SC CIV 95 009

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Petitioner

- and -

MARGARET LUCILLE CARSWELL

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE TEVIE H. MILLER

This is a rather unusual Notice of Motion brought by the respondent Margaret Carswell (hereinafter referred to as "Carswell") against the petitioner Robert Engle (hereinafter referred to as "Engle") seeking a declaration that a certain Pre-Nuptial Agreement (hereinafter referred to as "the Agreement") dated the 22nd of June 1989 made between Carswell and Engle is null and void in its entirety and therefore not binding upon the signatories. The application was brought as a result of suggestions which I made to the parties for the reasons that I will elaborate upon shortly.

In order to come to grips with the application it is necessary to set out some background of where the various pieces of litigation between Carswell and

Engle stand at this time as well as to review the history of the relationship between these two persons.

At the present time Engle is the petitioner in a divorce action which he commenced in the Northwest Territories on the 18th day of February 1992. Carswell is the respondent in that action and is also the counter-petitioner seeking the same remedy against Engle.

Carswell is also the petitioner in a divorce, custody and matrimonial property action against Engle which she instituted in the State of California, U.S.A. There are 3 infant children born to Carswell and Engle. Carswell challenged the jurisdiction of the Supreme Court of the Northwest Territories to hear the divorce action on the grounds that neither she nor Engle any longer had any residential qualifications giving this court jurisdiction under the Divorce Act to hear Engle's petition. Madam Justice Veit ruled that Engle had maintained his long time residence in the Northwest Territories and consequently this court had jurisdiction to deal with his petition for divorce. Her judgment has never been appealed. Carswell has resided with the 3 children in the City of Santa Barbara, California for the past several years. The children are currently ages 13, 10 and 7. On the 20th day of August 1993 I granted Engle's petition for divorce under our Divorce Act on the ground that the parties had been living separate and apart for more than 1 year, but ruled that the forum conveniens for resolving the parties' disputes over custody of the 3 children

and support for them should be determined by the courts in the State of California as that is where the children have been substantially residing for most of the past several years. It is my understanding that the California courts have not made a final disposition of custody matters to this date but have made several interim orders regarding maintenance for Carswell and the children as well as interim custody and access orders. At the present time, under California Court Order, Engle is paying spousal support to Carswell of $8,000 U.S. per month and child support to Carswell of $3,000 U.S. per month for each child.

There is also a substantial dispute between Carswell and Engle over the division of property. Central to this dispute is the agreement executed by the parties on June 22, 1987 which purports to deal principally with how property owned by Engle will be treated should the parties separate following the marriage ceremony which took place on June 22, 1987. The agreement also deals with custody and spousal support. Carswell made it clear early in the various divorce actions that she intended to challenge the validity of the entire agreement. It seemed apparent to me that the success or failure of this challenge had a material affect upon many of the remaining items in dispute, namely, custody, spousal support and maintenance for the children for it is acknowledged that Engle is possessed of substantial assets. In other words, I felt that no court could effectively deal with these items until it was determined who owned what share of the assets that are presently owned by either Carswell or Engle.

It was then determined that a special application dealing exclusively with the invalidity or validity of the agreement should be made. Carswell's then counsel agreed that this was probably a necessary step but argued that this hearing should take place in the courts in California while Engle's counsel maintained that this jurisdiction was the proper venue. I heard extensive argument from both sides and ruled that this court was the proper tribunal to rule on the question of the validity or otherwise of the agreement. One of the main reasons that led to this determination was that the agreement itself specifically designated this jurisdiction as the venue to settle any disputes. My ruling has not been appealed. It was agreed that, as Carswell was challenging the validity of the agreement, she should launch the application and bear the burden of proving its invalidity.

I heard 2 days of viva voce evidence from both sides and have subsequently been provided with excellent written briefs by both counsel.

The grounds upon which Carswell seeks to challenge the validity of the agreement are:

(a) Duress (including economic duress)

(b) Undue Influence

(c) Unconscionability

(d) Inequality of Bargaining Power

(e) Independant Legal Advice (or the absence of it)

Again, in order to weigh these grounds it is necessary to set out the background facts which must be considered by this court. I believe this is so because some of the tests which the court must address on the grounds raised by Carswell relate to subjective matters as they affected the parties. I am somewhat uncomfortable about setting out, what would ordinarily be private matters between two individuals, but the determination of the issues of fact and law that have been raised by both sides makes it virtually impossible to avoid.

Engle is a long time resident of Yellowknife and has been successfully involved in building up substantial businesses in the transportation sector of the Northwest Territories economy.

Carswell grew up in Eastern Canada and after successfully completing a 4 year Honours Arts Degree at York University she obtained both Bachelor of Common Law and Bachelor of Civil Law degrees from McGill University in 1978. Carswell decided to article in the Northwest Territories and came to Yellowknife in the middle of 1978 to commence her articles with a local law firm. Carswell met Engle at a social gathering and they started to see each other. In July of 1980 they made a decision to live together and Carswell moved into Engle's residence described as 5 Albatross Crescent in Yellowknife. At the time this decision was made Carswell was actually residing in Edmonton where she had taken a full-time legal position with the Provincial Attorney General's Department at an annual salary of $60,000. She was

also pregnant with the couple's first child, born September 20, 1981 who they named Jamie.

Upon returning to Yellowknife, Carswell did a small consulting job with the Northwest Territories Government relating to the preparation of a paper covering the relationship of tribal customs affecting the family and their interface with the legislation of the Northwest Territories. Arising out of this research Carswell had an article published in the Alberta Law Review covering the same area of the law. Still later, and on a part-time basis, Carswell wrote a series of articles which appeared in the Yellowknife newspaper, News of the North, on Family Law in the Northwest Territories and presented a similar series over the C.B.C. northern radio and television service.

With respect to the parties marital status and the events leading up to the signing of the agreement I propose, firstly, to review the testimony of Carswell and then that given by Engle. Where their recollection differs I will have to make findings of fact. Carswell's evidence is that she and Engle first discussed going through a formal marriage ceremony in October of 1979 at which time Engle took Carswell to the United States to introduce her to some members of his family. Carswell says she was most anxious to legalize their relationship but, for various reasons, nothing actually transpired for a number of years. However, it is apparent that the couple held themselves out to the community and to their children as being actually married,

except for a few very close friends and family who knew the true situation. Carswell claims that the first time any discussion ever came up about a pre-nuptial agreement was in the summer of 1982 when Engle produced a draft of a marriage contract which he had instructed his personal lawyers at the law firm of McMillan Binch in Toronto to prepare. Carswell testified that she was not very impressed with either the content or the draftsmanship of the contract and communicated these concerns to Engle. This document was entered as item C-4 of Exhibit 1 in the hearing. It is apparent from the document that Carswell was being asked to renounce any rights which she had or may acquire in the future against the vast majority of Engle's assets, including the home in Yellowknife. It must be noted that all of these assets belonged to Engle before the parties commenced living together. Carswell actually affixed her signature to this first agreement and had it witnessed by a family friend, Louise Irving, but she added a hand written paragraph to the effect that she was only prepared to be bound by the agreement if the parties were married by the end of 1983 and if The Law Reform Act of Ontario or other similar legislation of another jurisdiction covering matrimonial property rights governed their marriage. Engle never did sign this agreement as amended.

Carswell's evidence is that she never actually saw another draft of a pre-nuptial agreement until a few weeks before the marriage ceremony which took place on June 22, 1987. Nor, she says, was the matter of a pre-nuptial agreement a topic of discussion between the parties from 1982 to 1987. Carswell says that during this

period she made it very clear to Engle that she was not in favour of signing a pre-nuptial agreement but that she was anxious to legalize their marital status. Carswell testified this was primarily because she knew that, under the then laws of the Northwest Territories, illegitimate children didn't have any rights to inherit on an intestacy and she never knew whether Engle had a will or, if he did, what it provided.

Just before the birth of the youngest daughter, Alexandra on April 7, 1987, Carswell says that Engle told her that they should go through with a legal marriage ceremony and she whole-heartedly agreed. Carswell testified that she didn't understand there was a condition that she sign a pre-nuptial agreement before a ceremony would take place. Carswell's evidence is that a decision was made to wait until Jamie finished school in the spring and then to holiday at the family cottage on Hernando Island, B.C. for a few days before travelling to Vancouver, B.C. where the actual ceremony was to take place on June 22nd. The ceremony was to be performed by an old friend of the couple, Bishop Jack Sperry and the only guests were to be Mr. and Mrs. Victor Irving who had been close to the couple for years.

According to Carswell, early in June in Santa Barbara, California a few weeks before the scheduled wedding, Engle again brought up the subject of the pre-nuptial agreement and provided Carswell with an updated version of the same. This document is identified as item A-12 of Exhibit 1. It was prepared on Engle's instructions by one John Paterson of the McMillan Binch firm. Carswell says she was

shocked to receive this draft just before the wedding especially as Engle made it clear to her that a pre-nuptial agreement had to be signed before the wedding ceremony would take place. Carswell testified that there was little further discussion about the agreement until the parties were at the cottage on Hernando Island. The form of this copy of the agreement states that if the parties marry and subsequently separate Carswell receives a one-half interest in the home and contents in Yellowknife (referred to therein as "the principal residence"). It also provides a monthly spousal maintenance payment by Engle to Carswell of $5,000 indexed for inflation, mandates joint custody of the children and sets out the general obligation of Engle to pay child support. Carswell renounces any claim to all other assets owned by Engle.

Carswell claims that Engle accelerated the pressure upon her to sign this form of the agreement during the week before the scheduled ceremony while the family was staying at Hernando Island in spite of her protestations that the agreement was very "one-sided". It was during one of these heated discussions on the island that Carswell says she pointed out to Engle clause 6 of the agreement in which Carswell was to acknowledge that she had received independent legal advice before signing the agreement. In fact she says that she had never received such advice. Carswell testified that, some time after that conversation, she was told by Engle that there was a long distance phone call for her from a Yellowknife lawyer named John Vertes. Carswell claims that, at that time, she never contacted Vertes, directly or indirectly, for independent legal advice but she agreed that she had known Mr. Vertes

for a long time and held him in high regard as a friend and as a lawyer. She said that Vertes told her on the phone in a fairly short conversation that he understood she was being asked by Engle to sign a particular pre-nuptial agreement. Carswell acknowledges that Vertes advised her not to sign that agreement as it was not a fair distribution of Engle's assets should the parties separate. Carswell maintained that she told Vertes she had no choice but to sign the agreement as it was very important to her that the marriage went ahead.

John Vertes is now a Justice of the Supreme Court of the Northwest Territories. He was not called as a witness in the hearing but, by agreement, a copy of a memo he placed on his file dated June 23, 1987 was entered as Item C-1 of Exhibit 1. I will comment on this document in some detail later on. Carswell says it wasn't until after she talked to Vertes on the phone that she realized he must have a copy of the agreement in his possession and she wondered how this came about as she hadn't supplied it.

Both the Irvings and Bishop Sperry visited with Carswell and Engle on Hernando Island at this time although not together.

Carswell and Engle together with their children left Hernando Island a few days before the 22nd of June and travelled to Vancouver where they stayed at the Hotel Vancouver. Up to this point in time, Carswell had still not signed the agreement

and she says she was most unhappy with it. The wedding ceremony was scheduled for around 11:00 a.m. on Monday, June 22 at a church near the hotel. Carswell's evidence is that after breakfast on June 22nd Engle placed the agreement before her and said she had to sign it. She says she told him that she didn't think he'd call off the wedding if she didn't sign. Her evidence is that he responded to this by saying "try me". Carswell says she was very upset at this point and almost in a panic. Engle placed the agreement before her and said he wanted her to sign it forthwith. Carswell said she finally said she would but first she wanted to make some changes to the document. It is clear that some of the changes she wrote on the agreement are minor drafting ones but clause 2(3)(f) originally read:

> Robert and Margaret agree that it is their intention that the provisions herein which relate to the Principal Residence shall apply mutatis mutandis to any successor property which serves as the Principal Residence of Margaret and Robert.

She changed it to read:

> Robert and Margaret agree that it is their intention that the provisons herein which relate to the Principal Residence shall apply mutatis mutandis to any successor properties which are used exclusively by Margaret and Robert and the children.
>
> (underlining shows the changes made)

Carswell says Engle looked over the changes and appeared to accept them. Carswell then signed. She can't remember how many copies were signed. Carswell testified that she felt utterly helpless at this time and had no one to turn to. She said the reason she made the changes to paragraph 2(f) was to be able to establish a one-half interest claim in any residential properties that the family used.

She says Engle then took all the copies and left the room they were in. By this time Mr. and Mrs. Irving had arrived at the suite. Carswell can't remember seeing Engle affix his signature or the Irvings sign as witnesses, but their signatures appear on the document. They then all went to the church to meet Bishop Sperry and he conducted the marriage ceremony.

By prior agreement all 5 people returned to the hotel, picked up the 3 children and proceeded to where the Irvings' boat was docked. They went for a short cruise, ate on the boat and then, according to Carswell, it had previously been arranged that on the boat Bishop Sperry would repeat the marriage ceremony in front of the children as Carswell had told them their parents were renewing their marriage vows that had been entered into many years earlier. It is Carswell's recollection that the ceremony conducted by Bishop Sperry on the boat was an exact replica of the one performed in the church earlier that day. All of the participants then returned to the Hotel Vancouver where they were joined by a few more close friends and shared a dinner together. Carswell testified that, although she was very upset by the events surrounding the signing of the agreement that day, she did her best to mask her feelings in front of her family and friends.

It was Carswell's evidence that throughout the time they were together she never got involved in the day to day operations of Engle's businesses and only had a very general idea as to his net worth which she believed had increased

dramatically in value since they begin cohabitating. She did, however, fulfil her role as a stay-at-home mother and assisted in entertaining Engle's business associates on a frequent basis as well as supervise the various residences used by the family. I note that, except for the very first draft agreement, Carswell was consistent throughout all the negotiations leading up to the signing of the agreement and, subsequently, up to her challenge of the agreement that she never wanted or intended at the time the agreement was signed to make a property claim against Engle's business assets. It was not until the parties separated and Engle commenced a divorce action that she sought legal advise about her position and the legal status of the agreement itself.

Carswell was extensively cross-examined by Engle's counsel. She stated that she didn't have much exposure to family law during her term of articles and her limited practise experience but was generally familiar with the main principles in this area. She agreed that her subsequent research into family laws in the Northwest Territories and the articles she wrote and broadcast in Yellowknife made her fully aware of the rights and obligations of the parties as they related to property matters.

It was brought to Carswell's attention that a recent application concerning the residence in Palm Springs, California was made on her behalf by her California attorney which sought temporary possession of the same based on the terms of the pre-nuptial agreement being valid and binding upon the parties and now she was

seeking to deny the validity of the same agreement in this court. Carswell claimed that she was unaware of the grounds put forward by her California attorney in support of this application but claimed it never was proceeded with in any event.

Carswell recalled that the first time she had seen a draft of any agreement was early in 1982 when she received a copy of a document which is C-4 of Exhibit 1 prepared by a Ms. Pepall, a lawyer at McMillan, Binch. Carswell's memory is that she thought the draft was "very biased" in favour of Engle, In fact, as mentioned earlier, the document, precludes Carswell from advancing any claims against any of Engle's main assets, including the house in Yellowknife. This is the same document earlier referred to which Carswell signed after making some handwritten changes that were never accepted by Engle.

Carswell was asked if she recalls seeing another draft version of the agreement in 1985 shortly after the birth of the second child Emma. This document is identified as item B-6 of Exhibit 1. It was prepared by John Paterson of McMillan Binch but this draft gives Carswell, upon separation, a one-half interest in the Yellowknife residence and its contents and provides monthly spousal support to Carswell of $5,000 indexed to inflation as long as Carswell does not remarry. Carswell maintained that she had never seen this document in or about 1985 and certainly it does not bear either parties' signature. In fact, Carswell responded that she does not recall any significant discussions regarding the signing of an agreement

occurring between herself and Engle in the interval between 1982 to 1987 to just before the marriage ceremony nor did she see any further drafts of an agreement .

Carswell denied the suggestion that throughout the relationship Engle made it very clear to her that there would never be any legal marriage ceremony unless she signed a pre-nuptial agreement satisfactory to Engle.

Carswell confirms that she received a communication from John Paterson of McMillan Binch in early June of 1987 enclosing a draft of the agreement. This arrived after Engle seemed to finally be in favour of getting legally married following the birth of Alexandra, the third child. Carswell stated her attitude towards signing the type of agreement forwarded by Paterson remained one of opposition but says there was little discussion about it while the parties were still in Santa Barbara waiting for the oldest child to finish school.

She agrees she probably took the agreement with her to Hernando Island where the family went after Santa Barbara. She does recall both the Irvings and Bishop Sperry visiting them at Hernando during this period but not at the same time.

Carswell was cross-examined at length about her contact with Mr. Vertes which she says took place from Hernando Island. It was at this point in the cross-examination that Carswell was asked to review the contents of Vertes' memo to his file

dated June 23, 1987. This memo states that John Paterson of McMillan Binch contacted Vertes on June 15, 1987, I presume by phone, and advised him he was acting for Engle in drafting a pre-nuptial agreement. He also advised Vertes to expect a phone call from Carswell. On June 16th Paterson faxed a copy of the agreement to Vertes and he read the same but he says Carswell never called him that day. Vertes' memo goes on to say that he was contacted on June 17th by one Letha McLachlan, a lawyer friend of Carswell's who resided in Calgary, who informed him that Carswell was trying to reach him by phone but could not make contact. McLachlan informed Vertes that Carswell was then in Vancouver with Engle but did not provide a phone number where she could be reached. Vertes remembers McLachlan passing on information that Carswell was being pressured by Engle to sign an agreement if she wanted to get married.

Finally, according to the memo, on June 19th Carswell called Vertes from Vancouver and asked for Vertes' advice on the draft agreement he had received from Paterson. Vertes advised her that it was a very improvident agreement from her point of view in so far as a property division was concerned and that, if she were married, she "could do no worse" under the ordinary rules of dividing matrimonial property. The memo states he also told her that the agreement would likely be enforceable in the Northwest Territories if she signed it. The memo goes on to set out that Carswell agreed with Vertes' expressed concerns and that she told him she never wanted to make a claim against Engle's corporate interests but wanted to maintain some sort of

a claim against any property which the family had acquired that could be considered in law as "family assets". Vertes' memo says that Carswell finished the conversation by saying that she would try to go back and discuss this point with Engle and perhaps have the agreement re-drafted to cover this area of concern.

Vertes' memo then says he was contacted by Paterson on the 19th of June telling him he was rushing through a revision of the agreement which he faxed to Vertes late on the 19th. Paterson also told Vertes he should expect Carswell to contact him again. However, Carswell never did call Vertes and he apparently did not know where to reach her in Vancouver.

It is apparent that some of the sequences of events regarding the contact between Vertes and Carswell differed between what is contained in the memo and what was recollected by Carswell in her testimony at the hearing. When this was brought to Carswell's attention in cross-examination she agreed that she would accept Vertes' version even where it conflicted with her present recollection. However, she stated that it was apparent to her that, in the one discussion they had on the phone, she and Vertes were referring to the same draft of the agreement although she states that at the time she did not know where Vertes had obtained his copy as she never sent it to him. What seems clear is that Carswell never saw or was told about the existence of the revised draft that Paterson prepared and faxed to Vertes on June 19th.

The contents of Paterson's letter of June 19th to Vertes are perhaps significant and so I am repeating it in its entirety in this decision. It reads:

> I have now been able to speak to Bob Engle subsequent to my telephone conversation with you earlier this afternoon.
>
> In order that you may have those revisions I suggest be made as a result of our earlier conversation, I am faxing to you the agreement in its entirety with the changes marked.
>
> The concept that I understand you wish to have included was that any item of property acquired by either or both of Robert and Margaret after their marriage that could be considered a family asset in that it was used as a family unit would be subject to a division. You indicated that Margaret would release any right she had to any business assets acquired after marriage since these were not intended to be part of the "family assets".
>
> Bob Engle, after discussions with Margaret, advised me that the term "property" in this context should be defined as "real property".
>
> As you know from the agreement, paragraph 3(s) provides that after acquired property shall not be a joint asset "except as set out in this agreement". The addition of paragraph 3(5) and the amendment to the references in the first lines of paragraph 4 are intended to be one of the exceptions referred to in paragraph 3(2).
>
> Because of the time constraint with courier service and the added problem of delays in courier deliveries because of the over burdening of the courier system as a result of mail stoppages, I have dispatched to Bob Engle by courier the agreement which I am faxing to you so Bob would receive the package on Sunday in Vancouver at the Hotel Vancouver.
>
> If you need to reach me over the week-end I will be at our cottage on Saturday until late Sunday afternoon (705-756-8830) after which I will be at home (416-653-8897).

The significant change in the form of agreement prepared by Paterson and sent to Vertes is the addition of paragraph 2(5) on page 4 which reads as follows:

> Family Assets
>
> "Subject to paragraph 2(3) and 2(4), in the event that Robert and Margaret permanently cease to live together then that property acquired after their marriage by either or both of them, that is an asset that is used by Robert and Margaret as a family unit, would be subject to a division. It is understood that the term "family asset" shall not include any asset acquired by either Robert or Margaret, directly or indirectly, as a business asset."

Under further cross-examination Carswell was asked what types of assets she had in mind when she made the changes before signing the agreement. Her response was that she thought "family assets" included houses, cars, boats and planes used by the family.

Carswell said she never recalled discussing the agreement she signed with either of the Irvings. She conceded that all the changes made to the agreement that was signed were drafted by her. She described the changes she made were to produce a fairer agreement but that they only went as far as she thought she could get Engle to accept at that critical point in time.

Under questioning, Carswell said she thought the present market value of the Yellowknife house and contents to be in the neighbourhood of $1,000,000. She

also agreed that while the parties were living together Engle gifted to her a stock portfolio then valued at $100,000.00 and put $30,000 of R.R.S.P.s into her name.

She agreed that she made a decision at the time to ignore Vertes' advice and to sign the agreement as amended but she says she did so to ensure the marriage ceremony went ahead as planned.

Engle then testified. He said that he was in his mid 50's when he first met Carswell who was then in her late 20's. At that time Engle says he had already accumulated substantial assets. He said that at the beginning of their relationship he encouraged Carswell to pursue her legal career and even supported her taking the job in Edmonton with the Attorney General's Department.

Engle testified that the parties decided to live together in Yellowknife when they found out Carswell was pregnant and they wanted the child. He told his sister and a few close friends what the true legal relationship was between himself and Carswell. Engle said that at all times when the parties lived together he fully supported Carswell and the children and, as his businesses prospered, they enjoyed an increasingly high standard of living. It was Engle's recollection that after the birth of Jamie, they discussed the step of a legal marriage and he made it clear to Carswell then, and consistently thereafter, that he would only go through with a marriage ceremony if the parties first signed a formal pre-nuptial agreement. He says he took

this position on the advice of his personal lawyers at McMillan Binch. As the parties discussed a formal marriage from time to time Engle recalled that he instructed John Paterson of McMillan Binch to prepare a draft of an agreement whereby each party would renounce all claims against past, present and future property owned or acquired by either one. When Engle showed this document to Carswell in late 1981 she told him she wasn't happy with the basic concept of the agreement and was critical of some of the legal drafting. Engle says he asked Paterson to re-draft the agreement and presented the new version to Carswell in early 1982. Carswell agreed to sign this draft but only if the law of Ontario applied. Engle said he wasn't prepared to agree to this after consulting with his counsel. He said there were many more discussions with Carswell over the next few years and he thinks as many as 10 different drafts were prepared by Paterson and sent for discussion. Several new ideas were incorporated in later drafts including a provision that Carswell get a one-half interest in the Yellowknife residence and contents, a fixed predetermined monthly maintenance indexed to inflation, Carswell to receive independent legal advice and arrangements for custody and support for the children should the marriage break down. Engle pointed out that when he originally purchased the Yellowknife residence, title was taken in the name of one of his companies but he later transferred it to his own name. However, he said this was not done to accommodate the proposed agreement. Engle also mentioned that one of the assets specifically mentioned as being his own was any interest he might receive from his mother's estate.

Engle couldn't recall how he learned that Vertes would be the lawyer that would independently advise Carswell but does recall Paterson telling him that he was in contact with Vertes in 1985 when they discussed one of the earlier drafts.

Engle testified that the discussions with Carswell over an agreement were infrequent and usually accelerated each time another child was born to the couple. Engle stated that he considered Carswell to be an expert in family law, particularly in the Northwest Territories, but that she was familiar with the statutes in other jurisdictions.

Engle agreed that just prior to the birth of Alexandra in early 1987 the parties again addressed the question of a legal marriage ceremony. He recalled that both were getting pretty frustrated that they hadn't agreed on the terms of a pre-nuptial agreement but he believed that, at that time, Carswell clearly understood that without a signed agreement there would be no marriage ceremony.

He said that in March of 1987 the parties were discussing a June marriage date. They both wanted an old friend, Bishop Sperry, the Anglican Bishop of the Northwest Territories to perform the ceremony in Vancouver. It took some time for Bishop Sperry to make the necessary arrangements to allow him to marry the couple in British Columbia.

Engle testified that he and Carswell had several discussions regarding the agreement at Santa Barbara, Hernando Island and Vancouver during which she was still expressing reservations. He said he was aware that Carswell had talked to Vertes, that Vertes and Paterson were having discussions and he was in touch with Paterson. However he emphatically denied that he ever instructed Paterson to agree to the insertion of paragraph 2(5) which appears in the draft which Paterson sent to Vertes on June 19th. In fact, Engle testified that he was unaware on June 22nd that the June 19th draft even existed.

Engle agreed that around this time the discussions with Carswell regarding the form and the signing of the agreement were sometimes heated and that Carswell was pretty emotional at times about signing any form of agreement.

On the morning of the 22nd of June, Engle testified that the Irvings came to the suite in the Hotel Vancouver. They were their closest friends and very attached to the children. He believes they knew in advance that they would be asked to witness the signing of the agreement which took place only a very short time before the four left for the church. Engle denied that on June 22nd he ever told Carswell he would postpone the wedding ceremony if she never signed the agreement as their discussions never reached that point on that day. He also said he was never made aware by Carswell that Vertes had advised her against signing the agreement until after Carswell had signed the document. He said he signed the agreement after

Carswell signed because he didn't think the changes she had made constituted any substantive alterations to the document. Engle's recollection is that Carswell seemed satisfied with the situation after she signed and they never discussed the agreement again until after they separated several years later. It was only after Engle started divorce proceedings that Carswell challenged the validity of the entire agreement.

Under cross-examination Engle agreed that Carswell supported herself from her legal earnings up to the time they started living together. He said he never paid Vertes for the advice and time Vertes put in on Carswell's behalf regarding the pre-nuptial agreement in 1987.

Engle agreed that Carswell could fairly presume that without a signed agreement there would be no wedding ceremony. He stated that he thought he and Carswell were a happily married couple until several years later when the marriage broke up for reasons other than the impact of the pre-nuptial agreement.

Engle thought the market value of the Yellowknife house today was considerably less than $1,000,000 but it was hard to gauge because of the limited local market for houses in this price range. He said he had purchased the interest in the land at Hernando Island before the marriage in 1987 but after the parties started living together. It is worth today between $160,000 to 200,000. The Palm Springs property was purchased after 1987 and for tax reasons was held in the name of a

private company controlled by Engle. It was bought for $1,200,000 and then the existing house was demolished and replaced by a new one at a cost of $500,000.

Engle thought the 10 different drafts of the agreement that he said were prepared by McMillan Binch were a reflection of his desire to come up with an agreement that was fair to both parties and were also a reflection of Carswell's concerns as clauses were added to specifically protect her and the children. He said he thought the agreement they signed on June 22nd benefitted both sides. Engle maintained that Carswell was mistaken when she said she only saw and discussed 3 different drafts as he recalled discussing all 10 with her.

Engle denied ever getting a copy of the last draft prepared by Paterson on June 19th and says he was completely unaware of its existence until much later. Engle agreed that his instructions to Paterson in June of 1987 were to work with Vertes to see if they could address Carswell's concerns over the agreement. Lastly, Engle acknowledged he had probably been made aware before 1987 that Carswell had a potential property claim against him arising out of their long standing common-law relationship.

Counsel for Engle also called Victor and Louise Irving and Bishop Sperry to testify on the issue of the validity of the agreement.

Both of the Irvings confirmed that they were long-time friends of Engle and Carswell and hoped they were still friends. They had known for some time the true marital status of their friends and both stated that they were aware of discussions from time to time between Engle and Carswell about getting married. Both said they understood a pre-nuptial agreement was an integral part of the discussions over the years.

The Irvings recalled that they were asked in advance to be the witnesses at the wedding and to witness the signatures on the agreement but they can't recall specifically if one or both of Engle and Carswell asked them.

When they came to the hotel on the 22nd it was their impression that both Engle and Carswell were in good spirits and excited about the impending marriage ceremony. Neither could recall sensing any indication that Carswell was under any special stress. Both of the Irvings stated that neither Engle or Carswell ever discussed with them the contents of the agreement. They confirmed that they both signed as witnesses to the agreement but are not very clear as to the exact sequence of the signing.

The Irvings agreed that both Engle and Carswell are strong-minded, independent personalities and over the years of spending much time with them they saw no evidence that either consistently dominated the thoughts and actions of the

other. They did say that they witnessed many spirited discussions between Engle and Carswell but that they seemed to be able to always reach a mutually acceptable compromise.

Bishop Sperry testified that he first became a friend of Engle but later got to know Carswell well. He confirmed that he agreed to perform the marriage ceremony in Vancouver and that it took him some time to make the necessary arrangements in another jurisdiction. He said he was never aware during his short visit to Hernando Island that Engle and Carswell were having some disagreements over a pre-nuptial agreement. On the morning of the wedding he recalled that both Engle and Carswell seemed excited and happy and he sensed a feeling of deep commitment between the two. Bishop Sperry testified that the service he conducted on the boat was not a duplicate of the earlier ceremony but was an explanation to the children of the importance of marriage and the commitment it entails. He said he saw no evidence of anyone being under stress or unhappy that day.

As will be noted there are some differences between the recollections of Carswell and Engle relating to several of the events which occurred over the years and, where I think they impact on my decision, I will make certain findings of facts. The rest I attribute to the frailty of the human memory over the passage of time.

I turn now to consider the various grounds raised by Carswell challenging the validity of the agreement itself. As the agreement is clearly a contract entered into between Carswell and Engle the court must firstly be satisfied that it does not contravene the several grounds which go to the heart of any contract before it is deemed to be binding and enforceable upon the contracting parties. This takes us directly into an examination of the law of contract and a consideration of the background facts surrounding the execution of the agreement dated the 22nd of June 1987 as they relate to the various principles of contract law which can go to invalidating an apparent contract.

It seems to me that one should first examine the concepts of duress, undue influence, inequality of bargaining power and the issue of independent legal advice to determine whether any of these concepts invalidate this agreement before addressing the question of unconscionability. If any of the first four arguments prevail it should not be necessary to consider the actual terms of the agreement to measure fairness although it must also be observed that many of the concepts involved in these areas overlap one another and the same acts have to be considered in more than one area.

Duress:

When the concept of duress invalidating a signed contract arose at common law it was narrowly construed to mean actual physical violence or threats of physical violence to the person seeking to invalidate the contract, or, perhaps someone close to that person.

Latterly, the common law has extended this narrow interpretation to include what has been described as "economic duress".

The House of Lords in a 1982 decision, Universe Tankships Inc. of Monrovia v. International Transport Workers Federation [1982] 2 All ER at 88 said:

> "There are two elements ... The first was pressure amounting to compulsion of the will of the victim. This involved the absence of any practical choice other than of submission to the threat of the other party, proved by protest, by the absence of independent advice, or the absence of a declaration of intention to go to law to recover money paid or property transferred. However, the second element was perhaps more essential. This was the illegitimacy of the pressure exerted. ... Duress depended on whether the circumstances were such that the law regarded the pressure as legitimate. This involved, first of all, the nature of the pressure, which might be decisive in many instances and, second, the nature of the demand which pressure was applied to support."

The Privy Council addressed the important test to be used by a court in trying to determine whether economic duress occurred at the time the contract was

entered into in the 1979 case of Pao On v. Lau Yiu Long [1979] 3 All ER 65 at page 78-9, Lord Scarman said:

> "... In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering into the contract he took steps to avoid it."

This statement by Lord Scarman was adopted by Nunn J. in the Nova Scotia Supreme Court decision of De Wolfe v. Mansour et. al 73 N.S.R. (2nd) 110. It was also adopted by Rutherford J. of Ontario High Court in the decision of Ronald Elwyn Lister v. Dunlop Canada (1979) 27 O.R. (2d) 168 at page 178.

Applying those tests to this case, the evidence discloses the following:

(a) I accept Carswell's testimony that a great deal of pressure was placed upon her by Engle to sign the agreement as a prelude to any marriage ceremony being concluded.

(b) I accept Engle's evidence that his position was made clear to Carswell over a period of several years prior to June of 1987, namely, that there would be no legal marriage ceremony until a pre-nuptial agreement satisfactory to both sides, or at least to Engle, was signed.

(c) I accept Carswell's evidence that, over the years, she made it clear to Engle that she was not happy about signing any agreement. However, I also find on

the evidence of both, plus the various drafts of the agreement and the correspondence and discussions between Paterson and Vertes that Carswell consistently indicated her willingness to sign an agreement if it provided for some division of "family assets" as differentiated from Engle's "business assets".

(d) I find on the evidence that Carswell, with her background and legal training, was completely aware of the nature and terms of a pre-nuptial agreement and of its legal implications for the future.

(e) I find on the evidence that Carswell did receive clear and unequivocal independent legal advice from Vertes before she signed the agreement with her amendments. I also find that the thrust of the advice she received from Vertes was that the draft copy they were discussing on June 19th was of limited benefit, in terms of property, to Carswell and Vertes advised her against signing it.

(f) I find that Carswell had an alternative in June of 1987, namely, to refuse to sign the agreement and risk Engle backing out of the marriage ceremony. This would have left the status quo as it had existed for many years. There was no evidence adduced other than pure speculation on Carswell's part that Engle would seek to punish either Carswell or the children economically should the status quo remain. It would, no doubt, have been an embarrasment if the wedding ceremony had been called off but the only ones directly affected would have been the couple's close friends, the Irvings and Bishop Sperry.

Carswell testified that she felt compelled to go through with the marriage ceremony, even if it meant signing an unacceptable agreement, in order to protect the children should Engle die intestate. Again, there was no hard evidence presented that Engle would take this course of action. He was portrayed by Carswell as a hard-headed, practial and successful business man and to surmise that he would die without leaving a valid will is pure speculation and, I would find, against Engle's established life pattern. In addition, I think I can take judicial notice of the existence prior to the marraige of the provisons of the Dependants' Relief Ordinance R.S.N.W.T. 1988 CD-4 which gives natural children, under 19 years of age, certain rights to claim for relief under an intestacy and find that Carswell, with her extensive knowledge of Territorial family legislation would have been aware of these provisions. She carefully weighed her alternatives and made a calculated and informed decision to try and persuade Engle to accept her alterations to the agreement and still go through with the marriage ceremony. She succeeded in accomplishing both goals.

(g) I find that Carswell never took any steps to contest the validity of the agreement between the time she signed it and the break up of the marriage which took place several years later.

On the basis of these findings, it seems apparent to me that Carswell fails to meet the tests earlier referred to and her plea to strike down the entire agreement on the ground of duress cannot succeed.

Undue Influence

The concept of voiding a contract that came about under circumstances where the party seeking to avoid the contract alleges he or she signed at a time when they were unduly influenced by the other party is a development which came from the Courts of Equity in England and was an outgrowth of the common law idea of duress cancelling a contract. For a Court of Equity to intervene there had to be established the use by one of the contracting parties against the other clear evidence of oppression, coercion, compulsion or abuse of power or authority for the purpose of obtaining the consent of the other party to enter into the contract.

One of the leading cases in this area of contract law is the House of Lords decision in National Westminster Bank v. Morgan [1085] 1 A.E.R. 821. Professor G.L. Fridman in his textbook "The Law of Contract in Canada" (3rd Edition) at page 321 cites the above case as authority for the proposition that:

> "The principle justifying the court in setting aside a transaction for undue influence is the need to save persons from being victimized by others, not some vague "public policy".

Professor Fridman goes on to say that the decision of Allcard v. Skinner (1887) 36 Ch. D. 145 describes two classes of cases where the doctrine of undue influence applies.

i) those where the Court has been satisfied that the transaction was the result of influence expressly used by the donee for that purpose. This is described as actual undue influence.

ii) those where the relations between the donor and donee have at or shortly before the execution of the transaction been such as to raise a presumption that the donee had influence over the donor.

The first class comprises facts which establish actual undue influence. The second class arises where there is a presumption of undue influence such as trustee and beneficiary, or solicitor and client. The critical difference between the two classes lies in where the burden of proof is placed. In the first class the onus is on the party claiming the existence of undue influence to prove that such influence was actually exerted by the other party which robbed the first of the ability to make a reasonable decision. In the second class, once it is proven that a presumptive relationship exists, the onus is on the party alleged to be in the dominant position to rebut the presumption of undue influence by introducing suitable evidence to that effect. The obtaining of adequate independent legal advice by the alleged subservient party can be a type of rebuttable evidence.

Our Supreme Court of Canada examined this area of the law in the 1991 case of Geffen v. Goodman Estate (1991) 81 D.L.R. (4th) 211.

Madam Justice Bertha Wilson in her extensive review and update of the legal principles that have developed around the concept of "undue influence" said at pages 226 and 227:

> In my view, neither the result nor process focused approach to the doctrine of undue influence fully captures the true purport of this equitable rule. I say this primarily because the doctrine applies to a wide variety of transactions from pure gifts to classic contracts. In the case of the former it seems to make sense that the process leading up to the gifting should be subject to judicial scrutiny because there is something so completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity. With respect to contractual relations, however, it has long been the view of the courts that the sanctity of bargains should be protected unless they are patently unfair. I cannot think of any situation in which a contract has been rescinded on the sole basis that the process leading up to the bargain was somehow tainted. Something more, such as detrimental reliance, must be shown. It seems to me, therefore, that whatever the measure of undue influence this court adopts, it must be sufficiently flexible to account for a wide variety of transactions.
>
> What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in *Morgan*, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in *Goldsworthy v. Brickell, supra*, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another

> simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing *per se* reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.
>
> ...
>
> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

I interpret from these observations that this court should not be entirely constricted, in its examination of the facts of this case, by the earlier rather sharply divided categories but should look also at the overall impact of the relationship between Engle and Carswell, what took place at the time of the signing of the agreement and what led up to this event in order to assess whether, in reality, undue influence existed.

It should be noted, however, that there is judicial authority for the proposition that there is no presumption of undue influence where the relationship is that of husband and wife. In the Ontario High Court decision of Puopolo v. Puopolo (1986) 2 R.F.L. (3rd) 73 at page 78 Potts J. says:

> "In the case of husbands and wives, there is no presumption of undue influence. Instead, allegations of undue influence will fall into the first category and the person alleging will have to prove that it existed: see Bank of Montreal v. Stuart [1911] A.C. 120 (P.C.)."

This statement was followed by Barry J. in the Newfoundland Supreme Court decision of Campbell v. Campbell (No. 2) 83 Nfld. & P.E.I.R. 340 at page 358 when he states:

> "The Court there (referring to Puopolo) pointed out that there is no presumption of undue influence in the case of husbands and wives. Instead of the presumption of undue influence arising from a special relationship in the case of husbands and wives there must be "express influence" proven. There must be an exercise on the mind and will of general domination or control which undermines independence of decision."

There was no authority cited to me, nor did I locate any, that dealt with any presumption of undue influence between persons in a common law relationship. Counsel for Carswell did, however bring to my attention the decision in Lloyd's Bank Ltd. v. Bomze (1931) 1 Ch. 289 which held that where the relationship was that of an engaged couple there is a presumption of undue influence of the man over the woman. I concur with Mr. Andrew's observation in his brief that perhaps this decision is more reflective of the times in which it was decided than the mores of our society today.

It seems to me to be logical that if there is no presumption arising between husband and wife there should be none where the relationship is a common law one. In the case at bar, as it is Carswell who seeks to overturn the agreement,

the onus should be upon her to adduce sufficient evidence which meets the test of undue influence.

Even using the broader concepts elaborated by Wilson J. in the Geffen case (supra) I cannot find that Carswell has met this onus. There is no doubt in my mind that Carswell felt that she was in an awkward and stressful position when she made the decision to sign the agreement on June 22nd. However, the law is clear that this, by itself, is not a ground for voiding a contract unless it is proven that Carswell had been deprived by the actions of Engle from being able to exercise independent judgment and decision making. I think that many of the findings of fact I have already made in relation to the duress ground apply to this ground of attack and it seems redundant to repeat them again.

Let me just say that Carswell was uniquely qualified, because of her legal training and background, to fully understand the ramifications of the agreement. She signed it after having discussed it with independent legal counsel and against his advice. The evidence of the Irvings is that both Carswell and Engle were strong-willed, forthright individuals and that neither consistently dominated the other. Carswell only signed the agreement after making some changes to the same which she thought met her major concerns. She never took steps to challenge the agreement until the marriage break-down occurred, some 3 1/2 years after it was

signed. The desire of Engle to have a pre-nuptial agreement signed came as no surprise to Carswell.

For all of these reasons Carswell's challenge to the validity of the agreement on the grounds of undue influence must fail.

Unconscionability

Counsel for Carswell argues that the agreement of June 22, 1987 is so unfair to his client that the court should interfere with the contract and set it side.

Several of the cases referred to in this area of the law quote from the decision of Davey, J.A. (as he then was) in the B.C. Court of Appeal decision of Morrison v. Coast Finance Ltd. et al (1965) 54 W.W.W.R. 257 at 259 for a general statement of the applicable legal principles:

> The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. In such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by

proving that the bargain was fair, just and reasonable: *Aylesford (Earl) v. Morris* (1873) 8 Ch App 484, 42 LJ Ch 346, *per* Lord Selborne at p. 491, or perhaps by showing that no advantage was taken: See *Harrison v. Guest* (1855) 6 De GM & G 424, at 438, affirmed (1860) 8 HL Cas 481, at 492, 293 11 ER 517.

Another general statement is set out by Professor Fridman in his text earlier referred to at page 327:

> Where a bargain is held to be unconscionable, it is not the consent of the victim that is expunged but the reasonableness of the bargain, the conscientiousness of the other party, the equitable character of the transaction. In making such decisions, a Court may be concerned with the internal state of mind of the party seeking rescission. But it is also concerned with the external matters, the state of affairs surrounding the making of the contract, to the extent that such externalities operated on the mind of the party seeking rescission.

From these general statements I conclude that it is not the function of this court to decide whether Carswell made a bad bargain but whether, taking all of the circumstances into account, the bargain was so bad as to constitute a fraud perpetrated by Engle upon Carswell. To reach this conclusion the cases suggest that there must be established proof of inequality in the position of the parties arising out of (a) ignorance, or (b) need or distress of Carswell which left her in the power of Engle, and (c) proof of the substantial unfairness of the bargain obtained by Engle.

I have already found as a fact that Carswell cannot rely upon her ignorance of the law in this matter. It is suggested that the ignorance referred to in

this matter was the testimony given by Carswell that she was never informed by Engle what the true nature and extent of his total assets were at the time the agreement was signed. If one is referring to audited financial statements I have no doubt that Carswell had no access to this kind of financial information. However, the nature and extent of Engle's businesses were highly visible, they being in the public transport segment and the life style which the parties enjoyed at the time of the marriage and up to the date of separation, including the use of several homes, a private jet and an expensive boat had to be clear evidence to Carswell that Engle's assets were, indeed, substantial. I have also noted earlier that Carswell was consistent throughout the entire period of cohabitation that she was never interested in making any claim against Engle's "business assets".

I have also already found as a fact that Carswell was under stress at the time of the signing. Her stress was not caused by any immediate financial difficulties at that time for it is agreed that Engle was providing a very high standard of living for Carswell and the three children and gave no indication of changing this pattern with or without a signed pre-nuptial agreement. The major reason for the stress according to Carswell was her strong desire to conclude a legal marriage ceremony for future protection of herself and the children. While I do not dismiss her concerns, I am still forced to conclude on the evidence, that Carswell had to make a choice between leaving the situation remain as it had been for 7 good years, according to her description, or sign an agreement and conclude the marriage ceremony. She made

an informed and calculated decision which choice to make after making the amendments to the agreement and I have difficulty finding that this decision is the kind of weakness or distress which amounts to a fraud.

Is the agreement so unfair as to amount to a fraud? I have already addressed some of my comments and observations in this area under the heading of Undue Influence. Counsel for Engle suggests that one way of assessing this ground is to determine what Carswell might have received under the Matrimonial Property Act of the Northwest Territories based on the assumption that the parties were legally married throughout their period of cohabitation and there was no pre-nuptial agreement in existence. He argues that the Territories legislation, unlike some Canadian jurisdictions, makes no presumption of an equal division of matrimonial property. He also, refers to a number of decisions of this court, such as Chapman v. Chapman (1993) N.W.T.R. 346 and Filewych v. Filewych (1992) N.W.T.R. 357 which narrowly interpret the scope of "matrimonial property" to exclude business interests and, especially, business interests in which one spouse has made no monetary or personal contribution. By this yardstick of measurement, all of the business interests of Engle may well be found under Territorial jurisprudence not to be matrimonial property subject to a division of some sort. Perhaps that situation may explain Carswell's consistent position that she was making no claim to any interest in Engle's "business assets". Using this approach as something of a yardstick, and in view of some of my earlier comments, I cannot find on the evidence presented that the

overall thrust of the June 27th agreement is so unfair as to amount to a fraud and, therefore, Carswell's attack on this ground must fail.

Inequality of Bargaining Power

Although counsel for Carswell raised this concept as a separate head to invalidate the agreement I am of the view that it really is subsumed and is an integral part of the other heads, namely, duress, undue influence and unconscionability. If the court were to intervene on the simple ground that the contracting parties were not equal in bargaining power, I suspect that almost every contract could be challenged for I doubt that there would be many such ideal situations in real life. Again, I think what has to be shown by the party attempting to avoid the contract is that the inequality in the respective bargaining powers was of such an extreme nature that it constituted either duress, undue influence or unconscionability. Having already found that Carswell has failed to establish any of these grounds I also find that this ground of attack must fail.

Independent Legal Advice or the Lack of It.

Again, although Carswell's counsel lists this aspect as a separate head, he concedes in his argument that it is part of Carswell's position under the heads of duress, undue influence and unconscionability. Mr. Andrews also concedes that Carswell did have access to an independent legal advisor in the person of Mr. Vertes but takes the position that, because of all of the circumstances, the conversation

Carswell had with Vertes did not amount to proper independent legal advice as it is defined in our law. He bases this position primarily on two grounds: (a) Vertes did not have all of the relevant information on Engle's assets when he gave his advice to Carswell and (b) the contact with Carswell was so brief and sketchy.

To evaluate these concerns it is necessary to make some findings of fact.

1. Vertes had known Carswell for some years prior to 1987 and was aware of her legal background.

2. It would appear from the contents of Vertes' file that he had some contact and discussion with Carswell regarding a pre-nuptial agreement as early as 1983 or 1984. Evidence of this is the existence in Vertes' file of a memorandum in Carswell's handwritten undated but referring to the impending birth of the second child in 1984 outlining what she wanted to have included in any pre-nuptial agreement with Engle respecting property. It seems from this memorandum that Carswell wanted some share of "family property" but not any share of Engle's "business" assets. Carswell has no memory of preparing that memo nor of how it got into Vertes' file. Vertes does not mention it in his memo of June 19th but it does exist and was located in Vertes' file when Carswell or her counsel obtained possession of the same.

3. Vertes, even without having full details of Engle's assets, had enough information, either from his own knowledge of Engle's prominent position in the business affairs of the Northwest Territories or from what he had gleaned from

Carswell and Paterson, to advise Carswell that it may not be in her best interests financially to sign the agreement in the form it was on June 17th. Mr. Andrews' argument would certainly have more weight if Vertes had encouraged Carswell to sign but that's not apparently what happened.

4. While Carswell's evidence is that the telephone conversation with Vertes was fairly brief, according to Vertes' memo, both he and Carswell were going to continue to pursue with Engle and his counsel the possibility of expanding the agreement to include "family properties". This is precisely what both Vertes and Carswell then proceeded to do.

I find that Carswell did obtain adequate and reasonable independent legal advice before she made the decision to sign the agreement after she made the amendments.

In summary, I am of the view that Carswell has failed to discharge the burden of proving that the entire agreement of June 22, 1987 was invalid on the grounds alleged.

Does this end the matter completely? I think not. One of the basic concepts of a completed and enforceable contract is that the contracting parties have reached a consensus ad idem or a meeting of the minds upon all the critical parts of

the contract. Can it be truly and accurately said that this was the situation in the case at bar?

As I have observed several times earlier, except for the first agreement presented in 1982 which Carswell signed subject to the applicability of the Family Law Reform Act of Ontario, she was very consistent between 1982 and 1987 that she was not interested in making any claim against Engle's "business assets" but felt that she should have some rights to claim on interest in "family assets". In 1987 this concept of "family assets" seemed to be focussed upon real properties used by the family. I think it is abundantly clear from the documentation and the oral evidence that up to June 22, 1987 these "family assets" consisted of the Yellowknife residence and contents, the Hernando Island summer residence and the home in Palm Springs, California. It is only since the break-up of the marriage and the subsequent litigation that the concept of "family assets" has been broadened by Carswell to include the jet airplane, cars and boats.

When one carefully reviews the evidence of Carswell it is quite clear that, her attention and concern, at least in 1987, was to preserve her right to claim an interest in the real properties used by the family as residences. She testified that this is what she had in her mind when she made the changes in paragraph 2(3)(f) of the June 22, 1987 agreement. Engle, of course, takes the position that the reason he signed this agreement was that he thought the changes made by Carswell limited her

interest to only one "principal" residence being either the Yellowknife property or any single successor property that might become the couple's principal residence.

The accepted general rule regarding contracts reduced to writing is that a court should not allow extrinsic evidence to be considered unless there is ambiguity in the face of the written agreement. Is there any serious ambiguity on the face of the June 22nd agreement? To ascertain this the contract must, of course, be read as a whole.

In my view section 2(3)(f) as amended must be looked at in conjunction with section 3(c).

They read as follows:

> 2(3)(f) Robert and Margaret agree that it is their intention that the provisions herein which relate to the Principal Residence shall apply mutatis mutandis to any successor properties which are used exclusively by Margaret and Robert and the children.
> [Changes underlined].

and

> 3(c) Any other property which is acquired by either Robert or Margaret after their marriage shall belong exclusively and shall continue to belong exclusively to the party that acquired the property. Robert and Margaret acknowledge that neither of them has any legal or equitable interest in any other property which was acquired by the other party after their marriage. Neither Robert nor Margaret shall be entitled to have any property which is acquired after the marriage divided in any way by application to any court pursuant to the

operation of the common law or pursuant to any statute or ordinance.
[Changes underlined].

I find that by changing clause 2(3)(f) and clause 3(c) in the way it was re-drafted by Carswell and then reading the two altered clauses together created an ambiguity on the face of the contract as it relates to what constitutes "family assets". There are two possible interpretations of these two clauses. One is that the acquisition of more than one other principal residence may occur during the period of cohabitation but that there can only be one principal residence at any given point of time. (This is the interpretation given by Engle.) The other is that the term "successor properties", introduced by one of the changes made by Carswell, refers to a number of principal residences which come into existence by virtue of the fact that they are used as residences by the parents and the children. (This is the interpretation given by Carswell.) Obviously these two interpretations conflict with each other and give rise to the ambiguity I earlier referred to.

It then remains open to the court to examine other evidence that exists to see if such evidence will assist the court in trying to determine what the parties really intended to agree upon.

In my opinion there is in this case strong and cogent evidence which can and does assist the court in resolving the ambiguity.

It will be recalled that between June 16th and June 19th, 1987 both Engle and Carswell were in contact with their respective solicitors, John Paterson in Toronto and John Vertes in Yellowknife and that the two solicitors were in contact with each other during this time. The memo of John Vertes dated June 23, 1987 clearly sets out that on June 19th Carswell was not interested in making any claim against Engle's "business assets" but she was vitally interested in preserving any entitlement she might have at law against "family assets". Vertes's memo concludes on this point with the comment that Carswell would go back to re-discuss this aspect with Engle in the hopes of getting him to agree with this change and have the agreement re-drafted. According to Vertes's memo that is exactly what happened for later on June 19th, Paterson telephoned Vertes to inform him he had re-drafted the agreement to address the concerns which Carswell had expressed to Vertes regarding a preservation of a right to claim against "family assets" and would be faxing him a copy of the re-drafted agreement. Vertes's memo indicates that he did, in fact, receive a faxed copy of the re-drafted agreement late on June 19. Paterson also informed Vertes that he should expect a call from Carswell which never came. Vertes apparently did not know where to contact Carswell in Vancouver at that time.

The relevant clause of the re-drafted agreement goes right to the heart of Carswell's concerns regarding "family assets" for it reads as follows:

2(f) Family Assets:

Subject to paragraph 2(3) and 2(4) in the event that Robert and Margaret permanently cease to live together then that real property acquired after their marriage by either or both of them, which could be considered as a family asset, that is an asset used by Robert and Margaret as a family unit, would be subject to a division. It is understood that the term "family asset" shall not include any asset acquired by either Robert or Margaret, directly or indirectly, as a business asset."

Not only does Paterson fax to Vertes the re-drafted agreement with clause 3(5) (supra) included but he also faxes a covering letter. This letter makes several important statements.

Because of its importance, in my view, the letter was set out in its entirety at page 18 of this judgment.

It is apparent to me from this letter that:

(a) Paterson talked to Engle on June 19, 1987 about a revision to the agreement to include a provision covering "family assets" after he talked to Vertes earlier that day.

(b) Paterson informs Vertes that Engle advised him both he and Carswell discussed the matter of defining "family assets" and agreed that they would only cover "real property".

(c) Paragraphs 3 and 5 of the letter provide further comment about the intent of Engle and Carswell in making the change by inserting paragraph 3(5) into the agreement.

(d) The letter indicates that Paterson will make special efforts to get this revised agreement to Engle in Vancouver.

It is clear from the evidence that Carswell knew nothing about the revised agreement when she signed the document on June 22nd. Engle testified that he

never received a copy from Paterson prior to the signing of the agreement. Engle goes further and categorically states that he never discussed with Paterson the changes made by Paterson on June 19th and faxed to Vertes and never at anytime authorized such changes. I never had the benefit of hearing any oral evidence from Paterson at the trial.

According to Engle's evidence, Paterson had acted for Engle on the matter of the pre-nuptial agreement for approximately 7 years prior to June 1987 and had prepared approximately 10 drafts of the same. I infer from this testimony that Paterson was thoroughly familiar with the background of the agreement and of the complaints that Carswell had voiced to Engle over the earlier versions. I also infer that Paterson was well acquainted with Engle and of the views he held on the matter. If the testimony of Engle is to be accepted that he neither discussed nor authorized the changes made by Paterson on June 19th then Paterson was conducting himself in a most unprofessional manner to have redrafted the agreement and sending the covering letter. In effect, according to Engle, Paterson's re-draft of the agreement and the contents of the accompanying letter run completely contrary to his client's wishes and the reports of the telephone conversation Paterson says he had with Engle are fabricated.

In the absence of evidence, other than Engle's bald assertion, I find it hard to accept that Paterson's actions on June 19th were done entirely on his own,

without specific instructions from his client and with the prior knowledge that this was a concession his client had refused to go along with for many years. I do not go so far as to say that Engle received a copy of the revised agreement before June 22nd and failed to disclose the same to Carswell for it is possible that the couriered package went astray but, it is my belief that Engle did discuss the "family asset" position with Paterson and authorized the change as Paterson says he did in his letter of June 19th. His failure to disclose this change to Carswell on or before the signing on June 22nd clearly goes to the heart of the question of a meeting of the minds on that date.

It is this additional evidence which persuades me that the version adopted by Carswell of the changes she made on June 22nd closely parallels the changes which Paterson made in the final draft, with Engle's knowledge and consent, and is the correct way to interpret clause 2(3)(f) and 3 (c).

Having come to this conclusion where does it leave the parties vis a vis the agreement of June 22nd. In my view that agreement itself is still a valid and binding document except for the interpretations of clauses 2(3)(f) and 3(c). I hold that Carswell is not precluded by the agreement from advancing some sort of claim against "family assets". I do not believe it is the mandate of this hearing to attempt to define what are or are not "family assets" in the dispute between these two parties nor do I feel it is proper to determine in this hearing whether any of the two

residences in dispute, namely Hernando Island and Palm Spring's are covered by the agreement of June 22, 1987. That will be for the parties to try and sort out with their legal counsel or, perhaps, it will be the subject of further litigation in some jurisdiction.

The matter of costs, was not specifically addressed by counsel. The end result of my decision is a sort of a split.

Engle has succeeded in maintaining the bulk of the agreement. Carswell has established a right to advance a claim against some "family assets". I have already ordered that Engle pay a substantial sum in advance ($7,500.00) to enable Carswell to proceed with her application to set aside the whole agreement and he has done so. I think I will leave the matter of costs at that level so that Engle will bear his own costs of the application and Carswell will recover no more than she's already received.

J.S.C.N.W.T

DATED at the City of Edmonton
this 9th day of February 1995.

APPEARANCES:

Mr. John U. Bayley, Q.C.
Bayly Williams
for the petitioner, Robert Parsons Engle

Mr. W. Steven Andrew
Andrew Donahoe & Oake
Edmonton AB
for the respondent, Margaret Lucille Carswell

Action No. 6101-02145

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Petitioner

- and -

MARGARET LUCILLE CARSWELL

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE TEVIE H. MILLER