

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON MINORS' CONTRACTS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.,		

ATTORNEYGENERAL FOR BRITISH COLUMBIA.

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON MINORS' CONTRACTS

Underlying the law of minors' contracts there are two competing, if not irreconcilable, policies. One is that minors in the marketplace should be protected from themselves and from the unscrupulous. The other is that where circumstances require or make it desirable that a minor have access to the marketplace, that access should not be impeded or barred. In an attempt to reach a compromise between these two policies the common law has become doctrinaire, tortuous and virtually impossible for the layman to comprehend. In addition, by virtue of the protection which the law accords them, minors are frequently placed in positions in which they may profit unjustifiably at the expense of adults with whom they may contract.

This Report is devoted to an examination of the inadequacies of the existing law, a review of proposals for change made in other jurisdictions, and proposals for change in this Province which are aimed at providing a more balanced and rational compromise between the two competing policies.

INTRODUCTION

The law has always accorded a special place to people under the age of majority (which is nineteen in this Province) on the assumption that young people have need of a degree of protection in their dealings with others.

This doctrine has extended to the law of contract, and as early as 1788, Mr. Justice Buller, in *Campton v. Col-linson*, compendiously if bluntly stated the position to be that "an infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity."

In meeting specific fact situations the common law has, unfortunately, developed certain inconsistencies and certain legalistic concepts which has made it difficult for minors, and those who deal with them, to appreciate with any clarity or precision just what the law governing a minor's contract is, and what property rights flow from such a contract. The confusion of the common law has been compounded by attempts in the nineteenth century to bring about reform by statutory means.

The matter has attracted recent attention in a number of common law jurisdictions, and in 1974 the Law Reform Commission of British Columbia sought the agreement of the AttorneyGeneral for its inclusion on the Commission's approved programme. This agreement was obtained.

The development of the law to date has been characterized by attempts to reconcile two fundamentally conflicting policies. On the one hand there is the object of encouraging adults to deal with minors so that the latter's needs for goods and services may be met. On the other hand there is the object of protecting minors from unfair or unwise bargains, marked by a willingness on the part of the courts to retreat from principles of freedom of contract and to remake the bargain or restore the parties to their original positions.

These policies have lost none of their force with the passing of time, and have not become less irreconcilable. What we have attempted in this Report is to make recommendations which seek a fresh compromise and an escape from the more difficult inconsistencies and illogicalities of the common law.

"Necessaries" are defined in section 9 of the *Sale of Goods Act* as:

... goods suitable to the condition in life of [a]... minor ... and to his actual requirements at the time of sale and delivery.

The common law does not exclude the rendering of services from the category of necessaries, but the definition compendiously states the common law on what may constitute a necessary. In other words, the term embraces more than the basic necessities of life, and its meaning will vary according to "the age of the infant, his income and his rank, his profession or calling." In *Wong v. Kim Yee* school fees, school books and clothes were held to be necessities, but life insurance was not, because the court found that insurance was not a requirement of a single man. In *Soon and Soon v. Watson*, by contrast, the purchase of a house was held to be a necessary because the minor was married and had a child. On the authority of *Pyett v. Lampman* it appears that goods or services supplied to a minor for the purpose of furthering any business in which he may be engaged, are not necessities.

It has been pointed out that whether articles are necessaries is a question of mixed fact and law, and that it is for the plaintiff to prove as a matter of law that the goods are of a description reasonably suitable to the minor's condition in life. It remains a matter of fact, to be determined by reference to the minor's requirements, whether the goods or services are necessaries. It need hardly be pointed out that this creates a good deal of difficulty for the supplier who wishes to rebut the minor's plea of infancy with the plea that what he supplied was a "necessary." Although the concept of enforcing the minor's undertaking to pay for necessaries was developed "not for the benefit of the tradesman who may trust the infant, but for the benefit of the infant himself," it is to be doubted that many adults are encouraged to deal with the minor solely on account of such elusive tests.

The nature of a minor's liability on contracts involving necessaries remains a matter for debate, and the question is whether the liability is strictly contractual or arises in quasicontract. Both views have been espoused in the same case. Buckley L.J. said: "The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy could make." Support for this view is found in *Roberts v. Gray*, a case involving an executory contract for instruction (thought to be in the class of contracts for necessaries), where damages were awarded for breach. Fletcher Moulton L.J., on the other hand, held in *Nash v. Inman* that:

An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensus*

This theory is supported by the wording of section 9 of the *Sale of Goods Act*, which provides in part that:

... where necessaries are *sold* and *delivered* to an infant or minor, ... he must pay a *reasonable* price therefor. [Emphasis added.]

In other words, the minor's liability does not arise until necessary goods have actually been supplied to him, and he need pay only a "reasonable" price for them rather than the contract price.

The nature of the minor's liability for necessaries is of practical significance in the situation in which his obligations are executory. If, for example, he has contracted to accept necessary services, but has not yet had the benefit

of them, is he able, without penalty, to reject the services on one view of the law he would be liable for breach of contract, but on another would escape liability. The orthodox view would appear to be that, at least as far as goods are concerned, the minor is not liable for breach where they have not been delivered to him. In the matter of executory contracts for services, the position remains more uncertain.

A similar uncertainty surrounds the liability of the minor where a loan has been made to him for the purpose of payment for necessaries. The common law would not enforce repayment, but in the case where the loan was actually expended on necessaries, equity would subrogate the lender to the supplier of necessaries. There is authority for the proposition that this equitable doctrine falls outside the terms of section 2 of the *Infants Act*, but persuasive arguments to the contrary have been advanced.

2. *Beneficial Contracts of Service*

Contracts of service which are for a minor's benefit are, together with contracts for necessaries, binding on him. They are, on the narrowest interpretation, contracts of employment or apprenticeship, and the rationale for the rule was set out by Fry L.J. in *De Francesco v. Barnum*. He said: "There is another exception which is based on the desirableness of infants employing themselves in labour, therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be, *prima facie*, binding upon an infant."

An important component of the rule, however, is that the contract must, on the whole, be for the minor's benefit. The desirability of a minor's being able to find employment does not extend as far as his finding employment under conditions which are to his substantial disadvantage. But if the contract is found to be for the minor's benefit, it will be binding on him despite its executory nature.

The exact boundaries of the class of contracts for service are somewhat obscure. They extend beyond contracts of employment and apprenticeship in the strict sense, but do not embrace all contracts by which a minor can be said to earn a living. They do not, for example, encompass the so-called "trading contract" of the minor who is in business for himself. Yet in *Doyle v. White City Stadium* the conditions attaching to the grant of a boxing licence were held to bind the plaintiff, a minor, because a licence enabled him to earn a living, and this was for his benefit. Similarly, in *Chaplin v. Leslie Frewin (Publishers) Ltd.*, the appellant, also a minor, was seeking to recover the copyright of a book for which he had received royalties from the respondent publishers. A majority of the English Court of Appeal held the appellant was bound by his contract, Danckwerts L.J. stating that: "the advantage of the contract to the plaintiff in the present case was that it would enable the plaintiff to make a start as an author and thus earn money to keep himself and his wife."

Thus the law surrounding the binding effect of the contract of service is similar to the law relating to necessaries in the uncertainty of its application to specific fact situations.

3. ___ Contracts Validated by Statute

From time to time it has become apparent to the Legislature that the incapacity of a minor to make a valid contract, and to be bound by it, may inconvenience the minor and those who might otherwise deal with him. Recognition of this fact has given rise to a number of situations in which the Legislature has either conferred a limited capacity to contract on the minor himself, or has authorized an appropriate class of adult, or a court, to make or approve contracts on the minor's behalf.

(a) ___ *Contracts of the minor under statute*

The *Apprenticeship and Tradesmen's Qualification Act* provides in part that:

A minor who enters into a contract of apprenticeship which is registered in accordance with the provisions of this Act is liable upon the same, and shall have the benefit thereof according to its terms, as if he had been of legal age ...

The *Infants Act* provides in section 4 that:

Where a minor over the age of sixteen years, who has no parent or legal guardian, or who does not reside with his parent or guardian, enters into an engagement, written or verbal, to perform any service or work, he is liable upon the same, and shall have the benefit thereof, as if he had been of legal age...

The exact effect of this section is not clear. Given the state of the common law regarding beneficial contracts of service, it might seem on one reading of the provision that it is an extension of the common law, designed to bind the minors to whom it applies to contracts of service whether they are beneficial or not. This conclusion seems to be fortified by the fact that it applies to a limited class of minors only those without parents or guardians to oversee their interests or provide for them. It may have been thought, at the time the provision was enacted, that it was more important to encourage the employment of such minors under any conditions than to retain the common law (with its possibly discouraging effect on potential employers) that employment contracts are valid only if they are beneficial. On the other hand, it is conceivable that the courts would today regard this provision as a simple reinforcement of the common law, and imply from the use of the word "benefit," that the contract must be beneficial to the minor if it is to bind him. In the absence of reported decisions on the matter, any answer is speculative.

The *Workers' Compensation Act* provides in section 12 that a worker under the age of nineteen is *sui juris* for the purpose of Part I of the Act.

The *Cooperative Associations Act*, the *Credit Unions Act*, the *Insurance Act*, the *Savings and Loan Association Act*, and the *Societies Act*,

40. R.S.B.C. 1960, c. 362, s. 23. all confer limited contractual capacity on minors for the purposes of those Acts.

(b) *Contracts made on behalf of minors*

Section 17 of the *Infants Act* provides in part that:

- (1) The guardian of an infant may enter into an agreement for or on behalf of the infant,
 - (a) where the agreement involves a consideration not greater than three thousand dollars, with the approval of the Public Trustee signed by the impression of the seal of the Public Trustee on the agreement; or
 - (b) in all other cases, with the approval of the Supreme Court by order made on the petition of the guardian in a summary manner
- (4) The agreement of a guardian under this section is as good and effectual to all intents and purposes as if the infant had been of full age and had himself entered into the agreement.

Although the remainder of section 17 is directed more particularly to the settlement of minors' claims in litigation, subsections (1) and (4) appear to confer a broad power on a guardian, the Public Trustee and the Supreme Court, acting in concert, to make contracts of any kind concerning the minor.

The *Department of Highways Act*, the *Department of Public Works Act*, the *Gas Utilities Act*, the *Public Schools Act* and the *Railway Act* all confer power on parents and guardians of minors to convey and otherwise deal with the estate of a minor when that estate is required for the purposes of those Acts.

Under the *Infants Act* the Supreme Court has power to approve contracts for marriage settlements by minors, and to approve dealings relating to leases held by minors. The *Settled Estates Act* also confers wide powers on the Supreme Court, as section 3 of the Act provides that:

Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any less estate, is an infant, the land shall be deemed to be a settled estate under this Act.

The *Equal Guardianship of Infants Act*, the *Official Guardian Act* and the *Trustee Act* confer a number of powers and duties on guardians, trustees, official guardians, the Public Trustee and the Supreme Court in relation to the management and disposition of the property of minors, and the bringing and defending of actions on behalf of minors, but these powers and duties impinge only tangentially on the subject of minors' contracts, and we are not here concerned with them.

C. Contracts Not Binding

There are three broad categories of contracts which are not binding on the minor those which are voidable, those which are void by virtue of section 2 of the *Infants Act*, and those which are void at common law. Yet the precise distinctions to be drawn between these three categories are elusive, and an attempt to analyse the effects of holding a minor's transaction to be one rather than another reveals the law in one of its more confusing and illogical aspects.

1. ___ Voidable Contracts

At common law there were two kinds of minors' contracts which were held to be voidable. Into one class fell those contracts which were binding on the minor, despite his minority, until he chose to repudiate them. The second class comprised those contracts which could not be binding on the minor during his minority, and could be made binding after he attained his majority only by an act of ratification.

There are a number of difficulties associated with assigning a voidable contract to one category or the other, but in British Columbia the difficulties are, to a degree, made hypothetical by virtue of section 3 of the *Infants Act*, which provides that:

No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

Under the heading of "voidable contracts," therefore, we are concerned for the present only with that comparatively small class of contract which, at common law, is binding on the minor until repudiated by him either during his minority or at some reasonable time after he attains majority.

The rationale for making a distinction between these contracts and others is that they involve the minor in acquiring "an interest in some subjectmatter of a permanent nature, i.e. a subjectmatter to which continuous or recurring obligations are incident," although whether the rationale is convincing is a matter for legitimate argument.

The contracts which have most commonly been held to be voidable in the present sense are those involving land, shares in companies, partnerships and marriage settlements. All impose obligations on the minor until he sees fit to make a specific repudiation of them.

The repudiation, if it takes place after attainment of majority, must be "prompt or, put another way, "must be within a reasonable time after the minor ceases to be a minor."

In the situation where a minor's contract is avoided, the law concerning the rights of the minor, and the party who contracts with him, to money paid out, property transferred, or the value of services rendered, is in some confusion. There is frequently a conflict between the desirability of restitution by the minor and the present policy of the law that a contract should not be binding on the minor, since to decree restitution would often be to enforce the contract.

When a minor avoids a contract can he recover any money which he may have paid out pursuant to the contract? The rule would appear to be that he cannot, unless there has been a total failure of consideration. This doctrine has been reiterated in both Canadian and English cases.

A different rule almost certainly applies to the transfer of property. In *Whalls v. Learn* it was held that the plaintiff was entitled to the return of land which she had conveyed during her minority, and this holding was

64. *E.g., Edwards v. Carter*, n. 58 *supra*. followed in *Phillips v. Sutherland*. In both cases, however, it was emphasized that recovery of the land was dependent on return by the minor of any consideration received. The English cases are to the same effect. It has been pointed out in an English text on the law of contract, however, that in the recent decision of *Chaplin v. Leslie Frewin (Publishers) Ltd.* some doubt was cast on the rule that a minor is entitled to the return of property, by strong dicta of two of the judges of the Court of Appeal. Although the question did not arise directly, because the contract at issue was held to be a beneficial contract of service, both Danckwerts L.J.

68. *Ibid.* 97. and Winn L.J. were prepared to state that the plaintiff, a minor, was not entitled to the return of a copyright he had assigned, even though he was willing to return the royalties which were part of the consideration for the contract.

The rights of recovery of the other party upon a minor's repudiation of a contract are even more obscure.

Can the other party recover debts which have fallen due before the repudiation, or does the act of repudiation serve to obliterate the minor's liability in this respect? Cheshire & Fifoot point out that in an Irish decision it was held that a minor was liable for debts that had accrued before repudiation, but that although the point has never been expressly decided in England, *dicta* there indicate that the minor's liability is completely abrogated by repudiation. In Canada the better view would seem to be that repudiation leads to abrogation but the matter is by no means settled.

Can the other party, when the minor repudiates, recover money or property which he may have paid to the minor pursuant to the contract? The cases seem to indicate that the issue depends on whether it is the minor or the other party who is bringing the action in which the question arises. In *Cowern v. Neild* the defendant, a minor, was a merchant who had contracted to supply the plaintiff with hay and clover. The plaintiff had paid for the hay and clover in advance, but the hay was never delivered, and the clover had been rejected because of its poor quality. The plaintiff brought an action for the return of the money, but it was held that the infancy of the defendant was a complete defence to the action, in the absence of fraud on the defendant's part. The plaintiff was not, therefore, entitled to recover what he had paid. We have seen, however, that where, by reason of his minority, a minor seeks in an action to recover property which he may have transferred pursuant to a voidable contract, it is a condition of his recovery that he restore to the other party any consideration which he may have received. In *Whalls v. Learn* Boyd C. said:

(The plaintiff) cannot succeed in recovering land) without making complete restoration to the defendants of the specific, or an equivalent, value of that which she has received from the defendants during nonage. Coming to

the Court as an adult she will be dealt with as any other litigant and will be required to do equity as a condition of getting relief.

We have already mentioned that section 3 of the *Infants Act* removes the possibility of ratification, on attainment of majority, of a contract made during minority, and that therefore a large number of contracts remain unenforceable against the former minor throughout his life. Section 3, however, is not without its own difficulties and inconsistencies..

To begin with, Cheshire & Fifoot point out that the section may have gone considerably further than was intended, as the debate in the House of Lords at the time of its introduction 'in England gives some indication that it was designed only to prevent the ratification or revitalizing of debts contracted during minority, and not to embrace all those contracts not binding until ratified.

Nonetheless, the words do go further than the simple abolition of the ability to ratify or revitalize debts at majority, but just how much further they go has been a matter of debate. It is agreed on all sides that the section is badly drafted, but commentators disagree on its actual effect. Cheshire & Fifoot maintain the following: that a ratification after majority of a contract made during minority is not actionable; that a fresh promise after majority to pay a debt contracted during minority is not actionable; but that a fresh promise after majority to perform a contract made during minority is actionable. Treitel, on the other hand, states that:

It is submitted that the true effect of section 2 is as follows. There is no longer any distinction between promises to pay debts and ratifications of contracts. Both are unenforceable. There is, however, a distinction between promises to pay debts and ratifications of contracts on the one hand, and fresh promises to pay debts and to perform contracts on the other. Fresh promises are perfectly valid.

Whatever the precise effect of section 2 may be, there is some difficulty occasioned by the distinction to be drawn between ratifications on the one hand, and fresh promises on the other. The question is basically one of fact, and the distinction was somewhat obscurely described by Lindley J. in *Ditcham v. Worrall*, a case involving a promise to marry. He said:

A ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding.

... but there must be a consideration for a new and independent promise ... Where there is consideration and no new term introduced, the intention of the parties, if clearly expressed, will afford a test whereby to determine whether there has been a new promise or only a ratification of a former promise. But, where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is clear that this result at all events was intended by them, and if there is no law rendering such interpretation inadmissible.

It can very seldom be clear to minors, or those who contract with them, whether actions or omissions following the attainment of majority will fall into the category of ratifications or fresh promises.

2. Contracts Void under the *Infants Act*

Section 2 of the *Infants Act* provides that:

All contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void: but this enactment shall not invalidate any contract into which an infant may; by any existing or future Statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

There are thus three kinds of contracts by minors which are declared to be "absolutely void" in British Columbia: contracts of loan, contracts for the supply of nonnecessary goods, and contracts involving accounts stated. The important question, however, is the meaning and effect of the term "absolutely void," and this is a matter upon which the law is by no means certain.

A case in which the words "absolutely void" were given their literal meaning was *Courts & Co. v. Browne-Lecky*, in which it was held that the guarantor of a minor's overdraft with a bank was not liable to pay the bank on the guarantee. The reason for the decision was that the *Infants Relief Act* declared the minor's transaction with the bank "absolutely void" and therefore there was no debt to guarantee. In British Columbia, however, the decision has been specifically disapproved by Craig J. in *First Charter Financial Corporation Ltd. v. Musclow*, where it was stated that:

I think it is wrong, in principle, to allow a person who has guaranteed an infant's financial obligation to contend successfully that he is not liable because the infant's contract which he guaranteed is void when he has made that guarantee knowing that the infant could not be liable for the debt ...

It also appeared to be the judge's view that, despite the wording of section 2 of the *Infants Act*, the plea of infancy under that section is one which may be raised only by the minor himself.

An attempt should be made, however, to analyse the meaning of the words "absolutely void" in differing contexts. Can the minor sue on a contract which is absolutely void? Does property pass? What are the rights of recovery of a minor and the party who purports to contract with him, when the transaction falls within the ambit of section 2? Unfortunately, there appear to be no certain answers to any of these questions, and they have been described by the Latey Committee as giving rise to "acute legal controversy."

The question whether a minor can sue upon an absolutely void contract appears never to have been expressly decided, but the orthodox view is that he may. Atiyah notes that the arguments in favour of this position are *ab inconvenienti* rather than based on authority, but points out that to give the words "absolutely void" their literal meaning would be to hold that a minor who has paid for, but not taken delivery of, nonnecessary goods, would not be able to obtain the goods. In such a situation, too, the defence of infancy would be able to be set up against the minor himself. Treitel, on the other hand, has mounted a careful and substantial argument that the minor may not sue upon a contract that is absolutely void, relying on the wording of the Act and the argument that it should not be ignored simply because it has one undesirable consequence.

On the question whether property in nonnecessary goods passes to the minor, such authority as there is seems to indicate that it does. Lush J., expressing himself *obiter* in *Stocks v. Wilson*, thought so, and in *Watts v. Seymour* it appears to have been assumed. In that case the success of a prosecution under a statute regulating the sale of firearms depended on whether property in a firearm had passed to a seventeen year old. Although the matter of infancy was not pleaded, it was held that property had passed from the accused salesman to the minor, and that the accused had therefore infringed the statute.

The rights of the minor and the other party to restitution where there is an "absolutely void" transaction are similarly confused.

There are two important English cases relating to the right of the minor to recover money or goods with which he may have parted. The first is *Valentine v. Canali*. Here a minor became the lessee of a house, and as part of the transaction undertook to pay for some furniture contained in it. After occupying the house for some months, and having made partial payment for the furniture, he applied to have the lease set aside, and to recover the partial payment. The court ordered the cancellation of the lease, but as to the recovery of the money paid for the furniture, it was held:

No doubt the words of s. 1 of the *Infants' Relief Act, 1874* are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.

In *Pearce v. Brain* the minor exchanged his motorcycle for the defendant's car. After a short period the car broke down, and the minor sought to recover his motorcycle. Swift J. considered *Valentine v. Canali*, and stated that in order for the minor to succeed it was incumbent on him "to show a complete failure of consideration." It has been suggested that, on the authorities, at least three tests are available to determine whether the minor is able to recover money or goods:

- (i) Whether the minor has received any benefit under the contract. This test would allow a minor to recover where he had received goods but had never used them;
- (ii) Whether there has been a total failure of consideration. Here a minor would be precluded from recovering wherever he had received goods, regardless of whether he had used them or not;
- (iii) Whether *restitutio in integrum* is possible. This test would allow recovery by the minor if he could return the goods in the same condition in which he had received them.

Does the party who contracts with the minor have any right of recovery where he delivers money or goods to the minor pursuant to a contract falling within the ambit of section 2 of the *Infants Act*? It would seem that in the absence of fraud on the part of the minor, he does not. In *R. Leslie Ltd. v. Sheill* the defendant, a minor, negotiated a loan from the plaintiffs by fraud. The plaintiffs sought recovery from the defendant by an action for fraudulent misrepresentation or, in the alternative, for money had and received. The Court of Appeal was unanimous that the alternative claim must fail, and Lord Sumner said: "So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the *Infants' Relief Act*."

3. Contracts Void at Common Law

In other Canadian jurisdictions, in which there is no equivalent of sections 2 and 3 of the *Infants Act*, a number of cases have arisen in which the courts have declared that at common law certain contracts involving minors are void rather than voidable. These are contracts which contain penalties and other terms which are thought to be particularly oppressive or prejudicial to the minor.

This raises an interesting jurisprudential issue for British Columbia. Was section 2 of the *Infants Act* intended to be code on what contracts by minors may be held to be void, or is it open to British Columbia courts to apply the common law and hold that some contracts, not falling within section 2, are nonetheless void because they are prejudicial to a minor's interests? The issue is complicated by the fact that courts in other jurisdictions have sometimes held to be void those contracts which would, as a class, be held to be voidable under normal circumstances in this jurisdiction. The point does not appear to have been taken in British Columbia so far.

It is by no means easy to judge under what circumstances, in other jurisdictions, a normally voidable contract will be held to be void. The following cases are merely examples. In *Beam v. Beatty* a minor sold shares under terms by which he undertook to indemnify the purchaser for any loss which the purchaser might incur as a result of the sale. When the purchaser sought indemnification the court held that the contract was one involving a "bond with a penalty" and that it was therefore void rather than voidable. Because of this finding the defendant's apparent ratification of the contract was held to be ineffective, on the ground that a nullity cannot be ratified. In *Phillips v.*

Greater Ottawa Development Co. a minor contracted to buy land by a series of payments, but under the contract had no right to possession, title, or specific performance. It was held that the question whether the plaintiff, on attaining majority, had lost the right to repudiate did not arise, as the contract was void. In *McKay v. McKinley* a minor purchased land and executed mortgages for more than the properties were worth. The mortgages were discharged as void. In *Ivan v. Hartley* a minor executed a chattel mortgage over the contents of a shop, and subsequently applied to have the mortgage set aside as void. This case, perhaps, represents the furthest extension of the doctrine surrounding minors' contracts void at common law, as Hogg J., in setting aside the mortgage, said: "The chattel mortgage in question is in the usual and ordinary form ... The apparent reason for the setting aside was that the mortgage contained "certain penalties." In *Re Staruch*

112. [1957] O.W.N. 207 (C.A.), a quitclaim deed executed by a minor was set aside as void because it was not supported by adequate consideration, and in *Altobelli v. Wilson*, where a minor contracted to build a house, the contract was held to be void because "the infant had no opportunity whatsoever to obtain any benefit under it."

Assuming that the principles of these cases would be applied in appropriate circumstances in British Columbia, the precise effect of holding a minor's contract to be void at common law is, somewhat obscure. What does seem clear, however, is that the issue of ratification, or the loss of the right to repudiate by acquiescence, does not arise, on the basis that a nullity cannot be ratified, or that there is no need to repudiate a nullity. In British Columbia, of course, because of section 3 of the *Infants Act*, only the issue of repudiation is important.

Beyond this, the authorities are neither consistent nor particularly helpful on the practical distinction between a voidable and a void contract of a minor.

The question whether a minor can sue upon a void contract does not appear to have arisen, and there seems to be only one Canadian case on whether property passes. This case is *McBride v. Appleton*, in which a minor purchased a motorcycle by way of conditional sale and then transferred it to a third party: In an action by the vendor against the third party the majority of the court held that the contract was voidable rather than void, and it was only Roach J.A. who, thinking that the contract was void, dealt with the issue of the passing of property. He appeared to proceed on the assumption that property did not pass from the vendor to the minor as a matter of general principle, but in the final analysis concluded that the vendor had clothed the minor with all the indicia of title, and was therefore estopped from setting up the void contract against the third party.

The circumstances in which the minor will be entitled to restitution of any property which may have passed out of his hands pursuant to the void contract is not clear. In both *Phillips v. Greater Ottawa Development Co.* and *Altobelli v. Wilson* it appears to have been the view of the respective courts that the minor would be entitled to restitution only where there was a total lack of consideration or benefit to him, but there is an implication in *Re Staruch* that restitution may be ordered regardless of consideration or benefit.

The authorities are simply not clear on what restitutionary rights the other party to the void minor's contract may have.

D. Tort Liability and Contract

While a minor is, as a matter of general principle, liable for his torts, a plaintiff cannot use tort liability as a means of indirectly enforcing a contract against a minor. This principle, however, is uncertain in its application, as there have been numerous cases where, notwithstanding the existence of a contract between the plaintiff and a minor, the plaintiff has been permitted to succeed in tort on the basis that the wrong complained of was not sufficiently connected with the contract. The elusiveness of the distinction is normally illustrated by reference to the two wellknown cases of *Jennings v. Rundall* and *Burnard v. Haggis*. In the former case, a minor hired a horse from the

plaintiff on the understanding that it was to be "moderately ridden." In the event, the defendant rode the horse too hard, and the plaintiff sued in trover. The court held that the action was at base one in contract, and that the plaintiff could not succeed. In *Burnard v. Haggis*, by contrast, a minor again hired a horse but was specifically warned not to jump it. The defendant lent the horse to a friend, who jumped it and in so doing caused its death. The court specifically maintained the principle that a plaintiff cannot enforce a contract by suing in tort, but held that the actions of the defendant had taken the situation beyond that contemplated by the contract and that he was therefore liable.

Two British Columbia cases are also in point. In *Victoria U Drive Yourself Auto Livery Ltd. v. Wood* the defendant, a minor, hired a car from the plaintiffs. He allowed the car to be driven by a companion and, as a result of the companion's negligence, the car was wrecked. In the action by the plaintiffs for negligence the defendant set up the defence of infancy and contractual incapacity. With very little discussion the court simply applied *Burnard v. Haggis* and permitted the plaintiffs to succeed. The result was quite different, however, in *Dickson Bros. Garage and U Drive Ltd. v. Woo Wai Jing*. Here a minor again hired a car, and in the course of driving it damaged it through negligence. The contract of hire specifically stated that the bailee was to be responsible for any damage caused through negligence. It was held that as negligent conduct was envisaged by the contract, the defendant's actions were so connected to the contract that to allow the plaintiff to succeed would amount to contractual enforcement. Davey J.A. said:

The appellant gains no assistance from [*Victoria U Drive v. Wood*] ... in which an infant was held liable in tort under somewhat similar circumstances for damage caused to a car he had hired. There the Court considered the facts brought the case within the principle of *Burnard v. Haggis*; the question was one of fact, not of law, and the case is distinguishable upon the facts, the accident having been caused by a person the infant allowed to drive the car; a situation contrary to and not contemplated by the bailment.

The distinction, then, between liability *ex delicto* and immunity *ex contractu* would appear to be one of fact rather than law, and is difficult to discern with precision in any given case.

E. Fraud

Because a minor cannot be made liable on a contract, and may not be sued in tort as an alternative means of enforcing the contract, he cannot be successfully sued for the tort of deceit where he induces the other party to contract with him by fraudulently misrepresenting himself to be of full age.

There are, however, some limits on the extent to which the minor is permitted to profit from his fraud in these circumstances.

First, it would seem that where fraud is an issue, the minor may use the defence of infancy as a shield up to a point, but is not permitted to use it as a sword. In *Gregson v. Law and Barry* a minor, misrepresenting herself as being of full age, purported to transfer land. She later applied to have the transaction set aside, but Murphy J. said:

Whilst, apparently, it is true to say that being an infant she could not be made liable on a contract thus brought about, it is, I think, an altogether different proposition to say the court will actually assist her to obtain advantages based entirely on her own fraudulent act.

Secondly, equitable principles have developed in England which indicate that certain rights to restitution are available to the party who contracts with the minor on the basis of a fraudulent misrepresentation as to age. These rights have never been comprehensively defined, but textwriters agree, and the authorities support the proposition, that the plaintiff's right to be restored to the *status quo ante* must fall short of an indirect enforcement of the contract.

It has been suggested that the key to the authorities lies in whether the minor still possesses the property which has been transferred to him pursuant to the contract.

In *Lempriere v. Lange* a minor obtained a lease by fraud, and was subsequently ordered to surrender it. The claim by the lessor for damages for use and occupation of the premises was not, however, allowed; as the court thought that this went beyond a restoration of the *status quo ante* into the realm of contractual enforcement.

In *R. Leslie Ltd. v. Sheill*, where there was a contract of loan induced by fraud, and the money had been spent, A. T. Lawrence J. said: "If when the action is brought both the property and the proceeds are gone, I can see no ground upon which a court of equity could have founded its jurisdiction." Lord Sumner enunciated a similar doctrine. The difficulty presented by this case, however, is that it did not expressly overrule *Stocks v. Wilson* but merely held it "open to challenge." In *Stocks v. Wilson* it was held that a minor who had obtained goods by fraud and then disposed of them, was liable to account to the vendor for the proceeds.

Thus, the law relating to the rights to restitution of a party who contracts with a fraudulent minor remains in some uncertainty.

F. Guarantees and Indemnities

A question involving minors' contracts which has caused difficulty in the past concerns the liability of third parties who, in order to secure a contract between the minor and another party, agree to act as guarantors or indemnifiers.

In *Coutts & Co. v. Browne-Lecky* a minor was granted an overdraft from a bank, on the condition that the defendant act as a guarantor. When the plaintiff bank endeavoured to recover from the defendant on the guarantee, it was held that the action could not succeed, as the *Infants' Relief Act* made the overdraft agreement absolutely void, and it was therefore not possible to guarantee a nullity.

In *Yeoman Credit Ltd. v. Latter*, by contrast, a minor entered into a hirepurchase agreement for a car, and the defendant signed what was described as an indemnity. When the minor defaulted, the plaintiffs sought to recover from the defendant but the defence was raised that the hirepurchase agreement was void under the *Infants' Relief Act*. The Court of Appeal distinguished *Coutts v. Browne-Lecky* on the ground that the defendant had not guaranteed all the minor's obligations under the agreement, but rather had promised, as a primary obligation, to secure to the plaintiffs their intended profit. The defendant's obligation was characterized as an indemnity which might be enforced regardless of the nature of the agreement between the minor and the plaintiffs.

Coutts v. BrowneLecky turned upon the point that the agreement between the minor and the plaintiffs was "absolutely void," and thus the position of a guarantor of a minor's contract which does not fall within section 2 of the *Infants Act* is unclear if it is assumed that it will be determined by reference to *Coutts* alone. But the decision has been criticized, and the principle has not been followed in analogous cases. In *C.L. Hagan Transportation Ltd. v. Canadian Acceptance Corp.* the purchasers of a tractor gave a chattel mortgage over it to the defendant, who immediately assigned the mortgage to the plaintiffs. Under the terms of the assignment the defendant guaranteed payment to the plaintiffs in the event of a default by the purchasers. In an action to recover the value of the mortgage the defendant raised the defence that the obligation of the purchasers was, by statute, unenforceable against them. The Supreme Court of Canada held that the statute enured to the benefit of the purchasers only, and the fact that the debt was unenforceable against them did not relieve the defendant of its obligation to the plaintiffs under the guarantee.

In this context the most significant decision for British Columbia is *First Charter Financial Corp. v. Musclow*, a case which also involved a third party obligation on the purchase of a car by a minor. Craig J. found that the obligation was one of indemnity, but doubted that the legal effect of a guarantee was different. He said:

I do not agree with ... *Coutts v. Browne-Lecky*. I think it is wrong, in principle, to allow a person who has guaranteed an infant's financial obligation to contend successfully that he is not liable because the infant's contract which he guaranteed is void when he has made that guarantee knowing that the infant could not be liable for the debt and knowing, too, that the other party would not have entered into the contract unless the adult had guaranteed the debt.

While, therefore, in view of the finding of indemnity as a matter of fact in *Musclow* there may still be some marginal uncertainty in the law on this matter in British Columbia, the better view would appear to be that a guarantor may not escape liability by virtue of the principal's minority. This is consistent with the frequently repeated view that infancy is a personal privilege of which only the minor should be entitled to take advantage.

CHAPTER II PROPOSALS FOR CHANGE IN OTHER JURISDICTIONS

A. Introduction

In formulating our recommendations we have had the benefit of the work on the same subject carried out in a number of other jurisdictions in Canada and the Commonwealth. Notable among these jurisdictions in this connection have been the Province of Alberta, England, New South Wales and New Zealand. We have already acknowledged, in the Introduction to this Report, the debt of gratitude which we owe to the authors of the *Report of the Alberta Institute of Law Research and Reform on Minor's Contracts*. We have used their recommendations as a guide to the issues which we believe should be resolved in this Province, and because of this we refer to and describe those recommendations in some detail in the next chapter.

We think, however, that it would be informative and useful if we were also to summarize briefly the important features of the proposals made, and legislation enacted, in the other jurisdictions we have mentioned.

B. England

In 1965 the Lord Chancellor in England appointed a committee to inquire into questions related to the age of majority, under the chairmanship of the Hon. Mr. Justice Latey. That Committee presented its report in 1967, and among the many issues canvassed was that of the contractual capacity of minors. The principal recommendation of the entire report was that the age of majority should be lowered from twentyone to eighteen, and the Committee was therefore addressing itself, in the contractual context, to contracts made by persons under that age.

The Committee's approach to the question of minors' contracts was that the protection the law now gives rests on premises that are fundamentally sound, but that the minor should not be permitted to profit from that protection. Accordingly, it was recommended that while contracts entered into by a minor should not be enforceable by action or otherwise against the minor, where a minor receives money, property or services under a contract which he fails to perform he should be liable to account to the other party for the benefit he has received, a court having the power to relieve the minor from this liability to such an extent as it thinks fit. Similarly, it was recommended that where a minor has parted with money or property under a contract which is unenforceable against him, he should be entitled to the return of the money or property, subject to his obligation to account to the other party for any benefit the minor may have received if he resiles from the contract before it is fully performed.

To reinforce the restitutionary aspect of the proposals, the Committee recommended that courts be given wide discretionary powers in the making of adjustments in money and property between the minor and the other party. The Committee was at pains to emphasize that:

We think the best way to deal with these problems is to make it clear that the infant's obligation is designed to prevent him from profiting from his minority at the expense of the other party, and that the court should have the power to relieve the infant from this obligation to such extent as it thinks fit. The fact that a refund of part of the money he has received comes to much the same thing as an award of damages against him should not of itself lead the court to relieve the infant: it is the infant's overall position that should be considered. Clearly, where the adult party has taken advantage of the infant's age or inexperience the court would be entitled to take this into account in fixing the extent, if any, of the infant's liability ...

There is an important difference between the restitution we are here advocating and the ordinary remedy of damages. Whereas the object of damages is to compensate the plaintiff, the object of restitution is to prevent the infant from benefiting at the expense of the other party. It may be that in some circumstances the benefit to the infant will be greater than the other party's loss: in that event, it is a matter for consideration whether the infant's liability should be limited to the smaller amount; we tend to think it should be limited in this way.

In connection with its main proposal the Committee recommended the repeal of the *Infants' Relief Act, 1874*, pointing out the difficulties in interpretation to which it has given rise since its passage. In the face of the proposed repeal it was thought that minors should once again be free to ratify their contracts on attaining majority.

The Committee also recommended that minors be liable in tort in deceit even where the effect would be to enforce a contract indirectly, but concluded that they should remain exempt from liability in tort for deceit as to age where that deceit has induced a contract.

Although certain safeguards were recommended, the Committee also proposed that guarantors of minors' responsibilities should be liable on their contracts of guarantee.

The Committee's proposals were cast in somewhat general terms, and it appears to have been the intention that they would be examined by the English Law Commission before being presented to the Lord Chancellor as firm recommendations for legislative change. So far the English Law Commission has not presented a report on this matter, and this may account in part for the fact that the proposals have not been enacted.

Nonetheless they are appealing in their simplicity. Although a degree of uncertainty remains concerning the application of the doctrine of restitution to particular fact situations, the statement that minors' contracts are unenforceable against them has the advantage of clearing away a number of the uncertainties which now surround the law. We are attracted by the proposals as a point of departure for change in this Province, believing that the uncertainty of the doctrine of restitution may be overcome in time, and that this disadvantage is outweighed by the advantage of giving the courts wide powers to do what appears just in particular circumstances. The restitutionary principle has been espoused not only by the Latey Committee, but also in Alberta, New South Wales and New Zealand.

C. New South Wales

In 1970 the Parliament of New South Wales passed a complex and comprehensive statute, which set the age of majority in that State at eighteen, and codified the law relating to the civil capacity of minors in all respects. The making of contracts was assimilated, with all other civil transactions, into the concept of the "civil act." For present purposes, however, we set out only those parts of the statute which relate to the making of contracts. The basic scheme is that the contracts of minors are presumptively binding on them, subject to complicated rules relating to affirmation and repudiation by the minor, his personal representative and the court.

Under the Act, a "civil act" includes, among other things, both the making of a contract and a disposition of property. A contract is presumptively binding on the minor if it is for his benefit, unless at the time he made it he lacked, by reason of youth, the necessary understanding of its consequences. A disposition of property to the minor is presumptively binding on him unless the consideration was manifestly excessive, and a disposition of property by the minor is presumptively binding on him unless the consideration was manifestly inadequate.

Where a minor participates in a civil act and a bona fide purchaser for value who is not party to the act acquires a property interest as a result of the act, the act is presumptively binding on the minor provided that the third party was without notice of the minority.

The Act also makes provision for grants of contractual capacity to minors. The Supreme Court may confer a general or limited capacity, and the Courts of Petty Sessions may approve particular contracts. Neither court is to exercise this power unless it is of the opinion that the grant would be for the benefit of the minor. Where dispositions of property to or by a minor are at issue, there is provision for the minor to be advised by an independent solicitor or the Public Trustee, and where such advice has been rendered, the disposition is presumptively binding on the minor.

Where a person participates in a civil act while he is a minor, the act may be affirmed by the court while he is a minor (on the application of any interested person), or by him on attaining majority. The court is to affirm only where it would be for the minor's benefit.

A minor may repudiate a civil act that is not for his benefit up to the time he attains the age of nineteen.

A court may do likewise during minority. The act of repudiation itself, however, does not have effect against other parties where the civil act is presumptively binding on the minor. Where the civil act is not presumptively binding a court, on the application of any interested party, may either affirm or repudiate the civil act.

Under section 37 of the Act, where there has been a repudiation a court has wide powers to adjust rights between the parties to a civil act in which the minor has participated; but interestingly enough, where the civil act is presumptively binding in favour of any person, the court may not make any order adversely affecting his rights except with his consent.

Under section 47 guarantors of the obligations of minors are held to their guarantees, and under section 48 a minor is made responsible for his torts, regardless of whether the action amounts to indirect enforcement of the contract.

The Alberta Institute noted that this legislation might be open to criticism because it imposes liability where the common law did not do so, and because there would appear to be potential uncertainty for the courts and adult parties in determining whether a contract is for a minor's benefit. With these comments we respectfully agree. The principal object of the legislation, with its use of the concept of "presumptive binding" would appear to be to encourage adult parties to deal with minors and to secure title to property. Yet although it is difficult for us to make completely informed judgments at this distance, it would seem that the legislation, although comprehensive, is sufficiently complex to create some uncertainty in the minds of adult parties concerning their positions regarding minors. To this extent we are disposed to speculate whether adult parties are in fact encouraged to deal with minors by the terms of the legislation.

D. New Zealand

The concept of freedom of contract has always been based on an assumption of equality of bargaining power between parties, and of their ability to foresee and evaluate the consequences of their contracts. It has been assumed that people of mature judgment have the capability of recognizing unwise transactions and of resisting them. For a long period, however, the law has recognized that there is a likelihood that young people lack the maturity of judgment that is required for the principles of freedom of contract to operate in equilibrium, and has developed doctrines which protect the young from themselves and from the unscrupulous.

In all the jurisdictions in which the matter of minors' contracts has been the subject of recent study, the conclusion has been unanimous that young people continue to deserve the protection in the marketplace that the law has historically afforded them. We are of the same opinion. It is probably true that in contemporary circumstances young people who are likely to make contracts have, in general, more maturity of judgment than they did in the past. Yet it is observable that whatever the extent of this maturity, it has been matched or outstripped by the complexity of transactions in modern society, and we believe that there remains a justification for special rules governing the contracts of the young.

This belief leads us naturally to the concomitant question of which young people should have the benefit of these rules. Although in general adults probably have greater capability of assessing the consequences of their actions than, say, most sixteenyearolds, there are doubtless some sixteenyearolds who manifest greater acumen than a number of adults. This would seem to indicate that the law should vary from individual to individual, depending on his ability to appreciate the nature of the transaction in which he is engaged. But however attractive this concept may be in the abstract, it lacks a foundation in practicality. It would assume an ability on the part of the adult party to judge, according to a legal standard, the ability of every young person with whom he might contract, and this assumption is clearly insupportable. We are led, therefore, in the interest of making the law more certain, to seek a more arbitrary rule. The obvious choice is to take the age of majority and to suggest that the rules which we later recommend for the governing of the contracts of young people apply to all those who are below that age. The age of majority is nineteen in this Province, although we note that there has been a recent recommendation that it be reduced to eighteen. Because we acknowledge our choice of the age of majority to be arbitrary, it follows that we set no store by whether nineteen or eighteen is the age at which young people emerge from the protection inherent in our recommendations. We believe that certainty is the most desirable practical objective, reinforced by the belief that there is a complementary claim of consistency in the choice of the age which the Legislature lays down for the transition from legal minority to legal adulthood.

B. The Basic Recommendation

Having decided that minors should continue to receive some protection in law from the consequences of their contractual activity, we turn now to a consideration of the most crucial question. That question concerns the nature of the liability, if any, that should exist between minors and those who contract with them.

In debating this issue we have had to come to terms with its fundamental intractability. Minors not only have an interest in being protected from their own immaturity and from the unscrupulous, but also have a very real interest in securing goods and services by means of contracts. Yet it is manifest that the greater the degree of protection afforded to the minor, the lesser will be the extent to which he will be able to participate in the marketplace. The adult who knows that a contract cannot be enforced against a minor will obviously be reluctant to enter the contract in the first place.

The reforms and proposals for reform in other jurisdictions have all represented various attempts at seeking a compromise between the two opposing principles, as indeed does the present law, and we too have had to search for a workable compromise.

One option which was open to us, of course, was simply to adopt the formulae of the present law and bring such rationality and consistency into them as might be devised. This might involve a retention of the existing concepts of necessities and beneficial contracts of service, together with a statement that all other contracts are voidable at the instance of the minor.

We do not believe that this will serve. We have seen that the concepts of necessities and beneficial contracts are legalistic and that their boundaries are illdefined. We have also seen that they place a burden of inquiry on the adult which it is rarely possible for him to discharge with any certainty that he emerges with an enforceable contract. It seems unlikely that the existence of these concepts can act as any sort of encouragement for the adult to contract with the minor.

Similarly we have seen that the consequences of holding a minor's contract to be voidable are not only uncertain, but are also subject to certain arbitrary rules which in some cases may allow the adult to profit at the expense of the minor, but more commonly allow the minor to profit at the expense of the adult.

We are of the opinion, therefore, that a less narrow approach is required. Reforms and proposals for reform elsewhere divide themselves broadly into two categories those which make use of a presumption of enforceability subject to certain exceptions, and those which make use of a presumption of unenforceability, also subject to certain exceptions. Into the former category fall the New South Wales legislation and the proposals of a majority of the members of the Alberta Institute of Law Research and Reform. We have already expressed our uneasiness about the complexity of the New South Wales scheme, largely because the presumption of enforceability which is designed to encourage adult parties to contract with minors depends on the ability of those parties to perceive that a court will hold the transaction to be beneficial to the minor.

We now examine the proposals of the majority of the Alberta Institute.

Although the Institute begins with the proposition that a contract should not be enforceable against a minor, this is substantially modified by the later proposal of the majority. It is as follows:

- (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.

While we are entirely sympathetic to the aim of the Alberta majority, which is to encourage adults to contract with minors, we are in some doubt that the proposal will in fact do this. For the adult party to be secure, the contract

must not only be fair and reasonable in itself, but must also be fair and reasonable in the circumstances of the individual minor. In making his assessment the adult must have regard not only to the facts known to him, but also to facts which should have been known to him. This places on the adult a burden of inquiry which it will be difficult for him to know that he has discharged. But even if the adult does discharge the burden to his and a court's satisfaction, the contract is still subject to upset by virtue of the second part of the proposal. It seems to us, therefore, that the net result of the proposals will be to create around the law of minors' contracts an atmosphere of uneasiness that will lead adult parties to the general belief that it is better not to contract with minors at all, unless there is some more certain means of assessing the consequences. We find ourselves sharing the views of the minority of the Alberta Institute who state that:

... Recommendation 4(1) would increase uncertainty and complexity without commensurate advantage and ... Recommendation 4(2) would add to the complication of the law while giving little relief to the minor.

The reactions we have expressed to the New South Wales legislation and the Alberta Institute majority proposals indicate our belief that while the aims are laudable, the approach is selfdefeating. We have come, albeit reluctantly, to the conclusion that any attempt at compromise based on the adult's ability to prejudge the inherent fairness or benefit of a contract, and the probability of a court's reinforcing that judgment, will have no more encouraging effect on the adult than if the law simply provided that contracts against minors are unenforceable against them.

It follows from this that we prefer the approaches of the Latey Committee and the New Zealand legislation, both of which maintain the concept of unenforceability, subject to a wideranging power in a court to make orders of a compensatory or restitutionary nature where it appears that a minor is profiting from the protection which the law accords him. We are also in favour of the New Zealand principle of granting to a responsible authority the power to approve minors' contracts in advance, so that the adult will be certain that he has an enforceable contract and that minors will not be deprived entirely of contractual capacity. We describe this principle in more detail later in this chapter, but summarize it here in order to give a broad view of our approach to the issue of minors' contracts.

Our first recommendation, then, is that except where the law may specifically provide otherwise, a contract made by a minor should be unenforceable against him.

Our second recommendation is that there is no reason to change the existing rule that a minor may enforce a contract against an adult party to the contract. This proposal is common to all the jurisdictions where the matter has been recently studied, and is wellfounded in logic. We are concerned here with the protection which the law should afford to minors, and we can see no justification for an argument based on mutuality. It would be strange indeed if an adult could be held to a contract if it were made by another adult, but not if it were made by a minor.

Our third recommendation, also common to all the jurisdictions we have mentioned, is crucial. It is that where a contract made during minority is repudiated on that ground, a court should have the power to grant to any party such relief by way of compensation or restitution of property or both as is just, and in exercising this power should also have the power to discharge the parties from any further obligation under the contract.

We regard this as crucial for three principal reasons. First, it will provide some form of encouragement for adults to provide goods and services to minors. It is true that if an adult makes a contract with a minor that is later repudiated, the adult will, in general, have lost a chance for profit. However, he will retain a chance to be restored to the position that he would have been in had he not made the contract at all. Secondly, the proposal will go some way to ensuring that the minor is not, as he is under the existing law, put in a position where he may use the defence of minority as a means of profiting at the expense of the adult. Thirdly, the proposal will mitigate those instances where a minor has paid money or rendered services, repudiates the contract, and is unable to recover the money or the value of the services.

We are fully conscious that this recommendation, although not novel, will attract the criticism that it is uncertain in its application. Yet we believe that the arbitrary working of the existing rules relating to restitution and compensation, described in the first chapter, provides justification enough for the courts to be given a wide discretion in the adjustment of rights upon the repudiation of a minor's contract. We think it appropriate, however, that a court, in coming to a conclusion on the rights to restitution or compensation, should be accorded the benefit of certain legislative guidelines. The New Zealand legislation, in a slightly different context, provides that a court should have regard to the circumstances surrounding the making of the contract; the nature and value of any property involved; the age and means of the minor; and all other relevant circumstances. These matters, it seems to us, are appropriate for a court to consider when arriving at a decision on what orders of restitution or compensation may be characterized as just on the repudiation of a minor's contract.

Acceptance of the recommendations we have just outlined would mean the repeal of sections 2 and 3 of the *Infants Act*, and we believe this to be salutary. Their interpretation has caused much difficulty, and their removal would greatly assist in the clarification of law.

The Commission therefore recommends the following:

1. *Sections 2 and 3 of the Infants Act should be repealed.,*
2. *Except where the law may specifically provide otherwise, a contract made by a minor*
 - (a) *should not be enforceable against the minor;*
 - (b) *should be enforceable against other parties as if the minor had attained the age of majority.*
3. *If a contract is unenforceable against a minor because of his minority an action for relief ought to be able to be brought:*
 - (a) *by the minor; and*
 - (b) *after the minor has repudiated the contract, by an adult party.*
4. *In any action brought as a result of any enactment of the preceding recommendation the court ought to be able to:*
 - (a) *grant to any party such relief by way of compensation or restitution of property or both as is just; and*
 - (b) *upon doing so ought to be able to discharge the parties from further obligation under the contract;*

provided that no grant of relief should enable the party contracting with a minor to recover more than is necessary to restore him to the position in which he found himself before entering into the contract.
5. *In making any order under an enactment of the preceding recommendation, the court ought to have regard to:*
 - (a) *the circumstances surrounding the making of the contract;*

- (b) *the subjectmatter and nature of the contract;*
- (c) *in the case of a contract relating to property, the nature and value of the property;*
- (d) *the age and the means (if any) of the minor; and*
- (e) *all other relevant circumstances.*

C. Married Minors

An issue which caused a division among us was whether married minors should be subject to the law relating to contracts by adults, or whether they should retain the protection which the law now gives them as minors, revised as we recommend.

The Latey Committee and the Alberta Institute were against the principle of marriage conferring contractual capacity, and the New South Wales legislation does not touch on the point. The Latey Committee believed that it would create an undesirable incentive to early marriage, while the Alberta Institute thought that marriage does not "lessen the need for the protection of the law."

In New Zealand, by contrast, the legislation specifically provides that:

... a minor who is or has been married shall have the same contractual capacity as if he were of full age.

This is obviously a question on which the opinions of reasonable people may differ. When the working paper preceding this Report was issued, a minority of the Commission was of the view that it would be discriminatory to create a special rule for married minors, believing that the fact of marriage does not transform the minor into someone who is automatically capable of protecting himself or herself against an unfair or unwise bargain.

A majority, however, believed that in a situation which is basically one of compromise between protection of minors on the one hand, and their interest in being able to acquire goods and services by means of contract on the other, the situation of the married minor justified an adjustment of the compromise. It was thought that married minors, by virtue of their situation, have a greater need than others for full contractual capacity, and that since the age of majority, although the focal point of our recommendations, is essentially a matter of arbitrary choice, the philosophy of the basic proposal would not be compromised if full contractual capacity were justifiably conferred on those who are below that age but are married.

The Commission's tentative proposal, therefore, on which comment was specifically invited, was that a minor who is or has been married should have the same contractual capacity as if he or she were of full age.

A number of those who responded to the working paper took issue with this proposal, and urged upon us the proposition that married minors need at least as much, if not more, protection than unmarried minors, in view of the fact that married minors are likely to enter into more contracts. To meet the argument that married minors have in general a greater need for goods and services than unmarried minors, and therefore ought to be less inhibited in their access to the marketplace, our respondents pointed out that under another of our proposals, provision is made for the conferring of either full or limited contractual capacity by responsible authorities in appropriate circumstances, and that this would serve to lessen any practical hardship which might arise from according equal treatment to all minors.

In the face of these arguments one of our number was disposed to accept what was formerly the minority position, and although two members of the Commission remain in favour of different treatment for married minors, the majority now recommend that:

6. *No special rules should be devised for those minors who are or have been married.*

D. Executed Contracts

The Latey Committee were undecided on the issue whether a court should have the power to reopen contracts involving minors when those contracts have been fully executed by both sides. The Alberta proposals, and the New South Wales and New Zealand legislation, however, make no distinction between executed and executory contracts.

We agree that there is a superficial attraction in the notion that once a contract is over and done with, even if it involves a minor, it should remain undisturbed in the interest of bringing certainty and finality into affairs. Yet reflection reveals that an unwise or unfair transaction does not lose its character simply because it is concluded. When a young person agrees to pay too high a price for a car or a piece of land, and then makes payment and takes possession of the car or the land, there is nothing about the conclusion of the transaction which would justify logically a withdrawal of the protection which the law would give if payment had not been made or possession had not been taken.

Bearing in mind our recommendation concerning compensation and restitution for the party to a contract which is repudiated by a minor, we further recommend that:

7. *The recommendations enunciated in this Report should apply to executed as well as to executory contracts.*

E. Affirmation and Repudiation

Because of section 3 of the *Infants Act* it has been impossible in this Province since 1897 for a minor to affirm, on attaining majority, a contract made by him during Minority. We have, however, recommended the repeal of section 3, and we should therefore consider the merits of restoring the common law doctrine of affirmation. In other words, should it be open to a person who has made a contract during minority, to consider himself bound by that contract once he becomes of full age?

We have seen that the origins of section 3 are obscure, but they appear to have arisen out of a desire by nineteenth century English legislators to protect those with newlyacquired adult status from submitting to the appeals of moneylenders that debts incurred during minority should be acknowledged and thus become enforceable. We have also seen that section 3 has given rise to a legalistic debate on the difference between a fresh promise and an affirmation, the one being enforceable, the other not.

Our recommendations are based on the judgment that while minors ought to continue to receive some protection in the law, adults have no need of the particular protection suggested here. It seems to us to be a logical extension of this judgment that if an adult decides that it is to his advantage to consider himself bound by a contract made during his minority, he is capable of taking responsibility for that decision. The members of the Alberta Institute were of the same opinion.

The Alberta Institute were also in favour of making the law relating to affirmation and repudiation more clearcut. They said:

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 [the provisions for compensation and restitution].

We entirely agree with these proposals, as we believe it to be reasonable that once a minor has reached adulthood the law should not go out of its way to extend a privilege and protection that is attributable to minority. The parties may deal with each other as adults, and we can perceive no reason why one party should not be entitled to ask the other to declare himself on whether he intends to affirm or repudiate the contract.

The only matter on which we differ from the Alberta Institute is the length of time suggested for the former minor to make a decision. Although we recognize that any time chosen is largely arbitrary, we think thirty days is perhaps too short, and would prefer a sixtyday period.

We adopt the Alberta Institute's proposals and recommend the following:

8. *A contract may be affirmed by a minor who has attained the age of majority and after such affirmation it may be enforced against him.*
9. *An adult party ought to be able by notice in writing to require a minor who has attained the age of majority to affirm or repudiate a contract within sixty days from receipt of the notice. Unless the minor repudiates the contract within that time, it ought to be enforceable against him.*
10. *Where a notice is not issued by an adult party under the preceding recommendation, a contract which is made by a minor ought, unless it is repudiated by him within one year after the date upon which he attains the age of majority, thereafter to be enforceable against him.*
11. *For the purposes of these recommendations, repudiation of a contract ought to be able to be effected by:*
 - (a) *a refusal to perform the same or a material term thereof; or*
 - (b) *the making of a claim for relief under Recommendation (4); or*
 - (c) *the giving or the making of reasonable efforts to give oral or written notice or repudiation to the adult party.*

F. Minor's Liability in Tort

In Chapter I of this working paper we saw that the common law inhibited the use of the law of tort as a means of enforcing a contract against a minor.

As was pointed out in Chapter II, the jurisdictions where changes have been made or proposed have adopted varying attitudes to this aspect of the law. The Laty Committee believed that no change was required except in the case of a minor's fraud. It was thought that where there was fraud unconnected with age, a minor should not be permitted to escape liability. But in the case of a fraud related to age it was said:

We have carefully considered [the] position and ... we sympathise with those witnesses who argue that the law is wrong to protect a fraudulent infant against an innocent and deceived adult party ... [But] If the law were to provide simply that an infant who held himself out as being of full age should be liable in contract as if he were of full age, or be liable in tort for his fraud, then a way round the whole law of infancy might be opened. We should soon find in contracts a clause to the effect that "I am over 18" (or whatever the age of capacity is to be). The adult party would refrain from asking questions and would, no doubt, in many cases be able to show that he relied on the infant's representation.

We believe that our proposals as to the liability of an infant in restitution will adequately protect the other party whether or not the infant was fraudulent, and that no other liability should be imposed on the infant in these circumstances.

In New South Wales the legislation simply provides that a minor will be liable for a tort whether or not the tort is connected with a contract. In New Zealand the common law position is maintained, with a special provision that a minor's fraud should be taken into account in the making of a decision on restitution and compensation.

The Alberta Institute adopted the position that the difficulty of deciding when an action in tort was or was not an indirect means of enforcing the contract justified, with one notable exception, an abolition of the common law rule. Thus, a minor should be liable for a tort connected with a contract to the extent that he would be liable for other torts. The exception, however, relates to a misrepresentation of age. In this instance the Alberta Institute's reasoning is the same as that of the Latey Committee.

In the working paper which preceded this Report we said:

Our position is different again. We are conscious of the danger that an abolition of the common law rule relating to torts connected with a contract may very well result in a subversion of the scheme of protection which we propose. Although we are not particularly content with the rather obscure distinction between torts connected and unconnected with the contract, we have found it impossible to devise an alternative which would not exculpate minors from liability for torts for which they should remain liable. We are therefore attracted by a retention of the common law. But to this a majority of us have our own exception. We do not believe that it is right or proper for a minor to escape liability in tort where he has consciously and deliberately misrepresented his age with the intention of deceiving an adult party into contracting with him. In other words, a minor should remain liable in deceit for a fraud as to age, even if the action is an indirect enforcement of the contract.

Since the working paper was published we have had occasion to reconsider our position on this issue, in the light of the law relating to the measure of damages available upon the successful prosecution of an action in deceit. It has been said that:

Thus the correct measure of damages in the tort of deceit is an award which serves to put the plaintiff into the position he would have been in if the representation had not been made to him, and not, as with breach of condition or warranty in contract, into the position he would have been in if the representation had been true.

That this is an adequate description of the present law in Canada seems undoubted in view of the decisions in *Hepting v. Schaaf*, *Parna v. G. & S. Properties Ltd.* and, most recently, *Northern & Central Gas Ltd. v. Hillcrest Collieries Ltd. et al.* On mature reflection it seems to us that the best relief available to an adult party who frames his action in deceit against a minor who has fraudulently misrepresented his age will rarely exceed in scope the best relief available to him if he were to proceed under our Recommendation (4). We have therefore concluded that, as a practical matter, there is little to be gained by making a minor invariably liable for the tort of deceit where the cause of action is in substance a cause of action on the contract.

While we still recognize the difficulty involved in maintaining the common law distinction between torts connected and unconnected with the contract, we have continued to find it impossible to devise an alternative which

would not exculpate minors from liability for torts for which they should remain liable. On the specific issue of a minor's fraud, we think it preferable to adopt the New Zealand solution of permitting a court to take that factor into account in determining the measure of relief available, under our Recommendation (4), to either party to the contract.

Having accepted the principle, however, that fraud on the part of the minor may reduce the measure of relief available to him if proceedings are brought under Recommendation (4), we continue to share the concern of the Latey Committee and a majority of the Alberta Institute that adults may seek to protect themselves in part by inducing, in one form or another, a false representation from the minor. In particular we are concerned about the use of standard form contracts containing forms of words such as: "I warrant that I have attained the age of majority." While we do not think the situation is likely to arise at all commonly, we believe that a document containing this or a similar form of words, signed by the minor, will probably be the evidence of fraud most frequently advanced by a small number of unscrupulous adults seeking to mitigate their losses in contracts involving minors.

Our fears on this score are partially allayed by the requirements of the common law in relation to the proof of fraud. In *Hjort v. Wilson* the British Columbia Court of Appeal adopted the test of fraud laid down by the House of Lords in *Derry v. Peek* and *Nocton v. Ashburton* and that "the fraud proved must be actual fraud, a *mens rea*, an intention to deceive. Bearing in mind the high standard of proof required of he who alleges fraud, we do not think that any but the deliberately fraudulent minor will attract a reduction in the relief available to him, and this, in our view, is as it should be. Nonetheless, we are concerned enough about the possibility of adults' using standard form contracts containing warranties as to age to wish to make specific provision that the signature of such documents does not of itself constitute *prima facie* evidence of fraud.

In addition there is one other aspect of the law surrounding assertions of fraud which we believe should be altered for present purposes. It is not ordinarily a defence to an allegation of fraud that he who alleges it was negligent or foolish in relying on the misrepresentation or had an opportunity for verifying it. While actual knowledge of the untruth is a bar to recovery, the mere availability of means of knowledge is not sufficient. We think that even where an adult is confronted with a deliberately fraudulent minor who lies about his age in order to induce a contract, it ought to be a condition of the minor's liability that the adult's belief in the truth of the statement ought to be reasonable. It would, in our view, be going too far to allow an adult to assert that he relied on the fraudulent statement of the average twelveyearold that he was nineteen.

The Commission therefore recommends that:

12. (1) *Nothing in these recommendations should limit or affect the rule of law whereby a minor is not liable in tort where the tort is connected with a contract or where the cause of action for the tort is in substance a cause of action in contract, provided that if a minor induces another person to enter a contract by means of fraudulent representations as to the minor's age or any other matter, the court may take any such representation into account in deciding whether to exercise any of its powers under an enactment of Recommendation (4).*
- (2) *A minor shall not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age unless the person to whom the representation was made had reasonable grounds for believing that it was true.*
- (3) *A minor shall not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age by reason only of the fact that the minor signed or otherwise adopted a document relevant to the transaction that:*

- (a) contained a statement that the minor was nineteen years of age or otherwise had contractual capacity; and
- (b) was prepared and tendered by or on behalf of the plaintiff; and
- (c) was preprinted and used by the plaintiff in like transactions.

G. Grants of Capacity to Make Minors' Contracts

We have already mentioned in passing that we are in favour of granting to a responsible authority the power to approve minors' contracts in advance, so that an adult will, in circumstances which he thinks appropriate, have an opportunity to make sure that he has an enforceable contract, and that minors will not be deprived entirely of the benefits of contractual capacity.

This is a principle which has commended itself in three of the common law jurisdictions to which we have previously referred. In New South Wales section 26 of the Minors' (*Property and Contracts*) Act provides in part that:

- (1) The Supreme Court, on application by a minor, may, by order
 - (a) grant to the minor capacity to participate in any civil act or in any description of civil acts or in all civil acts; ...
- (3) The Court shall not make an order under this section unless it appears to the Court that the order is for the benefit of the minor.

Section 27 of the same Act also provides in part that:

- (2) A court of petty sessions may, on application by a minor, by order approve a contract proposed to be made by a minor...
- (5) A court of petty sessions shall not make an order under this section unless it appears to the court that
 - (a) the minor would not undertake obligations under the proposed contract ... to the value of seven hundred and fifty dollars or upwards; and
 - (b) the order is for the benefit of the minor.

In New Zealand, section 9 of the *Minors' Contracts Act* provides in part that:

- (1) Every contract entered into by a minor shall have effect as if the minor were of full age if, before the contract is entered into by the minor, it is approved under this section by a Magistrate's Court.
An application to a Magistrate's Court under this section may be made
 - (a) By the minor or any other person who will be a party to the proposed contract; or
 - (b) By a guardian of the minor ...

The Alberta Institute made two recommendations on this matter. The first is that:

- (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 [recommendation], "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.

The second recommendation is that

(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.

We are in favour of the principles underlying these recommendations because we believe that our basic proposal that contracts be unenforceable against minors will lead to some situations where it is necessary or desirable that a minor be able to contract but where adults will be unwilling to take the risk. The availability of an approval procedure will overcome these situations to an extent, and will have the added virtue of permitting an examination of the individual minor's circumstances so that an informed decision can be made on whether the proposed transaction is for his overall benefit or not.

In company with New South Wales and the Alberta Institute we believe that there ought to be two kinds of approval procedure.

First, a minor or his guardian ought to be able to apply to a Judge or Local Judge of the Supreme Court of British Columbia for an order which would confer on the minor either full contractual capacity or full contractual capacity within a limited area. We concede that this procedure would in all likelihood be rarely used, particularly if the age of majority is reduced to eighteen in this Province, but there may nonetheless be circumstances in which it is warranted. There may, for example, be enterprising seventeen-year-olds of mature judgment who wish to engage in small business and who would find it inconvenient, not to say impractical, to obtain the separate approval (which we later recommend) for each contract into which they may wish to enter. It is difficult to prescribe in advance with any precision or comprehensiveness the factors which ought to be taken into account in reaching a decision to make an order of the kind described; as much will depend on the particular circumstances surrounding each application. Essentially, given the existence of a *prima facie* case for the necessity for an order, the issue is whether the applicant demonstrates sufficient maturity of judgment to make it reasonably safe to assume that he does not require the protection accorded to minors in general.

It now appears to be an established principle in legislation relating to the property rights of minors that the Public Trustee should be given notice of any relevant court proceedings, and an opportunity to appear if he thinks it appropriate. It is therefore also recommended that section 22 of the *Infants Act*, which embodies this principle, should be made expressly applicable to any proceedings which may arise out of the enactment of these recommendations.

The second kind of approval procedure which we recommend is likely to be more commonly used. A minor, his guardian, or any adult party to a proposed contract should have the right to apply to the Public Trustee for an order granting to the minor the capacity to enter into the contract. This recommendation differs from the first principally in that it is designed not to give a minor full contractual capacity, but rather to put him in a position whereby an adult is encouraged to enter one particular contract with him.

We do not think the Public Trustee's discretion in making a decision whether to approve contractual capacity ought to be unduly fettered, but nonetheless, he should in most cases take into account the nature, subjectmatter and terms of the contract, the requirements of the minor having regard to his particular circumstances, and the economic resources of the minor.

If any party to the application to the Public Trustee is dissatisfied with his decision, we believe that there ought to be an automatic right to petition the Supreme Court for a review of the decision, and the Supreme Court ought to be entitled to substitute its own discretion for that of the Public Trustee.

Our recommendation that the services of the Public Trustee be utilized rather than those of the Provincial Court (as has been done in other jurisdictions) is, we conceive, justified on a number of counts.

First, the office of the Public Trustee has considerable experience in the administration of the affairs of minors, and is accustomed to making judgments on a day-to-day basis on whether expenditures by minors are justified.

Secondly, an analogous function is already in the hands of the Public Trustee by virtue of section 17(1) of the *Infants Act*.

Thirdly, to accord the function to the Provincial Court would inevitably involve expense and delay which in many cases might outweigh the importance of the transaction, and deprive the proposal of its utility. We agree that to the extent that Provincial Courts are available throughout the Province, and that the Public Trustee's office is centralized, there is at first glance something to be said for following the example of other jurisdictions and according jurisdiction to the Provincial Court. But the Public Trustee may operate with a degree of speed and informality, by mail and telephone, which the nature of the judicial function does not allow, and we therefore believe that the Public Trustee will be in a position to serve the public better.

It may be that some objections to the recommendation will be raised. First, it may be said that it is cumbersome, and that it is not practical to obtain the approval of the Public Trustee for all transactions into which minors may enter. This would be to misconceive the function of the recommendation and the occasions on which its use will be appropriate. Merchants and others will, we think, continue to deal with minors in small day-to-day cash transactions much as they do now, even given the unsatisfactory and uncertain state of the law, and it is important to emphasize that the approval of the Public Trustee is not a *pre-requisite* to a contract with a minor, but simply a protection for the adult party if he thinks it appropriate or worthwhile. It would, we think, only be in situations involving credit or large sums of money that adult parties would consider it safer to secure the approval of the Public Trustee, or to insist that the minor do so. In addition, it seems to us likely that adult parties will continue in many cases to avail themselves of an adult guarantor or indemnifier of the minor's liability as a more convenient means of securing their position. This may be all the more likely if our later recommendation relating to the liability of guarantors of the liability of minors is accepted.

A second objection to the recommendation may be that it might be interpreted as a usurpation by an official of government of authority which ought more properly to remain with parents or guardians. Once again we do not believe that this objection, if made, would be justified. We reiterate our point that the approval of the Public Trustee is not a *prerequisite* to the making of a contract by a minor. An adult party may be willing to contract without it, but

if he is not, and if the minor's parents are anxious that the contract proceed, they may offer themselves as guarantors or indemnifiers and thereby eliminate the necessity for the Public Trustee's intervention. The only situation in which there may be a potential for an overlapping of authority is that where parents have expressed opposition to the contract and are not willing to act as guarantors, and where the minor seeks independently to further the contract by applying for the Public Trustee's approval. By hypothesis this is a situation in which parental authority is in any event somewhat weakened, because it does not extend as far as preventing the minor from pursuing an independent course. Yet we would expect that one of the matters which the Public Trustee would take into account in arriving at a decision is whether there are parental objections which are wellfounded.

One group of lawyers responding to the working paper suggested that jurisdiction to confer capacity to enter individual contracts ought to reside in Judges in Chambers rather than the Public Trustee. The suggestion was made in the belief that decisions would be made more quickly and that it would be more appropriate that the parties bear the cost of the application rather than the public purse.

We have already stated our view that, with proper administrative arrangements, the Public Trustee's Office is by nature more capable of rendering a speedy and fully informed decision than the courts in this particular instance. As to the matter of cost, we see no reason why the Public Trustee could not impose a charge for his services to applicants if this were thought to be desirable.

We have been careful to cast our recommendations for an approval by the Public Trustee in terms of the granting of contractual *capacity* only. Although we expect that the Public Trustee will in the normal course of events examine the nature, subjectmatter and terms of a proposed contract, we do not think that his approval should have any greater effect than preventing the setting up of the defence of infancy by a minor if he is sued upon the contract. All other contractual defences available to adults should remain open to the minor, despite the Public Trustee's approval.

46. We again acknowledge our indebtedness to the drafting contained in the Alberta Report, n. 4 *supra*, 3740. It would cast far too onerous a responsibility on the Public Trustee if his approval were, for example, to constitute a guarantee that the terms of any particular contract did not infringe the provisions of the *Trade Practices Act*. It should perhaps go without saying that the Public Trustee should be immunized expressly from any suggestion that liability attach to him for any loss which may be incurred either directly or indirectly by any party to a contract which he has approved. The function of the Public Trustee, as we see it, is simply to arrive at a judgment whether a contract is in the best interests of a minor, and his approval should not constitute a representation of any kind beyond the fact that the minor may not subsequently set up the defence of infancy.

The Commission recommends that:

13. (1) *The Supreme Court of British Columbia or a Judge or Local Judge thereof, on application by a minor or his parent or guardian, may by order grant to the minor capacity to enter into all contracts or any description of contracts.*
- (2) *The Court shall not make such an order unless it is satisfied that it is for the benefit of the minor and that, having regard to the circumstances of the minor, he is not in need of the protection offered by law to minors in matters relating to contract.*
- (3) *A contract made by a minor under any subsisting grant of capacity shall be enforceable against him.*
- (4) *The Public Trustee shall be given notice of, served with the documents concerning, and entitled to appear in, proceedings under this recommendation, in accordance with section 22 of the Infants Act.*

14. (1) *A minor, his parent or guardian, or any adult party to the contract may apply to the Public Trustee for a grant of capacity to the minor to enter a particular contract, either before or after the contract is entered into.*
- (2) *The Public Trustee shall have complete discretion in determining the best interests of a minor under this proposal, but without restricting the generality of the foregoing, may take into account;*
- (a) *the nature, subjectmatter and terms of the contract;*
 - (b) *the requirements of the minor, having regard to his particular circumstances;*
 - (c) *the financial resources available to the minor; and*
 - (d) *the wishes, where they can reasonably be ascertained, of any parent or guardian of the minor.*
- (3) *Where the Public Trustee refuses to grant to the minor the capacity to enter a contract, any person referred to in (1) of this recommendation may apply, upon ten days' notice in writing to the Public Trustee, to the Supreme Court or a Judge or Local Judge thereof by petition in a summary way for a grant of capacity to enter the contract. The Public Trustee may be directed to state his reasons for his refusal, and the Court is entitled to substitute its own discretion for that of the Public Trustee.*
- (4) *A contract entered into by a minor is enforceable against him if a grant of capacity has been made to him under this recommendation.*
- (5) *No liability of any kind shall attach to the Public Trustee as the result of an exercise of his discretion under this recommendation.*

H. Dispositions Of Property

On the matter of title to property which may be at issue in a contractual situation involving a minor, we are in complete agreement with both the reasoning of and the recommendations advanced by the Alberta Institute. We believe we can do no better here than to reproduce that reasoning and those recommendations and to advance them as recommendations for change in this Province.

The Report states:

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 property or an interest in it in good faith and for value should be protected.

The Alberta Institute therefore recommends, as does this Commission, that:

15. *A disposition of property or grant of a security or other interest therein made under a contract which is unenforceable against a minor should be effective to transfer the property or interest, unless and until the court makes an order under Recommendation 4.*

16. *A disposition of property or a grant of a security or other interest therein to a bona fide transferee or grantee for value should not be invalid for the reason only that the transferor or grantor acquired the property under a contract which is unenforceable against a minor.*

I. Guarantees and Indemnities

We have already noted that it is probably now the law in this Province that an adult guarantor of a minor's obligations may not escape liability by pleading the immunity of the minor.

In all the jurisdictions whose reforms or proposals for reform in this area we have studied, the decision has been made as a matter of policy that adult guarantors should indeed be liable, and we agree. We do so because we believe that by putting the matter beyond doubt, an avenue for the encouraging of adult suppliers of goods and services to deal with minors will open up further. It is already common practice for businessmen to deal with a minor and a guarantor or indemnifier in circumstances where they would not deal with the minor alone.

The course of action we recommend will, of course, expose the adult guarantor to a liability against which he cannot entirely protect himself. If, however, the arrangement between the minor and the guarantor takes a contractual form, the guarantor will at least have recourse to the restitutionary and compensatory principles which we have recommended as an alternative to the enforcement of contracts against minors.

The Commission therefore recommends that:

17. *(1) A guarantor of an obligation of a minor should be bound by his guarantee to the same extent that he would be bound if the minor were an adult.*
- (2) The term "guarantor" should include 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, whether that obligation is enforceable against the minor or not.*

J. Other Statutory Ages for Contracting

We pointed out in Chapter I that there are a number of provisions throughout the British Columbia statutes which, in particular circumstances, reduce the age at which a minor may make a binding contract. For example, the *Apprenticeship and Tradesmen's Qualification Act* provides in part that:

A minor who enters into a contract of apprenticeship which is registered in accordance with the provisions of this Act is liable upon the same, and shall have the benefit thereof according to its terms, as if he had been of legal age ...

These provisions represent policy decisions by the Legislature that minors ought in certain cases to be bound by some contracts, notwithstanding their minority, and with one exception we see no reason to propose changes in those decisions.

The exception is section 4 of the *Infants Act* which provides that:

Where a minor over the age of sixteen years, who has no parent or legal guardian, or who does not reside with his parent or guardian, enters into an engagement, written or verbal, to perform any service or work, he is liable upon the same, and shall have the benefit thereof, as if he had been of legal age, and the provisions of [sections 2 and 3] do not apply to such engagement.

We discussed this provision, enacted in 1897, in Chapter I, and speculated that it may have been intended to encourage the employment of orphans at any cost. However this may be, and whether or not it had the desired effect, it is inconsistent with our basic recommendation, as we see no reason why orphans should be deprived of the protection offered to other minors.

The Commission therefore recommends that:

18. *Where statutory provision has already been made for allowing minors, at particular ages and in particular circumstances, to make binding contracts, those provisions, with the one exception referred to in the next recommendation, should remain in force.*
19. *Section 4 of the Infants Act should be repealed.*

K. Other Statutory Provisions

Section 9 of the *Sale of Goods Act* provides that:

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property; except that where necessaries 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. "Necessaries" in this section means goods suitable to the condition in life of such infant or minor, or other person, and to his actual requirements at the time of the sale and delivery.

If our recommendations are accepted, the reference in this section to the liability of minors to pay a reasonable price for necessaries which have been sold and delivered to them will be inconsistent with the general law, and therefore the section should be amended to exclude the reference.

One of the difficulties which we have had to face in analyzing the present law relating to minors, contracts, and making proposals for reform, is that there already exist in the statutes of the Province a number of provisions relating to the management and disposition of the property of minors by others. These concern chiefly, although not exclusively, land and the proceeds of litigation. They embrace:

- (a) contracts made by guardians alone;
- (b) contracts made by guardians with the approval of the Public Trustee;
- (c) contracts by guardians with court approval;
- (d) contracts made by the Public Trustee with court approval;
- (e) marriage settlements made by minors with court approval;
- (f) contracts made by minors or guardians with court approval relating to land.

Our chief difficulty with these provisions is that they are part and parcel of other provisions which transcend the narrow issue of minors' contracts and involve the much wider question of the responsibilities of parents, guardi-

ans, the Public Trustee and the Supreme Court for the control of the property of minors in all contexts. A further difficulty is that the statutes themselves overlap each other, if they do not conflict.

We were, therefore, confronted with a choice between proceeding with a project on minors' contracts but leaving the existing statute law as it is for the time being, or undertaking a vastly more ambitious and timeconsuming task on the whole of the law relating to minors' property. We concede that there is a substantial case to be made for a reexamination of such statutes as the *Equal Guardianship of Infants Act*, the *Infants Act*, the *Official Guardian Act* and the *Settled Estates Act* in so far as they concern the property of minors, but for the time being we prefer to proceed with recommendations for reform of the law which affects contractual issues alone, and to defer the wider study until a more convenient opportunity arises.

Yet while we do not at this juncture make recommendations for changes in the statutes governing the property of minors, we do recommend that where a minor has been accorded contractual capacity either by the Supreme Court or the Public Trustee, the minor should have control over his property to the extent that is necessary to give effect to the purpose of the grant, and the grant should, according to its tenor, override any other statutory provision which might otherwise be applicable.

The Commission recommends that:

20. *Section 9 of the Sale of Goods Act be amended to exclude the reference to the liability of minors to pay a reasonable price for necessities which have been sold and delivered.*
21. *To the extent that it is necessary to give effect to the purpose of a grant of contractual capacity, according to its tenor, under these recommendations, all other statutory provisions relating to the contracts or property of minors should be regarded as inapplicable.*

L. Limitation of Liability

The Alberta Institute thought it wise, as a matter of caution, to make explicit their intention that their proposals should not expose a minor to any greater liability than that of an adult at common law.

Although our basic recommendation does not, unlike Alberta's, involve a presumption of enforceability, and the need for a limitation of liability clause is not therefore so great, we also think it safer to be explicit, particularly because our recommendations encompass situations in which a minor will be granted contractual capacity by the Supreme Court or the Public Trustee.

The Commission therefore proposes that:

22. *Nothing in these recommendations should be construed as:*
 - (a) *disentitling a minor to any defence available to an adult; or*
 - (b) *imposing upon a minor a greater liability than that of an adult by reason only of his minority.*

CHAPTER V

CONCLUSION

A. Summary of Recommendations

1. *Sections 2 and 3 of the Infants Act should be repealed.*
2. *Except where the law may specifically provide otherwise, a contract made by a minor*
 - (a) *should not be enforceable against the minor;*
 - (b) *should be enforceable against other parties as if the minor had attained the age of majority.*
3. *If a contract is unenforceable against a minor because of his minority an action for relief ought to be able to be brought:*
 - (a) *by the minor; and*
 - (b) *after the minor has repudiated the contract, by an adult party.*
4. *In any action brought as a result of any enactment of the preceding recommendation the court ought to be able to:*
 - (a) *grant to any party such relief by way of compensation or restitution of property or both as is just; and*
 - (b) *Upon doing so ought to be able to discharge the parties from further obligation under the contract;*

provided that no grant of relief should enable the party contracting with a minor to recover more than is necessary to restore him to the position in which he found himself before entering into the contract.

5. *In making any order under an enactment of the preceding recommendation, the court ought to have regard to:*
 - (a) *the circumstances surrounding the making of the contract;*
 - (b) *the subjectmatter and nature of the contract;*
 - (c) *in the case of a contract relating to property, the nature and value of the property;*
 - (d) *the age and the means (if any) of the minor; and*
 - (e) *all other relevant circumstances.*
6. *No special rules should be devised for those minors who are or have been married.*
7. *The recommendations enunciated in this working paper should apply to executed as well as to executory contracts.*
8. *A contract may be affirmed by a minor who has attained the age of majority and after such affirmation it may be enforced against him.*

9. *An adult party ought to be able by notice in writing to require a minor who has attained the age of majority to affirm or repudiate a contract within sixty days from receipt of the notice. Unless the minor repudiates the contract within that time, it ought to be enforceable against him.*
10. *Where a notice is not issued by an adult party under the preceding recommendation, a contract which is made by a minor ought, unless it is repudiated by him within one year after the date upon which he attains the age of majority, thereafter to be enforceable against him.*
11. *For the purposes of these recommendations, repudiation of a contract ought to be able to be effected by:*
 - (a) *a refusal to perform the same or a material term thereof; or*
 - (b) *the making of a claim for relief under Recommendation (4); or*
 - © *the giving or the making of reasonable efforts to give oral or written notice of repudiation to the adult party.*
12. (1) *Nothing in these recommendations should limit or affect the rule of law whereby a minor is not liable in tort where the tort is connected with a contract or where the cause of action for the tort is in substance a cause of action in contract, provided that if a minor induces another person to enter a contract by means of fraudulent representations as to the minor's age or any other matter, the court may take any such representation into account in deciding whether to exercise any of its powers under an enactment of Recommendation (4).*
 - (2) *A minor shall not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age unless the person to whom the representation was made had reasonable grounds for believing that it was true.*
 - (3) *A minor shall not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age by reason only of the fact that the minor signed or otherwise adopted a document relevant to the transaction that:*
 - (a) *contained a statement that the minor was nineteen years of age or otherwise had contractual capacity; and*
 - (b) *was prepared and tendered by or on behalf of the plaintiff; and*
 - (c) *was preprinted and used by the plaintiff in like transactions.*
13. (1) *The Supreme Court of British Columbia or a Judge or Local Judge thereof, on application by a minor or his parent or guardian, may by order grant to the minor capacity to enter into all contracts or any description of contracts.*
 - (2) *The Court shall not make such an order unless it is satisfied that it is for the benefit of the minor and that, having regard to the circumstances of the minor, he is not in need of the protection offered by law to minors in matters relating to contract.*

- (3) *A contract made by a minor under any subsisting grant of capacity shall be enforceable against him.*
- (4) *The Public Trustee shall be given notice of, served with the documents concerning, and entitled to appear in, proceedings under this recommendation, in accordance with section 22 of the Infants Act.*
14. (1) *A minor, his parent or guardian, or any adult party to the contract may apply to the Public Trustee for a grant of capacity to the minor to enter a particular contract, either before or after the contract is entered into.*
- (2) *The Public Trustee shall have complete discretion in determining the best interests of a minor under this proposal but without restricting the generality of the foregoing, may take into account;*
- (a) *the nature, subjectmatter and terms of the contract;*
 - (b) *the requirements of the minor, having regard to his particular circumstances;*
 - (c) *the financial resources available to the minor; and*
 - (d) *the wishes, where they can reasonably be ascertained, of any parent or guardian of the minor.*
- (3) *Where the Public Trustee refuses to grant to the minor the capacity to enter a contract, any person referred to in (1) of this recommendation may apply, upon ten days' notice in writing to the Public Trustee, to the Supreme Court or a Judge or Local Judge thereof by petition in a summary way for a grant of capacity to enter the contract. The Public Trustee may be directed to state his reasons for his refusal, and the court is entitled to substitute its own discretion for that of the Public Trustee.*
- (4) *A contract entered into by a minor is enforceable against him if a grant of capacity has been made to him under this recommendation.*
- (5) *No liability of any kind shall attach to the Public Trustee as the result of an exercise of his discretion under this recommendation.*
15. *A disposition of property or a grant of a security or other interest therein made under a contract which is unenforceable against a minor should be effective to transfer the property or interest unless and until the court makes an order under Recommendation (4).*
16. *A disposition of property or a grant of a security or other interest therein to a bona fide transferee or grantee for value should not be invalid for the reason only that the transferor or grantor acquired the property under a contract which is unenforceable against a minor.*
17. (1) *A guarantor of an obligation of a minor should be bound by his guarantee to the same extent that he would be bound if the minor were an adult.*
- (2) *The term "guarantor" should include 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, whether that obligation is enforceable against the minor or not.*

18. *Where statutory provision has already been made for allowing minors, at particular ages and in particular circumstances, to make binding contracts, those provisions, with the one exception, referred to in the next recommendation, should remain in force.*
19. *Section 4 of the Infants Act should be repealed.*
20. *Section 9 of the Sale of Goods Act should be amended to exclude the reference to the liability of minors to pay a reasonable price for necessities which have been sold and delivered.*
21. *To the extent that it is necessary to give effect to the purpose of a grant of contractual capacity, according to its tenor, under these recommendations, all other statutory provisions relating to the contracts or property of minors should be regarded as inapplicable.*
22. *Nothing in these recommendations should be construed as:*
 - (a) *disentitling a minor to any defence available to an adult; or*
 - (b) *imposing upon a minor a greater liability than that of an adult by reason only of his minority.*

B. Acknowledgments

The Commission wishes to acknowledge its gratitude to those individuals and organizations who took the time and trouble to respond to the working paper. Their responses were of significant assistance to us.

We wish also to thank our Director of Research, Mr. Keith B. Farquhar, who was responsible for the research upon which the working paper and this Report was based, and for the drafting of both documents.

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February 24, 1976.