THE PRIMACY OF EXPECTANCY IN ESTOPPEL REMEDIES: AN HISTORICAL AND EMPIRICAL ANALYSIS

ADAM SHIP*

This article explores the historical origins and development of estoppel remedies from the early English courts to the modern application of estoppel principles in Canada. The author characterizes different types of estoppel, noting their doctrinal similarities and differences. The author pays particular attention to the reasoning the courts rely on when applying an estoppel remedy and concludes that an estoppel remedy is most likely to correspond to the expectancy of the representee. Hence, expectancy, also understood as the reasonable expectations engendered in the representee through the representations made by the representor, is the foremost basis for estoppel remedies. The author includes extensive appendices, as a record of his empirical study testing the remedial basis of estoppel, which cite recorded Canadian appellate estoppel cases, subdividing this data into: (1) successful estoppel cases; (2) unsuccessful estoppel cases; and (3) irrelevant estoppel cases.

C et article examine les origines historiques et le développement des préclusions comme recours à partir des premiers tribunaux anglais jusqu'à l'application moderne des principes de préclusion au Canada. L'auteur qualifie différents types de préclusion en notant leurs similarités et différences de doctrine. L'auteur accorde une attention spéciale au raisonnement auquel se fient les tribunaux dans le cas d'un tel recours, et il conclut que la préclusion correspond probablement à l'attente du destinataire. D'où, l'attente, que l'on peut aussi considérer comme l'attente raisonnable créée chez le destinataire par les observations faites par son représentant, constitue la plus grande base de ce genre de recours. L'auteur inclut des annexes considérables, comme dossier de son étude sur le test de recours de la préclusion, qui font mention de causes de préclusion d'appel et dont l'information est subdivisée en : 1) causes réussies, 2) causes perdues et 3) causes non pertinentes.

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* Litigation Associate, McCarthy Tétrault LLP, Toronto.

I. INTRODUCTION

"Estoppel" is a word with an ancient genesis in Anglo-Canadian law, and an even earlier genesis in the English language. With respect to the latter, its etymology reveals a meaning synonymous with "stop,"[1] and for the legal taxonomist this has implications for its legal conceptualization. For the famous legal taxonomist Peter Birks, the etymology of estoppel suggested that, when employed as a legal label, it was "indicative … of binding effect."[2] From the perspective of estoppel's earliest operation in the law of England, we shall see that this suggestion is apt.

There are several doctrines of common law and equity which share the label "estoppel" and, with the exception of estoppel by record,[3] estoppel by deed,[4] and the historical estoppel *in pais*,[5] these doctrines also share many important characteristics. To the extent that it is possible to speak of a coherent and discrete body of jurisprudence relating to these similar estoppels, it is one which suffers from "convoluted problems of nomenclature"[6] which reflect, to a large extent, a complex legal history of evolution and categorization. For the purposes of the following analysis, I identify three categories of estoppel, beyond the three already named, which hold the greatest historical import:[7] (1) estoppel by representation;[8] (2) promissory estoppel;[9] and (3) proprietary estoppel.[10] These estoppels share important doctrinal features and, at a high enough level of abstraction, it is possible to provide, as follows, a description of all three: when a person, by words or conduct, leads another to believe in a particular state of affairs, he or she will not be allowed to go back on it when it would be unjust for him or her to do so.[11]

Despite a vernacular etymology suggesting a binding effect and the ability to state an abstract description which encompasses many of its disparate legal categories, "estoppel" is a concept whose precise role in the law is much disputed among judicial and academic commentators throughout the English-speaking world. For example, the question of whether,

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1 Edward Coke, *The First Part of the Institutes of the Laws of England*, 13th rev. ed. (London: T. Wright, 1788) at 352-53, suggesting a French derivation; Spencer Bower, *The Law Relating to Estoppel by Representation*, 4th ed. by Piers Feltham, Daniel Hochberg & Tom Leech (London: LexisNexis UK, 2004) at 3, suggesting a contemporaneous English and French etymology.

2 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 U.W.A. L. Rev. 1 at 21-22, 63.

3 "Estoppel by record" is part of the law of *res judicata* and is often referred to as "issue estoppel" or "cause of action estoppel." A short discussion of its history and its relationship with other estoppels is found at Part III.A., below.

4 "Estoppel by deed" is, in modern times, rarely invoked. For its history and relationship with other estoppels, see Part III.A., below.

5 The historical doctrine of "estoppel *in pais*" is discussed at Part III.A., below.

6 Bruce MacDougall, "Consideration and Estoppel: Problem and Panacea" (1992) 15 Dal. L.J. 265 at 271 [footnotes omitted] (although not employing the phrase in precisely the same sense).

7 "Estoppel by convention" will not be discussed in this article. This doctrine, which evolved from estoppel by deed, is now treated as a particular application of estoppel by representation, promissory estoppel, or proprietary estoppel where, instead of "a representation made by a representor and believed by a representee," there is "an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as the basis of their relationship": Bower, *supra* note 1 at 180, cited in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 at para. 54 [*Ryan*].

8 Often referred to as "estoppel by conduct." This doctrine is discussed at Part III.C, below.

9 Discussed at Part III.D, below. This is sometimes referred to as "equitable estoppel," although this blurs its relationship with proprietary estoppel.

10 This doctrine is discussed at Part III.E, below. Historically identified with the alternative doctrines of "estoppel by acquiescence" and "estoppel by encouragement."

11 Elizabeth Cooke, "Estoppel and the protection of expectations" (1997) 17 L.S. 258 at 260, suggesting that this loosely describes estoppel in law and equity, citing *Moorgate Mercantile Co. Ltd. v. Twitchings* (1975), [1976] 1 Q.B. 225 at 241.

as a remedial matter, the doctrine actually does provide a binding effect is probably one of the most contentious issues in the modern law of estoppel,[12] and it is to this question that this article is directed. The debate respecting estoppel remedies — that is, the remedy to be applied on the successful invocation of estoppel by representation, promissory estoppel, or proprietary estoppel — is one appearing to relate, in part, to the proper characterization of estoppel's underlying purpose or animating feature.

For many scholars[13] and judges,[14] the general purpose of estoppel is to respond to a circumstance of detrimental reliance where a party making a representation attempts to act inconsistently with the assumptions thereby engendered.[15] To the extent that the animating feature or underlying purpose of a legal doctrine should mirror the relief it provides,[16] this characterization suggest a remedy directed at alleviating the harm caused by detrimental reliance. An opposing view characterizes the purpose or animating feature of estoppel as the enforcement of representations or the preclusion of acts inconsistent with previous representations,[17] which suggests a form or quantum of relief that protects the expectations engendered in the representee. Finally, an emerging view asserts that estoppel is animated

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12 When I speak of a "modern law of estoppel," estoppel by record is excluded.

13 See e.g. Robert A. Hillman, "Questioning the 'New Consensus' on Promissory Estoppel: an Empirical and Theoretical Study" (1998) 98 Colum. L. Rev. 580 at 581, 585 (discussing promissory estoppel); Andrew Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L. Rev. 32; Bower, *supra* note 1 at 5-6 [footnotes omitted]: "the foundation of true estoppel lies in detrimental reliance"; Mark Lunney, "Jorden v Money — A Time for Reappraisal?" (1994) 68 Austl. L.J. 559 at 575: "equity can intervene to prevent … detriment"; Warren A. Seavey, "Reliance Upon Gratuitous Promises or Other Conduct" (1951) 64 Harv. L. Rev. 913 at 926.

14 See e.g. *Ryan*, *supra* note 7 at para. 68; *Grundt v. Great Boulder Proprietary Gold Mines Limited*, [1937] HCA 58, 59 C.L.R. 641 at 674-75; *Sami's Restaurant Corp. v. W. Hanley & Co. Ltd.*, 2002 BCCA 218, 166 B.C.A.C. 230 at para. 28: "[t]he prevention of injustice caused by reliance is the purpose of estoppel by conduct or acquiescence."

15 Throughout this article, I speak of "representation" to include, where applicable, a promise, conduct amounting to a representation, acquiescence amounting to a representation, and any other causative act on the part of the person against whom the estoppel is asserted ("the representor").

16 Hillman, *supra* note 13 at 581: "remedy should be consistent with the … theory it reinforces"; Andrew Robertson, "Reliance and expectation in estoppel remedies" (1998) 18 L.S. 360 at 362 [Robertson, "Estoppel Remedies"]: "relief should be consistent with the philosophy"; Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, U.K.: Cambridge University Press, 2003) at 66 [Waddams, *Dimensions*]: "If reliance is the reason for enforce[ment] … there is a strong argument for restricting the remedy to … reliance"; Joachim Dietrich, "What is 'Lawyering'? The Challenge of Taxonomy" (2006) 65 Cambridge L.J. 549 at 569, discussing Birks' view on the relationship between remedies and "causative events." It has been suggested, in the estoppel context, that a doctrine's remedy does not always mirror its basis of liability: Neil G. Williams, "What to do When There's No 'I Do': a Model for Awarding Damages Under Promissory Estoppel" (1995) 70 Wash. L. Rev. 1019 at 1049; Michael Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel. L.R. 209 at 213. This more theoretical question about the relationship between remedy and liability is outside the scope of this article.

17 See e.g. W.S. Holdsworth, *A History of English Law*, vol. 9 (London: Methuen, 1926) at 163: "honest fulfilment of representations, a belief in which had induced another person to take action"; David Jackson, "Estoppel as a Sword" (1965) 81 Law Q. Rev. 84 at 85; Edward Yorio & Steve Thel, "The Promissory Basis of Section 90" (1991) 101 Yale L.J. 111, discussing promissory estoppel; *Tomerlin v. Canadian Indem*, 394 P.2d 571 at 578 (Cal. S.C. 1964); *Morgan v. Railroad* (1877), 96 U.S. 716 at 720 [*Morgan*]: "he who has been silent … when he ought … to have spoken, shall not be heard"; John S. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* (Chicago: Callaghan and Company, 1900) at 6, citing with strong approval Coke, *supra* note 1 at 352: "*allegans contraria non est audiendus*, [he who alleges contradictory things is not to be heard]"; Melville M. Bigelow, *A Treatise on the Law of Estoppel and its Application in Practice*, 2d ed. (Boston: Little, Brown, 1876) at xliii - xliv.

by concerns respecting unfairness or unconscionability,[18] which may indicate a flexible approach to relief.

While there is no doubt that the animating purpose of a legal principle can clarify controversial points of technical doctrine,[19] when the purpose itself is elusive, the task of its identification can prove as controversial as the issue which precipitated the task. When this is the case and the goal remains to settle a controversy of technical doctrine, attention must be duly focused on the state of binding authority and the nuances of legal history. Unless the goal is to *propose* a certain approach to the doctrinal issue or to establish the conceptual or practical *superiority* of a certain view, the task is a descriptive one, requiring a neutral methodology.[20]

In light of these observations, the goal of this article is to illustrate, through an analysis of the complex legal history of estoppel and its recent operation in Canada, the remedial primacy of expectancy.

Lon Fuller and William Perdue, Jr. have articulated three conceptual bases for contractual remedies[21] which apply equally in an estoppel context: the expectation, reliance, and restitutionary measures. The restitutionary approach to estoppel provides relief to the representee measured by the gains he was induced to provide to the representor in reliance on the operative representation. No serious attempt has been made in the scholarly literature to articulate the purpose or remedial approach of estoppel in restitutionary terms and, given the historical and empirical analyses to follow, this is understandable. The reliance approach to estoppel remedies, by way of contrast, provides relief measured by the loss suffered by the representee in reasonable reliance on the operative representation. "Detrimental reliance,"[22] which encapsulates the interest at stake under this approach, includes both actions taken affirmatively and omissions to pursue an opportunity, provided there is a sufficient nexus with the representation.[23] This approach to relief under estoppel may be further contrasted with its main rival, the expectation approach, which, although accepting that reliance is a

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18 See e.g. Lunney, *supra* note 13 at 575; MacDougall, *supra* note 6 at 293; P.D. Finn, "Equitable Estoppel" in P.D. Finn, ed., *Essays in Equity* (Sydney: Law Book, 1985) 59 at 86 (discussing promissory estoppel); S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at 148-49 [Waddams, *Contracts*], the principle is one of preventing injustice, not of enforcing promises; *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.*, [1982] 1 Q.B. 133 at 154-55 (Ch. D.); *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 at 103-104 (C.A.),"unconscionability" proves the link between all estoppels; *Adelaide Capital Corp. v. Offshore Leasing* (1996), 149 N.S.R. (2d) 281 at paras. 60-70 (C.A.); *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 at 99-101 (C.A.); *B & A Bobcat and Excavating Ltd. v. Sangha*, 1999 BCCA 49, 118 B.C.A.C. 186 at para. 14.

19 L.L. Fuller & William R. Perdue, Jr., "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 52: "legal rules can be understood only with reference to the purposes they serve."

20 Waddams, *Dimensions*, *supra* note 16 at 221-23. This point is not without controversy: See Allan Beever & Charles Rickett, "Interpretive Legal Theory and the Academic Lawyer," Review, (2005) 68 Mod. L. Rev. 320; Stephen A. Smith, "A Map of the Common Law?" (2004) 40 Can. Bus. L.J. 364.

21 *Supra* note 19 at 53-54.

22 As used here, "detrimental reliance" should not be confused with its technical features as a doctrinal requirement for asserting a successful estoppel claim. Recently, in *Ryan*, *supra* note 7 at paras. 69, 74, the Supreme Court of Canada defined the scope of this requirement.

23 Williams, *supra* note 16 at 1059; *supra* note 19 at 55 (one of the first to expressly include lost opportunities as part of the reliance interest); Mary E. Becker, "Promissory Estoppel Damages" (1987) 16 Hofstra L. Rev. 131 at 136-37; Jay M. Feinman, "Promissory Estoppel and Judicial Method" (1984) 97 Harv. L. Rev. 678 at 688; W. David Slawson, "The Role of Reliance in Contract Damages" (1990) 76 Cornell L. Rev. 197 at 220, suggesting that, where appropriate, the valuation of lost opportunities must account for their contingent nature.

threshold requirement of estoppel,[24] measures its relief by reference to the expectations reasonably engendered in the representee. This will often be effectuated by "estopping" the representor from acting inconsistently with the representation — in other words, by enforcing it.

In Part II of this article, I briefly set out the findings of, and methodology for, an empirical study I conducted to test the remedial basis of estoppel. My conclusions disclose strong appellate judicial support in Canada, over the last 12 years, for an expectation approach to estoppel. Part III contains a detailed historical analysis of estoppel and is split into five sections, each providing an historical account followed by an analysis of the different categories of estoppel and their interrelation. Through this historical analysis, I reach six main conclusions:

(1) Reliance was not a threshold requirement of any of the common law estoppels until the mid-eighteenth century when the requirement was imported from equity in the first common law decision on estoppel by representation;

(2) This threshold requirement of reliance flowed from an historical equitable jurisdiction developed in the seventeenth century which enforced representations on an expectancy basis;

(3) This equitable jurisdiction came to be seen as incompatible with the common law doctrines of deceit and consideration and, in response to this perception, was categorized as a doctrine of "estoppel" although that label was unknown to the Chancery;

(4) By the time this categorization was complete, estoppel by representation was a doctrine equally of law and equity, providing an expectation-based remedy, and restricted to representations of existing fact;

(5) Promissory estoppel is an equitable doctrine which developed largely as a response to a specific restriction imposed on estoppel by representation and shares the latter doctrine's remedial focus on expectancy; and

(6) Proprietary estoppel is an equitable doctrine which developed independently from estoppel by representation, although both share a partly common genesis, and provides relief measured by the reasonable expectations engendered in the representee.

II. EMPIRICAL METHODOLOGY AND REMEDIAL FINDINGS[25]

The goal of my empirical analysis was modest: to determine what measure of relief was awarded in estoppel judgments rendered by Canadian courts of appeal since 1995, and by the Supreme Court of Canada since 1985. To this end, I assembled a data set containing all

[24] I employ the phrase "threshold requirement" throughout this article to emphasize the distinction between a constituent element of estoppel and its remedial basis. I realize, however, that this phrase may have specific meanings in other areas of the law.

[25] I will discuss the non-remedial findings of my empirical research, where relevant, in Part III, below.

Supreme Court of Canada[26] decisions since 1985, and all decisions from courts of appeal since 1995,[27] where the word "estoppel" appeared in the summary or headnote. While this method suffered from limitations,[28] it was effective at capturing a large number of cases through an objective measure. After screening out duplicates, cases of estoppel by record and other irrelevant cases,[29] I was left with a data set containing 108 cases. Of these, 79 were cases where the court rejected the estoppel claim(s) being asserted. In Appendix B,[30] I list all such cases, classify the estoppel at issue and indicate the reason(s) for the rejection. This left a data set of 29 cases in which estoppel was successful and in which the court provided or affirmed a remedy. In Appendix A, I list these cases, classify the estoppel at issue,[31] note the remedy awarded, and provide a summary of the case.[32] In classifying the remedy, I first analyzed the facts of the case to conceptualize the reliance and expectation measure that was applicable.[33] As the data set was relatively small, I did not cross-compute the remedies based on estoppel classification, although the pattern was generally consistent across categories. In 26 of the 29 cases, the court did not discuss the remedial issue in any abstract way.

My findings provide evidence of the remedial primacy of expectancy in the recent treatment of estoppel by appellate courts in Canada. In all 29 cases, the remedy provided to the representee was consistent with the expectation measure, and in no decision was the relief exclusively consistent with the reliance measure. In 14 cases, however, the value of relief was reasonably consistent with both the reliance and expectation measure. In these cases, I have classified the remedy as "equivalent," demonstrating in the case abstract in Appendix A the sense in which the evidence disclosed a reasonably strong likelihood that the reliance and expectation measure would have been substantially the same in any event. In these 14 cases, the court almost always employed the phraseology of estopping or precluding the representor from resiling from the representation, which is more consistent with the expectation approach.

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26 For the Supreme Court of Canada, I found these cases in the Supreme Court Reports on Quicklaw, entering "estoppel" under document segment "summary" and adding the restriction "date is after 12/31/1984."

27 For the Courts of Appeal, I found these cases in the Quicklaw database "All Canadian Court Cases," updated on 26 March 2007, entering "estoppel" under document segment "summary" and "appeal" under the document segment "court," and adding the restriction "date is after 12/31/1994." It should be noted that "All Canadian Court Cases" appears to have been changed recently to include cases from two reporters which I did not have access to (and which would not have been helpful), "All Canadian Weekly Summaries," and "Weekly Criminal Bulletin."

28 It would have missed cases where the concept of estoppel was at issue, but applied using a different label. Moreover, it would have missed cases where the headnote improperly excluded the word "estoppel."

29 See Adam Ship, "Appendix C: Cases Not Relevant," available upon request to <aship@mccarthy.ca> for a chart containing all non-duplicative cases I screened out and the screening parameters. These constituted the majority of the cases found.

30 Adam Ship, "Appendix B: Unsuccessful Estoppel Cases," available upon request to <aship@mccarthy.ca> ["Appendix B"].

31 In classifying, I followed the following parameters: (1) Where a court expressly classified the estoppel, I have recorded the class accordingly, unless the classification could not reasonably be supported by precedents establishing the particular class; (2) Where the court failed to expressly identify the category, but the estoppel more reasonably fit into one category than any other, I recorded it as falling within that category; (3) Where the court failed to expressly identify the category, and the estoppel does not fit into any one category more reasonably than another, I recorded it under the category "Unclear"; and (4) Where a case is recorded as "Unclear" this often means that it equally fit within the classes "Promissory Estoppel" and "Estoppel by Representation."

32 I also indicate if the defendant was the party estopped (55.2 percent of cases), and if the parties were in a pre-existing legal relationship (62.2 percent of cases, 70.8 percent of cases if proprietary estoppel is removed from the data set).

33 I often refer to the trial decision to ensure a sufficient factual basis for the conceptualizations, in which case I have indicated such reference in the case summary.

As will emerge from my analysis below, the legal history of estoppel also supports the remedial primacy of expectancy. The contemporary Canadian law of estoppel, therefore, comports with estoppel's jurisprudential history.

III. HISTORY, ANALYSIS, AND DISCUSSION

A. ESTOPPEL BY RECORD, ESTOPPEL BY DEED, AND ESTOPPEL *IN PAIS*

1. HISTORY

Estoppel by record, part of the doctrine of *res judicata*,[34] is the earliest form of estoppel known to English law.[35] By one account, it has formed a part of the law since the courts were first constituted in England.[36] Certainly, it was present in the early medieval period and is found in the earliest collections of English law.[37] According to John Henry Wigmore, one of the earliest forms of estoppel by record evolved from the Germanic principle that the "King's word is indisputable," under which the king's seal attached to a document rendered its contents incontestable.[38] By the twelfth century, this principle had evolved to its more modern form, under which the judgments of a court of record were given "conclusive effect" and parties were accordingly estopped from contradicting those matters which had been solemnly recorded by the king's courts.[39] The rationale for estoppel by record in this early period was inextricably tied to the pleading system and the historical practice of producing a record as a "mode of proof."[40] Dramatic procedural changes to the trial system came with a shift in rationale for the doctrine towards an emphasis on the finality of litigation.[41] In modern times, courts often speak in terms of "issue estoppel"[42] and "cause of action estoppel,"[43] both of which trace their genesis to estoppel by record.

Estoppel by record is the antecedent of the doctrine of estoppel by deed,[44] under which a person may be estopped from acting inconsistently with a deed to which he was a party. Similarly, if the deed's execution was based on a false premise, a party may be estopped from invoking the falsity.[45] In the eleventh century, the solemnity and conclusiveness accorded to the king's seal began to be extended to the seal of private persons. By the thirteenth century, the doctrine of estoppel by deed was established,[46] and a deed duly authenticated by a party's seal was afforded the same effect as that of a judgment, that is, a "final determination of the issue between the parties."[47] The original basis for the doctrine mirrored that of estoppel by record — it was employed as a mode of proof. As trial

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34 A term that was borrowed from Roman law: Bigelow, *supra* note 17 at xliii [footnotes omitted].
35 Bower, *supra* note 1 at 9; Bigelow, *ibid.* at xliv; Holdsworth, *supra* note 17 at 144-46.
36 Bigelow, *ibid.*
37 Holdsworth, *supra* note 17 at 148; John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, vol. 4 (Toronto: Canada Law Book, 1905) at 3411-23.
38 Wigmore, *ibid.* at 3414.
39 Holdsworth, *supra* note 17 at 147-48.
40 *Ibid.* at 144-45, 149; Bower, *supra* note 1 at 9.
41 Holdsworth, *ibid.* at 149.
42 See e.g. *Pocklington Foods v. Alberta (Provincial Treasurer)* (1993), 165 A.R. 155 (C.A.).
43 See e.g. *Brown v. Marwieh* (1995), 145 N.S.R. (2d) 220 (C.A.).
44 Bower, *supra* note 1 at 9; Wigmore, *supra* note 37 at 3411-23; Holdsworth, *supra* note 17 at 154.
45 *Guimond v. Hébert* (1997), 195 N.B.R. (2d) 194 (C.A.) at paras. 13-22.
46 Wigmore, *supra* note 37 at 3411-23; Holdsworth, *supra* note 17 at 145-62, citing Statham and Fitzherbert Abridgments and Yearbooks *temp*. Edw. 1 *annis* 1307-26.
47 Bower, *supra* note 1; Holdsworth, *ibid.* at 155, 157.

procedures evolved, however, the doctrine came to be seen as "based on the act of the party in authenticating by his seal a document which placed him under some liability to another."[48]

From estoppel by record and estoppel by deed developed the doctrine of estoppel *in pais*, of which one of the earliest cases was in 1445.[49] From the idea that one binds himself by affixing his seal to and executing a deed, came the notion that certain actions such as livery of seisin, acceptance of rent, entry, partition, and acceptance of an estate[50] were so notorious that they would effect an estoppel on the actor, by precluding him or her from averring a different state of facts.[51] A particular application of the doctrine was addressed by Parke B. in *Lyon v. Reed*:

> [I]f lessee for years accept a new lease [from] his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former.[52]

By "*in pais*" — which means, "without legal proceedings"[53] — the doctrine contemplated that as an evidentiary matter, the representor was estopped from disputing the natural inference flowing from his act.[54] Estoppel *in pais*, however, remained confined to a narrow set of ossified categories and failed to evolve into any kind of general principle in the sixteenth and seventeenth centuries.[55]

2. DISCUSSION AND ANALYSIS

Estoppel by record, estoppel by deed, and estoppel *in pais* share two important characteristics. First, all three doctrines operate by giving *conclusive* effect to a particular externality — the record, the deed, or the act *in pais*.[56] For the first two doctrines, this flows from the solemnity accorded to the seal of both the king and a private person. For estoppel *in pais*, it flows from the notoriety attached to certain actions. The conclusiveness accorded to the externality means that the outcome is all or nothing. With a successful invocation of estoppel by record, the party against whom the doctrine is directed is estopped from (re)litigating the matter; with a successful invocation of estoppel by deed, the estopped party is bound by the deed; finally, when estoppel *in pais* is successfully asserted, the estopped party cannot resile from the representation derived from his or her notorious act. There is no notion that the outcome of any of these estoppels will be based on a particular kind of injury suffered by the party invoking it.

Second, neither estoppel by record, estoppel by deed,[57] or estoppel *in pais* require proof of detrimental reliance. In fact, reliance was neither a constituent element nor an animating feature of any of these doctrines. With estoppel *in pais*, although it is possible that the

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48 Holdsworth, *ibid.* at 157.
49 *Ibid.* at 147, 159.
50 Coke, *supra* note 1 at 352-53.
51 Bigelow, *supra* note 17 at 346; Holdsworth, *supra* note 17 at 145, 159; Bower, *supra* note 1 at 9-10.
52 (1844), 13 M. & W. 285, 153 E.R. 118 (Ex. Ct.) at para. 306.
53 *Black's Law Dictionary*, 7th ed., *s.v.* "*in pais*"; *The Dictionary of Canadian Law*, 2d ed., *s.v.* "*in pais*."
54 Birks, *supra* note 2 at 21.
55 Holdsworth, *supra* note 17 at 160; Bigelow, *supra* note 17 at 347, 431, makes a similar point.
56 Bigelow, *ibid.* at xliii-xliv.
57 Bower, *supra* note 1 at 23.

notoriety of the particular action was based on an underlying notion that the opposing party would have relied on it, the estoppel effect flowed with mere proof of the act.[58]

Despite these important similarities, the focus shifted for the first time with estoppel by deed, from the solemnity of the record to the actions of the party against whom it was deployed.[59] This was due to the fact that estoppel by deed was based on the act of the party in authenticating a document by his seal.[60] This evolution towards the act of the estopped party was important to the development of estoppel in *pais*, under which the representor was bound by inferences flowing from his or her own actions.[61]

Writing in the early seventeenth century, Lord Coke articulated the purpose of estoppel at common law:

> No man ought to allege any thing but the truth for his defence, and what he has alleged once, is to be presumed true, and therefore he ought not to contradict it; for … *allegans contraria non est audiendus*, [he who alleges contradictory things is not to be heard].[62]

Although, as we shall see, estoppel evolved much since the time of Lord Coke, this notion of estoppel's underlying rationale would continue to resonate into the twentieth century.[63]

B. EQUITY'S JURISDICTION TO "MAKE REPRESENTATIONS GOOD"

1. HISTORY

Seventeenth-century developments in equity dramatically changed estoppel, leading ultimately to the modern doctrine of estoppel by representation. The origin of estoppel by representation lies in the influence of equitable principles on the common law doctrine of estoppel *in pais*.[64] An important case in the development of the equitable jurisprudence that would dramatically influence estoppel *in pais* is *Hunt v. Carew*,[65] a 1649 Chancery decision. In *Hunt*, the defendant held a remainder interest in land that the plaintiff wanted to lease from the defendant's father who held a life interest. The defendant falsely told the plaintiff that he had previously transferred his remainder interest to his father, and the plaintiff relied on this when purchasing the leasehold directly from the father. The Court ordered the defendant to make an assurance and confirm the lease on the grounds that the plaintiff had relied on and was deceived by the defendant's misrepresentation.[66]

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58 *Supra* note 52.
59 Jackson, *supra* note 17 at 86.
60 Holdsworth, *supra* note 17 at 157.
61 Bower, *supra* note 1 at 10.
62 Coke, *supra* note 1 at 352. Coke also stated another purpose of estoppel, which was the need for conclusive fact finding.
63 See e.g. Ewart, *supra* note 17 at 6, citing this passage from Coke, *ibid.* and a similar statement from the U.S. Supreme Court in *Morgan*, *supra* note 17.
64 Holdsworth, *supra* note 17 at 160-61; John McGhee, ed., *Snell's Equity*, 31st ed. (Toronto: Carswell, 2005) at 253 (emphasizing common law); Bigelow, *supra* note 17 at 431 (emphasizing equity).
65 (1649), Nels. 46, 21 E.R. 786 (Ch.) [*Hunt*].
66 *Ibid.* at 786: "he relying on the Affirmation of the Son … that the Lease would be good ... by which he was deceived."

Hunt is reflective of a body of equitable jurisprudence developing at the time, which purported to disclose a jurisdiction in Chancery to "make the representation good."[67] In *Evans v. Bicknell*,[68] an 1801 Chancery decision, Lord Chancellor Eldon recognized this jurisdiction:

> [I]t is a very old head of equity, that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the [representor] shall make that representation good, if he knows it to be false.[69]

One requirement of this doctrine is that the representor have knowledge of the information that would render the representation false.[70] The knowledge requirement, however, was often relaxed through an objective imputation of knowledge. For example, both *Hobbs v. Norton*[71] and *Hunsden v. Cheyney*,[72] cited as early examples of this equitable principle,[73] simple negligence sufficed. In *Burrowes v. Lock*,[74] it was clearly held that a grossly negligent misrepresentation would engage the doctrine.[75]

To the extent that negligence was sufficient to engage liability in equity for making a false statement, the doctrine was on a collision course with *Derry v. Peek*[76] and the common law tort of deceit.[77] In *Derry*, the House of Lords expanded on the principle flowing from *Pasley v. Freeman*,[78] holding that liability at common law in deceit could not lie where the representor held an honest belief in the truth of the statement. In *Evans*, Lord Chancellor Eldon had arguably considered the equitable jurisdiction to mirror this principle as he specifically required the representor to know of the falsehood and prefaced his statement of the principle by asserting that the equitable jurisdiction was concurrent with liability under *Pasley*.[79] Nevertheless, when representee-litigants began to invoke precedents where fraud was not required, the equitable jurisdiction came to be re-examined and cases therein recategorized.

In *Low*,[80] the English Court of Appeal recategorized several leading Chancery decisions of this kind as cases of "estoppel." According to Lindley L.J., although the equitable

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67 R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies*, 3d ed. (Sydney: Butterworths, 1992) at 420; Jackson, *supra* note 17 at 87-88; Frederick Pollock, *The Law of Torts*, 5th ed. (London: Stevens and Sons, 1897) at 187.

68 (1801), 6 Ves. Jr. 174, 31 E.R. 998 (Ch.) [*Evans*].

69 *Ibid.* at 1002 [footnotes omitted].

70 Ian E. Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melbourne U.L. Rev. 349 at 357: "possession by the representor of [the requisite] information."

71 (1682), 1 Vern. 136, 23 E.R. 370 at 370 (Ch.) [*Hobbs*]: "it was a negligent thing." By way of contrast, in *Dyer v. Dyer* (1682), 2 Chan. Cas. 108, 22 E.R. 869, cited by Holdsworth, *supra* note 17 at 161, the Court refused to grant relief where there was no proof of fraud.

72 (1690), 2 Vern. 150, 23 E.R. 703 [*Hunsden*]. In *Hunsden*, the Court held against the defendant despite her insistence on not having knowledge of the falsity. Meagher, Gummow & Lehane, *supra* note 67 at 406-407, n. 2, cites this as a case where negligence sufficed, although the report does not disclose whether the Court actually held on that basis rather than merely disbelieving the defendant.

73 G.H.L. Fridman, "Promissory Estoppel" (1957) 35 Can. Bar Rev. 279 at 291 [Fridman, "Promissory Estoppel"]; Holdsworth, *supra* note 17 at 161; Meagher, Gummow & Lehane, *ibid.*

74 (1805), 10 Ves. Jr. 470, 32 E.R. 927 at 929 (Ch.) [*Burrowes*]: "[a]t least it was gross negligence."

75 Jackson, *supra* note 17 at 87; *Low v. Bouverie*, [1891] 3 Ch. 82 [*Low*].

76 (1889), 14 App. Cas. 337 (H.L. (Eng.)) [*Derry*].

77 *Supra* note 70 at 357-61.

78 (1789), 3 T.R. 51, 100 E.R. 450 (K.B.) [*Pasley*].

79 Bigelow, *supra* note 17 at 431; Ewart, *supra* note 17 at 7, both agree that the equitable jurisdiction mirrored deceit.

80 *Supra* note 75.

jurisdiction to give relief for careless misrepresentations was "quite inconsistent with *Derry v. Peek*," *Derry* left untouched "the law relating to estoppel."[81] *Burrowes*, moreover, was clearly recategorized in *Low* as a case of estoppel.[82] Lord Kay in *Low*, after referring to several cases including *Burrowes*, *Hobbs*, and *Hunsden*,[83] all cases tending to illustrate equity's jurisdiction to remedy careless misrepresentations, suggested that there was no equitable jurisdiction inconsistent with *Derry* because all Chancery decisions cited to the contrary were either actually based on fraud or were really cases of "estoppel."[84]

It would appear, therefore, that the independent development of this historical equitable jurisdiction discontinued after *Derry*. However, this doctrine's substantial influence on estoppel by representation and proprietary estoppel, and its further marginalization by the House of Lords, will be explored in the sections below.

2. DISCUSSION & ANALYSIS

At this stage in the history of estoppel, three issues arise in relation to the historical jurisdiction of the Chancery. The first relates to the remedy available under the doctrine. We shall see that, although many of the earlier decisions were unclear as to the reasoning underlying the remedy provided, the later judgments clearly cast the jurisdiction in wide terms. The second issue is related to the first; to what extent, if any, was detrimental reliance a threshold requirement of the doctrine? Finally, the decision of the English Court of Appeal in *Low*[85] raises an important third issue related to the phenomenon of legal categorization.

The remedial approach of this historical jurisdiction appears to have been based on protecting the representee's expectancy interest although the earlier decisions are somewhat ambiguous. In many of the early decisions grounding this jurisdiction, the remedy awarded was consistent with both the reliance and expectation measures, and the courts' reasoning on the remedial issue was less than clear. One example is the case of *Burrowes*[86] where the representor-trustee told the representee that a beneficiary under his trust, with whom the representee was about to contract, was entitled to £288. The trustee had forgotten, however, that the beneficiary's interest was encumbered. After the beneficiary assigned his interest under the trust to the representee to discharge a debt, the representee discovered the encumbrance. He brought a suit in equity against the representor-trustee and the beneficiary. According to Grant M.R.:

> [The trustee-representor] must be answerable, in case [the beneficiary] cannot answer the demand; and must first pay over to the [representee] the residue of the trust fund, deducting the [existing encumbrance]; then [the beneficiary] must make up the deficiency; and, if he fails, [the trustee-representor] must make it good.[87]

The remedy awarded to the representee does not clearly fall within one measure of recovery. The representee relied on the representation by purchasing the interest and thereby discharging a debt owed to him by the beneficiary. It is arguable that but for this

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81 *Ibid.* at 100.
82 *Ibid.* at 100-102.
83 *Supra* note 72.
84 *Low*, *supra* note 75.
85 *Ibid.*
86 *Supra* note 74.
87 *Ibid.* at 929.

representation made by the trustee of the very trust from which the interest was to be drawn, the representee would not have entered into this transaction. Thus, detriment suffered in reliance is the difference between the value expected and the value received. In short, the expectation measure mirrors the reliance measure. Unfortunately, the report of the decision does not disclose which measure animated the court's reasoning, although Grant M.R. prefaced his decision by citing the court's authority to "make [the] representation good,"[88] which at least semantically comports with expectancy.

An earlier example of remedial uncertainty is the decision in *Hunt*.[89] Recall that in *Hunt*, the representor told the representee that his father had a full interest in the land that the representee wanted to lease. In truth, the representor held a remainder interest. In reliance on the representation, the representee leased the land, paying a price reflecting his expectation. Thus, in ordering the representor who held the remaining interest to confirm the lease, the Court both gave effect to the expectations engendered by the representation and remedied the representee's detrimental reliance. The report of *Hunt* does not disclose which measure was dominant in the Court's reasoning on the issue of remedy.

In *Hobbs*,[90] another early case, the fact pattern and the remedy were almost identical to *Hunt*. The Court ordered the representor to pay an annuity on the basis that he had encouraged the representee to purchase the annuity without disclosing his own existing interest in the underlying land. The representee's reliance on the representation arguably took the form of purchasing the annuity, and in doing so, he paid a price which mirrored the expectation engendered by the encouragement.

Despite these cases of uncertain remedies, in the seventeenth-century decision of *Hunsden*, and many of the early nineteenth-century cases, the doctrine was articulated in terms that suggested it would provide full protection for the expectations engendered in the representee. In *Hunsden*, the Court held that the defendant, whose representation regarding the nature of her interest in land had induced a marriage between her son and a third party, must "make [the representation] good" by exercising her proprietary rights in conformity with the representation.[91] There was no discussion in the report of the decision regarding the value of the representee's detrimental reliance. In the 1801 decision in *Evans*, Lord Chancellor Eldon also cited the doctrine as requiring the representor to "make [the] representation good."[92] This articulation suggests that the remedy is to enforce the representation, thus addressing the expectation interest of the representee. This passage from *Evans* was cited as the main authority in *Burrowes*, suggesting that the Court there also based its remedy on the expectation measure, despite the fact that the remedy happened to be consistent with the reliance interest as well.

Lord Cottenham's speech in an 1845 House of Lords decision is also frequently cited[93] in the same vein. According to Lord Cottenham:

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88 *Ibid.*
89 *Supra* note 65.
90 *Supra* note 71.
91 *Hunsden*, *supra* note 72 at 703-704.
92 *Supra* note 68 at 1002.
93 Finn, *supra* note 18 at 62-65; Davidson, *supra* note 70 at 361, noting that this decision has since been reinterpreted as one of contract by the House of Lords, which is discussed below at *infra* notes 140-45 and surrounding text.

> A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity, for the purpose of realising such representation.[94]
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> …
>
> *I am of the opinion … that the expressions used in the proposed arrangement, acted on as they were, became obligatory on the party on whose behalf the proposition was made*.[95]

This passage, which referred to the equitable jurisdiction,[96] strongly suggests that the expectation measure dominated the remedy. Finally, in *Loffus v. Maw*, after citing part of Lord Cottenham's speech above, the Vice-Chancellor was even more explicit on the remedy:

> The [representor's] representation in this case, and any other case within the application of the doctrine [stated by Lord Cottenham], binds the property … *as completely, according to the law of this Court, as if he had bound himself in consideration of money*.[97]

Although we shall see later[98] that the House of Lords would soon overrule *Loffus* and reinterpret the speech of Lord Cottenham, at least some of the important decisions under this principle have invoked a remedy that is clearly based on an expectation, as opposed to a reliance measure. Moreover, *all* of the decisions are consistent with the expectation measure while none were exclusively consistent with a reliance-based remedy.

While expectancy was likely the basis for the Courts' remedy in these cases, I submit that, in contrast to the common law doctrines of estoppel by record, estoppel by deed, and estoppel *in pais*, detrimental reliance was a requisite element of this equitable jurisdiction. For example, in the cases of *Hunt* and *Hobbs*, two of the earliest cases, reliance was part of the Courts' analysis. In *Hunt*, the Court expressly invoked the representee's reliance in finding against the representor. Moreover, in *Hobbs*, the disposition was based in part on the fact that the representee "encouraged" the underlying transaction and the additional fact that, had the representor not been negligent in his misrepresentation, the representee would have been "informed" of the truth *before* entering into the transaction. In *Hunsden* and *Gale v. Lindo*,[99] two other seventeenth-century decisions, although the Courts' reasoning on reliance is less clear than in *Hunt* and *Hobbs*, the respective representations appeared to play a material role in inducing the marriage agreements at issue.

The requirement of reliance is perhaps clearest in *Evans*, where Lord Chancellor Eldon's articulation of the Chancery's jurisdiction in such cases made reliance a core requirement: "if a representation is made to another person, *going to deal in a matter of interest upon the faith of that representation*, the [representor] shall make that representation good."[100] In *Burrowes*, the Court expressly applied Lord Chancellor Eldon's statement, making specific

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94 *Hammersley v. De Biel* (1845), 12 Cl. & F. 45, 8 E.R. 1312 at 1312 [*Hammersley*].
95 *Ibid.* at 1320, n. 1 [emphasis added].
96 *Ibid.* at 1331, Lord Campbell: "Of course, Lord Cottenham is here speaking of … a doctrine of a Court of Equity."
97 (1862), 3 Giff. 592, 66 E.R. 544 (Ch.) at 549 [emphasis added, *Loffus*].
98 *Infra* notes 140-45 and surrounding text.
99 (1687), 1 Vern. 475, 23 E.R. 601 [*Gale*].
100 *Supra* note 68 at 1002 [footnotes omitted, emphasis added].

findings of fact to discharge the requirement of reliance.[101] Finally, *Hammersley* and *Loffus* were explicit in requiring detrimental reliance. In *Hammersley*, the Court set out the principle on which the decision in *Loffus* is based, as requiring a representation "made by one party for the purpose of influencing the conduct of the [representee], *and acted on by him*."[102] Reliance was thus a threshold requirement for relief under the jurisdiction.

Beyond a remedial approach likely favouring expectancy and the requirement of reliance, the equitable jurisdiction raises an additional issue related to categorization. In the eighteenth and early nineteenth centuries, an orthodox conceptualization of "estoppel" would have focused on common law estoppel by record and its extension into the common law doctrines of estoppel by deed and *in pais*. This is because an orthodox conceptualization of "estoppel" is one most grounded in the history of the legal use of that term, and these were the only doctrines in either the common law or equity which — up until the early nineteenth century — bore the label. There could be no understanding of the term "estoppel" in the law without reference to its genesis in these common law concepts. However, in *Low*,[103] early Chancery cases were labelled as "estoppel" decisions. This labelling occurs despite the fact that in the reports of the decisions in question, the word "estoppel" does not appear, and the Chancery had not expressly adopted the concept of "estoppel."

I would submit that in *Low*, a broad description of equity's enforcement of representations was likely construed as a threat to the authority of the House of Lords' decision in *Derry*, which restricted liability for misrepresentation to cases of fraud. As Lord Kay stated in *Low*: "I am not satisfied that relief in the nature of a personal demand against the defendant has been given in Equity in cases which did not involve fraud or to which this doctrine of estoppel *would* not apply."[104] The use of the word "would" in the preceding sentence suggests a conscious recognition of the fact that the cases in question were not necessarily decided by reference to the common law notion of estoppel from that era. Treating the cases as ones of estoppel, a concept known to the common law, was somehow less of a threat to the tort of deceit than allowing them to remain illustrations of equity's independent jurisdiction to make representations good. This phenomenon of categorizing Chancery decisions as ones of estoppel, as we shall see, would prove important in the history of estoppel by representation.

C. ESTOPPEL BY REPRESENTATION

1. HISTORY

In 1762, the Court of King's Bench in *Montefiori v. Montefiori*[105] delivered a judgment that many scholars[106] assert imported into the common law equity's flexible approach to making representations good. According to Lord Mansfield:

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101 *Supra* note 74.
102 *Supra* note 94 at 1320, n. 1 [emphasis added].
103 *Supra* note 75.
104 *Ibid.* at 112-13 [emphasis added].
105 (1746-1779), 1 Bla. W. 363, 96 E.R. 203, Lord Mansfield [*Montefiori*].
106 McGhee, *supra* note 64 at 253-54; Holdsworth, *supra* note 17 at 160-62; Fridman, "Promissory Estoppel," *supra* note 73 at 292.

> The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different from the truth … they shall be bound to make good the thing in the manner in which they represented it. It shall be, as represented to be.[107]

No case was cited by Lord Mansfield for this proposition of law, and no common law decision at the time would appear to support it. However, both *Gale*[108] and *Hunsden*[109] — seventeenth-century Chancery decisions founding equity's jurisdiction to make representations good — dealt with the exact factual scenario contemplated by *Montefiori*. In *Gale*, the representor loaned money to his sister so that she would look wealthier to her suitor who married her on the strength of her wealth. The representor was enjoined from recovering the money. In *Hunsden*, the representor's careless ignorance as to her own interest in land had the same effect as a representation by colouring the terms of a marriage treaty between her son and his fiancée. She was compelled to stand by the treaty.

Several decades after *Montefiori*, common law courts began to enunciate a doctrine of estoppel by representation. In *Heane v. Rogers*,[110] the Court of King's Bench set out the following rule of law:

> There is no doubt but that the express admissions of a party … or admissions implied from his conduct, are … strong evidence, against him; but we think that [only where] … another person has been induced … to alter his condition … [is] the party estopped from disputing their truth.[111]

Three years later, in *Graves v. Key*,[112] the Court of King's Bench cited *Heane*, *Wyatt v. The Marquis of Hertford*,[113] and *Straton v. Rastall*[114] for the following proposition:

> A receipt is an admission only, and the general rule is, that an admission, though evidence against the person who made it … is not conclusive evidence, except as to the person who may have been induced by it to alter his condition.[115]

In the 1837 decision of *Pickard v. Sears*,[116] the common law principle of estoppel by representation was given what many legal scholars consider to be its first modern articulation.[117] Citing *Heane* and *Graves*, Lord Denman stated the principle as follows:

> [T]he rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous

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107 *Supra* note 105 at 203.
108 *Supra* note 99.
109 *Supra* note 72.
110 (1829), 9 B. & Cress. 577, 109 E.R. 215 (K.B.) [*Heane*].
111 *Ibid.* at 218.
112 (1832), 3 B. & Ad. 313, 110 E.R. 117 (K.B.) [*Graves*].
113 (1802), 3 East 147, 102 E.R. 553 at 553 (K.B.): "it did not appear that the [representee] was in any way prejudiced … [and therefore the admission may be departed from]."
114 (1788), 2 T.R. 366, 100 E.R. 197 (K.B.), holding that, without more, a receipt is not conclusive proof against a person who signs it.
115 *Supra* note 112 at 119, n. (a) [footnotes omitted].
116 (1837), 6 Ad. & El. 469, 112 E.R. 179 (K.B.) [*Pickard*].
117 Bigelow, *supra* note 17 at 431-32; Ewart, *supra* note 17 at 8; Holdsworth, *supra* note 17 at 146; Meagher, Gummow & Lehane, *supra* note 67 at 406-407.

> position, the former is concluded from averring against the latter a different state of things as existing at the same time.[118]

In *Freeman v. Cooke*,[119] Parke B. labelled *Pickard*, *Heane*, and *Graves* as cases of "estoppel" and qualified, as follows, the "wilfulness" requirement from *Pickard*:

> [B]y the term "wilfully," [we must understand that it is sufficient if the representor] … so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it.[120]

With the 1854 decision of *Jorden v. Money*,[121] the doctrine of estoppel by representation crystallized, taking on a modern form that is still retained in England.[122] In *Jorden*, Lords Cranworth and Brougham, for a majority of the House of Lords, held that the doctrine "does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do."[123] *Jorden* was an appeal from the old equity jurisdiction: its effect cannot be confined to estoppel at common law.[124] Moreover, the House of Lords in *Jorden* was unanimous in considering the principle under consideration to be one "equally of law and of equity"[125] with the same elements. After *Jorden*, estoppel by representation was largely considered to be the same at both common law and in equity[126] and no longer applied to representations as to future intention.

In Canada, the distinction between estoppel by representation and promissory estoppel has largely disappeared. From an empirical point of view, in almost 31 percent of the estoppel cases studied, it was impossible to tell to which category of estoppel the court was referring and in most of this group of cases, the difficulty arose because the facts supported both promissory estoppel and pre-*Jorden* estoppel by representation.[127] Moreover, in 15 percent[128] of cases, I classified the estoppel as estoppel by representation, and in most of these, the court made no explicit mention of, nor seemed to be constrained by, the restrictive principle in *Jorden* that it only applies to the statements of fact.[129] By way of contrast, I was able to classify almost 40 percent[130] as cases of promissory estoppel, a classification often based on the courts' own label. It would appear that this label, relative to estoppel by representation, is dominant in Canadian appellate jurisprudence.

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118 *Supra* note 116 at 181 [footnotes omitted].
119 (1848), 2 Exch. Rep. 654, 154 E.R. 652 [*Freeman*].
120 *Ibid.* at 653.
121 (1854), 5 H.L. Cas. 185, 10 E.R. 868 [*Jorden*].
122 Lunney, *supra* note 13 at 559; Bower, *supra* note 1 at 4, calling the doctrine, "estoppel by representation of fact."
123 *Supra* note 121 at 882.
124 G.H. Treitel, *The Law of Contract*, 11th ed. (Toronto: Carswell, 2003) at 116; Meagher, Gummow & Lehane, *supra* note 67 at 419-20; Bower, *supra* note 1 at 21.
125 *Supra* note 121 at 880. Lord Brougham implicitly endorsed this idea.
126 Fridman, "Promissory Estoppel," *supra* note 73 at 293; Finn, *supra* note 18 at 64-66; Meagher, Gummow & Lehane, *supra* note 67 at 409-11, although suggesting at 406-407 that such equivalence was clear since *Pickard*, *supra* note 116. Compare Jackson, *supra* note 17 at 97, arguing that the common law conceptualization was different.
127 This figure is taken by combining the results in Appendix A and "Appendix B," *supra* note 30.
128 The actual figure is 14.8 percent, based on five from Appendix A and 11 from "Appendix B," *ibid.*
129 In very few cases, this restriction was acknowledged. See e.g. *Ford v. Kennie*, 2002 NSCA 140, 210 N.S.R. (2d) 50 at para. 38; *Canadian Forest Products Ltd. v. B.C. Rail Ltd.*, 2005 BCCA 369, 42 B.C.L.R. (4th) 201 at para. 47, citing *Canadian Acceptance Corp. Ltd. v. Contractors Supplies Ltd. (liquidator of)*, [1958] S.C.R. 546 at 555.
130 The actual figure is 39.8 percent, based on 32 from "Appendix B," *supra* note 30, and 11 from Appendix A.

2. DISCUSSION AND ANALYSIS

The same three issues discussed in relation to the evolution of the historical Chancery jurisdiction arise with respect to this account of estoppel by representation. The first concerns the phenomenon of categorization discussed in relation to the decision in *Low*.[131] The second relates to the remedial approach of estoppel by representation, which will be shown to favour expectancy. Third, the role of reliance as a threshold element will be explored.

The decision in *Jorden*, by interpreting many divergent decisions as examples of the same principle, casts additional light on all three of these issues. Lord Cranworth began his analysis in *Jorden* by setting out the principle as follows:

> [I]f a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application.… [I]n a great many cases [the representor has] been held bound to make his representations good.[132]

Following this articulation, Lord Cranworth proceeds to discuss cases from both the Chancery and common law which he expressly considers to be examples of this universal principle. According to Lord Cranworth, *Gale*,[133] a seventeenth-century Chancery decision, is an early example of this principle, as are the common law cases of *Montefiori*, *Pickard*, and *Freeman*.

The manner in which the principle was stated in the common law decisions, however, differed from its articulation in those of the Chancery. In *Heane* and *Graves*, for example, the doctrine is cast in evidentiary terms: an "admission" of a party is only strong "evidence" against him unless the admission induces reliance, in which case it is "conclusive" or works as an "estoppel." This articulation expressly employs the concept of reliance or change of position as a threshold requirement without which there can be no remedy. The analytical role of reliance, however, does not extend into the remedy which clearly favours expectancy. The representor's admission becomes binding on him, and reliance in no way animates the relief provided.[134] To a large extent, this remains the remedial conceptualization in England.[135] The famous common law decision in *Pickard* contained similar dicta, wherein *Heane* and *Graves* are cited as the only authorities. *Freeman* is of similar effect, relying heavily on *Pickard*.

In terms of categorization, the evidentiary nature of the principle at common law differs from its articulation in equity. In *Hunsden*, rather than stating the principle in evidentiary terms, the Court, as indicated in the report, "compelled" the representor to "make [the

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131 *Supra* note 75.
132 *Supra* note 121 at 880.
133 *Supra* note 99.
134 The Honourable L.J. Priestley, "Estoppel: Liability and Remedy?" in Donovan W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Scarborough: Carswell, 1993) 273 at 276; Bower, *supra* note 1 at 131, 492; Meagher, Gummow & Lehane, *supra* note 67 at 406-407.
135 *Scottish Equitable Plc. v. Derby*, [2001] EWCA Civ 369, [2001] 3 All E.R. 818. The Court affirms the evidentiary conceptualization, but asserts a jurisdiction to mitigate its effect if justice requires less than full expectancy relief.

representation] good."[136] In *Gale*,[137] moreover, the issue is cast in terms of a fraud perpetrated against the representee entitling him to act, as against the representor, as if the representation had been true. It is therefore not altogether clear that the early Chancery decisions and nineteenth-century common law decisions really represent examples of the same universal principle, despite Lord Cranworth's suggestion to the contrary. Indeed, as Stephen Waddams has noted, "[e]quitable concepts … cut across legal categories, and cannot easily be fitted to concepts derived from the common law."[138] Nevertheless, as the doctrine discussed in *Jorden* came to be understood as "estoppel,"[139] all of the decisions cited by Lord Cranworth can — with basis in high authority — be similarly labelled, however (un)supportable from an historical perspective the label may be.

At the same time, by holding that the application of this universal principle was restricted to representations of existing fact, *Jorden* can be understood as protecting the sanctity of the common law doctrine of consideration. In this sense, it is similar to the later decision of *Low*,[140] which, as discussed previously, played a similar protective role in relation to the common law tort of deceit. In setting out the restriction on estoppel in *Jorden*, Lord Cranworth held:

> [The] doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. *In the former case it is a contract, in the latter it is not.*… [I]t seems to me that the distinction is founded upon perfectly good sense, and that in truth *in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say,* "*Enter into a contract*," and then all difficulty is removed.[141]

One interpretation of this passage is that Lord Cranworth subscribed to a particular notion regarding the exclusivity of contract in the law of promissory liability. About 30 years after *Jorden*, the House of Lords rendered a similar decision in *Maddison v. Alderson*,[142] where it re-examined several decisions in which courts of Chancery invoked their historical jurisdiction. In *Maddison*, many of these decisions were construed as inconsistent with *Jorden*. Such cases were either labelled as cases of contract,[143] or where not susceptible to contractual analysis, expressly overruled.[144] After *Jorden* and *Maddison*, very little remained of the blanket jurisdiction of equity to make representations good.[145]

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136 *Hunsden*, *supra* note 72 at 703 [emphasis added]: "the [action] was brought by [the plaintiff] … and prayed … *that the defendant might be compelled to make it good*.… [T]he court decreed it for the plaintiff."

137 In *Gale*, *supra* note 99 at 601, the representee had died, but the court indicated that had the representee been alive, he would "have been relieved."

138 Waddams, *Dimensions*, *supra* note 16 at 13 [footnotes omitted].

139 *Supra* note 121, is universally considered to be a seminal estoppel decision.

140 *Supra* note 75.

141 *Supra* note 121 at 882 [emphasis added].

142 (1883), 8 App. Cas. 467 (H.L.) [*Maddison*].

143 Some of the early Chancery decisions are susceptible to contractual analysis, although the Chancery judges were likely not conscious that their decisions were based on contract. See Meagher, Gummow & Lehane, *supra* note 67 at 420; Finn, *supra* note 18 at 63-64; Jackson, *supra* note 17 at 88 (esp. n. 27); *Hammersley*, *supra* note 94, was held to be a case of contract in *Maddison*, *ibid.*

144 *Maddison*, *ibid.* at 473-74, 483; Priestley, *supra* note 134 at 275-76; Finn, *ibid.* at 65; see also Davidson, *supra* note 70 at 361. *Loffus*, *supra* note 97, was overruled.

145 Finn, *ibid.* at 64-66, asserts that proprietary estoppel and equitable estoppel by representation are what remain of this historical jurisdiction.

The influence of equitable principles on the ultimate doctrine of estoppel by representation is also evident. Recall that reliance was not a threshold element in the doctrines of estoppel by record, estoppel by deed, or the historical version of estoppel *in pais*.[146] Recall additionally, that the purpose or policy underlying the common law doctrines of estoppel by deed and *in pais* as stated by Lord Coke in the seventeenth century was based on the principle that "*allegans contraria non est audiendus*."[147] This articulation has evidentiary overtones. However, in *Montefiori*, the first modern common law decision of estoppel by representation, reliance was a requirement. The principle in *Montefiori* only operated where a material misrepresentation *induced* a marriage. By the nineteenth century, *Heane*, *Graves*, and *Pickard*, although maintaining the common law evidentiary conceptualization, expressly embraced the idea that reliance was required in order to render the representation conclusive.

I would submit that this embrace by the common law of the requirement of reliance must be seen as an importation from equity, which, as noted in the discussion under the history of the Chancery's historical jurisdiction, clearly made reliance a constituent element early on. Without some evidence in the historical record of another source of this change in common law doctrine, and given that *Montefiori*, the first common law decision of estoppel by representation, was likely influenced by marriage cases from the Chancery requiring reliance, it would appear that the threshold element of reliance came from the Chancery.

We can also see that the common law's evidentiary conception of estoppel came to be imposed on equity. With the recategorization and abolition in *Jorden*, *Maddison*, and *Low* of much of the Chancery's remaining jurisdiction to enforce representations,[148] estoppel by representation came to be seen as the same at common law and in equity. What emerged was a doctrine that maintained the common law notion that the representor will be precluded from acting inconsistently with representation. I would submit that the phraseology of "estopping" the representor, rather than that of "making the representation good," is indicative of the evidentiary conceptualization of the common law and came to dominate estoppel both at common law and in equity.

D. PROMISSORY ESTOPPEL

1. HISTORY

The genesis of promissory estoppel is inextricably tied to the decision in *Jorden*[149] where the House of Lords restricted the application of estoppel by representation to representations of existing fact. The doctrine of promissory estoppel is commonly traced[150] to the 1947 decision of Denning J. (as he then was) in *Central London Property Trust Limited v. High Trees House Limited*.[151] According to Denning J. the "representation [in the instant case] … was not a representation of an existing fact," which is the essence of common law estoppel; "[i]t was a representation, in effect, as to the future." At common law, that "would not give

146 See *supra* notes 57-58 and surrounding text.
147 Coke, *supra* note 1 at 352.
148 Proprietary estoppel, however, is also a remnant of this historical jurisdiction. See Part III.E, below.
149 *Supra* note 121.
150 Shannon K. O'Byrne, "More Promises to Keep: The Expansion of Contractual Liability Since 1921" (1996) 35 Alta. L. Rev. 165 at 175-76; Meagher, Gummow & Lehane, *supra* note 67 at 420; MacDougall, *supra* note 6 at 274; Bower, *supra* note 1 at 12, 443.
151 [1947] 1 K.B. 130 [*High Trees*].

rise to an estoppel, because [of] *Jorden v. Money*."[152] Nevertheless, according to Denning J., equity could still be employed:

> The law has not been standing still since *Jorden* v. *Money*.… [There are cases of promises which were] intended to create legal relations and which, to the knowledge of the person making the promise, [were] going to be acted on by the person to whom it was made, and which was in fact so acted on.… The courts … have refused to allow the party making it to act inconsistently with it.… [These] decisions are a natural result of the fusion of law and equity.… [T]he cases of *Hughes* v. *Metropolitan Ry. Co.*,[153] *Birmingham and District Land Co.* v. *London & North Western Ry. Co.*[154] and *Salisbury (Marquess)* v. *Gilmore*[155] … [show] that a party would not be allowed in equity to go back on such a promise.[156]

The label "promissory estoppel," which was first employed by Samuel Williston in the United States, to distinguish the concept from estoppels restricted to statements of fact,[157] has since been imposed on the *High Trees* principle.

Two things should be noted at this point. First, the decision in *Jorden* was an appeal from a decision in equity, and the notion that its effect is limited to common law estoppel cannot be maintained.[158] In fact, at least since *Jorden*, estoppel by representation is a doctrine equally of equity and common law with the same characteristics.[159] Second, of the three decisions cited by Denning J. in *High Trees*, two — *Birmingham* and *Salisbury* — rely completely on the authority of the third, *Metropolitan*, to which attention will now turn.

In *Metropolitan*, a decision of the House of Lords, Lord Cairns, without citing any authority,[160] enunciated the following abstract principle of equity which ultimately influenced *High Trees*, *Birmingham*, and *Salisbury*:

> [I]t is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results … afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[161]

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152 *Ibid.* at 134.
153 (1877), 2 App. Cas. 439 (H.L. (Eng.)) [*Metropolitan*].
154 (1888), 40 Ch. D. 268 (C.A.) [*Birmingham*].
155 (1942), 2 K.B. 38 (C.A.) [*Salisbury*].
156 *Supra* note 151 at 134-35.
157 E. Allan Farnsworth, *Farnsworth on Contracts*, 4th ed. (New York: Aspen, 2004) at 93, n. 21.
158 Treitel, *supra* note 124 at 116; Meagher, Gummow & Lehane, *supra* note 67 at 419-20; Bower, *supra* note 1 at 21.
159 See *supra* note 129.
160 It has been suggested that Lord Cairns in *Metropolitan*, *supra* note 153, may have been referring to the equitable principle of relief against forfeiture, but this was rejected in *Birmingham*, *supra* note 154. It has also been suggested that the reference was to estoppel by acquiescence, which itself evolved from equitable misrepresentation, although Lord Cairns' articulation seems to emphasize a more active role for the representor. See Bower, *supra* note 1 at 445-46.
161 *Metropolitan*, *ibid.* at 448.

Although it is arguable that this principle cannot be reconciled with *Jorden*,[162] it spawned a separate doctrine, labelled "promissory estoppel," that has since been affirmed as good law in Canada, Australia, and the United Kingdom.[163] At the same time, moreover, the authority of *Jorden* appears to remain intact, at least in the U.K.[164]

Four years after rendering his famous decision in *High Trees*, Denning J. (as he then was) added what has appeared to many to represent an important clarification of the scope of that decision. In *Combe v. Combe*, he provided the following proposition:

> [Promissory estoppel] may be part of a cause of action, but not a cause of action in itself … [and, as such,] it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.… I fear that it was my failure to make this clear [in *High Trees*] which misled [the trial judge] in the present case.[165]

As Lord Denning would later write, promissory estoppel — instead of constituting an independent basis of promissory liability — was designed to mitigate the "ill effects" of the operation of the doctrine of consideration in the context of contractual modifications and discharges.[166]

2. DISCUSSION AND ANALYSIS

The relationship between promissory estoppel and the doctrine of consideration is a topic about which much ink has been spilled and provides further insights into the three familiar issues of remedy, reliance, and categorization. To understand this relationship requires an appreciation of historical nuance.

Described at a high enough degree of abstraction, estoppel-like concepts are sweeping, capable of rendering nugatory other legal principles. Promissory estoppel is especially illustrative of this potential vis-à-vis the contractual requirement of consideration.[167] As we have seen in *Jorden* and *Maddison*, the Chancery's jurisdiction to enforce representations came to be reinterpreted, recategorized, and restricted in response to its relationship with contract. As Holmes J. (as he then was) stated in 1884, writing for the U.S. Supreme Court: "it would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it."[168] In 1974, legal theorist Grant Gilmore predicted that promissory estoppel would eventually overpower contract as the principal source of promissory liability.[169] The *Combe* restriction, and we shall see other

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162 Meagher, Gummow & Lehane, *supra* note 67 at 420; Bower, *supra* note 1 at 29-30, citing Meagher, Gummow & Lehane with approval.

163 See e.g. *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 1 W.L.R. 761 (H.L. (Eng.)); *Waltons Stores (Interstate) Limited v. Maher*, [1988] HCA 7, 164 C.L.R. 387 [*Waltons*]. In the United States, the genesis of promissory estoppel is traced to s. 90 of the First *Restatement of the Law of Contracts* (St. Paul: American Law Institute, 1932).

164 Lunney, *supra* note 13 at 559; Bower, *supra* note 1 at 30.

165 [1951] 2 K.B. 215 at 220 (C.A.) [*Combe*].

166 A.T. Denning, "Recent Developments in the Doctrine of Consideration" (1952) 15 Mod. L. Rev. 1 at 4.

167 Waddams, *Dimensions*, *supra* note 16 at 58, making this argument in relation to promissory estoppel.

168 *Commonwealth v. Scituate Savings Bank* (1884), 137 Mass. 301 at 302, Holmes J.

169 Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974), cited in Hillman, *supra* note 13 at 581.

suggested restrictions, were thought to reduce the tension between estoppel and consideration by narrowing estoppel's reach.

The conceptual overlap between contract and promissory estoppel may flow in part from the historical development of equitable misrepresentation. Some of the early cases of equity's jurisdiction to enforce representations are susceptible to contractual analysis and were rendered at a time when the doctrine of consideration had not yet become firmly established at common law.[170] In the 1649 case of *Hunt*, for example, the representee offered the representor money for his assistance in procuring a perfect lease from the representor's father. The representor, after accepting the money, falsely told the representee and his father, that his own interest in the land would not interfere with the transaction. After realizing that the lease he held was not of the quality he expected because of the representor's underlying interest in the land, the representee brought suit in the Chancery against the representor. The Court, in ordering the representor to make an assurance and to confirm the lease, arguably acted within the bounds of contractual principles yet to be solidified at common law.[171] It has also been suggested that *Gale* and *Hobbs* may be consistent with contract.[172] To the extent that some of these Chancery decisions were rendered before consideration was treated as a bedrock of contract, their susceptibility to *post hoc* contractual analysis is relevant to the contemporary relationship between contract and estoppel. To state this same proposition differently, since estoppel by representation — which strongly influenced promissory estoppel — is a product of equitable principles developed at a time before the doctrine of consideration had been firmly established, it should come as no surprise that modern estoppel may potentially overlap with contract. This is especially the case given that equitable principles often develop in response to perceived lacunae in the common law.

A number of restrictions on the operation of promissory estoppel have been suggested to mitigate its tension with contract law.[173] One of the most important, and historically interesting, is the restriction that emerged in *Combe*, which continues to resonate in England[174] and partially in Canada,[175] although not in the U.S.[176] It has been suggested, both in *Combe* itself[177] and by others,[178] that the restriction of promissory estoppel's operation to pre-existing legal relationships is designed to protect contract law as the exclusive source of promissory liability.

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170 Meagher, Gummow & Lehane, *supra* note 67 at 420; Jackson, *supra* note 17 at 88 (esp. n. 27); Finn, *supra* note 18 at 63-64.

171 Waddams, *Contracts*, *supra* note 18 at 85, n. 297, noting that mutual promises, without consideration, were "early held to be enforceable."

172 Jackson, *supra* note 17 at 88 (esp. n. 27).

173 Waddams, *Dimensions*, *supra* note 16 at 65: "various limits have been suggested."

174 McGhee, *supra* note 64 at 257-58; Bower, *supra* note 1 at 472, 500; Treitel, *supra* note 124 at 106, 112-15.

175 G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 124 [Fridman, *Contract*]; MacDougall, *supra* note 6 at 289; J.A. Manwaring, "Promissory Estoppel in the Supreme Court of Canada" (1987) 10:3 Dal. L.J. 43 at 56; *Canadian Superior Oil Ltd. v. Paddon-Hughes Development*, [1970] S.C.R. 932 at 937 [*Canadian Superior*]; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271; *Remington Energy Ltd. v. British Columbia (Hydro and Power Authority)*, 2005 BCCA 191, 210 B.C.A.C. 293. Interestingly, in my empirical study, I found the presence of a pre-existing legal relationship in only 70.8 percent of the successful estoppel cases. This figure is taken from Appendix A, but with the proprietary estoppel decisions not counted.

176 Slawson, *supra* note 23 at 199-200; Bower, *supra* note 1 at 516; Treitel, *supra* note 124 at 118.

177 *Supra* note 165 at 220: "consideration is too firmly fixed to be overthrown by a side-wind."

178 See e.g. Trietel, *supra* note 124 at 112-15; Waddams, *Dimensions*, *supra* note 16 at 65: "[i]n order to avert this consequence."

In my opinion, however, although the *effect* of this restriction may be to limit the tension between promissory estoppel and contract, its genesis long predates *Combe* and is more historical than pragmatic. Recall that the common law decisions of *Heane*, *Graves*, and *Pickard*, which crystallized the modern doctrine of estoppel by representation, cast the principle in evidentiary terms, that presupposes a legal relationship between the parties. A party could not found a cause of action on estoppel by representation because "estoppels" at common law operated like rules of evidence.[179] Insofar as promissory estoppel can be understood as a direct offspring of that older estoppel, the restriction in *Combe* should not be seen as novel. Estoppel by deed and estoppel by representation had long operated in the exclusive context of pre-existing legal relationships and promissory estoppel is no different. Instead, the novelty can be seen in the imposition by the common law of the evidentiary conceptualization on the equitable jurisdiction to enforce representations under which there did not appear to be a similar restriction to pre-existing legal relationships.[180]

A number of the other suggested limitations on the operation of promissory estoppel are remedial, and the one most supported by authority provides that, on reasonable notice to the representee, the representor may repudiate his representation.[181] Historically, this limitation does not appear to have been applicable to estoppel by representation,[182] and I would suggest that it flows partly from the unique context in which promissory estoppel evolved.[183] It should be recalled that in *High Trees* and *Metropolitan*, the two cases establishing the independent principle of promissory estoppel, the underlying context concerned the modification of existing contractual relations. In *Metropolitan*, the principle was stated as operating where the representor leads the representee "to suppose that the strict rights arising under the contract will not be enforced,"[184] and *High Trees* wholly adopted this formulation. In *Combe* and in extrajudicial writings,[185] Lord Denning has stressed that promissory estoppel is supposed to mitigate the harshness of consideration in the context of contractual modifications.[186] In this sense, promissory estoppel mirrors the common law doctrine of waiver.[187] Under this latter doctrine, the representor is free to resume her rights on reasonable notice; what she cannot do, however, is lure the representee "into a default and then seek to take advantage of that default without giving the [representee] a chance to cure it."[188] Waiver

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179 Meagher, Gummow & Lehane, *supra* note 67 at 411; Bower, *supra* note 1 at 12-13; Treitel, *ibid.* at 112, although suggesting that, for promissory estoppel, the restriction was about avoiding conflict with contract.

180 See e.g. *Hunt*, *supra* note 65; *Hobbs*, *supra* note 71: the representation was in itself actionable. I could find no indication that the Chancery jurisdiction was limited to pre-existing legal relationships.

181 Fridman, *Contract*, *supra* note 175 at 136: "as long as such … [was] effected reasonably and without giving rise to some inequity"; Waddams, *Contracts*, *supra* note 18 at 142-43; McGhee, *supra* note 64 at 271; Manwaring, *supra* note 175 at 66. The scope of this principle, however, has not been entirely worked out: see Bower, *supra* note 1 at 490-92.

182 Treitel, *supra* note 124 at 116; Meagher, Gummow & Lehane, *supra* note 67 at 411; *Cf.* Bower, *ibid.* at 133.

183 In Canada, where the distinction between promissory estoppel and estoppel by representation has largely disappeared, there is wide judicial support for the idea that the representor may resume his previous position on reasonable notice. See e.g. *International Knitwear Architects v. Kabob Investments Ltd.* (1995), 67 B.C.A.C. 128 at para. 29; *Martinez v. Hogeweide*, 1998 ABCA 34, 209 A.R. 388 at para. 9; *Newfoundland Assn. of Public Employees v. Newfoundland (Treasury Board)*, [1999] N.J. No. 143 (C.A.) (QL) at paras. 37, 39; *Subway Franchise Systems of Canada, Ltd. v. Esmail*, 2005 ABCA 350, 380 A.R. 274 at para. 14.

184 *Supra* note 153 at 448.

185 *Supra* note 166 at 4.

186 Also supporting this view of promissory estoppel's role is Roger Halson, "The offensive limits of promissory estoppel" [1999] L.M.C.L.Q. 256 at 277; Manwaring, *supra* note 175 at 51, noting as well that its goal is to avoid unjust enrichment.

187 Waddams, *Contracts*, *supra* note 18 at 147-48.

188 *Ibid.* at 448 [footnotes omitted].

may thus be seen as at least partly concerned with detrimental reliance, since resumption on reasonable notice depends on a certain change of position. Since resumption on notice operates under promissory estoppel, it may be said that detrimental reliance also partly underscores that doctrine.[189]

That being said, as a precedential matter, promissory estoppel has operated to protect reasonable expectations engendered in the representee. Although there is some support for a reliance approach to relief in England,[190] Australia,[191] the U.S.,[192] and Canada,[193] the weight of authority endorses expectancy. In Australia, a recent High Court decision has reaffirmed that expectations will be accorded prima facie protection,[194] and a number of empirical analyses have found near exclusive support for expectancy.[195] In England, although there is no binding authority on the issue,[196] at least one commentator has found strong empirical support for expectation relief.[197] In the U.S., although the state of binding authority is ambiguous,[198] the empirical data strongly supports the view that promissory estoppel protects the representee's expectations.[199] As my own empirical analysis of modern appellate authority in Canada has indicated, in every instance where promissory estoppel has been successfully asserted, the remedy awarded has been consistent with expectancy.[200] While the majority of these cases was *also* consistent with the protection of detrimental reliance, the court virtually always characterizes the operation of the doctrine as "estopping" the representor from resiling from his representation. This characterization is more consistent with expectancy relief and mirrors both estoppel by representation, from which promissory estoppel evolved, and Lord Cairns' principle stated in *Metropolitan* and applied in *High Trees*.

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189 *Ibid.* at 148-49.

190 Bower, *supra* note 1 at 493: "there appears to be no reason why the court should not award … reliance [relief where appropriate]"; McGhee, *supra* note 64 at 272, noting that, generally, rigidity has been rejected for a focus on equities, although acknowledging that the issue must still be decided by an appellate court.

191 *Australia v. Verwayen*, [1990] HCA 39, 170 C.L.R. 394; *Waltons*, *supra* note 163.

192 See e.g. *RCM Supply Company v. Hunter Douglas Inc.* (1982), 686 F.2d 1074 (U.S. 4th Cir.).

193 Waddams, *Contracts*, *supra* note 18 at 140, submitting that "the reliance rather than the expectation interest should be protected," although acknowledging that "the effect is often" to protect expectations.

194 *Giumelli v. Giumelli*, [1999] HCA 10, 196 C.L.R. 101, cited to this effect in James Edelman, "Remedial Certainty or Remedial Discretion in Estoppel after Giumelli?" (1999) 15 J. Contract L. 179 at 198-99; Simon Gardner, "The Remedial Discretion in Proprietary Estoppel" (1999) 115 Law Q. Rev. 438 at 439, n. 9; Bower, *supra* note 1 at 522.

195 Pratt, *supra* note 16 at 212; Robertson, "Estoppel Remedies," *supra* note 16 at 366.

196 McGhee, *supra* note 64 at 272.

197 Cooke, *supra* note 11.

198 Various courts have endorsed both theories in the U.S.

199 See Daniel A. Farber & John H. Matheson, "Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'" (1985) 52 U. Chicago L. Rev. 903 at 909; Yorio & Thel, *supra* note 17 at 151, 166; Becker, *supra* note 23 at 163; Feinman, *supra* note 23 at 687-88. Compare Hillman, *supra* note 13.

200 See Appendix A.

E. PROPRIETARY ESTOPPEL

1. HISTORY

The location of proprietary estoppel in this larger historical picture is complex and its own history multifaceted. Proprietary estoppel is a doctrine wholly of equity and is often said to be based on the alternative principles of acquiescence and encouragement.[201] In *Savage v. Foster*,[202] a 1723 Chancery decision, the principle of acquiescence was applied:

> Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser.[203]

The doctrine of encouragement is similar, although instead of passive acquiescence, there is active encouragement.[204] Proprietary estoppel has been traced to seventeenth-century Chancery decisions,[205] although there are several doctrines of equity which seem to have influenced its overall development.

Paul Finn treats modern proprietary estoppel as a vestige of the historical equitable jurisdiction to make representations good, discussed at length above.[206] It is true that the historical jurisdiction to make representations good is closely related to the originating principles of proprietary estoppel. For example, *Hobbs*,[207] an important case in the development of equitable jurisdiction to make representations good,[208] has been cited — rightly I would submit — as an early authority for proprietary estoppel.[209] In *Hobbs*, the Court, as noted, "decreed the payment of [an] annuity [charged on lands], purely on the encouragement [the defendant] gave [the plaintiff] to proceed in his purchase … [despite the fact that he had failed to properly] inform himself of his own title."[210] We can see that the defendant was liable for having "encouraged" the plaintiff to purchase an interest in land that, unbeknownst to the plaintiff, was encumbered by the defendant's own interest. The defendant was not permitted by equity to assert this strict legal right as against the plaintiff.[211] *Hunt* and *Gale*, also early examples of the Chancery's historical jurisdiction to remedy misrepresentations, are similar cases where the representor's own interest in the underlying realty was obscured by the representation.

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201 McGhee, *supra* note 64 at 258, 281; Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (London: Sweet & Maxwell, 1996) at 103, 109, 115. It has been noted that, in English law, there is confusion about the relationship between proprietary estoppel and the "common intention" constructive trust: see Halson, *supra* note 186 at 276; Meagher, Gummow & Lehane, *supra* note 67 at 432-33.

202 (1795), 9 Mod. 35, 88 E.R. 299 (Ch.) [*Savage*].

203 *Ibid.* at 300.

204 McGhee, *supra* note 64 at 258. It has been suggested that Lord Cairns' speech in *Metropolitan*, *supra* note 153, was referring implicitly to the principle of acquiescence: see Bower, *supra* note 1 at 446, n. 1.

205 Pawlowski, *supra* note 201 at 5, 116.

206 Finn, *supra* note 18 at 64-66. See discussion in Part III.B, above.

207 *Supra* note 71.

208 Fridman, "Promissory Estoppel," *supra* note 73 at 291; Holdsworth, *supra* note 17 at 161.

209 Pawlowski, *supra* note 201 at 5, 116.

210 *Supra* note 71 at 370. The report is only a second hand account of the Court's reasoning.

211 Another example would be *Hunt*, *supra* note 65, which, although not generally labelled as a case of proprietary estoppel, shares many similarities to *Hobbs*, *supra* note 71, and is cited as one of the earliest cases of equity's jurisdiction to make representations good.

Despite a jurisprudential origin shared with, or traceable to, equitable misrepresentation, proprietary estoppel was also likely influenced by an older, independent[212] principle of equitable restitution.[213] In *Peterson v. Hickman*,[214] the earliest decision I could find,[215] the defendant owned land that had been leased to the plaintiff by a third party. In reliance on the lease, and without knowledge that the lessor's title was defeasible, the plaintiff spent considerable sums of money building on the land. When the defendant avoided the lease at law, the Court of Chancery ordered her "to yield a [r]ecompence for the [b]uilding and [b]ettering of the [l]and," on the ground that "wheresoever one hath a [b]enefit, the [l]aw will compel him to give a [r]ecompence."[216] Similarly, in *Edlin v. Battaly*,[217] cited as one of the earliest authorities for estoppel by acquiescence,[218] the Chancery relieved a purchaser of land against "an old dormant title" by allowing him to "hold the land [until] he be repaid his charges" incurred in building on the land.[219] Finally, in *Attorney General v. Baliol College*, this principle was repeated: "suppose a man comes [to equity] to set aside a conveyance for fraud, if the grantee has made lasting improvements, the Court will do him, justice and let him have satisfaction for them."[220]

Indeed, the modern doctrine of proprietary estoppel is clearly at least partly concerned with avoiding unjust enrichment.[221] In stating the principle of estoppel by acquiescence in the famous proprietary estoppel decision of *Ramsden v. Dyson*, Lord Cranworth, for a majority of the House of Lords, articulated its rationale as based on the idea that "it would be dishonest [for the acquiescing party] … to remain wilfully passive … *in order afterwards to profit by the mistake which* [*he*] *might have prevented.*"[222] Overall, the historical principle of equitable restitution likely had an influence on, and may even form a part of, that body of jurisprudence that modern commentators call "proprietary estoppel."

There is also some indication that the modern articulation of proprietary estoppel was partly coloured by the development of the equitable doctrine of part performance.[223] The doctrine of part performance grew in response to perceived injustices flowing from particular pleadings of the *Statute of Frauds*.[224] Part performance and proprietary estoppel share similarities, and in many fact situations, particularly where the representor and the representee had verbally discussed terms, both doctrines may be live issues.[225] In the 1866 House of Lords decision in *Ramsden*,[226] widely considered to represent the basis of the

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212 *Montreuil v. Ontario Asphalt* (1922), 63 S.C.R. 401, suggesting that this principle was separate from the doctrines of acquiescence and encouragement.

213 Waddams, *Dimensions*, *supra* note 16 at 59-60, also asserts that proprietary estoppel seems based (partly) on restitutionary concerns. See also Bower, *supra* note 1 at 11, who sees the modern doctrine as based on a mixture of unjust enrichment and part performance.

214 [*Peterson*] [unreported], discussed in *The Earl of Oxford's Case* (1615), 1 Rep. Ch. 1, 21 E.R. 485 at 486.

215 Cited by McGhee, *supra* note 64 at 255, n. 13, as part of the origin of estoppel in equity.

216 *Supra* note 214.

217 (1793), 2 Lev. 152, 83 E.R. 494 (Ch.) [*Edlin*].

218 Pawlowski, *supra* note 201 at 5, 116.

219 *Supra* note 217 at 494.

220 (1744), 9 Mod. 407, 88 E.R. 538 at 541 (Ch.) [*Baliol*].

221 Waddams, *Dimensions*, *supra* note 16 at 56-60.

222 (1866), L.R.H.L. 129 at 170 [*Ramsden*] [emphasis added].

223 Bower, *supra* note 1 at 11, suggesting that the modern doctrine is based on a mixture of unjust enrichment and part performance.

224 1677 (U.K.), 29 Car. II, c. 3.

225 For example, the fact pattern in the case *Deglman v. Brunet Estate*, [1954] S.C.R. 725, where the doctrine of part performance was an issue, would appear to have been ripe for arguments based on proprietary estoppel.

226 *Supra* note 222.

modern doctrine of proprietary estoppel, Lord Kingsdown's enunciation of the principle included cases of verbal contract, the classic province of part performance.[227] Indeed, he cited *Gregory v. Mighell*[228] as his main authority for the principle, although this was arguably a case better construed as based on part performance. In *Dillwyn v. Llewelyn*,[229] another decision treated as a leading application of the principle of proprietary estoppel,[230] the English Court of Appeal in discussing the doctrine of encouragement, used contract phraseology and treated it as "somewhat analogous" to part performance. It may be that some of the cases today labelled as important examples of proprietary estoppel were decided on the basis of alleviating perceived injustices flowing from the *Statute of Frauds*.[231]

2. DISCUSSION AND ANALYSIS

The remedial issue in proprietary estoppel is complex and difficult owing to its "mixed origin"[232] and the fact that unlike other estoppel doctrines, proprietary estoppel can, in and of itself, found a cause of action.[233] As noted previously,[234] the Chancery's historical jurisdiction to make representations good was often stated and exercised consistently in a manner reflective of the expectation measure of relief. Moreover, the eighteenth-century decision of *Savage*[235] that applied the principle of acquiescence described the disposition as enjoining the representor from setting up his rights. Similarly, the doctrine of part performance, when successfully invoked, bypasses the *Statute of Frauds* and treats the relations between the parties as one of binding contract with the attendant remedy.[236] By way of contrast, it is also clear that the equitable restitutionary principle flowing from *Peterson* and exemplified in *Edlin* and *Baliol* was concerned with providing the representee with a "recompense" equivalent to the gain that the representor enjoyed. Notice that in none of these sources of proprietary estoppel is the remedial analysis structured by the representee's detrimental reliance on the representation.

The state of binding authority in Canada and England on the appropriate measure of relief for proprietary estoppel is muddled, although, as an empirical matter,[237] the dominant

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227 *Ibid.* at 170-71: "under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord." Although Lord Kingsdown wrote in dissent, many of the propositions of law contained in his speech are now treated as accepted by the majority: see *Crabb v. Arun District Council*, [1976] 1 Ch. 179 at 194 [*Crabb*], Scarman L.J.; Waddams, *Dimensions*, *supra* note 16 at 60, n. 15.

228 (1811), 18 Ves. Jr. 328, 34 E.R. 341 at 343: "[i]t is in part performed; and the Court must find some means of completing its execution."

229 (1862), 4 De G. F. & J. 517, All E.R. Rep. 384.

230 Waddams, *Dimensions*, *supra* note 16 at 59.

231 Halson, *supra* note 186 at 276-78, proprietary estoppel can only be understood by reference to its function in relaxing the technicalities of land conveyancing.

232 Bower, *supra* note 1 at 11.

233 Treitel, *supra* note 124 at 147; Halson, *supra* note 186 at 261-62; MacDougall, *supra* note 6 at 276, 295; McGhee, *supra* note 64 at 258; Pawlowski, *supra* note 201 at 6, 116; Bower, *ibid.* at 348-49; A.S. Burrows, "Contract, Tort and Restitution — A Satisfactory Division or Not?" (1983) 99 Law Q. Rev. 217 at 240; *Canadian Superior*, *supra* note 175 at 937 [emphasis added]: "*subject to the equitable rule as to acquiescence* … a cause of action cannot be founded upon estoppel"; *Zelmer v. Victor Projects Ltd.* (1997), 90 B.C.A.C. 302 at para. 48: "a cause of action can be based on … proprietary estoppel"; *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317 at para. 23 [footnotes omitted]: "but proprietary estoppel appears to be an exception to that rule [the sword/shield rule]."

234 See *supra* notes 86-98 and surrounding text.

235 *Supra* note 202.

236 Waddams, *Contracts*, *supra* note 18 at 168-69.

237 In my empirical study, only 11.1 percent of the estoppel cases were classified as cases of proprietary estoppel and in only five of these was the estoppel successfully asserted. All of these five cases were consistent with the expectation approach, although three were also consistent with the reliance measure.

remedial outcome in England appears to vindicate the expectancy interest.[238] There are several questions with clearer answers. One supportable proposition is that the restitutionary measure of remedy has virtually never been employed.[239] Additionally, unlike in relation to promissory estoppel, the effect of proprietary estoppel is permanent and the representor cannot, if all the other elements of the doctrine have been made out, resume his former position.[240] Scholarly discourse, moreover, generally agrees that the remedy to be provided in cases of proprietary estoppel is dependent on a number of factors other than simply the subjective expectations engendered by the representation, such as detrimental reliance,[241] impropriety on the part of the parties,[242] and practicability.[243] It is common in England to speak of a requirement of "proportionality" between the expectation interest and the representee's detrimental reliance,[244] although I find this articulation unsatisfying. The leading modern authority on remedies for proprietary estoppel in England is *Crabb*,[245] which speaks of providing "the minimum" relief necessary to satisfy the "extent of the equity" raised on the facts. The phrase "minimum equity to do justice," appearing in the judgment of Scarman L.J., is now recited frequently as the basis for a remedial discretion in proprietary estoppel, as well as for the proposition that the remedial approach is to respond to detrimental reliance.[246]

In my opinion, the "extent of the equity" which relief in proprietary estoppel must satisfy will generally be defined through the lens of the reasonable expectations of the representee determined by reference to the circumstances of the case. In *Crabb*, although the Court contemplated that the representee may be required to pay a reasonable fee for any easement awarded,[247] this flowed from his reasonable expectation:

> Clearly the [representee] … came away from that meeting in the confident expectation that a right would in due course be accorded.… [However, he also knew that] [t]he nature of the legal right to be granted had to be determined. It might be given by way of licence. It might be granted by way of easement. Conditions might be imposed. *Payment of a sum of money might be required. But* [*the representee*] *… came away from the meeting in the confident expectation that such a right would be granted upon reasonable conditions.*[248]

Thus, although the remedy must satisfy the "minimum equity to do justice,"[249] that equity was characterized in *Crabb* by reference to reasonable expectations. The remedy is flexible and discretionary only insofar as the court must choose from a wide range of possible

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238 Cooke, *supra* note 11 at 280; Burrows, *supra* note 233 at 242; Gardner, *supra* note 194 at 438-39; Finn, *supra* note 18 at 67; Bower, *supra* note 1 at 492; Meagher, Gummow & Lehane, *supra* note 67 at 428-29 (prima facie awards expectancy).

239 Gardner, *ibid.* at 439; Waddams, *Dimensions*, *supra* note 16 at 59: "remedy has not normally been measured by enrichment."

240 Treitel, *supra* note 124 at 142; Meagher, Gummow & Lehane, *supra* note 67 at 419; McGhee, *supra* note 64 at 258. Of course, one of threshold elements of proprietary estoppel is reliance on the representation.

241 McGhee, *ibid.* at 284; Bower, *supra* note 1 at 131; Treitel, *ibid.* at 141; Finn, *supra* note 18 at 92.

242 Pawlowski, *supra* note 201 at 74, citing *Williams v. Staite*, [1979] Ch. 291 at 299, Goff L.J.

243 Gardner, *supra* note 194 at 446, 465; Pawlowski, *ibid.* at 76 [citations omitted].

244 See e.g. Treitel, *supra* note 124 at 141; McGhee, *supra* note 64 at 284.

245 *Crabb*, *supra* note 227 at 193-94, 198. Interestingly, the famous speech of Lord Kingsdown in *Ramsden* clearly favoured expectation: *Ramsden*, *supra* note 222 at 170: "a Court of equity will compel the [representor] to give effect to such promise or expectation."

246 See e.g. Robertson, "Estoppel Remedies," *supra* note 16 at 362.

247 This fact is sometimes used to establish that *Crabb*, *supra* note 227, supports a flexible remedy: Waddams, *Dimensions*, *supra* note 16 at 61. Ultimately, the Court in *Crabb* did not require the payment of a fee because of post-representation conduct by the representor.

248 *Crabb*, *ibid.* at 196, Scarman L.J. [emphasis added].

249 *Ibid.* at 194.

options,[250] one that best responds to this characterization. This is the interpretation of *Crabb* given by Elizabeth Cooke and others.[251]

Recall that with proprietary estoppel, the material representation often takes the form of acquiescence or encouragement, rather than a promise or express representation. In this context, characterization of the representee's reasonable expectation requires careful factual analysis. The main thrust of the analysis, I would submit,[252] is to examine all the circumstances of the case to determine what a reasonable person in the place of the representee would have expected. Ambiguity in the representation means that there may be a disconnect between subjective and reasonable expectations. Put another way, where the material representation was clear or express, the remedy will favour subjective expectancy, while in other cases, the lack of particularity in the representation may make detrimental reliance a more appropriate measure of relief.[253]

IV. CONCLUSION

The purpose of this article has been to demonstrate the primacy of expectancy in estoppel remedies. The empirical analysis in Part II has provided evidence of such primacy in recent Canadian appellate jurisprudence, while the analysis in Part III has carefully traced the role of reliance in the development of estoppel. Reliance was not a threshold requirement of any of the common law estoppels until the mid-eighteenth century; instead, it was imported as a threshold requirement from equity's historical jurisdiction to enforce representations. As this jurisdiction came to be seen as in conflict with common law concepts, it was labelled an "estoppel" doctrine, and the result was a common law and equitable estoppel by representation under which the representor was fully estopped from resiling from his representation. The evidence also suggests that both proprietary and promissory estoppel, although historically influenced by a number of sources, protect the reasonable expectations engendered in the representee.

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250 The range of legal and equitable remedies, in England at least, is vast: see Bower, *supra* note 1 at 350.

251 Cooke, *supra* note 11 at 266; Treitel, *supra* note 124 at 141, although speaking in terms of proportionality, the main analytical tool in this treatise is the reasonable, as opposed to subjective, expectations of the representee; *Jennings v. Rice*, [2002] EWCA Civ 159 at para. 50, Walker L.J., making clarity of representation a key factor.

252 In making this point, I am in agreement with Cooke, *supra* note 11 at 276.

253 Christine Davis, "Estoppel: An Adequate Substitute for Part Performance" (1993) 13 Oxford J. Leg. Stud. 99 at 115; McGhee, *supra* note 64 at 284. This was also the explicit basis for the remedy in *Maritime Telegraph and Telephone v. Chateau Lafleur Development Corp.*, 2001 NSCA 167, 199 N.S.R. (2d) 250 at paras. 40, 55; *Jennings v. Rice*, *supra* note 251 at para. 50; the implicit basis for the remedy in *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197, 180 B.C.A.C. 258 at para. 48, as the remedy mirrored the expectation.

APPENDIX A:
SUCCESSFUL ESTOPPEL CASES, DATA ON REMEDIES

			Classification of Remedy			
Case	**Defendant Estopped**	**Existing Relations**[a]	**Expectancy**	**Reliance**	**Flexible**	**Equivalent**[b]
Kenora (Town of) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.[1]		*				*
Campbell v. Campbell[2]	*	*	*			
International Knitwear Architects v. Kabob Investments Ltd.[3]	*	*	*			
Vic Van Isle Construction Ltd. v. Board of Education School District No. 23 (Central Okanagan)[4]		*	*			
Farm & Leisure Equipment Ltd. v. Arnburg[5]		*	*			
Zelmer v. Victor Projects Ltd.[6]	*		*			
Camrad Inc. v. Cafe Supreme F. & P. Ltd.[7]	*	*	*			
Beer v. Townsgate I Ltd.[8]	*		*			
Guimond v. Hébert[9]			*			
Furmanek v. Community Futures Development Corp. of Howe Sound[10]						*
B & A Bobcat and Excavating Ltd. v. Sangha[11]		*				*

	Classification of Estoppel[δ]					
Abstract Dicta[·]	**Promissory**	**Proprietary[†]**	**By Deed**	**By Representation[·]**	**By Convention**	**Unclear[¤]**
						*
						*
	*					
	*					
		*				
	*					
			*			
	*					

			Classification of Remedy			
Case	**Defendant Estopped**	**Existing Relations[a]**	**Expectancy**	**Reliance**	**Flexible**	**Equivalent[b]**
713860 Ontario Ltd. v. Royal Trust Corp. of Canada[12]			*			
Flello v. Baird[13]	*					*
CMLQ Investors v. Cajary Building Corp.[14]	*		*			
Hansen v. British Columbia (Minister of Transportation and Highways)[15]	*	*				*
Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)[16]		*				*
Maritime Telegraph and Telephone v. Chateau Lafleur Development Corp.[17]	*					*
Willoughby Residential Development Corp. v. Bradley[18]	*		*			
Depew v. Wilkes[19]			*		*	
Trethewey-Edge Dyking (District of) v. Coniagas Ranches Ltd.[20]	*	*	*			*
Bank Leu AG v. Gaming Lottery Corp.[21]	*				*	
Highfield Place v. 233985 Alberta Ltd.[22]	*	*				*
Heathwood Manor (Raglan) v. Vadum[23]		*				*

	Classification of Estoppel[δ]					
Abstract Dicta[•]	**Promissory**	**Proprietary[†]**	**By Deed**	**By Representation[•]**	**By Convention**	**Unclear[□]**
				*		
		*				
				*		
	*					
						*
*		*				
				*		
		*				
*		*				
				*		
	*					
	*				*	

Case		Defendant Estopped	Existing Relations[•]	Classification of Remedy			
				Expectancy	Reliance	Flexible	Equivalent[þ]
3163083 Canada Ltd. v. St. John's (City of)[24]			*	*			
Deloitte & Touche LLP v. Marino[25]			*				*
Canada (A.G.) v. Adamoski[26]			*	*			
Chan v. Lee Estate[27]		*	*				*
Brar v. Roy[28]		*	*				*
Subway Franchise Systems of Canada Ltd. v. Esmail[29]			*				*
Totals	29	16	18	15	0	1	14
Percentage[‡]		55.2	62.1	50	0	3.3	46.7

[ð] In classifying, I followed the following parameters: (1) where a court expressly classified the estoppel, I recorded the class accordingly, unless the classification could not reasonably be supported by precedents establishing the particular class; (2) where the court failed to expressly identify the category, but the estoppel more reasonably fit into one category to the exclusion of any other, I recorded it as falling within that category; (3) where the court failed to expressly identify the category, and the estoppel did not fit into any one category more reasonably than another, I have recorded it as an "Unclear" classification; and (4) where a case is recorded as "Unclear," this often means that it equally fit within the classes Promissory Estoppel and Estoppel by Representation.

[•] "Existing Relations," for the purposes of this chart, means that there was a pre-existing legal relationship between the parties at the time that the representor made the representation. Moreover, it includes a relationship between two parties created by a statutory limitation period, i.e., where one party may bring suit against another and that suit is subject to a statutory limitation period. However, "Existing Relations" does not include a pre-contractual relationship, where one party is estopped from denying the existence of a concluded contract, since at the time of the representation, there was no actual contractual relationship between the parties. Although I only found a pre-existing relationship in 62.1 percent of the cases, if I remove the decisions where proprietary estoppel was at issue, this increases to 70.8 percent. Proprietary estoppel does not require a pre-existing legal relationship.

[þ] "Equivalent," for the purposes of this chart, means a remedy in which the evidence discloses a reasonably strong likelihood that the reliance and expectation measure would have been substantially the same in any event. In many of the cases where I recorded an "Unclear" remedy, however, the Court will have provided the standard remedy of estopping the representor from resiling from the representation, without any further analysis on the issue. Where there is some evidence that the expectancy and reliance measure would be

	Classification of Estoppel[ð]					
Abstract Dicta[⋆]	**Promissory**	**Proprietary[†]**	**By Deed**	**By Representation[⋆]**	**By Convention**	**Unclear[¤]**
	*					
	*					
	*					
				*		
	*					
	*					
3	11	5	1	5	1	6
10.3	37.9	17.2	3.4	17.2	3.4	20.7

similar, but such evidence falls short of disclosing a reasonably strong likelihood of equivalence between the two measures, I have recorded the remedy as that which the evidence more strongly supports.

⋆ "Abstract Dicta," for the purposes of this chart, means that the court actually discussed the remedial issue in the abstract, rather than simply providing a remedy.

† "Proprietary Estoppel," for the purposes of this chart, includes the classifications Estoppel by Acquiescence, Estoppel by Encouragement, and Estoppel due to Unconscionability, where the classification appears to comply reasonably with the precedents establishing the class "Proprietary Estoppel."

⋆ "Estoppel by Representation," for the purposes of this chart, includes the classification "Estoppel by Conduct," as this classification appears to comply reasonably with the precedents establishing the class "Estoppel by Representation." It also includes "Agency by Estoppel" per Lord Cranworth in *Pole v. Leask* (1863), [1861-73] All E.R. 535 at 541-42 (H.L.); see also *Lloyds Bank Plc. v. Independence Insurance Co. Ltd.*, [2000] 1 Q.B. 110 (C.A.).

¤ "Unclear," for the purposes of this chart, means that the court in the specific case did not expressly identify which category of estoppel it was referring to and the reference does not reasonably fall into one category to the exclusion of the others. Where the Court failed to expressly identify the category, but the estoppel more reasonably fits into one category to the exclusion of the others, I have recorded it as falling within that category. In many cases, "Unclear" classification means that the Court did not expressly categorize the estoppel and it reasonably fit within both Promissory Estoppel and Estoppel by Representation.

‡ The percentages under Classification of Remedy is based on a total of 30 cases, since in one case, two estoppel arguments were successful.

1 [1994] 1 S.C.R. 80, Major J. (majority). The representor was estopped from claiming restitutionary relief for under-billing the representee for seven years; the representee relied to their detriment on the representor's erroneous billing practices. The trial decision, (*Hydro Electric Commission of Kenora (Town*

of) v. Vacationland Dairy Co-Operative Ltd., [1989] O.J. No. 3133 (Dist. Ct.) (QL)), found that representee had relied on the under-billing for budget purposes, as annual budgets were based partly on previous years' expenses; and that the representee had no money with which to pay the restitutionary claim given that the regulatory environment precluded it from increasing the prices of its products and given that any profit from previous years had been reinvested into the business. Although the Court of Appeal did not discuss the issue of remedy directly, it did state that the value of the unbilled product no longer existed, which suggests that the Court would have considered the reliance measure to be equivalent to the expectation measure. The Court, however, ultimately "estops" the representor from resiling, without any discussion of the remedy.

[2] (1995), 107 Man. R. (2d) 137 (C.A.), Monnin J.A. (unanimous), leave to appeal to S.C.C. refused, 25103 (20 June 1996). The representor estopped from resiling from its promise, made in the context of a divorce settlement, not to seek a share of the representee's pension credits despite the fact that under this alternative ground of the judgment, the promise could be construed as unenforceable under statute. There is no analysis of the extent to which the representee relied on the promise. The evidence in this respect is complicated by the fact that the promise was but one term in a large settlement, although the representee's pension was always going to be worth much more than the representor's. Had the promise not been made, the representee could arguably have demanded another benefit when negotiating the settlement. The Court, however, merely "estopped" the representor from resiling without any further analysis of the remedy (although the main ground of the main basis of the judgment was not estoppel).

[3] (1995), 67 B.C.A.C. 128, Southin J.A. (unanimous). The representor was estoppel from resiling on its promise to accept less for rent than it was contractually entitled to until such time as it provided reasonable notice. There is no analysis or evidence of the extent to which the representee actually relied to its detriment on this representation. However, the context underlying the promise was that the representee was in dire financial straits and had considered closing down. Therefore, it is unlikely that the representee could have paid the contractual rate of rent in any event, which means that a reliance-based remedy would have been smaller than the expectation remedy that was ultimately given. The Court, however, merely "estopped" the representor from resiling without any further analysis on remedy.

[4] (1997), 88 B.C.A.C. 161, Hall J.A. (majority). The representor was estopped from resiling from the common assumption that, in the context of a public construction project, it would pay labourers more than required under statute; the representee relied on this assumption by obtaining approval from the Ministry for increased funding based on an overall price which reflected the assumption. Had the remedy reflected reliance, it is not clear what the remedy would have been, since the Court found that the Ministry would not have approved of lower wages for labourers in any event, meaning that the funding would not have been approved had the representor not induced the common assumption. It is not clear what would have occurred but for the representation. The Court, however, merely "estopped" the representor from resiling without any further analysis on remedy.

[5] (1997), 159 N.S.R. (2d) 396 (C.A.), Bateman J.A. (unanimous). The representor was estopped from resiling from its promise to the representee that, if the representee voluntarily surrendered property held under an unpaid conditional sales contract, the representor would not enforce its right to payment for any deficiency on the sale of the property. There is no indication that, had the representation not been made, the representee would have been able to make the appropriate payments under the contract as the trial decision ((1996), 152 N.S.R. (2d) 57 (S.C.)) found that the representee was unable to pay due to financial difficulties. There is some indication that the representee could have obtained a stay from the Farm Debt Review Board of any repossession attempt by the representor; it is possible that this would have given the representee more time to make the payments. The Court, however, merely "estopped" the representor from resiling without any further discussion of remedy.

[6] (1997), 90 B.C.A.C. 302, Hinds J.A. (unanimous). The representor was estopped from resiling from its promise to gratuitously grant the representee an easement over his land. In the trial judgment ([1995] B.C.J.

No. 2255 (S.C.) (QL)), the representee was awarded an easement as had been promised (a proprietary remedy), and the judgment does not discuss the issue of the remedy in detail. The Court of Appeal held that it was the role of the trial judge to determine how the equity was to be satisfied, and affirmed the remedy without any analysis. The remedy in formal terms was one of expectancy. However, the representee, in reliance on the promise, had spent over $100,000 constructing a water reservoir in the location where the easement was promised. It is not clear if the value of this reliance would mirror the value of expectancy, as there is no indication of the value of the easement in monetary terms.

[7] [1997] O.J. No. 1949 (C.A.) (QL), *per curiam*. The representor was estopped from resiling from its promise not demand payment of royalties under a franchise agreement. The issue of reliance was not discussed in detail in the trial judgment ((1995), 25 B.L.R. (2d) 64 (Ont. Ct. J. (Gen. Div.)); there was a separate successful claim of negligent misrepresentation in relation to a different event which makes it difficult to distil from the judgment reasons which relate to the issue of estoppel remedy. It is not clear what a reliance-based remedy for the estoppel claim would have looked like, as it would appear that most of the detrimental reliance occurred in relation to the negligent misrepresentation that preceded the estoppel representation. The Court, in any event, affirmed the trial judge's holding that the representor was estopped from relying on the strict terms of the franchise agreement, without any discussion of estoppel remedy.

[8] (1997), 36 O.R. (3d) 136 (C.A.), Brooke J.A. (unanimous). The representor was estopped from resiling from its representation that it would not rely on a term of an offer that acceptance be received within a certain time; the representor had represented through conduct that late acceptance was okay and that a contract had been properly entered into. The representee was a condominium developer, and the representor was a purchaser. There is no discussion in the judgment of the extent to which the representee relied on the representation; no indication if the representee would or would not have built the unit in any event had there been no representation. Thus, there is no factual basis on which to extrapolate what a reliance-based remedy would have looked like. The Court, however, merely held that the representor was "estopped" from invoking late acceptance to get out of the deal, without any further discussion of remedy.

[9] (1997), 195 N.B.R. (2d) 194 (C.A.), Turnbull J.A. (unanimous). The grantor was estopped from acting inconsistently with a deed wherein he purported to grant an interest in land to the grantee. The grantee in this case lived on the land for many years, and thus there would have been substantial reliance. However, there is no discussion in the judgment of the extent of this reliance or of the fact that such was required. The estoppel by deed had the effect in law of giving the grantee a lawful interest in the land despite the fact that the grantor had not held the interest at the time the deed was executed. The Court gave effect to the need without any further discussion of remedy.

[10] (1998), 110 B.C.A.C. 212, Goldie J.A. (unanimous). The representor was estopped from resiling from its representation that the representee would have a first-ranked security interest in the inventory of a third party. There was evidence indicating that the representee would not have provided a loan to the third party without the representation from the representor. This loan allowed the third party to contract with the representor. A reliance-based remedy would have been equal to the loss that the representee would have suffered on the transaction in light of the third party's eventual default on the loan. An expectation-based remedy, which the Court in fact ordered, was the finding that the representee had a first-ranked security interest in the inventory, which could then be used to satisfy the loss suffered by the representee on the third party's default. In the end, the two remedies would be substantially the same, although the Court ultimately enforced the representation without discussion of the remedial issue.

[11] 1999 BCCA 49, 118 B.C.A.C. 186, Newbury J.A. (unanimous). The representor was estopped from resiling from its representation that the representee did not have to comply with a contractual term requiring the representee to use a particular kind of material in a construction project. The estoppel was being used here as a defence by the representee against a claim of breach of contract by the representor. The trial judgment ([1996] B.C.J. No. 673 (S.C.) (QL)) does not indicate the detriment that the representee suffered in reliance on the representation, although presumably the representee would not have acted inconsistently with the

contract had the representation not been made. To the extent that this presumption is true, the representor would have had no claim for breach of contract. In this sense, a reliance remedy and expectation remedy are substantially the same. The Court, however, merely estopped the representor from resiling from the representation without any further discussion of remedy.

[12] (1999), 43 O.R. (3d) 159 (C.A.), *per curiam*. The representor was estopped from resiling from its representation that it had no concerns about the propriety of its postponement of its mortgage in real property to the benefit of the mortgage of the representee. The trial judgment ((1996), 27 O.R. (3d) 559 (Gen. Div.)) found several incidents of detrimental reliance, including that the representee would have acted differently in relation to the default of the mortgagor had it known that the representor's postponement in favour of it was improper. However, the extent of detriment suffered, in monetary terms, was not discussed and was not easily extrapolated. Overall, there does not appear to be sufficient evidence on the record to indicate that the expectation remedy awarded (enforcement of the postponement) would have been substantially equivalent to a reliance-based remedy. In any event, the Court merely estopped the representor from resiling from the representation, without any further discussion of remedy.

[13] 1999 BCCA 224, 122 B.C.A.C. 96, Cumming J.A. (unanimous on this issue). The representor was estopped from resiling from its representation that it would not dispute the conclusions of a land survey; in reliance on this representation, the representee built its house on an area that, but for the survey, would have been contested. The representor had attempted to resile from the representation by demanding compensation from the representee of $130,000 for building on the disputed land. The judgment does not disclose, in monetary terms, the extent of reliance by the representee. However, given that the representee presumably would not have built the house where it was but for the representation, it is likely that reliance damages would at least have been substantially similar to the expectation remedy (since it is safe to assume that the value of the expectation remedy, in this case enforcement of the land survey, was approximately $130,000). The Court, in any event, merely estopped the representor from resiling without any further discussion of remedy.

[14] (1999), 127 O.A.C. 284 (C.A.), *per curiam*. The representor was estopped from asserting that the third party was not his agent; the third party, in the context of negotiating a complex loan of which the representor was a co-guarantor, substituted the term of the loan to three years from five years, and the representor was estopped from denying that third party was his agent and thus that the agreement was binding on him. The representor insists that it would only have agreed to a five-year term, but there was no clear finding of fact to this effect by the trial judge. The trial judgment ([1998] O.J. No. 5455 (Ct. J. (Gen. Div.) (QL)) does not discuss the issue of reliance in any detail: it is not clear to what extent the representee would have acted differently but for the representation, i.e., it is not clear if the representee would have agreed to make this loan had the representor not made the representation. Had the representor, instead, insisted on the five-year term, it is not clear whether or not the loan would have been made. Therefore, there is no evidence to establish that a reliance-based remedy would have been substantially the same as an expectation-based one. The Court, in any event, merely estopped the representor from resiling from its representation, without any further discussion of the remedial issue.

[15] 2000 BCCA 338, 139 B.C.A.C. 147, Mackenzie J.A. (unanimous). The representor was estopped from invoking a statutory limitation period because it misrepresented to the representee the nature and scope of that limitation period. In reliance on that representation, the representee did not file its claim on time; but for the representation, it would have filed on time. Therefore, the representee's detrimental reliance was substantially similar to the representee's expectation. The Court, however, merely estopped the representor from invoking the limitation period without further discussion of remedy.

[16] 2001 BCCA 392, 154 B.C.A.C. 42, Newbury J.A. (unanimous on this issue). The representor was estopped from resiling from its representation that compensation received from the representee-expropriating-authority would be held on trust subject to a final determination by an adjudicator on the true value of the expropriated land. The evidence reasonably established that, but for the representor's representation, the

representee would not have made the payment because its internal valuation of the expropriated property was less than that which it paid to the representor on trust. Thus, it relied on the representation by making the payment before an adjudicator could rule finally on the value of the property. The value of the representee's reliance in this case is the difference between the amount paid originally and the true value of the property as determined by the adjudicator; the representee's expectation was that the amount originally paid would be effectively refunded if the adjudicator found the true value to be less. Therefore the two remedial measures would have been substantially similar. The Court, however, merely estopped the representor from resiling without any further discussion of remedy.

[17] 2001 NSCA 167, 199 N.S.R. (2d) 250, Cromwell J.A. (unanimous). The representee was entitled to an equitable easement over land of the representor; this is because the representor represented that the representee would gain a property right of access over land to be held by the representor. The representee relied on the representation by consenting to the city's conveyance of a public road to the representor, thereby losing an important transportation route; without this consent by the representee, the city may not have conveyed the land to the representor, in which case the representee would have had much less use for the right of access. The Court held that the nature of the equity raised by the estoppel is based on the expectations of the representee. However, the representee's reliance interest is substantially similar in that, due to its reliance, it lost a transportation route which the right of access was supposed to compensate.

[18] 2002 BCCA 321, 169 B.C.A.C. 253, Mackenzie J.A. (unanimous). The representor was estopped from asserting that a third party was not his agent; the third party sold land to the representee, and the representor "clothed" the third party with the authority to do so despite the representor's equitable interest in the land. Although the Court and the trial decision (2001 BCSC 992, 44 R.P.R. (3d) 232) found that the representee had spent considerable resources, as a developer who had also purchased adjoining land from other parties, the vast majority of such expenditures occurred prior to the representation. Therefore, it is likely that a purely reliance-based remedy would have been equivalent to an expectation-based remedy. The Court, in any event, merely estopped the representor from resiling without any further discussion.

[19] (2002), 60 O.R. (3d) 499 (C.A.), Rosenberg J.A. (unanimous). First, the representor was estopped from resiling from its representation that the representee could build and then use a well on the representor's property. The Court awarded an equitable easement over the well, but subject to a $100 annual licence fee payable to the representor. A purely expectation-based remedy in the circumstances would not have included the annual fee; a purely reliance-based remedy would have required the representor to compensate the representee for the cost of installing the well. Therefore, the remedy in the circumstances was flexible, although on the whole it emphasized the representee's expectations. Second, the representor was estopped from resiling from its representation that the representee could install concrete blocks on the representor's property. The Court awarded an equitable easement. A reliance-based remedy would have merely compensated the representee for the costs of installing the blocks. The Court, however, gave a fully expectation-based remedy.

[20] 2003 BCCA 197, 180 B.C.A.C. 258, Levine J.A. (majority). The representor was estopped from resiling from its representation that the representee would have permanent access to its land for the purpose of upkeeping the dykes. The representee spent considerable sums of money upkeeping the dykes over the course of many years, but this was its sole purpose as an incorporated entity. The Court granted a registrable easement in favour of the representee, which was based on its expectation of permanent access. The evidence did not establish that detrimental reliance on the representation, in the necessary legal sense, would have been equivalent to this expectation remedy. In any event, the Court based the remedy on the expectations of the representee.

[21] (2003), 175 O.A.C. 143, Weiler J.A. (unanimous), leave to appeal to S.C.C. refused, 29993 (1 April 2004). The representor was estopped from resiling from its written representation, on the face of a share certificate, that securities issued by it were fully paid. The representee relied on this representation by lending $4.5 million to a third party, who transferred the share certificates as security for the loan. The Court held that,

in making the series of loans, the representee relied primarily on the value of the shares, although there was other security for the loan. Based on this holding, it is arguable that the value of a reliance remedy would have been substantially similar to an expectation remedy in that, but for the misrepresentation, the loan would not have been issued or would have been significantly diminished. The Court, in the end, enforced the representation.

22 2003 ABCA 261, [2003] A.J. No. 1107 (QL), Côté J.A. (unanimous). The representor was estopped from resiling from its representation that the representee could pay reduced rent during a specified period. The representor attempted to resile by levying distress against the representee's property. However, the representee relied on representation by remaining in the tenancy and continuing its business, which it had considered closing; but for the promise of reduced rent, it is arguable that the representee would not have incurred the further rental debts as well as overhead costs. Therefore, value of reliance would substantially mirror value of expectancy. The Court, however, enforced the representation.

23 [2004] O.J. No. 729 (C.A.), *per curiam*. The representor was estopped from resiling from its representation that the representee may have a dog in her condominium unit; the representee relied on the representation by purchasing the unit (see trial judgment, (2003) 20 R.P.R. (4th) 231 (Ont. Sup. Ct. J.)). Therefore, reliance was substantial, and the remedy of enforcing the representation can be justified both in terms of reliance and in terms of expectation. The Court, however, merely precluded the representor from enforcing a condominium bylaw prohibiting dogs, without further discussion of the remedial issue.

24 2004 NLCA 42, [2004] N.J. No. 239 (QL), Welsh J.A. (majority). The representor, a tax assessor, was estopped from resiling from a common assumption, shared by the representee, that the representee did not have to disclose an insurance policy in order to preserve a right of appeal. A statute provided that such disclosure was necessary. Although the Court found that there was a common assumption that disclosure was not required, it is not clear that, but for the common assumption, the representee would have complied with the statute. The Court is not clear about when exactly the common assumption first became operative. Only if it first became operative before the statutory deadline is it possible to say that, but for the assumption, the representee would have complied with the statute. Thus, it is not clear that a reliance remedy would mirror an expectation one. In any event, the Court merely enforced the assumption, by preserving the representee's right of appeal.

25 (2004), 72 O.R. (3d) 274, Lang J.A. (unanimous). The representor, a trustee-in-bankruptcy, was estopped from resiling from its representation that it would not take action against the home of the representee-bankrupt. The Court found that, but for the representation, the representee would not have remained in the home, paid off tax and mortgage arrears, or made upgrades to the home. The Court is not clear on the actual value of such reliance, but it would appear that, based on the limited equity in the home, it is reasonable to conclude that a reliance-based remedy would have been substantially similar to the expectation remedy given. In this case, the representor was estopped from taking action against the home of the representee.

26 2004 BCCA 625, 206 B.C.A.C. 312, Lambert J.A. (unanimous). The representor was estopped from resiling from its representation that the representee's debt was extinguished. The representee relied on the representation by not making an assignment in bankruptcy. The Court found that there was detriment in the fact that it would have been better for the representee to make an assignment in bankruptcy at the time of representation, as opposed to in the present. However, since it was held that the representee could still make an assignment in bankruptcy in the present, detrimental reliance was not equivalent to the value of the loan. The Court, in any event, merely enforced the representation.

27 2004 BCCA 644, 249 D.L.R. (4th) 38, Newbury J.A. (unanimous on this issue). The representor was estopped from invoking a statutory limitation period because of conduct and representations made to the representee. The representor, as an executor, had statutory duties under the British Columbia *Wills Variation Act*, R.S.B.C. 1996, c. 490, to notify the representee of its right to challenge the will, which was not done. In the trial decision (2002 BCSC 678, 47 E.T.R. (2d) 163) it was held that the representee would

have been alerted to her rights and obtained legal advice had these statutory duties been discharged, meaning that the representee may not have missed the limitation period. Further, the trial decision found that the representor, qua beneficiary, represented to the representee after probate that certain concessions would be made to the representee in light of the inequitable nature of the will. This seemed to have the effect of helping to push matters beyond the limitation period. However, the representor ultimately refused to make any such concession. Thus, it is substantially likely that a remedy based on detrimental reliance on the conduct and representation would have mirrored the expectation-based remedy awarded.

[28] 2005 ABCA 269, 371 A.R. 290, *per curiam*. The representor was estopped from invoking a statutory limitation period because of conduct that had the effect of inviting the representee to believe that, in the context of ongoing settlement negotiations, the representor would not enforce the limitation period. The trial decision (2004 ABQB 383, [2004] A.J. No. 576 (QL)) found that the representee would have filed a statement of claim within the proper time period but for the representation. Therefore, it is reasonable to assume that a remedy based on detrimental reliance would have been substantially similar to a remedy based on expectancy. In any event, the Court merely estopped the representor from invoking the statutory limitation period without any further discussion of the remedial issue.

[29] 2005 ABCA 350, 380 A.R. 274, Côté J.A. (unanimous). The representor was estopped from resiling from its representation that it would not enforce an arbitral decision against the representee in which it was held that a franchise agreement between the parties was terminated. In the trial judgment (2004 CarswellAlta 1988 (Q.B.)), it was held that the representee relied on this representation by making substantial royalty and other financial payments and incurring substantial financial liabilities. The evidence discloses a reasonably strong likelihood that the reliance and expectation measure would have been substantially the same in any event. The Court, however, merely enforced the representation by staying enforcement of the arbitration award, without further discussion of the remedial issue.