minor.<sup>19</sup>

Apprenticeship contracts are contracts of service and are governed by the same principles. The Apprenticeship Act<sup>20</sup> regulates them but does not make them valid.

The distinction between non-binding trading contracts and contracts of service which are binding if beneficial may be difficult to draw. For example, where a minor contracted with a publishing company to publish the story of the minor's life and received considerable advance payments, he was not allowed to repudiate the contract because it was held to be a binding contract of service and not a trading contract.<sup>21</sup>

## 2. VOIDABLE CONTRACTS

There are two classes of minors' contracts which are called "voidable". A contract of the first class is voidable in the usual sense of the word; it continued to impose obligations upon a minor until he repudiates it. The second class would not usually be described as voidable; a minor does not incur a legal obligation under it until he ratifies it after

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<sup>18</sup>Doyle v. White City Stadium Ltd., [1935] 1 K.B. 110 (C.A.).

<sup>19</sup>Denmark Products Ltd. v. Boscobel Productions Ltd. (1967), 111 S.J. 715 (Q.B.).

<sup>20</sup>R.S.A. 1970, c. 20.

<sup>21</sup>Chaplin v. Leslie Frewin Ltd., [1966] Ch. 71 (C.A.).

reaching his majority. The boundary between the two classes is not clear, nor is the distinction between them easy to rationalize.

(1) Contracts Which are Binding Until Repudiated

Four kinds of contracts are binding until repudiated: contracts concerning land, contracts for the sale of shares, partnership agreements, and marriage settlements. The rationale is that in these cases the minor acquires "an interest in permanent property to which continuing obligations attach"<sup>22</sup> but that rationale does not explain why a fully paid up contract for the purchase of land is voidable in the first sense nor does it explain why a contract for the purchase of personal property is voidable only in the second sense. Either because of the apparent irrationality of the distinction or because it has been overlooked, some Canadian cases suggest, though they do not decide, that some contracts for the purchase of personal property may be binding until repudiated.<sup>23</sup>

If a contract is valid until repudiated the minor may repudiate during minority or within a reasonable time after majority,<sup>24</sup> though it has been suggested that after majority

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<sup>22</sup>Rex. v. Rash (1923), 53 O.L.R. 245 at 263, per Rose J.

<sup>23</sup>Blackwell v. Farrow, [1948] O.W.N. 7 (Ont. H.C.); Fannon v. Dobranski (1970), 73 W.W.R. 371 (Alta. D.C.); LaFayette v. W. W. Distributors & Co. Ltd. (1965), 51 W.W.R. 685 (Sask. D.C.); Coull v. Kolbuc (1969), 68 W.W.R. 76 (Alta. D.C.).

<sup>24</sup>Hilliard v. Dillon, [1955] O.W.N. 621 (H.C.); Murray v. Dean (1926), 30 O.W.N. 271 (H.C.).

he may withdraw a repudiation which took place during his minority.<sup>25</sup> He must repudiate the whole contract<sup>26</sup> and if he affirms after majority he loses the right to repudiate.<sup>27</sup> Repudiation discharges him from obligations which would have arisen later. It seems likely that it will also discharge him from obligations which have accrued but have not been performed, but the law is not settled.<sup>28</sup> It appears that he may recover money which he has paid only if the consideration for it has failed<sup>29</sup> and that he may recover property which he has transferred only if he restores the other party to his original position.<sup>30</sup> It is not apparent why different tests should apply to the cases of money paid and property transferred, and the difference in the tests has not been explicitly recognized. Where a partnership agreement is involved the minor is bound to his partners until repudiation but is not answerable to third parties and seems merely to be unable to share in profits or capital until the liabilities are paid off.<sup>31</sup>

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<sup>25</sup>Phillips v. Sutherland (1910), 15 W.L.R. 594 (Man. K.B.).

<sup>26</sup>Henderson v. Minneapolis Steel & Machinery Co., [1931] 1 D.L.R. 570 (Alta. S.C.).

<sup>27</sup>Re Paterson, [1918] 1 W.W.R. 105 (Man. S.C.).

<sup>28</sup>Re Central Bank and Hogg (1890), 19 O.R. 7 (Ch.); N.W. Railway Co. v. M<sup>r</sup>Michael (1850), 155 E.R. 49 (Ex.).

<sup>29</sup>Short v. Field (1914), 32 O.L.R. 395 (C.A.).

<sup>30</sup>Whalls v. Learn (1887), 15 O.R. 481 (Div. Ct.).

<sup>31</sup>Lovell and Christmas v. Beauchamp, [1894] A.C. 607 (H.L.).

(2) Contracts which are not Binding until Affirmed

We turn to the second class of voidable contracts, those which are not binding on the minors until ratified. The class does not include contracts for the purchase of necessities, contracts which are binding until repudiated, or contracts which are void as being prejudicial. It includes all other minors' contracts. Examples are trading contracts, contracts for the purchase of goods other than necessities, and contracts settling lawsuits. There is a question whether or not the ratification must be in writing. Ives J.<sup>32</sup> said that it need not be in writing, but Lord Tenterden's Act<sup>33</sup> says it must and that Act, though repealed in England in 1874, appears to have been received in Alberta as part of the law of England of July 15, 1870, and has been held applicable in Saskatchewan.<sup>34</sup> The better view appears to be that writing is required, though if the minor fully performs his part of the contract it seems that ratification is unnecessary.<sup>35</sup>

The minor may enforce the contract against the adult without previous ratification, though because of lack of mutuality specific performance is not available to him.<sup>36</sup>

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<sup>32</sup>Re Hutton, [1926] 4 D.L.R. 1080 at 1083 (Alta.S.C.).

<sup>33</sup>9 Geo. 4, c. 14, s. 5 (U.K.).

<sup>34</sup>Molyneux v. Traill (1915), 32 W.L.R. 292 (Sask. D.C.).

<sup>35</sup>Blackwell v. Farrow, [1948] O.W.N. 7, 10 (Ont. H.C.).

<sup>36</sup>Farnham v. Atkins (1670), 82 E.R. 1208.

Third parties cannot rely on the invalidity of the contract.<sup>37</sup>

Unless he ratifies a contract of the second class the minor need not perform his obligations (though Coull v. Kolbuc<sup>38</sup> suggests the contrary). A different and very difficult question is whether the minor can recover money or property which he has parted with under the contract. Three recent Alberta cases illustrate the difficulties. In Bo-Lassen v. Josiassen,<sup>39</sup> which was decided in 1964 though not reported until 1973, a minor had unwisely bought a second-hand and inoperable motorcycle. By returning it unused, he was able to restore the adult to his prior position and Buchanan C.J.D.C., fortified by an unreported decision of the District Court which was affirmed by the Appellate Division, held that he was therefore entitled to recover the purchase price. In Coull v. Kolbuc<sup>40</sup> however, a minor who had had the use of a used motor car for 10 days was unable to recover his \$50.00 deposit towards its purchase price. Cormack D.C.J. said that the \$50.00 was a payment to hold the car until the minor could pay the balance of the price and held that because "the infant had acquired some real advantage" under the contract he could not recover back the money paid. In Fannon v. Dobranski<sup>41</sup> the minor bought

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<sup>37</sup>McBride v. Appleton, [1946] 2 D.L.R. 16 (Ont. C.A.).

<sup>38</sup>(1969), 68 W.W.R. 76 (Alta. D.C.).

<sup>39</sup>[1973] 4 W.W.R. 317.

<sup>40</sup>Supra, f.n. 38.

<sup>41</sup>(1970), 73 W.W.R. 371 (Alta. D.C.).

a car which broke down after he had driven it 70 miles. Belzil D.C.J. held that the minor could not recover the purchase price. Because the contract was fully executed there was nothing to repudiate; and because the minor had received valuable consideration, and indeed the very thing he had bargained for, he could not recover the price. The three judgments are not easy to reconcile. The Bo-Lassen case<sup>42</sup> emphasizes the vigilance of the courts to protect minors while Coull v. Kolbuc<sup>43</sup> suggests that social conditions have changed since the law began to protect minors. The Bo-Lassen<sup>44</sup> case leaves the minor at least some chance of recovering money which he has paid; Coull v. Kolbuc<sup>45</sup> and Fannon v. Dobranski<sup>46</sup> would virtually deny him that chance.

In an English case<sup>47</sup> the majority of the Court of Appeal thought that a minor could not recover a copyright even if the contract under which it was conveyed was voidable. They apparently thought that the test was whether or not restitution could be made. A Manitoba case<sup>48</sup> says that if the minor pays money without valuable consideration he may recover it, but where he pays it for valuable consideration

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<sup>42</sup>Supra, f.n. 39.

<sup>43</sup>Supra, f.n. 38.

<sup>44</sup>Supra, f.n. 39.

<sup>45</sup>Supra, f.n. 38.

<sup>46</sup>Supra, f.n. 41.

<sup>47</sup>Chaplin v. Frewin, [1966] 1 Ch. 71.

<sup>48</sup>Sturgeon v. Starr (1911), 17 W.L.R. 402 (Man. K.B.).

he may recover it only if he can make restitution, a principle which would help to reconcile the two tests, that relating to lack of valuable consideration and that relating to restitution. It is not, however, clear when one test will be applied and when the other. The two tests may give different results in a particular case, and the uncertainty is undesirable.

Problems also arise in a case in which a minor wants to avoid performing his obligations without restoring what he has received. In one case<sup>49</sup> a minor who refused to pay for goods was required to return those which he still had at majority but it seems that he was not liable for those which were no longer in his possession. In another<sup>50</sup> he was not liable for the depreciation of the goods which he returned. It is even sometimes said, and has been said by the Ontario Law Reform Commission,<sup>51</sup> that a minor can keep goods which are necessities and refuse to pay for them and, while we hope that that view would not ultimately prevail, we find it disturbing that there is support for it in the present law.

### (3) Defects in the Law Relating to Voidable Contracts

The uncertainty of the law relating to voidable contracts is undesirable. So are some of the consequences of the various

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<sup>49</sup>Louden Mfg. Co. v. Milmine (1908), 15 O.L.R. 53. (Div. Ct.).

<sup>50</sup>Noble's Ltd. v. Bellefleur (1963), 37 D.L.R. (2d) 519 (N.B.C.A.).

<sup>51</sup>Report on the Age of Majority, 1969.

rules. If, as in Coull v. Kolbuc<sup>52</sup> and Fannon v. Dobranski<sup>53</sup> the minor can recover money only if there is a total failure of consideration, he may be deprived of the protection of the law because of some inconsiderable benefit received. If in order to recover he must make restitution he is not likely to be able to do so if the goods have depreciated in value; and the court has no power to order compensation or to make other adjustments. If he has a right to avoid liability by returning the goods the right is of little value if he has paid a substantial part of the price and is precluded from recovering it. On the other hand, if the minor refuses to ratify it is unfair to the adult to say that the minor can keep the goods and refuse to pay for them, or even that the minor need not compensate the adult for goods which the minor has sold or consumed.

Settlements of disputed claims are a special class of contracts. There are decisions which suggest that such a settlement can be approved by the court and so made binding.<sup>54</sup> Section 16 of the Infants Act gives statutory authority to such a proceeding in Alberta, but only if the claim is for personal injury to the minor. In the absence of ratification or approval by the court settlements are not binding.

### 3. VOID CONTRACTS

In Canada some minors' contracts are void. A minor's bond indemnifying his purchaser against loss on the purchased

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<sup>52</sup>Supra, f.n. 38.

<sup>53</sup>Supra, f.n. 41.

<sup>54</sup>Poulin v. Nadon, [1950] 2 D.L.R. 303 (Ont. C.A.); Re Birchall (1880), 16 Ch. D. 41 (C.A.).



shares has been so held<sup>55</sup> and the principle has been extended to other contracts involving penalties.<sup>56</sup> It has also been extended to other contracts considered prejudicial to the minor such as land mortgages securing a purchase price which was in excess of market value;<sup>57</sup> an improvident sale of a minor's interest in land;<sup>58</sup> an unfair contract in which a minor undertook to build a house;<sup>59</sup> and a loan agreement and wage assignment.<sup>60</sup> There is an incidental and perhaps not too significant suggestion in the McKay case<sup>61</sup> that any contract not for the minor's benefit will be void, but it has also been said that a contract will be void only if there is a penalty or a clear prejudice to the minor.<sup>62</sup>

A void contract cannot be ratified.<sup>63</sup> The minor can recover back money or property from the other party regardless

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<sup>55</sup>Beam v. Beatty (1903), 4 O.L.R. 554 (Ont. C.A.).

<sup>56</sup>Phillips v. Greater Ottawa Development Co. (1916), 38 O.L.R. 315 (A.D.).

<sup>57</sup>McKay v. McKinley, [1933] O.W.N. 392 (H.C.).

<sup>58</sup>Re Staruch, [1955] 5 D.L.R. 807 (Ont. S.C.).

<sup>59</sup>Altobelli v. Wilson, [1957] O.W.N. 207 (C.A.).

<sup>60</sup>Upper v. Lightning Fasteners Employees' Credit Union (1967), 9 C.B.R. 211 (Ont. Co. Ct.).

<sup>61</sup>Supra, f.n. 57.

<sup>62</sup>Coull v. Kolbuc, supra, f.n. 38; Hagerman v. Siddall & Johnson, [1924] 2 D.L.R. 755 (Sask. K.B.); Phillips v. Greater Ottawa Development Co., supra, f.n. 56; Beam v. Beatty, supra, f.n. 55.

<sup>63</sup>Beam v. Beatty, supra, f.n. 55.

of the benefit to the minor and of his ability to make restitution,<sup>64</sup> though there is one suggestion to the contrary.<sup>65</sup> The title of third parties to goods apparently passing under a void contract is subject to attack by the minor unless there is an estoppel.<sup>66</sup>

It is not easy to predict when a court will hold that a minor's contract is void, and the consequences of such a holding go farther than is necessary to give proper protection to the minor. The law is uncertain and can lead to unfairness.

#### 4. LIABILITY FOR A TORT CONNECTED WITH PERFORMANCE OF A CONTRACT

A minor is usually liable for his torts unless he is of tender age and the tort involves some specific mental element such as malice or negligence.<sup>67</sup> Sometimes an adult who cannot recover from a minor in contract will sue in tort instead. The law distinguishes two categories of cases. It will not recognize a cause of action in tort which is in substance an action on the contract or is so directly connected with the contract that the tort action is an indirect means of enforcing the contract. It will however permit an action

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<sup>64</sup>Re Staruch, supra, f.n. 58.

<sup>65</sup>Phillips v. Greater Ottawa Development Co., supra, f.n. 56.

<sup>66</sup>McBride v. Appleton, supra, f.n. 37.

<sup>67</sup>Continental Guaranty Corp'n. v. Mark, [1926] 4 D.L.R. 707 (B.C.C.A.).

in tort if the wrong is not an act of the kind contemplated by the contract, even though the wrong is concerned with the subject matter of the contract and could not have been committed if the contract had not existed.<sup>68</sup> An action in negligence resulting in damage to a car has been held to be an action to enforce a contract in a case in which the minor bought the car under a conditional sale contract which provided that the car was at his risk and that he would insure against physical damage.<sup>69</sup> So has a similar action where the contract required the minor to indemnify the owner against damage to the property.<sup>70</sup> On the other hand, an action against a minor succeeded where a horse which he hired for riding, but expressly not for jumping, was injured through being jumped by a friend to whom he lent the horse.<sup>71</sup> And a minor has been held liable for damage caused by another minor to whom he had lent the car which he had hired from the plaintiffs, even though there was a term of the contract requiring the hirer to make good all damages and though the result therefore came very close to enforcing a term of the contract.<sup>72</sup>

The distinction between the two categories of cases is artificial and uncertain. It is strange that a bailor may

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<sup>68</sup>Dickson Bros. Garage v. Woo Wai Jing (1958), 11 D.L.R. (2d) 477 at 478 (B.C.C.A.).

<sup>69</sup>Supra, f.n. 50.

<sup>70</sup>Supra, f.n. 68.

<sup>71</sup>Burnard v. Haggis (1863), 143 E.R. 360.

<sup>72</sup>Victoria U Drive Yourself Auto Livery Ltd. v. Wood (1930), 2 D.L.R. 811 (B.C.C.A.).

fail in an action in tort for the reason only that the bailee is in breach of a contractual provision which was intended to protect the bailor, and it is difficult to find a policy reason for the distinction.

## 5. LIABILITY FOR FRAUDULENT MISREPRESENTATION

A minor is not liable in deceit for a fraudulent misrepresentation which induces a contract.<sup>73</sup> Otherwise there would be an indirect enforcement of the contract. For similar reasons the minor cannot be estopped from pleading the defence of infancy.<sup>74</sup>

A contract induced by a minor's fraud has been set aside at the instance of the other party.<sup>75</sup> The fraudulent minor can be forced to restore that which he acquired by his fraud, but he cannot be made to restore that which he no longer has. There is grave doubt that he can be forced to turn over the proceeds of any re-sale of goods acquired by his fraud. Stocks v. Wilson<sup>76</sup> said that he could, but in Leslie v. Sheill<sup>77</sup> a minor who had obtained a loan on the strength of a fraudulent misrepresentation as to his age was held not to be liable to restore the money after he had spent

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<sup>73</sup>Stocks v. Wilson, [1913] 2 K.B. 235.

<sup>74</sup>Jewell v. Broad (1909), 19 O.L.R. 1; aff'd (1910), 20 O.L.R. 176 (C.A.).

<sup>75</sup>Lempriere v. Lange (1879), 12 Ch. D. 675.

<sup>76</sup>Supra, f.n. 73.

<sup>77</sup>[1914] 3 K.B. 607 (C.A.).

it, and the court distinguished Stocks v. Wilson<sup>78</sup> and restricted it to very narrow circumstances. The court did leave open the possibility that the adult party might trace the proceeds of the sale into other money or property but tracing seems unlikely to help in Canada. The proceeds can be traced under the common law rules only if property in the goods has not passed and therefore could not be traced in the case of voidable contracts. The proceeds can be traced under the rules of equity only if there is a fiduciary relationship which is not likely to arise in the case of a minor purchasing goods.

#### 6. LIABILITY IN QUASI-CONTRACT

Does an action lie against a minor in quasi-contract for money had and received? In England the answer is no.<sup>79</sup> However, the English cases appear to assume that quasi-contractual liability depends upon an implied contract, while in Canada it depends instead upon an independent obligation created by law;<sup>80</sup> and the Infants Relief Act, 1874, does not apply here. The English cases therefore need not be followed in Canada and one case<sup>81</sup> suggests that they may not be followed. In that case an adult was able to recover from a minor a deposit of \$50.00 paid by the adult towards

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<sup>78</sup>Supra, f.n. 73.

<sup>79</sup>Supra, f.n. 77; Cowern v. Nield, [1912] 2 K.B. 419.

<sup>80</sup>Deglman v. Guaranty Trust Co., [1954] S.C.R. 725.

<sup>81</sup>Molyneux v. Traill, supra, f.n. 34.

the purchase price of cattle which the minor refused to deliver. The law is not clear.

## 7. MINORS AND AGENCY

It has been held that "the appointment of an agent is void or voidable just like any other act, undertaking or contract of the infant" so that minor plaintiffs were able to recover damages from a defaulting vendor of land upon a contract entered into by them through an adult agent.<sup>82</sup> It seems that the agency contract will be binding, voidable or void, depending upon the nature of the primary contract with the third party. So far as the third party is concerned, the acts of the agent will have the same effect as if they were the acts of the minor, and the third party will have his usual action against the agent for breach of warranty of authority.

A minor can act as an agent, and his minority will not affect the rights and obligations of his principal. It will not affect the other party to the contract, except in two ways. One is that he may not be able to sue the minor for breach of warranty of authority. The second is that if the minor is acting for an undisclosed principal, the other party's election to treat either the agent or the undisclosed principal as the contracting party will be purely nominal because the minor agent will be able to set up his minority as a defence to an action brought against him.

It seems that an infant's power of attorney is void.<sup>83</sup>

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<sup>82</sup>Johansson v. Gudmundson (1909), 11 W.L.R. 176.

<sup>83</sup>Zouch d. Abbott & Hallet v. Parsons (1765), 97 E.R. 1103 (K.B.), supra, f.n. 82.

We see no reason why a power of attorney should be treated differently from other methods of appointment of agents.

#### 8. GUARANTEES AND OTHER THIRD PARTY OBLIGATIONS

The other party to the contract may insist upon obtaining the benefit of the obligation of an adult as a protection against the minor's lack of capacity. In the case of a contract which is void, a guarantee is probably unenforceable.<sup>84</sup> If the minor's obligation is only voidable it is not clear whether a guarantee is enforceable if the minor repudiates the contract or does not ratify it; in cases not involving infants, guarantees have been enforced although the principal obligations were unenforceable.<sup>85</sup> It is clear that if the third party undertakes a primary obligation, whether an indemnity or otherwise, he will be bound.<sup>86</sup> The distinction is artificial and the enforceability of the obligation should not depend upon the form in which it is put.

#### III. REFORMS ELSEWHERE

New Zealand and New South Wales have recently enacted statutes relating to minors' contracts. In England the

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<sup>84</sup>Coutts & Co. v. Browne-Lecky, [1947] 1 K.B. 104.

<sup>85</sup>C. L. Hagan Transportation Ltd. v. Canadian Acceptance Corporation Ltd., [1974] S.C.R. 491; Edmonton Airport Hotel Co. Ltd. et al v. Credit Foncier Franco-Canadien, [1965] S.C.R. 441.

<sup>86</sup>Pearson v. Calder (1916), 35 O.L.R. 524 (Ont. A.D.); Feldman v. Horn and Rae (1960), 33 W.W.R. 568 (Alta. D.C.).

Latey Committee made proposals for change in the law though no legislation has been enacted. We will now discuss the three proposals.

1. ENGLAND

In 1967 the Lord Chancellor's Committee on the Age of Majority (the Latey Committee) prepared a report<sup>87</sup> which made proposals for the reduction of the age of majority and for the reform of the law of minors' contracts. The Committee enunciated two principles:

- (a) nothing should be done to make it more difficult for an infant to withdraw from an unwise transaction;
- (b) the infant must not be allowed to profit materially from his incapacity.

To give effect to the two principles the Committee proposed that contracts entered into by a minor should not be enforceable against him<sup>88</sup> but that a minor who fails to perform his part of a contract should account to the other party for benefits received under the contract, subject to a discretionary power in the court to grant him relief to such an extent as it thinks fit.<sup>89</sup> If on the other hand the minor has parted with money or property under a contract which is unenforceable against him, he should be entitled to its

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<sup>87</sup> Cmnd. 3342.

<sup>88</sup> para. 299.

<sup>89</sup> Para. 309.



return, subject to his obligation to account to the other party for any benefit received by him under the contract before he resiles from it.<sup>90</sup> Without reaching a firm conclusion the Committee did not think that its proposals should apply to a fully executed contract.<sup>91</sup> Its proposals have been criticized as leading to the erosion of the present protection enjoyed by minors.<sup>92</sup>

The Latey Committee thought that the minor should be bound by a ratification of a contract after majority.<sup>93</sup> They proposed that the minor should be liable in deceit for a fraud not connected with his age.<sup>94</sup> They proposed that he should remain exempt from liability for fraudulent misrepresentation as to his age, their proposed restitutionary provisions being in their opinion sufficient to protect the adult even if the minor is guilty of such fraudulent misrepresentation.<sup>95</sup> They recommended that an adult should be bound by a contract to accept liability in the event of the failure of a minor to carry out what he has undertaken to do, even though the minor's undertaking is unenforceable against the minor, but only if an appropriate warning to the surety appears on the document signed by him.<sup>96</sup>

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<sup>90</sup>Para. 310.

<sup>91</sup>Para. 312.

<sup>92</sup>Report on the Age of Majority and Related Matters, Ontario Law Reform Commission, 1969, 50-51.

<sup>93</sup>Paras. 337-340.

<sup>94</sup>Para. 351.

<sup>95</sup>Para. 354.

<sup>96</sup>Para. 366.

## 2. NEW ZEALAND

The New Zealand Minors' Contracts Act<sup>97</sup> recognizes two classes of minors. A contract entered into by a minor who has reached the age of eighteen years is enforceable against him, subject to the power of the court to relieve against it.<sup>98</sup> The class of minors with whom we are concerned is those who have not reached eighteen years, the age of majority. For them the general principle is that the contract shall be "unenforceable against a minor but otherwise shall have full effect as if the minor were of full age".<sup>99</sup> However, the court may enforce the contract or declare it binding on the minor if it considers it "fair and reasonable".<sup>100</sup> The court is to consider the circumstances surrounding the making of the contract, the subject matter and nature of the contract, the nature and value of any property involved, the age and means of the minor and all other related circumstances.<sup>101</sup> It can order any restitution and compensation which it deems just. Its discretion extends to claims against minors by sureties.<sup>102</sup> The guarantee or indemnity itself is enforceable by the creditor against the surety.<sup>103</sup>

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<sup>97</sup> Statutes of New Zealand, 1969, No. 41.

<sup>98</sup> Section 5.

<sup>99</sup> Section 6(1).

<sup>100</sup> Section 6(2).

<sup>101</sup> Section 6(3).

<sup>102</sup> Section 7.

<sup>103</sup> Section 10.

A minor may enter into a binding contract with the approval of the Magistrate's Court.<sup>104</sup> The procedure, which was available even before the 1969 Act, appears to be frequently used.

The approach of the New Zealand statute is somewhat similar to that of the Latey Committee, though the power of the court to enforce the contract against the minor is a significant difference.

### 3. NEW SOUTH WALES

The New South Wales statute is the Minors (Property and Contracts) Act.<sup>105</sup> It applies to "civil acts", a term which includes things other than contracts, but we will refer only to contracts. If a contract is for a minor's benefit it is "presumptively binding on him",<sup>106</sup> i.e., binding on him as if he were not under the disability of infancy,<sup>107</sup> unless he lacks, by reason of his youth, the understanding necessary for his participation in the contract.<sup>108</sup> Otherwise the contract is not binding upon him unless he affirms it after majority<sup>109</sup> or does not repudiate it before

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<sup>104</sup>Section 9.

<sup>105</sup>Statutes of New South Wales, 1970, No. 60.

<sup>106</sup>Section 19.

<sup>107</sup>Section 6(3).

<sup>108</sup>Section 18.

<sup>109</sup>Section 30(1).

he attains the age of nineteen years.<sup>110</sup> However, the court may approve a contract which upon such approval becomes binding upon the minor,<sup>111</sup> or it may grant to the minor capacity to enter into a particular contract or description of contracts or into all contracts.<sup>112</sup> The court's powers to approve contracts and to grant capacity are to be exercised only for the benefit of the minor.

The statute deals separately with property. A disposition is "presumptively binding" unless the consideration is manifestly inadequate.<sup>113</sup> Even if the disposition is made under an unenforceable contract the court cannot re-open it without the consent of the other party.<sup>114</sup> A disposition to a minor is also presumptively binding unless the consideration is manifestly excessive.<sup>115</sup> In ordinary circumstances the contract is not made binding merely because the disposition is binding.

If a minor refuses to pay under a contract the other party may ask the court to affirm or repudiate the contract,<sup>116</sup> and if the court repudiates the contract it may then make

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<sup>110</sup>Section 31.

<sup>111</sup>Section 30(2).

<sup>112</sup>Sections 26, 27.

<sup>113</sup>Section 20(1).

<sup>114</sup>Section 37(3).

<sup>115</sup>Section 20(2).

<sup>116</sup>Section 30.

the necessary adjustments between the parties.<sup>117</sup> There is also provision that if an independent solicitor or the Public Trustee certifies that the minor makes a disposition freely and understands its nature and that the consideration is not manifestly inadequate, the disposition will be binding.<sup>118</sup>

The Act provides that an infant may appoint an agent by power of attorney or otherwise and that an act done by the agent is as valid as the act of the minor himself.<sup>119</sup> A guarantor of an obligation of a minor is bound by the guarantee to the extent to which he would be bound if the minor were not a minor.<sup>120</sup> The infant is made liable in tort whether or not his tort is connected with a contract and whether or not the cause of action in tort is in substance a cause of action in contract.<sup>121</sup>

The legislation imposes liability upon the minor in cases in which the common law did not do so and its policy is therefore open to argument by those who think that his liability should not be increased. It may also be open to criticism on the grounds that it will be difficult for an adult party to determine whether or not a contract is for the benefit of the minor so as to be binding, a problem

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<sup>117</sup>Section 37.

<sup>118</sup>Sections 28, 29.

<sup>119</sup>Section 46.

<sup>120</sup>Section 47.

<sup>121</sup>Section 48.

comparable to that of determining whether or not goods are necessities. The court will face the same problem.

#### IV. PROPOSALS FOR CHANGE

##### 1. UNENFORCEABLE CONTRACTS

As we have said, we think that the present law relating to the contracts of minors is unsatisfactory and in need of change. It is often uncertain. It is sometimes harsh. The court does not have power to relieve against its harshness.

If the law is to be reformed, the first question is whether it should give some protection to young persons against liability on their contracts. It is obvious that it must protect children of tender years, but a more difficult question is when its protection should end. Our answer is that the law should protect minors against the consequences of their immaturity and inexperience but that it should not protect contracting parties who have attained the age of majority. We recognize that a test based upon age is arbitrary but we think that it will serve the purpose and we do not think that any other kind of test is practicable. The Legislature by the Age of Majority Act<sup>122</sup> decided that the age of eighteen is the age at which young persons should acquire all the rights and undertake all the responsibilities of adulthood and we do not see any reason to recommend a change in that decision.

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<sup>122</sup>S.A. 1971, c. 1.

## RECOMMENDATION #1

*THAT THE LAW GIVE SOME PROTECTION TO MINORS  
FROM LIABILITY ON THEIR CONTRACTS.*

The most difficult question of all is what protection the law should give. We start by saying that contracts entered into by minors should be declared unenforceable against them except to the extent that the law expressly makes them enforceable. Contracts should however remain enforceable against adult parties to them.

In many cases it would be unconscionable for the minor to refuse to perform the contract while retaining benefits received under it. In many others it would be wrong not to allow him to recover money or property he has parted with under the contract. The court should therefore have a broad discretionary power to do justice by requiring either party to return money or property or to make compensation for benefits received. Our recommendation includes contracts between minors as well as contracts between adults and minors.

## RECOMMENDATION #2

*EXCEPT AS PROVIDED IN THE PROPOSED ACT A CONTRACT  
MADE BY A MINOR*

- (1) SHALL NOT BE ENFORCEABLE AGAINST THE MINOR;*
- (2) SHALL BE ENFORCEABLE AGAINST OTHER PARTIES  
AS IF THE MINOR HAD ATTAINED THE AGE OF  
MAJORITY.*

## RECOMMENDATION #3

(1) IF A CONTRACT IS UNENFORCEABLE AGAINST A MINOR BECAUSE OF HIS MINORITY AN ACTION FOR RELIEF UNDER THIS RECOMMENDATION MAY BE BROUGHT

(i) BY THE MINOR; AND

(ii) AFTER THE MINOR HAS REPUDIATED THE CONTRACT, BY AN ADULT PARTY.

(2) IN ANY SUCH ACTION THE COURT MAY:

(i) GRANT TO ANY PARTY SUCH RELIEF BY WAY OF COMPENSATION OR RESTITUTION OF PROPERTY OR BOTH AS IS JUST; AND

(ii) UPON DOING SO MAY DISCHARGE THE PARTIES FROM FURTHER OBLIGATION UNDER THE CONTRACT.

## 2. ENFORCEABILITY OF CERTAIN CONTRACTS

At this point we see two alternative proposals. The first would create a special category of contracts enforceable against minors; the second would not. A majority of our Board prefer the first proposal and a minority prefer the second. We all agree that either proposal is preferable to the existing law. Our divergence of view is merely as to which of the two proposals would be better.

The majority believe that the law should interfere with contracts only to the extent necessary to give reasonable protection to minors against unwise contracts; that the law should recognize that it is essential for minors to be able to acquire things and services by contract; that it should recognize the interest of adults in being able to deal with minors; that it should not allow a minor to take unconscionable



advantage of the protection given to him by law; and that it should be as simple and intelligible as possible. To the majority these considerations suggest that an adult who deals fairly with a minor should be able to enforce the contract and that if he cannot enforce it he should be protected against loss. If the adult does not deal fairly with the minor Recommendation #2 would apply.

In the view of the majority an adult party should be able to enforce against a minor a contract which is fair and reasonable in itself and in the circumstances of the minor. In making the contract, the adult should be able to proceed on the facts known to him unless there is something in the circumstances which should put him on his guard. He should bear the burden of showing two things. One is that he thought that the contract was fair. The other is that he had reasonable grounds for that opinion. The proposal resembles the New South Wales plan except that an adult who had acted reasonably would not be affected by circumstances unless he knew or should have known of them.

In any particular case the first questions which would have to be considered under the majority proposal are whether or not the minor got fair value for what he gave and whether or not the transaction was free from overreaching. If the answers are affirmative, the contract will be fair and reasonable in itself. The next questions are whether or not the contract was fair and reasonable in the circumstances of the particular minor as known to the adult and whether or not it was reasonable for the adult to proceed without further investigation into the facts. If the answers to those questions are also affirmative the adult would have satisfied the burden of proof and he would be entitled to enforce the contract against the minor.

The majority proposal would, however, allow the minor to escape from a contract which is apparently fair and reasonable but is in fact improvident for him. They would make it a condition of escape that he restore the adult party to as good a position as if the contract had not been made. The adult party would therefore lose nothing but a chance for profit, and the minor would not be permitted to obtain unconscionable benefit from his minority. There may not be many cases in which it would be in the minor's interest to take advantage of such a provision but it may be useful in some circumstances, particularly if the contract is still executory.

The majority think that their proposal is fair to the adult. It is true that he must make a decision as to whether the contract is fair and that he must consider the possibility that a court may disagree with him, but in most cases the difficulty will be more apparent than real. A contract for food, clothing or shelter at the going price would usually appear to be fair and reasonable in the interest of the minor and the circumstances would not usually suggest the need for inquiry. However, if the contract is for an expensive fur coat or automobile, the adult party would have a heavy burden of inquiry. Even if the adult party is mistaken as to the fairness of the contract he can expect the court to exercise its discretionary powers to do justice between himself and the minor. Nor will he suffer if the minor is allowed to escape from a contract which is apparently fair and reasonable but actually improvident if the minor must restore him to his original position or to an equivalent position.

The majority also believe that the proposal is fair to minors. It is, in their view, in the interests of minors

that they be allowed to make fair and reasonable contracts. If the contract is fair and reasonable a minor should not be heard to complain about carrying it out. While there may be some cases in which a minor is bound by a contract which, because of circumstances unknown to the adult party, is not fair and reasonable in the interest of the minor, such cases should be rare. Their importance (particularly since the minor will not be bound unless the contract is fair and reasonable in itself) is outweighed by the importance to minors of enabling adult parties to deal with them in the much more common cases in which the appearance of fairness corresponds with the facts.

The majority's recommendation is therefore as follows:

#### RECOMMENDATION #4

- (1) (i) *AN ADULT PARTY MAY ENFORCE A CONTRACT AGAINST A MINOR IF HE SATISFIES THE COURT;*
  - (a) *THAT AT THE TIME THE CONTRACT WAS MADE THE ADULT PARTY BELIEVED IT TO BE FAIR AND REASONABLE IN ITSELF AND IN THE CIRCUMSTANCES OF THE MINOR; AND*
  - (b) *THAT HIS BELIEF WAS REASONABLE.*
- (ii) *IN DETERMINING WHETHER OR NOT THE ADULT PARTY'S BELIEF WAS REASONABLE THE COURT SHALL HAVE REGARD ONLY TO THE CIRCUMSTANCES WHICH WERE OR SHOULD HAVE BEEN KNOWN TO THE ADULT PARTY.*
- (2) *NOTWITHSTANDING SUBSECTION (1) A COURT MAY REFUSE TO ENFORCE A CONTRACT AGAINST A MINOR IF THE MINOR SATISFIES THE COURT:*

- (i) *THAT THE CONTRACT WAS IMPROVIDENT  
IN THE INTEREST OF THE MINOR; AND*
- (ii) *THAT THE MINOR BY RESTITUTION OR  
COMPENSATION OR A COMBINATION OF  
BOTH HAS PUT OR WILL PUT THE ADULT  
PARTY IN AS GOOD A POSITION AS IF  
THE CONTRACT HAD NOT BEEN MADE.*

The minority of our Board would prefer not to include Recommendation #4. Their position is similar to that of the Latey Committee and they accept its reasoning. No difficulty should be placed in the way of a minor who wants to withdraw from an unwise contract; but if he wishes to withdraw he should compensate the adult for any benefit received. The minority further believe that the law will be certain and intelligible if it provides that no contract is enforceable against a minor. They further believe that the reduction of the age of majority to eighteen years greatly reduces the force of any argument for a class of enforceable contracts. They believe that Recommendation #2 and Recommendation #3 would make a satisfactory and complete statement of the law. They believe that Recommendation #4(1) would increase uncertainty and complexity without commensurate advantage and that Recommendation #4(2) would add to the complication of the law while giving little relief to the minor.

### 3. MARRIED MINORS

The New Zealand statute gives married minors almost complete capacity to contract. It may be thought that married minors have greater need to enter into contracts, or it may be thought that marital status confers greater business sense. However, we do not think that marriage lessens

the need for the protection of the law, and we make no recommendation that it do so.

#### 4. EXECUTED CONTRACTS

Another question is whether our proposed reforms should apply to executed as well as to executory contracts. We think that it should apply to both. The fact that the adult has pocketed the minor's money or otherwise received the benefit of performance by the minor should not deprive the minor of the protection of the law.

#### RECOMMENDATION #5

*THE PROPOSED ACT SHOULD APPLY TO EXECUTED  
AS WELL AS TO EXECUTORY CONTRACTS.*

#### 5. AFFIRMATION AND REPUDIATION

The next question is whether a contract which is unenforceable at the time it is made should be capable of affirmation later. We think that the minor should be able to affirm the contract after he attains the age of majority. We think also that the danger that the minor may repudiate the contract should not threaten the adult party indefinitely. It is sufficient that the law give him a reasonable time after majority to repudiate the contract, and if he does not do so the contract should become binding upon him. We think that a reasonable time is one year. Subject to a dissent by two of our members we also think that an adult party who wishes to ascertain his position should be able to give a written notice to the minor after majority requiring him to affirm or repudiate the contract within 30 days of the receipt of the notice. If the minor does not repudiate,

the contract should become enforceable against him. If he does repudiate, then the adult party would be entitled to ask the court for whatever relief he is entitled to under Recommendation #3.

RECOMMENDATION #6

*A CONTRACT MAY BE AFFIRMED BY A MINOR WHO HAS ATTAINED THE AGE OF MAJORITY AND AFTER SUCH AFFIRMATION MAY BE ENFORCED AGAINST HIM.*

RECOMMENDATION #7

*(1) AN ADULT PARTY MAY BY NOTICE IN WRITING REQUIRE A MINOR WHO HAS ATTAINED THE AGE OF MAJORITY TO AFFIRM OR REPUDIATE A CONTRACT WITHIN 30 DAYS FROM RECEIPT OF THE NOTICE.*

*(2) UNLESS SUCH A MINOR REPUDIATES A CONTRACT:*

*(i) WITHIN 30 DAYS FROM THE RECEIPT BY HIM OF A NOTICE UNDER SUBSECTION (1), OR*

*(ii) BEFORE OR WITHIN ONE YEAR AFTER THE DATE UPON WHICH HE ATTAINS THE AGE OF MAJORITY,*

*WHICHEVER PERIOD FIRST EXPIRES, THE CONTRACT MAY BE ENFORCED AGAINST HIM.*

RECOMMENDATION #8

*FOR THE PURPOSES OF THIS ACT, REPUDIATION OF A CONTRACT IS EFFECTED BY:*

*(1) A REFUSAL TO PERFORM THE SAME OR A MATERIAL TERM THEREOF; OR*

*(2) THE MAKING OF A CLAIM FOR RELIEF UNDER RECOMMENDATION #3 OR RECOMMENDATION #4(2); OR*

- (3) *THE GIVING OR THE MAKING OF REASONABLE EFFORTS TO GIVE ORAL OR WRITTEN NOTICE OF REPUDIATION TO THE ADULT PARTY.*

6. MISTAKE AS TO MINOR'S AGE

In many cases the adult does not know that the other party is a minor. We think that the burden should be upon the adult to inquire and investigate rather than upon the minor to inform. Although it is the minor who knows the facts, his failure to inform is likely to arise from the very inexperience and immaturity against which the law should protect him; and standard representations of age inserted in standard forms of contracts would otherwise easily circumvent the law. Further, the adult party will have the protection of the court even if the contract is unenforceable, while if an improvident contract is treated as enforceable the results to the minor may be serious.

Subject to two dissents by members of our Board, we think that our previous recommendations should apply to a case in which the minor lies about his age as well as to a case in which the adult merely does not know that he is a minor.

RECOMMENDATION #9

*THE PROPOSED ACT SHOULD APPLY WHETHER OR NOT:*

- (1) *THE ADULT IS AWARE THAT THE MINOR HAS NOT ATTAINED THE AGE OF MAJORITY; OR*
- (2) *THE MINOR HAS REPRESENTED HIMSELF TO HAVE ATTAINED THE AGE OF MAJORITY.*

## 7. MINOR'S LIABILITY IN TORT

We think that in tort as well as in contract the adult should have no recourse against a minor who lies about his age. The proposed Act should so provide.

We have said (page 16) that the distinction between those tort actions which are in substance actions on a contract and those which are not is artificial and uncertain. We think that the distinction should be abolished insofar as it puts a minor in a different position from an adult. A tort will be conduct separate and apart from the making of the contract and we think that unless the existence of the contract would provide an adult with a defence to an action in tort it should not do so for a minor.

### RECOMMENDATION #10

- (1) *A MINOR IS NOT LIABLE TO AN ADULT FOR DAMAGE RESULTING FROM FALSE REPRESENTATIONS AS TO THE AGE OF THE MINOR.*
- (2) *EXCEPT AS PROVIDED IN SUBSECTION (1) IT IS NOT A DEFENCE TO AN ACTION IN TORT AGAINST A MINOR THAT:*
  - (a) *THE TORT IS CONNECTED WITH A CONTRACT;*  
*OR*
  - (b) *THE CAUSE OF ACTION FOR THE TORT IS IN SUBSTANCE A CAUSE OF ACTION IN CONTRACT;**SAVE TO THE EXTENT THAT THE CONTRACT WOULD PROVIDE A DEFENCE FOR THE MINOR IF HE HAD ATTAINED HIS MAJORITY.*

## 8. VALIDATION OF MINORS' CONTRACTS

We believe that a court should be able to give its approval to a beneficial contract which a minor has entered



into or which he wishes to enter into, and that a contract so approved should be enforceable against the minor. The Infants Act<sup>123</sup> already empowers the Supreme Court to order a sale, lease or other disposition of a minor's real estate<sup>124</sup> and to approve a settlement of his claim for damages for personal injury.<sup>125</sup> In New Zealand the Magistrate's Court can give approval to all contracts made by minors. In New South Wales the Supreme Court can do so. There will be cases in which a contract will be for the benefit of the minor and when the other party will not want to enter into it without a legal assurance that it will be enforceable against the minor.

We believe that in comparatively small transactions a party to the contract should be able to apply to the Family Court for approval. The procedure is simpler in that court and the subject matter seems appropriate for it. On the other hand, where substantial matters of contract and property are involved, we believe that the application should be to the court which exercises general jurisdiction in larger matters relating to contract and property, that is, to the Trial Division of the Supreme Court of Alberta.

Where should the line be drawn between a small transaction and a large one? Any limit will be arbitrary. We recommend that \$2,500 be the limit of the jurisdiction of

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<sup>123</sup>R.S.A. 1970, c. 185.

<sup>124</sup>Section 2.

<sup>125</sup>Section 16.

the Family Court and that it be based upon the consideration which the minor gives or promises to give under the contract, whether in money or money's worth. To avoid uncertainty as to whether his order is valid, the Family Court judge's decision as to the value of the consideration should be enough to establish his jurisdiction. It should be possible to raise the \$2,500 limit by order in council in case the value of money continues to fall.

#### RECOMMENDATION #11

- (1) *A CONTRACT ENTERED INTO BY A MINOR IS ENFORCEABLE AGAINST HIM IF IT IS APPROVED BY THE COURT ON HIS BEHALF.*
- (2) *THE MINOR OR ANY ADULT PARTY TO THE CONTRACT MAY APPLY FOR THE APPROVAL OF THE COURT EITHER BEFORE OR AFTER THE CONTRACT IS ENTERED INTO.*
- (3) *THE COURT SHALL NOT APPROVE A CONTRACT UNLESS SATISFIED THAT APPROVAL IS FOR THE BENEFIT OF THE MINOR ON WHOSE BEHALF IT IS APPROVED.*
- (4) *FOR THE PURPOSES OF THIS SECTION, "COURT" MEANS:*
  - (i) *A JUDGE OF THE FAMILY COURT IF HE IS SATISFIED THAT THE CONSIDERATION GIVEN BY THE MINOR UNDER THE CONTRACT OR DISPOSITION HAS A VALUE NOT EXCEEDING \$2,500 OR SUCH HIGHER FIGURE AS MAY BE PRESCRIBED BY THE LIEUTENANT GOVERNOR IN COUNCIL; OR*
  - (ii) *THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA IN ANY OTHER CASE.*

Despite the reduction in the age of majority there may be some minors who are handicapped in business by lack of

capacity to make contracts. The need to return to the court for approval of specific contracts may be unduly burdensome. We therefore believe that it would be desirable that the Supreme Court should have power to grant to a particular minor the capacity to make contracts generally or any description of contracts.

#### RECOMMENDATION #12

- (1) *THE TRIAL DEIVISION OF THE SUPREME COURT OF ALBERTA ON APPLICATION BY A MINOR MAY BY ORDER GRANT TO THE MINOR CAPACITY TO ENTER INTO CONTRACTS OR ANY DESCRIPTION OF CONTRACTS.*
- (2) *THE COURT SHALL NOT MAKE SUCH AN ORDER UNLESS SATISFIED THAT IT IS FOR THE BENEFIT OF THE MINOR.*
- (3) *A CONTRACT MADE BY THE MINOR UNDER ANY SUBSISTING GRANT OF CAPACITY SHALL BE ENFORCEABLE AGAINST HIM.*

#### 9. DISPOSITIONS OF PROPERTY

We think that the proposed Act should place beyond dispute the effect of a disposition of property by a minor under a contract which is unenforceable against him. It would be unsatisfactory to leave title to property in limbo until the contract becomes binding or the court deals with the matters. We believe that the best way to deal with the problem is to use the analogy of a voidable contract and to provide that title passes to the other party until the court or the parties decide otherwise. We believe also that third parties who in the meantime acquire the property or an interest in it in good faith and for value should be protected.

## RECOMMENDATION #13

(1) A DISPOSITION OF PROPERTY OR A GRANT OF A SECURITY OR OTHER INTEREST THEREIN MADE UNDER A CONTRACT WHICH IS UNENFORCEABLE AGAINST A MINOR IS EFFECTIVE TO TRANSFER THE PROPERTY OR INTEREST UNLESS AND UNTIL THE COURT ORDERS RESTITUTION UNDER RECOMMENDATION #3(2).

(2) A DISPOSITION OF PROPERTY OR A GRANT OF A SECURITY OR OTHER INTEREST THEREIN TO A BONA FIDE TRANSFEREE OR GRANTEE FOR VALUE IS NOT INVALID FOR THE REASON ONLY THAT THE TRANSFEROR OR GRANTOR ACQUIRED THE PROPERTY UNDER A CONTRACT WHICH IS UNENFORCEABLE AGAINST A MINOR.

10. GUARANTEES AND INDEMNITIES

We see no reason why an adult guarantor should receive the protection which the law gives to minors. We therefore believe that a guarantor should be bound by his guarantee of a minor's obligation to the same extent as if the minor had been an adult.

A more difficult question arises if the guarantor is called upon to honour his guarantee by paying the creditor's claim. Should the guarantor then be able to claim indemnity from the minor? We think that for this purpose the guarantor should be in the same position as any other person dealing with a minor. If the original contract was enforceable against the minor the guarantor should be able to claim indemnity from the minor. If it was not, the court should have a discretionary power to give the guarantor relief against the minor. We recognize that many guarantees are given gratuitously and that it may appear harsh to hold a guarantor to

his guarantee without giving him the right to recoup himself fully from the principal debtor, but we think that the protection of the minor must come first and that the intervention of a guarantor should not be a means of indirectly enforcing a contract against the minor.

#### RECOMMENDATION #14

- (1) A GUARANTOR OF AN OBLIGATION OF A MINOR IS BOUND BY HIS GUARANTEE TO THE SAME EXTENT THAT HE WOULD BE BOUND IF THE MINOR WERE AN ADULT.
- (2) IF THE OBLIGATION IS ENFORCEABLE AGAINST THE MINOR UNDER THIS ACT HE SHALL INDEMNIFY THE GUARANTOR TO THE SAME EXTENT THAT HE WOULD IF THE MINOR WERE AN ADULT.
- (3) IF AN OBLIGATION IS NOT ENFORCEABLE AGAINST A MINOR BY VIRTUE OF RECOMMENDATION 2(1) OR RECOMMENDATION 4(2) THE COURT MAY GRANT TO A GUARANTOR SUCH RELIEF AGAINST THE MINOR AS IS JUST.
- (4) IN THIS SECTION "GUARANTOR" INCLUDES A PERSON WHO ENTERS INTO A GUARANTEE OR INDEMNITY OR OTHERWISE UNDERTAKES TO BE RESPONSIBLE FOR THE FAILURE OF A MINOR TO CARRY OUT A CONTRACTUAL OBLIGATION.

#### 11. AGENCY

A minor may act through an agent. We see no reason to differentiate for the purposes of this report between a contract entered into in person and one entered into through an agent. The law already so provides but we think that it is necessary to provide for powers of attorney which are not valid under the present law.

## RECOMMENDATION #15

*A MINOR MAY APPOINT AN AGENT BY POWER OF ATTORNEY OR OTHERWISE.*

12. LIMITATION OF MINOR'S LIABILITY

We do not think that our recommendations will be construed so as to make a contract enforceable against a minor to a greater extent than it would be enforceable against an adult in the same position. However, to avoid doubt, we think that the proposed Act should make its intention clear.

## RECOMMENDATION #16

*SAVE AS PROVIDED IN RECOMMENDATION #3(2)  
NOTHING IN THE PROPOSED ACT:*

- (1) DISENTITLES A MINOR TO ANY DEFENCE AVAILABLE TO AN ADULT; OR*
- (2) IMPOSES UPON A MINOR A GREATER LIABILITY BY REASON ONLY OF HIS MINORITY.*

13. STATUTORY PROVISIONS CONCERNING AGE

Other statutes may provide for the age at which a contract can be made. Examples are the Marriage Act, the Insurance Act, and the Student Loans Guarantee Act. Where the Legislature has addressed its mind to the particular circumstances, the resulting legislation should govern that contract.

## RECOMMENDATION #17

*A STATUTE OF THE PROVINCE PRESCRIBING THE AGE  
AT WHICH A PERSON MAY ENTER INTO A CONTRACT  
OR DESCRIPTION OF CONTRACT SHALL HAVE EFFECT  
NOTWITHSTANDING THE PROPOSED ACT.*

14. OTHER STATUTORY PROVISIONS

The proposed Act will cover ground which is not covered by the Infants Act. The proposed Act, however, covers only cases where the minor himself makes the contract; the Infants Act also covers cases in which contracts and dispositions are made for the minor. We think that where the minor makes the contract the proposed Act should be the only one to apply, and we think that the Infants Act should be amended accordingly. This recommendation applies to the provisions for contracts relating to real property and settlements of personal injury claims.

There is one anomaly in the Infants Act. The combined effect of sections 11, 12 and 13 and of the Age of Majority Act is that a female minor 17 years of age, and no one else, may with the sanction of the Supreme Court make a valid and binding property settlement in contemplation of marriage. If such a settlement is ever made, we think that the procedure which we have proposed for the recommended Act will be appropriate, and we therefore recommend the repeal of sections 11 to 13 of the Infants Act.

When these amendments have been made we believe that the proposed Act and the Infants Act will be able to exist side by side.

There will, however, be a conflict between our recommendations and section 4(2) of the Sale of Goods Act which is reproduced at page 4. That subsection provides that an infant must pay a reasonable price for necessities sold and delivered to him. It and subsection 4(3) should be amended by deleting the references to infants and minors.

RECOMMENDATION #18

*THAT THE INFANTS ACT BE AMENDED:*

*(a) BY ADDING AFTER SECTION 1 A NEW SECTION 1.1:*

*1.1 THIS ACT DOES NOT APPLY TO A CONTRACT  
TO WHICH THE MINORS' CONTRACTS ACT  
APPLIES.*

*(b) BY STRIKING OUT SECTIONS 11, 12 and 13.*

RECOMMENDATION #19

*THAT SECTION 4 OF THE SALE OF GOODS ACT BE  
AMENDED:*

*(1) BY STRIKING OUT THE WORDS "TO AN INFANT OR  
MINOR OR" FROM SUBSECTION (2); AND*

*(2) BY STRIKING OUT THE WORDS "INFANT OR MINOR  
OR" FROM SUBSECTION (3) AND BY SUBSTITUTING  
THE WORD "SUCH" FOR "OTHER" IN THE SAME  
SUBSECTION.*

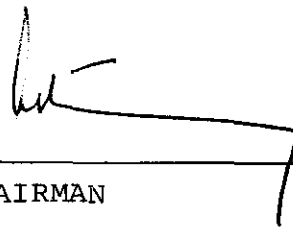
We attach a draft Act which might be considered as the basis for an Act to give effect to our recommendations.



December, 1974

W. F. Bowker  
R. P. Fraser  
G. H. L. Fridman  
Wm. Henkel  
W. H. Hurlburt  
H. Kreisel  
Frederick Laux  
W. A. Stevenson

NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this Report.

A handwritten signature in dark ink, appearing to be 'W. F. Bowker', written over a horizontal line.

CHAIRMAN

A handwritten signature in dark ink, appearing to be 'W. F. Bowker', written over a horizontal line.

DIRECTOR

MINORS' CONTRACTS ACT

1. In this Act unless the context otherwise requires "court" means the Trial Division of the Supreme Court of Alberta.
2. Except as provided in this Act a contract made by a minor:
  - (1) shall not be enforceable against the minor;
  - (2) shall be enforceable against other parties as if the minor had attained the age of majority.

(Recommendation #2, p. 28)

- 3.(1) If a contract is unenforceable against a minor because of his minority, an action for relief under this section may be brought:
  - (i) by the minor; and
  - (ii) after the minor has repudiated the contract, by an adult party.
- (2) In any such action the court may:
  - (i) grant to any party such relief by way of compensation or restitution of property or both as is just; and
  - (ii) upon doing so may discharge the parties from further obligation under the contract.

(Recommendation #3, pp. 29)

- 4.(1) (i) ~~An~~ adult party may enforce a contract against a minor if he satisfies the court:
  - (a) that at the time the contract was made the adult party believed it to be fair and reasonable in itself and in the circumstances of the minor; and
  - (b) that his belief was reasonable.

(ii) In determining whether or not the adult party's belief was reasonable the court shall have regard only to the circumstances which were or should have been known to the adult party.

(2) Notwithstanding subsection (1) a court may refuse to enforce a contract against a minor if the minor satisfies the court:

(i) that the contract was improvident in the interest of the minor; and

(ii) that the minor by restitution or compensation or a combination of both has put or will put the adult party in as good a position as if the contract had not been made.

(Recommendation #4, pp. 32-33)

5. This Act applies to executed as well as to executory contracts.

(Recommendation #5, p. 34)

6. A contract may be affirmed by a minor who has attained the age of majority and after such affirmation may be enforced against him.

(Recommendation #6, p. 35)

7.(1) An adult party may by notice in writing require a minor who has attained the age of majority to affirm or repudiate a contract within 30 days from receipt of the notice.

(2) Unless such a minor repudiates a contract:

(i) within 30 days from the receipt by him of a notice under subsection (1), or

(ii) before or within one year after the date upon which he attains the age of majority,

whichever period first expires, the contract may be enforced against him.

(Recommendation #7, p. 35)

8. For the purposes of this Act repudiation of a contract is effected by:
- (1) A refusal to perform the same or a material term thereof; or
  - (2) The making of a claim for relief under section 2 or section 3(2); or
  - (3) The giving or making of reasonable efforts to give oral or written notice of repudiation to the adult party.

(Recommendation #8, pp. 35-36)

9. This Act applies whether or not:
- (1) The adult is aware that the minor has not attained the age of majority; or
  - (2) The minor has represented himself to have attained the age of majority.

(Recommendation #9, p. 36)

- 10.(1) A minor is not liable to an adult for damage resulting from false representations as to the age of the minor.
- (2) Except as provided in subsection (1) it is not a defence to an action in tort against a minor that:
- (i) the tort is connected with a contract;  
or
  - (ii) the cause of action for the tort is in substance a cause of action in contract.
- save to the extent that the contract would provide a defence to the minor if he had attained his majority.

(Recommendation #10, p. 37)

- 11.(1) A contract entered into by a minor is enforceable against him if it is approved by the court on his behalf.

- (2) The minor or any adult party to the contract may apply for the approval of the court either before or after the contract is entered into.
- (3) The court shall not approve a contract unless satisfied that approval is for the benefit of the minor on whose behalf it is approved.
- (4) For the purposes of this section, "court" means:
  - (i) A judge of the Family Court if he is satisfied that the consideration given by the minor under the contract or disposition has a value not exceeding \$2,500 or such higher figure as may be prescribed by the Lieutenant Governor in Council; or
  - (ii) The Trial Division of the Supreme Court of Alberta in any other case.

(Recommendation #11, p. 39)

- 12.(1) The Trial Division of the Supreme Court of Alberta on application by a minor may by order grant to the minor capacity to enter into contracts or any description of contracts.
- (2) The court shall not make such an order unless satisfied that it is for the benefit of the minor.
- (3) A contract made by the minor under any subsisting grant of capacity shall be enforceable against him.

(Recommendation #12, p. 40)

- 13.(1) A disposition of property or a grant of a security or other interest therein made under a contract which is unenforceable against a minor is effective to transfer the property or interest unless and until the court orders restitution under Recommendation #3(2).
- (2) A disposition of property or a grant of a security or other interest therein to a bona fide transferee or grantee for value

is not invalid for the reason only that the transferor or grantor acquired the property under a contract which is unenforceable against a minor.

(Recommendation #13, p. 41)

- 14.(1) A guarantor of an obligation of a minor is bound by his guarantee to the same extent that he would be bound if the minor were an adult.
- (2) If the obligation is enforceable against the minor under this Act he shall indemnify the guarantor to the same extent that he would if the minor were an adult.
- (3) If an obligation is not enforceable against a minor by virtue of section 2(1) or section 4(2) the court may grant to a guarantor such relief against the minor as is just.
- (4) In this section "guarantor" includes a person who enters into a guarantee or indemnity or otherwise undertakes to be responsible for the failure of a minor to carry out a contractual obligation.

(Recommendation #14, p. 42)

15. A minor may appoint an agent by power of attorney or otherwise.

(Recommendation #15, p. 43)

16. Save as provided in section 3(2), nothing in this Act:

- (1) disentitles a minor to any defence available to an adult; or
- (2) imposes upon a minor a greater liability by reason only of his minority.

(Recommendation #16, p. 43)

17. A statute of the province prescribing the age at which a person may enter into a contract or description of contract has effect notwithstanding this Act.

(Recommendation #17, p. 44)

18. The Infants Act is amended:

- (1) by adding after section 1 a new section 1.1:

1.1 This Act does not apply to a contract to which the Minors' Contracts Act applies.

- (2) by striking out sections 11, 12 and 13.

(Recommendation #18, p. 45)

19. Section 4 of the Sale of Goods Act is amended:

- (1) by striking out the words "to an infant or minor or" from subsection (2); and
- (2) by striking out the words "infant or minor or" where the same appear in subsection (3) and by substituting the word "such" for "other" in the same subsection.

(Recommendation #19, p. 45)

ACKNOWLEDGMENTS

The Alberta Law Foundation has made a grant to the Institute for the purposes of this project.

We have had the benefit of research done by G. R. Bretten, formerly Assistant Director of the Institute. We have also had the benefit of further research done by Mr. G. N. Pratt at our request. Finally, Professor David R. Percy has prepared a research paper for us and has acted as consultant in connection with our consideration of our recommendations and in connection with the drafting of our Report, all of which has been of very great assistance to us. Mr. Lloyd W. Gardiner, Q.C., the Public Trustee, also gave us very useful advice and suggestions for which we are grateful. Needless to say, we bear the responsibility for our recommendations.