Undue Influence and Independent Legal Advice

Introduction

Layman and lawyers alike know the legal consequences of signing your name on the dotted line. Courts of law seek to uphold contracts and after you have entered one it is difficult, usually impossible to get out unless the other party consents or you can show fraud, duress, mistake or illegality.

This rigorous, sometimes harsh standard imposed by law is supplemented by several equitable doctrines, one of which is undue influence. Equity will set aside a transaction entered into as the result of conduct which, though not amounting to actual fraud or duress, is contrary to good conscience (Halsbury's Laws of England (4th Ed.), vol. 18, p. 148). The doctrine of undue influence was developed not to save people from the consequences of their own folly but to prevent them from being victimized by other people (Allcard v. Skinner (1887), 36 ChD 145 at pp. 182, 183 (C.A.)). The plea of undue influence attacks the sufficiency of consent (per Davey J.A. in Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 at p.713 (B.C.C.A.)). A useful definition is provided by Professor Fridman in his book, The Law of Contract in Canada (Toronto: Carswell, 1986), at p. 301:

> "Any improper use by one contracting party of any form of oppression, coercion, compulsion or abuse of power or authority for the purpose of obtaining the consent of the other party may result in avoidance of the resulting contract on the ground of undue influence."

Undue influence is of two types, actual and presumed. In the former, it must be established that a person has deliberately used his influence on another, preventing the exercise of free will. The party impeaching the transaction bears the burden of establishing that:

> "...an unfair advantage has been gained by an unconscientious use of power by a stronger

> party against a weaker, in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the stronger party." (Halsbury's Laws of England (4th ed), vol. 18, pp. 149-150)

In some situations, however, no such wrongdoing need be proved. The relationship between the parties raises a presumption of undue influence, and the burden is then placed on the person in a position of influence to disprove the presumption, or have the transaction set aside by the court. This may happen when a relationship exists in which one party is able to dominate the will of another. Examples include solicitor-client, parent-child, or principal-agent relationships. Although other relationships, such as banker and customer, do not generally raise a presumption of undue influence, the required relationship may exist on the particular facts of a case.

If facts are led to establish undue influence or a presumption is raised based on the nature of the relationship, the defendant is required to prove that the other party acted independently, with full and informed thought. Evidence that independent legal advice was obtained will usually rebut the presumption. Its absence is not crucial if it can still be shown that the parties knew what they were doing at all relevant times.

In this paper we will first be undertaking a review of the caselaw respecting undue influence. We will then take the relevant principles which emerge from the cases and apply them to our day to day practices.

Lloyds Bank Limited v. Bundy

A case that has been influential in Canada is the English Court of Appeal decision in Lloyds Bank Ltd. v. Bundy, [1974] 3 All E.R. 757. In Bundy, the Bank extracted a guarantee and a mortgage from the father to secure past advances to the son's company, which was in severe financial distress. The father was not knowledgeable in business affairs, and the bank did not explain the company's accounts very fully.

The majority of the Court found there was a pre-existing relationship of trust and confidence between the father and the bank which imposed a duty of fiduciary care upon the bank to advise him to obtain independent legal advice so that he could make a free and informed decision. The Court held that the defence of undue influence was available and therefore the guarantee and mortgage were unenforceable. It is noteworthy that on the facts the bank was aware the father trusted the bank and was relying on the bank's advice.

In writing for the majority, Sir Eric Sachs made it clear that "Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances...." Although he went on to say that it was neither "feasible or desirable" to attempt to rigidly define the "exact transition point where a relationship that does not entail that duty passes into one that does..." he nevertheless offered the following guidelines:

> "... Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some interest in it being concluded." (p.767)

Fulfilment of the duty, according to Sir Eric, also depends "on the facts before the court."

> "It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment." (p. 768)

Lord Denning, M.R. in his concurring decision attempted to create a principle of "inequality of bargaining power" which had four key elements:

(a) a markedly improvident transaction;

(b) a party whose bargaining power was grievously impaired;

(c) undue influences or pressures by the stronger party; and

(d) no independent advice to the weaker party.

National Westminster Bank v. Morgan

The doctrine of undue influence was examined by the House of Lords for the first occasion this century in National Westminster Bank v. Morgan, [1985] 1 All E.R. 821. In Westminster, the House of Lords expressly rejected the "inequality of bargaining power" principle suggested by Lord Denning but approved, with some qualifications, the majority decision in Bundy. The Court stated that if a party has a "dominating influence" over another party and

uses that influence to obtain an unfair advantage, then equity would protect the weaker party from the "undue influence" of the stronger. The House of Lords was at some pains to point out that the purpose of this principle was to prevent victimization, not to protect people against their own folly.

In Westminster, Mr. Morgan was a businessman who had run into financial difficulties. His home, which he owned jointly with his wife, the respondent, was mortgaged to a building society that was threatening foreclosure because he had failed to make the repayments due under the mortgage. In order to avert these proceedings, the husband enetered into an arrangement with the National Westminster Bank to refinance the loan from the building society. The bank required that this loan to secure the mortgage be in the joint names of Mr. and Mrs. Morgan. The bank obtained a joint mortgage in an unlimited amount from the husband and wife which by its written terms secured all advances to the husband. In fact it had been the intention of both the bank and the wife that the mortgage only secure a specific advance to refinance the mortgage on the house, and the bank had incorrectly advised the wife when she signed the mortgage document that it only secured that specific advance. She did not have independent legal advice.

Even though the bank sought only to recover the specific advance rather than rely on the broader written terms of the mortgage document, the Court of Appeal held there was a confidential relationship between the bank and the wife and that the mortgage had been procured by undue influence and was

unenforceable.

The first question considered by the Court of Appeal was whether a presumption of undue influence is capable of arising where the relationship is that of banker and customer. Slade L.J. noted that while the relationship of banker and customer does not of itself give rise to a presumption of undue influence, he went on to say that where a bank assumes the mantle of adviser, it must then be cautious, because it may have placed itself in a position where the customer is looking to the bank for protection. On this point both the House of Lords and Court of Appeal were in agreement.

Next the Court of Appeal examined the facts to determine whether a relationship sufficient to raise a presumption had been proved. Both Slade L.J. and Dunn L.J. held that a "confidential relationship" necessary to give rise to the presumption had arisen at the meeting between the manager and the wife. The Court of Appeal put weight on various facts, including the fact that the transaction was for the benefit of the bank and its shareholders; the fact that the manager took the documents to the wife's house for her signature; evidence from the manager that the wife was relying on his guidance and advice; the fact that the manager knew the husband was a poor businessman; and the fact that the wife was in a vulnerable position because of the threat of foreclosure proceedings.

The House of Lords disagreed and through Lord Scarman rejected the Court of Appeals description of the relationship that

has to be proved to raise the presumption as well as their interpretation of the facts. Lord Scarman said at p. 826:

> "...that the Lord Justices were led into a misinterpretation of the facts by their use, as is all to frequent in this branch of law, of words and phrases such as 'confidence', 'confidentiality', 'fiduciary duty'. There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife, Bank of Montreal v. Stuart [1911] A.C. 120); and there are plenty of non-confidential relationships in which one person relies upon the advice of another, for example, many contracts for the sale of goods."

Unfortunately, Lord Scarman gave little indication as to what kind of relationship must be proved, or what sort of facts might point to the existence of the relationship. He did however expressly approve of the last paragraph of Sir Eric Sachs' judgment in Lloyds Bank Ltd. v. Bundy, where Sir Eric considered the nature of the relationship necessary to give rise to the presumption in banking situations. Referring to this paragraph at p. 830, Lord Scarman said that Sir Eric "got it absolutely right." In that passage Sir Eric explained when a special relationship arises:

> "....it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When however, a bank, as in the present case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may-- not necessarily must-- be crossing the line into the area of confidentiality so that the court may then have to examine all the facts including, of course, the history leading up to the transaction , to ascertain whether or

> not that line has, as here, been crossed. It would indeed be rather odd if a bank which vis-a-vis a customer attained a special relationship in some ways akin to that of a 'man of affairs'--something which can be a matter of pride and enhance its local reputation--should not, where a conflict of interest has arisen as between itself and the person advised, be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for the 'meticulous examination' of the particular facts to see whether that duty has arisen."(Bundy, p. 772)

After quoting these words by Sir Eric Sachs, Lord Scarman said at p. 831:

> "This is good sense and good law,though I would prefer to avoid the term 'confidentiality' as a description of the relationship which has to be proved. In truth, as Sir Eric recognized, the relationships which may develop a dominating influence of one over another are infinitely various. There is no substitute in this branch of the law for a 'meticulous examination of the facts.'"(emphasis added)

This statement by Sir Eric Sachs makes clear that once a bank is shown to be advising on matters germane to the wisdom of the transaction a court will look closely at the facts to determine whether the requisite relationship existed to raise a presumption. However, it is doubtful whether the mere existence of an advisory position is sufficient of itself to raise the presumption. Other remarks by Sir Eric Sachs in the same case tend to support this conclusion. At p. 767 of Bundy, he argues that the presumption of undue influence arises in situations where the weaker party is relying on the advice of the other party and that party knows there is reliance. The Court of Appeal concluded that Mrs. Morgan had

relied on the bank's advice. Although it is not made clear by the House of Lords, it seems reasonable to suppose that Lord Scarman was of the view that there was no reliance by Mrs. Morgan upon the guidance and advice of the bank. It is clear, however, that the House of Lords decided that the bank manager had not crossed the line between on the one hand explaining a normal business transaction and on the other hand entering into a relationship with a customer in which he had a dominating influence.

The House of Lords and the Court of Appeal also disagreed as to whether a manifestly disadvantageous transaction is a necessary element apart from a relationship of influence in order to raise a presumption of undue influence. Throughout the proceedings the bank argued that the transaction was for the benefit of the wife and that consequently the presumption of undue influence had not arisen. The Court of Appeal concluded that this did not prevent the existence of a confidential relationship from arising and that the presumption arose once the relationship was proved. At that point, according to the Court of Appeal, the onus shifts to the other party to prove that the weaker party had formed an independent and informed decision. In the view of the Court of Appeal, it was irrelevant that Mrs. Morgan had not been disadvantaged in some way by the transaction.

The House of Lords rejected this approach outright. Lord Scarman reviewed the authorities and concluded that:

> "Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption

> that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence...." (p. 827)

Applying this to the facts in Westminster, it was Lord Scarman's position that Mrs. Morgan was not disadvantaged by the mortgage to the bank. It was an ordinary business transaction whereby she was able to rescue her home by way of a short-term loan at a commercial rate of interest. Lord Scarman gave no weight to the fact that the terms of the mortgage were in fact different than she had been told because in the end the bank sought only to enforce its security against the loan necessary to save her home and not any business debts incurred by her husband. Lord Scarman was not "persuaded that the trial judge fell into error when he concluded that the relationship between the bank and the wife never went beyond the normal business relationship of banker and customer" (p. 826).

The doctrine of undue influence as defined by the House of Lords contains two important notions: First, the fact that one party has dominated or victimized another to enter into a transaction; and secondly, that this transaction is to the manifest disadvantage of the dominated party. Both of these elements must be established by a plaintiff if he seeks to rely on the presumption of undue influence. The following excerpt from

Poosathuria v. Kannappa Chettiar (1919) L.R.47 Ind App 1 (P.C.), quoted with approval by Lord Scarman in Westminster, provides a succinct statement of the law as expounded by the law lords:

> "Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it or on the evidence, to be unconscionable, the burden of proving that such a contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other." (p. 829)

Canadian Caselaw

Several Canadian cases have considered the principles enunciated in Westminster and Bundy. (e.g., Hayward v. Bank of Nova Scotia (1985), 51 O.R. (2nd) 193 (C.A.); Standard Investments Ltd. v. Canadian Imperial Bank of Commerce (1985), 52 O.R. (2d) 473 (C.A.); Royal Bank of Canada v. Aleman, [1988] 3 W.W.R. 461 (Alta. Q.B.)). Each of these cases deals with the issue of breach of fiduciary care. Many transactions which involve undue influence may also give rise to allegations of breach of fiduciary care. Both are equitable doctrines and there is some measure of overlap. However, an analysis of fiduciary duty is beyond the scope of this paper.

In Hayward, the plaintiff, a 60-year-old widow, sought investment advice from the Bank. The Bank manager recommended a speculative investment which turned out badly without making full disclosure of the Bank's knowledge of the risks entailed. The plaintiff listened to, accepted and relied on the bank's advice. The trial judge found there had been a breach of fiduciary duty and

held for the plaintiff.

The Court of Appeal agreed, and after referring to the judgment of Lord Scarman in Westminster, summarized their reasons as follows at p. 195:

> "It follows that rarely will the ordinary loan transaction be set aside. It must be a transaction to the manifest disadvantage to the customer and the banker must have and exercise a dominating influence over the customer. In those circumstances the relationship will arise imposing the duty upon the banker to ensure that the customer formed an independent judgment based upon full disclosure before entering into the transaction."

A 1988 judgment of the Nova Scotia Supreme Court Trial Division dealt expressly with the doctrine of undue influence. No mention was made of the Westminster decision or of Lord Sachs' judgment in Bundy. The law applied is nevertheless similar to the holding in those decisions. In MacDonald v. Creelman (1988), 83 N.S.R. (2d) 415 an 84 year old widow brought an action for a declaration that a deed giving her house to her daughter was void. She requested the return of the property claiming her age, the relationship of trust and dependence she had with her daughter and the nature of the transaction itself raised the presumption of undue influence. Davison J. disagreed. At p. 421 of his decision he laid down the following principles:

> "The court must examine the events leading up to and at the time of the gift and consider the following questions. Was the donee in a position where he or she exercised influence over the donor? Was there inequality in their bargaining power? Did the donee rely on the donor for advice to the extent that there

> was a trust which was misused by the donee for his or her own benefit?
>
> "If it is determined that the relationship was one where the donee was in a position to exert undue influence, the burden is on the donee to show the influence wasn't exerted and the donor made the gift of his or her own free will. In the absence of independent legal advice, this burden of proof could be onerous." (emphasis added)

Davsion J. went on to hold that on the facts the presumption of undue influence was not raised. He found the elderly lady was an independent woman who looked after her own financial affairs. He felt that the daughter did not exercise any more influence than was normal in a family relationship.

The facts in Burrell v. Burrell (1991), 106 N.S.R. (2d) 171 were similar to those in Creelman. In Burrell an 84-year-old widow needed money to pay legal fees incurred by her late husband's estate. Because of her advanced age she could not get a loan. The women's youngest son convinced her to convey her home to him so he could get a mortgage and pay the debts. The idea originated with the estate's lawyer and the son. The women had no independent legal advice and never intended to convey the property outright. She brought an action to have the conveyance set aside or for an order that the property be reconveyed to her.

Tidman J. affirmed the approach taken by Davison J. in Creelman and quoted his statement of the law at p.421 of the decision (quoted, supra). The learned justice made a finding that the plaintiff was not sophisticated in business matters and relied completely on the advice and guidance of her son. Although he did

not use the words, Tidman, J. put weight on the fact that the transaction was to the manifest disadvantage of the plaintiff. He could not believe that as part of a plan to pay debts owing on the estate of her late husband, she would voluntarily give away her home. Tidman, J. concluded on the facts that the relationship necessary to support a presumption of undue influence had been proved.

The defendants led evidence that the plaintiff had signed an affidavit saying she understood the nature of the transaction. The trial judge refused to accept this as proof that the plaintiff had made a free and informed decision in view of the fact that the lawyer advising her was taking instructions from the defendant. Mr. Justice Tidman ruled that the burden imposed by the presumption had not been discharged and the conveyance was therefore set aside.

Without intending to provide an exhaustive list, other Canadian cases which deal with undue influence or the principles espoused in Bundy and Westminster are: Central Guaranty Trust Co. v. Hardy (1992), 110 N.S.R.(2d) 197 (S.C.T.D.); First Calgary Financial Savings & Credit Union Ltd. v. Meadows (1990), 73 D.L.R. (4th) 705 (Alta. C.A.); Atlas Supply Co. of Canada Ltd. v. Yarmouth Equipment Ltd. and Murphy (1991), 103 N.S.R. (2d) 1 (S.C.A.D.); Pacific Faith Fishing Co. v. Crown Life Insurance Co. (1989), 38 C.C.L.I. 19 (B.C.C.A.); Bertolo v. Bank of Montreal (1986), 18 O.A.C. 262 (C.A.); Dewolfe v. Mansour and Tru-Kent Developments Ltd. (1986), 73 N.S.R. (2d) 110 (S.C.T.D.); Fleet v. Farrell (1985), 71 N.S.R. (2d) 124 (S.C.A.D.); Matheson v. Johnston's

Estate (1984), 66 N.S.R. (2d) 19 (S.C.T.D.); Thermo-Flo Corp. Ltd. v. Kuryluk (1978), 84 D.L.R. (3d) 529 (N.S.S.C., T.D.).

Goodman Estate v. Geffen

In the Supreme Court of Canada decision, Goodman Estate v. Geffen (1991) 127 N.R. 241, Wilson J. considered the doctrine of undue influence at length and some of her statements received the support of a majority of the Court. Although the discussion is obiter, a considered view of law by a majority of the Supreme Court of Canada is binding upon the provincial courts of appeal and the trial courts.

The facts in Geffen are as follows. Mrs. Goodman had a history of mental illness and instability. After inheriting her mother's house, she and her three brothers were concerned that her disability would interfere with her ability to act responsibly in relation to the property. Prior to her death, Mrs. Goodman executed a trust agreement with two of her brothers and a nephew as trustees. According to the agreement she retained a life interest in the property and upon her death it was to be divided among her children, nieces and nephews. After Mrs. Goodman died, the executor commenced an action to determine the validity of the trust, alleging that it was executed under undue influence.

On the issue of undue influence, the Court was severely divided. Wilson and Cory JJ. stated that the presumption of undue influence applied but was rebutted. LaForest and McLachlin JJ. stated that the presumption did not apply. Sopinka J. stated that

whether the presumption applied was immaterial where there was no undue influence. In his decision, LaForest, J. supported some of the conclusions drawn by Wilson J. in her discussion of undue influence but refused to speculate on issues he did not feel were germane to the case. On this analysis, one concludes that at least part of Wilson J.'s statement on undue influence had majority support.

Wilson J. begins her treatment of the doctrine of undue influence with a thorough review of the caselaw and academic commentators. Her focus throughout is toward determining "the nature of the relationship that must exist in order to give rise to a presumption of undue influence." At p. 265 of the decision she writes:

> "Bearing in mind the decision in National Westminster Bank v. 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. ... 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 here 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 obtain."

Wilson J. next turns to the question of "manifest disadvantage." She feels that while such a requirement is "perhaps appropriate" in a commercial setting, in the area of gifts it makes no sense to require a plaintiff to prove "that their generosity placed them at a disadvantage."

In his judgment, LaForest J. (McLachlin J. concurring) agrees with Wilson J's discussion of the law up to this point. He writes at p 285 of the decision:

> "Wilson, J., concludes that such a presumption will arise only when the parties are in a relationship of "influence", where one person is in a position to dominate the will of another. I agree with this."

He also expressly agrees with her "that the requirement of manifest disadvantage simply does not make sense in the context of this case where the challenged transaction concerns a gift." He refuses however to comment on whether manifest disadvantage need be shown to raise the presumption in a commercial setting.

Lower courts are given helpful guidance by Wilson J. on how to approach the issue of undue influence. She suggests a step by step approach at p. 267 of the judgment:

> "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 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.

"Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. From the court's point of view this added requirement is justified when dealing with commercial transactions because, as already mentioned, a court of equity, even while tempering the harshness of the common law, must accord some degree of deference to the principle of freedom of contract and the inviolability of bargains. Moreover, it can be assumed in the vast majority of commercial transactions that parties act in pursuance of their own self-interest. The mere fact, therefore, that the plaintiff seems to be giving more than he is getting is insufficient to trigger the presumption.

"By way of contrast, in situations where consideration is not an issue, e.g., gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. . . .

"Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, ...the onus moves to the defendant to rebut it. As Lord Evershed, M.R., stated in Zamet v. Hyman, supra, at p. 398, the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised."

Summary of Legal Principles Emerging from the Caselaw

Although it is not possible to make a definitive statement concerning the law on undue influence, the case law does reveal the general principles which are relevant and likely to be applied by a court.

Undue influence is of two types, actual or presumed.

1) Actual - When a party wanting to impeach a transaction is able to show that his will was dominated by the defendant, and the situation involves a gift or a bequest, the transaction will be set aside. In a commercial setting it may also be necessary to prove that the transaction was a disadvantage to the plaintiff or an advantage to the defendant.

2) Presumed - In certain situations, the courts will presume undue influence.

(a) Dominance - The absolutely crucial question and the key to this area of law is this: Do the facts reveal a relationship which allows "one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power"? (Geffen per Wilson, J., at p. 265). Some of the factors Courts consider are age, business sophistication, language ability and a relationship of dependency. If the facts establish dominance then the presumption will arise in the case of a gift or bequest. However, in commercial transactions, in addition to this dominance, the plaintiff may have to show that

they suffered a disadvantage or that the defendant obtained a benefit.

(b) Special Relationships - Certain relationships will always give rise to the presumption of undue influence: doctor and patient, solicitor and client, parent and child, guardian and ward.

3) Onus Shifts - If the plaintiff is successful in raising the presumption of undue influence then the onus shifts to the defendant to prove that the plaintiff entered into the transaction as a result of his own "full, free and informed thought". (Geffen per Wilson, J., at p.268).

4) Independent Legal Advice - Courts are in agreement that the most effective way to rebut the presumption is to show that the plaintiff had independent legal advice.

Some Practical Applications to Our Day to Day Practice

1) Banks' Approach

We have attached to this paper copies of interoffice guidelines used by the Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce and the Royal Bank of Canada to advise their staff with respect to questions of undue influence and independent legal advice. It is clear from reviewing these documents that the banks have a good understanding of the doctrine of undue influence and the significance of independent legal advice. This material describes the situations which alert one to the possibility of undue influence. Loan officers are instructed to be aware of various factors that may be possible warning signs

a relationship of domination exists -- is the guarantor voluntarily doing this; does he understand the transaction; consider other factors such as lack of business sophistication, difficulty with language, elderly persons, etc. If a bank manager has a concern, they must insist on independent legal advice.

Banks generally do not appear to be in the practice of requesting independent legal advice when it is not needed. It would appear to be most often requested when a wife is acting as guarantor for her husband's company in a commercial transaction and perhaps even more certainly where the matrimonial home or assets of the wife are being pledged to secure the debt.

If on the facts of a given situation, the bank feels that independent legal advice is required and requests this, in most instances it would be folly for a lawyer to question its judgment. On the other hand, we do have an obligation to protect the bank and the mortgagor and the mortgagor is always footing the bill. If, in your practice, you run into a banker who regularly insists on independent legal advice where it is obviously not necessary, indicating that he simply does not understand the use of such a document, then it may be wise to try and educate the particular banker. If this does not work, you may have no choice but to consider talking to regional office.

2) <u>You are Retained to Place a Mortgage With a Guarantee</u>

What about a situation where you are retained to place

a mortgage which involves a third party guarantor and the bank has not asked for independent legal advice? What are our obligations here?

Lawyers must constantly be on guard for the possibility that a client is acting under the undue influence of another. If this is happening, and as professionals we should have recognized it but did not, we will be held to be negligent. This is especially important in a mortgage situation where the lawyer sometimes has a professional duty to three persons -- the bank, the mortgagor and the guarantor. Therefore, it goes without saying that we must be aware of the factors that would allow us to determine whether this situation may exist.

A prudent solicitor should examine the situation very carefully. In most cases, this does not take a great deal of time and in noting the relationship between the parties, their ability to understand and their age, you can normally determine very easily that there is no problem. However, if any of the warning signs are present -- e.g., the Father seems to be under the control of the son, the guarantor is very old or appears infirm or does not appear to have the ability to understand -- we then have the responsibility to slow down and carefully examine the situation to ensure that undue influence is not present. Nothing can be taken for granted and if anything appears to be wrong, then we must insist on independent legal advice to protect the bank, the mortgagor, guarantor and last but certainly not least, ourselves.

It is also obvious that a commercial transaction is more

complex than a personal transaction and some commercial transactions are much more complex than others. The greater the complexity of the transaction, the greater the need to ensure that we are satisfied.

Even if the bank has not requested that independent legal advice be obtained by one of the parties, the solicitor may be liable for not perceiving that it was required. In the event a plea of undue influence is later raised, and the bank suffers a loss, the bank will argue that it was incumbent on the solicitor to be aware of this area of law and to ensure that the client bank was fully protected.

3) Retained to Prepare Deed From Parent to Adult Child

Another very practical application of the principles of undue influence come into play when you are retained to do a deed from a parent to an adult child.

In most cases, when the parent comes in alone, asks you to do a deed and you sense no problems (they appear to understand, do not appear to be under anybody's influence and generally want to do this), the deed is done and that is the end of the matter. However, if any of the principles that are involved in establishing the presumption of undue influence arise, then you must satisfy yourself that this is being done freely and voluntarily. If, in your professional opinion, there is undue influence, there is no resolution to the problem but to refuse to complete the transaction. Independent legal advice is not an option.

If the son or daughter accompanies the parent to your

office, this in itself raises some concerns. You must insist that the child not be present during any of the discussions. This will better allow you to satisfy yourself that there is no dominance by the child over the parent.

What if the individual is extremely old? Age by itself does not mean anything and if you are satisfied the person totally understands what they are doing, there is no need to take any special precautions. However, if you have any doubt as to the ability of the person to understand what they are doing, given their age, it would be wise to consult with their doctor to obtain a medical certificate that they have the required ability to understand the consequences of their action.

4) Who Must Provide the Independent Legal Advice?

If the bank has asked for independent legal advice, or if they have not and it appears to you that a real question of undue influence has been raised, it is imperative to ensure that the client be counselled by a solicitor completely independent of both the bank and your firm. There must be no question of any possible conflict of interest.

I was asked to touch on the possibility of another lawyer in your firm providing this advice. I would say this is never an option. If you do this, it may be evidence that you recognized the situation was problematic but that you took inappropriate action -- you should have insisted on independent legal advice and you did not.

What happens if a party refuses to go for independent

legal advice? If, in your professional opinion, there is a reasonable possibility this person is subject to undue influence then you are under an obligation to inform the bank that the transaction should not be completed.

Is there any protection in obtaining a letter from the party to the effect that you have advised him to obtain independent legal advice but he has declined to do so? I see no real protection here. If, in your professional opinion, the party is under undue influence or the party requires independent legal advice, what advantage would such a letter be if the Court subsequently finds that you were correct and sets aside the transaction?

5) <u>What are the Responsibilities of the Lawyer Giving Independent Legal Advice</u>

When you receive a call from another lawyer to provide independent legal advice to a party, I think you have to assume that there is some valid reason for this. It's not enough to simply review the document, explain what it means and have them sign it. You have to be aware of the factors that would raise undue influence and be satisfied that these are not present. You also have to be satisfied the party understands the nature of the transaction and the documents he is signing. And as previously noted, the more complex the transaction the more detailed the inquiry will have to be.

A solicitor who undertakes to provide advice represents to the party that he understands, or has the expertise to

understand the nature of the transaction. It has been decided that legal advice given to a guarantor by a solicitor who is not fully apprised of the transaction or the financial status of the guarantor is not sufficient to rebut evidence of inequality of bargaining power. (The Royal Bank of Canada v. Hipwell (unreported) February 9, 1981, Ont. H.C.J.; Williams v. Johnson (1937) 4 All E.R. 34). It would also appear that the solicitor is required to inform himself or herself of the financial position of the principal debtor, including his or her ability to perform obligations under the primary contract. For example, in Bomek v. Dauphin Plans Credit Union (1983), 20 Man. R. (2d) 150 at p. 159, the Manitoba Court of Appeal stated that "any reasonably competent legal advisor would...wonder about...the efficacy of an oral promise to pay the mortgage and about the financial ability of the promisor to make good on his promise."

Conclusion

It goes without saying that the equitable doctrine of undue influence is a very complicated area of the law. Courts have struggled with the doctrine generally, and with the conditions necessary to raise the presumption of undue influence specifically. While in our day to day practices, there is no need for us to have a detailed academic understanding of the development of this equitable doctrine, it is essential that we have a working knowledge of the principles involved in order to protect our clients' interests.