1980

Infants Act - "Absolutely Void" Agreement - Property Passage and Restitutionary Implications - Prokopetz v. Richardson's Marina et al.

John D. McCamus

Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation


This Commentary is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
INFANTS ACT — "ABSOLUTELY VOID" AGREEMENT — PROPERTY PASSAGE AND RESTITUTIONARY IMPLICATIONS — PROKOPETZ v. RICHARDSON'S MARINA ET AL. — It is an unusual event for litigation concerning an infant’s contract to result in a reported judgment of a superior court. For this reason alone, the recent decision of MacDonald J. of the British Columbia Supreme Court in Prokopetz v. Richardson’s Marina Ltd. et al.¹ is an object of curiosity. The case is noteworthy however, not merely as an interesting aberration, but because it considers a central and previously unresolved question relating to the interpretation of the British Columbia Infants Act.² In Prokopetz, MacDonald J. was called upon to decide whether property would pass in goods purchased by an infant under a contract which is “absolutely void” by virtue of the provisions of Section 2 of the Act. In holding that property does not pass in these circumstances MacDonald J. has, it will be argued here, launched an unfortunate interpretation of the Act which is capable of producing unnecessary hardship both to infants and to third parties with whom they deal and which adds an additional source of confusion to an already impressively chaotic area of private law.³

At the outset, it must be conceded that the British Columbia Infants Act, and the English Infants Relief Act of 1874⁴ on which it is based, does not easily yield guidance as to the proper resolution of the property passage question. Indeed it fails to answer, or in some cases only obscurely answers, a number of questions which are quite

⁴ 37 & 38 Vict., c. 62.
pertinent to the basic problem set addressed by the Act, i.e. the legal consequences of contracting with minors. Section 2 of the Act provides:

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

The draftsman’s careful attempt to avoid conflict with statute law and with some apparently satisfactory features of the common law and equitable rules has left a trail which is notoriously hard to follow.\(^5\) Of particular interest here is that this provision offers little evidence of legislative intent with respect to the rights of the parties concerning benefits conferred under invalid agreements. The agreement, to be sure, is “absolutely void”. But does the property in goods delivered pursuant to such an agreement pass? May the infant recover moneys on the value of other benefits conferred on the adult? May the adult recover the value of benefits conferred on the infant? In short, although the Act stipulates clearly that the agreement itself is unenforceable, it does not indicate what the consequences of this are for the proprietary and restitutiorary rights of the parties.\(^6\)

In *Prokopetz*, the Court expressly addressed one of the proprietary issues: does property in the subject matter of a sale pass to the infant buyer? Before turning to consider the holding in this case however, we should note that there is an interesting relationship between the proprietary and restitutiorary issues. Consider the matter from the point of view of an adult seller. If, as in *Prokopetz*, it is determined that property does not pass to the infant, the seller will not be too distressed if it should also be held that he has no restitutiorary remedy against the infant for the value of goods supplied. He will simply fall back on his position (a secured position at that) as owner of the goods. Conversely, if a court first comes to the conclusion that the adult has no restitutiorary claim against the infant, there may be a very strong temptation to hold that property does not pass to the infant in order to ensure that some form of relief is secured


to the adult party. It may be that some sentiment of this kind induced the holding in Prokopetz. It will be argued below however, that this analytical device for bringing relief to the adult party, i.e. the holding that property does not pass, does not adequately resolve this problem. A “no property passes” rule has a number of unsatisfactory consequences for other parties, notably the infant and others who enter into bona fide transactions to acquire title from the infant. Moreover, it offers only a very limited solution to the more general problem of affording appropriate relief to adult parties to unenforceable infants’ contracts. After reviewing the holding in Prokopetz, these points will be considered in greater detail. Attention will then be turned to alternative solutions available at common law as well as the proposals of the Law Reform Commission of British Columbia put forward in its 1976 Report on Minors’ Contracts.7

The facts of Prokopetz are inspired. The chattel around which the dispute centred was a large wooden scow, the Northern Warrior, which the young Prokopetz had manufactured while an infant from materials obtained by him, for the most part on credit, from a variety of suppliers. Prominent amongst these was Richardson’s Marina from whom Prokopetz obtained, on credit, about $11,000 worth of materials. The remarkable confidence demonstrated by Richardson’s in the creditworthiness of a seventeen year old boy is to be explained by two facts. Prokopetz was at the time of the supply an employee of the firm. Moreover, he had a good credit history with them. The Northern Warrior was Prokopetz’s third boat. He had begun dealing with Richardson’s when he was twelve years old.

At about the time work on the Northern Warrior was complete, Prokopetz left Richardson’s and took up employment with Nanaimo Shipyards Ltd., to whose premises he moved his new boat. A few months later, Prokopetz took the boat on a weekend trip along the B.C. coast in order to test the Warrior in more exposed waters. He was accompanied by a friend, Ernest Hartt, in another vessel. The Warrior did not rise to the occasion. It began to take on a substantial amount of water and was ultimately towed back to the Nanaimo Shipyards premises by the Hartt vessel. Having sustained damage, the Warrior’s engine was removed from the boat and taken to the Nanaimo workship. Nanaimo refused to undertake the necessary repairs however, as it was clear that Prokopetz, now unemployed as the result of a lay-off, would be unable to pay for it. Prokopetz then removed some of the other equipment on the boat and placed it,

7 Infra, note 31.
presumably for purposes of safe-keeping, in a vessel owned by Ernest Hartt’s brother Ted. Having made these arrangements Prokopetz left for a two week visit to Vancouver.

Upon his return, Prokopetz discovered that Richardson’s Marina had taken possession of the Northern Warrior, its engine and equipment. Nanaimo, aware that the engine had been purchased from Richardson’s and was as yet unpaid for, had advised Richardson’s of the current status of the Warrior. Richardson’s, with Nanaimo’s consent, removed the engine to its own premises. Further, Mr. Richardson himself contacted Ted Hartt, advised him that it “could be a matter for the police” and successfully persuaded Hartt to turn over the vessel and its equipment to their possession. Once he had learned of this chain of events, Prokopetz protested to Richardson’s. He advised them that some of the equipment had been purchased from other suppliers and asked for the return of his property. Mr. Richardson responded to these overtures by enquiring as to Prokopetz’s intentions with respect to his outstanding account at Richardson’s. Obtaining no satisfaction on this point, Richardson refused to return the goods. In due course Richardson sold off some of the equipment (crediting Prokopetz’s account in the amount of the proceeds) and returned two other items to their original (and unpaid) supplier. Some additional items disappeared. The rest, including the hull of the vessel, remained on Richardson’s premises.

On these facts, Prokopetz launched a claim in conversion and trespass to chattels. The principal defence raised by Richardson was that inasmuch as the agreements to supply the goods to Prokopetz were “absolutely void” by virtue of the operation of Section 2 of the Infants Act, property in the goods could not have passed from any of the suppliers to Prokopetz. 8 This point had not been authoritatively determined 9 in the English case law interpreting the equivalent provision of the Infants Relief Act, 1874. Dicta in two decisions suggested that property would pass under such agreements. 10

8 Supra, note 1, at 444.
9 There is a suggestion in the judgment of MacDonald J. that Prokopetz would have good title as against Richardson’s in the goods supplied by others. Id., at 446. It does not appear however, that this view is consistently applied by MacDonald J. in determining the extent of Richardson’s liability in trespass and conversion.
10 MacDonald J. expressed the view however, that: “In England it is accepted that though the contract with an infant may be void under the provisions of the statute, nevertheless property will pass under it...”. Id. at 447.
MacDonald J. however, took the contrary view in order to give “full effect” to the wording of the provision. Reviewing the English material, he concluded that the opinions did not bind him and quoted with apparent approval a passage from *Cheshire and Fifoot* intimating that although the point was “far from settled”, a literal reading of the phrase “absolutely void” would suggest that property would not pass under such an agreement. MacDonald J. recognized that the effect of the interpretation would “diminish the protection given to the infant” and have the effect “of adding to the risks of adults dealing with infants”. Nonetheless, he felt that “these results are just as consistent with the intentions of the enactment as are the results under the English cases.” MacDonald J., writing well within the Canadian tradition, does not elaborate in his judgment on either the precise nature of these statutory intentions, or the logical connection between them and the consequences of the interpretation which he propounds.

The implications of this interpretation for Prokopetz’s claim were, of course, rather negative. MacDonald J. held that the agreements under which Prokopetz purchased goods from each of the suppliers were “absolutely void”, with the result that he neither obtained property in the goods nor the right to possess them. “[W]ithout a right to possession”, his Lordship observed, “the foundation for actions in trespass and conversion is lacking.” Although this obviously bodes ill for Prokopetz, the case does have an interesting surprise ending. Prokopetz’s claim did in fact succeed. Recovery was allowed for the amount by which the market value of the completed vessel (estimated as at the date of the alleged conversion) had exceeded the unpaid charges to all suppliers. Prokopetz had obtained, apparently, a proprietary interest in the goods reflecting the amount paid by him to his suppliers together with the value added to the property by his own effort in constructing the vessel. This is not precisely the nature of his interest however, as MacDonald J. is evidently of the view that Prokopetz should wholly bear any loss in market value sustained by the goods. In substance, the “ownership” rights retained by the suppliers look remarkably like an unpaid

12 *Supra*, note 1, at 448.
14 *Supra*, note 1, at 448.
15 Id., at 449.
16 Id.
vendor's lien, whereas the proprietary interest of Prokopetz bears a considerable similarity to the corresponding right of the purchaser to the amount by which the proceeds exceed the outstanding balance of the purchase price. What at first appeared to be a retention of full ownership rights because of the "absolutely void" nature of the agreement is thus converted, somewhat magically, to something rather more like an equitable lien retained by the seller to secure the price. The "general" or residual property in the goods appears to have passed to the infant buyer, notwithstanding the clear statement to the contrary in Mr. Justice MacDonald's judgment. Whatever the nature of Prokopetz's interest however, it is evidently thought by MacDonald J. to be sufficient to support claims in trespass to chattels and conversion.

The interpretation of the Infants Act offered in support of this somewhat surprising analysis requires a bit of sleight-of-hand. It is apparently Mr. Justice MacDonald's assumption that although property cannot, as a general matter, pass under an "absolutely void" agreement, some sort of proprietary interest will pass on each and every occasion when the infant makes a payment on account. No explanation is put forward for this view. And indeed, it is difficult to see any basis for it in the language of the Act. If we accept Mr. Justice MacDonald's view that property does not pass under an "absolutely void" contract when the chattels are delivered with the intent to pass property, it seems rather odd, to say the least, to conclude that a proprietary interest of sorts does pass when a payment is made, even though the parties may reasonably be assumed to have had no intention to create such an interest at that time. The only possible basis for Mr. Justice MacDonald's analysis of the property passage issue would appear to be that we are permitted to read into the Act whatever proprietary scheme is necessary in order to protect the well-behaved infant who has at least made a start on paying for the goods in question. Whatever the merits of this approach, it is obviously a method of statutory construction which provides ample scope for creative interpretation of the Act. What MacDonald J. has attempted, in effect, is to work out an equitable resolution of the conflict between the interests of the supplier and the infant purchaser through manipulation of proprietary concepts. The supplier is protected by the rule that property does not pass. The infant is protected

17 With the remarkable distinction, of course, that the seller's lien provided by the general law at sale of goods is possessory only and does not survive delivery of the goods to the buyer. See generally, G. Fridman, SALE OF GOODS IN CANADA (2nd ed. 1979) chap. 14.
by the rule that payment creates a proprietary interest. It will be suggested below that a more satisfactory mechanism for dealing with these problems would be achieved by recognizing that property passes under such agreements to the infant but that certain restitutionary or unjust enrichment remedies may be available to the supplier.

Why would it have been preferable for MacDonald J. to follow the lead of the English cases and hold that property would pass? What is so wrong with the notion that property does not pass under an “absolutely void” agreement? There are a number of reasons for attacking this interpretation of the Act. First, and perhaps most obviously, it is an approach which creates unnecessary hardship for bona fide third parties who have, for example, purchased the goods from the infant. The great inconvenience which may result from undermining title in this way seems especially unwarranted here where the original owner, the supplier, has freely parted with possession of the goods in the expectation that title would go with them. It is of course true that a cluster of aged common law mistake doctrines (non est factum, mistakes as to identity or subject matter) have visited such hardship on third party purchasers. In recent years however, such doctrines have been given an increasingly restrictive reading and replaced by equitable doctrines affording protection to innocent third parties who have given value for the goods. Similarly, under other common law doctrines invalidating contracts, such as the illegality rules, the courts have been increasingly of the view that property passes notwithstanding the “void” nature of the agreement. It seems very likely that the animating factor in these developments is a concern to protect the title of innocent third parties.

A second range of concerns arises with respect to the rights of the parties inter se. With respect to the rights of the infant, it is clear that the decision of MacDonald J. undermines, to some extent, the underlying policy of the Infants Act. The Act has as its evident objective the protection of infants from the sharp practice of others, as well as from their own folly. The effect of leaving property with the

---


20 The act renders agreements unenforceable regardless of whether the adult has engaged in sharp practice. Presumably, therefore, the intent of the statute is to permit infants to resile from bargains they have come to regret even though
adult supplier is to constitute him a secured creditor, a position for which he has not bargained, and to encourage the use of the self-help remedy demonstrated in Prokopetz itself. It is distinctly odd to grant creditors a privilege to engage in practices against defaulting infants which would, if perpetuated against defaulting adult parties, clearly be tortious. The encouragement of self-help against infant creditors does not appear to be consistent with the underlying philosophy of the Act. Moreover, if the reading of MacDonald J. of the "absolutely void" expression is sound, it is difficult to see that property would ever pass to the infant under the agreement. MacDonald J. does suggest that some proprietary rights arise once partial payment of the price is made. Yet as suggested above, it seems doubtful that this is a tenable reading of the Act. Even if one adopts the view of MacDonald J., the infant who purchases on credit is left exposed until payments are made. Surely, it would be far better simply to hold that property passes to the infant at the time of delivery.

From the point of view of the adult party, the analysis of MacDonald J. has some obvious virtues. Indeed, the sacrifice made of the infant's interests is presumably undertaken in order to afford some relief to the adult party. However, as a device for securing redress to the adult party the denial of property passage is rather unsatisfactory. Anomalous results are presented in a number of situations. Thus, the proprietary remedy is effective only to the extent that the infant has retained possession of something of value. The supplier of a wasting asset or one destroyed by the infant has no remedy. One who has advanced moneys to an infant would presumably obtain relief only if the moneys can be traced under common law tracing rules. Further, proprietary remedies offer nothing to the supplier of services. In short, if the withholding of property passage is intended as a means for protecting the interest of adults dealing in good faith, it accomplishes this objective only in a random and very arbitrary way.

The perils of the proprietary analysis might have been dramatically illustrated in Prokopetz itself if the title issue had been more carefully reviewed. Prokopetz had purchased, inter alia, lumber and

---

converted it into a boat. Was there not therefore a strong argument that Prokopetz acquired property to the resulting chattel, the *nova species*, by operation of the doctrine of *specificatio*? Further, regardless of who in law owned the *Northern Warrior*, did the suppliers of materials of lesser significance not lose their title by accession? The proprietary position of those who supplied goods to Prokopetz was perhaps more insecure than was appreciated. The point to be made here is that a much more consistent and clear-headed analysis of the adult party's position would be effected by recognizing that any remedy available should be an *in personam* claim premised on a theory of preventing the unjust enrichment of the infant. We will return below to a consideration of the prospects for such claims.

One final complaint concerning the implications of the analysis of MacDonald J. relates to the respective positions of competing creditors of the infant. Once again, anomalous results are encouraged. By allowing the supplier of chattels under an "absolutely void" agreement a secured claim, MacDonald J. has given this perhaps unattractive plaintiff a priority over more deserving candidates, such as the supplier of necessaries (whether of goods or of services) who is left with merely an *in personam* unjust enrichment claim. Again, a preferable solution would be to find that the remedies of the supplier, if indeed a remedy is appropriate, should be *in personam* in nature.

How then should the analysis of these problems proceed? The principal difficulty is to find some mechanism for affording relief to the adult party. The statute does not, of course, address this policy question. It straightforwardly pursues a policy of infant protection by holding that certain bargains with infants are unenforceable. Clearly, no contractual relief will be available to a party to an agreement invalidated by the Act. But what of the other forms of obligation imposed under our private law, those duties under the laws of tort, restitution and property? The Act is silent on these issues. To what extent then is the pro-infant policy of the statute consistent with the operation of certain common law doctrines which would enable some form of redress by the adult party. It has been argued here that the manipulation of proprietary concepts is not a satisfactory basis

---


24 See generally, McCamus, *supra*, note 6, at 96-98.
for assigning rights to the adult party. Granting the adult a proprietary remedy undermines the policy of the statute and creates the various anomalies recounted above. Tort law might hold out some opportunity for redress where the infant has wilfully misled the adult.\footnote{Cowern v. Nield [1912] 2 K.B. 419.} Indeed, some writers have taken a rather generous view of the adult’s right to sue in tort on the basis that this would permit at least some form of \textit{in personam} relief.\footnote{E.g., P. Atiyah, \textit{The Liability of Infants in Fraud and Restitution} (1959) 22 \textit{Mod. L. Rev.} 273.} Ultimately however, tort does not offer an adequate resolution of these problems. In \textit{Prokopetz} for example, it is difficult to see that the conduct of the infant was tortious in any respect. Nonetheless, many would feel that \textit{Prokopetz} ought not be permitted to keep his boat and pay nothing for it.

The solution argued for here is simply to recognize that the adult party may bring claims in restitution or unjust enrichment for the value of benefits received by the infant, provided of course that the granting of relief is not permitted to undermine the statutory policy of protecting infants from the ill effects of sharp practice or their own foolishness. The general policy or principle of that body of law which is now recognized (most importantly, by the Supreme Court of Canada\footnote{E.g., Degiman v. The Guaranty Trust Co. of Canada and Constantineau [1954] S.C.R. 725; Corp. of the County of Carleton v. Corp. of the City of Ottawa [1965] S.C.R. 669; Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd. [1976] 2 S.C.R. 147.}) as the law of restitution is that one ought not to be unjustly enriched at another’s expense. Is this not the sentiment that underlies our concern, and perhaps the concern of MacDonald J., that \textit{Prokopetz} not be allowed to keep his boat and pay nothing for it? If so, we would more directly meet this concern by simply allowing an \textit{in personam} claim against \textit{Prokopetz} for the value he has obtained at the supplier’s expense. Such a claim would not be contingent on \textit{Prokopetz}’s possession of the chattel and this, it may be argued, is as it should be. For surely we would be similarly disposed to grant relief if \textit{Prokopetz} had sold his boat and invested the proceeds into what had become a successful water taxi service. If \textit{Prokopetz} had become an enormously wealthy young man at Richardson’s expense the granting of relief would not appear to subvert the policy of the Infants Act. On the other hand, we might feel very differently if \textit{Prokopetz} had acquired worthless goods, had been inveighed into his contractual commitments by trickery or had lost the boat at sea in a reckless teen-age adventure. In such cases, the granting of relief
would undermine the statutory policy and ought therefore to be denied.

The granting of restitutionary or unjust enrichment relief to parties to unenforceable contracts is, in Canadian restitutionary law at least, a well recognized principle of liability. Liability will not be imposed where doing so will seriously undermine the policy of the rule rendering the contract unenforceable, hence, the limits suggested above for the right of recovery of the adult party. It is true however, that the explicit recognition of such restitutionary rights in the context of infants’ contracts is not yet to be found in the case law. Accordingly, a more cautious court might prefer to adopt an indirect application of these principles for which there is considerable evidence in the Canadian case law. Many courts have affected restitution to the adult party by holding that the infant who wishes to ignore his contractual arrangements is in effect exercising a rescissionary remedy and ought therefore to be held to an equitable duty to make *restitutio in integrum*. As the approach taken is equitable in nature, it is presumably possible to invoke doctrines protecting bona fide third party purchasers or defeating plaintiffs who have engaged in sharp practice or who have slept on their rights. More generally, it should be possible to argue on the basis of such authorities that an equitable duty to make restitution would not be imposed where doing so would be oppressive and would thus undermine the objective of the unenforceability rule.

In sum, then, the holding of MacDonald J. that property does not pass under an infant’s agreement which is “absolutely void” under the Infants Act effects a poor solution to the problem of reconciling the underlying policy of the Act with some protection of the interests of the adult party dealing in good faith. If better solutions are indeed available at common law, however, it must be conceded that the amount of learning heaped on this somewhat slender subject by both the courts and legal commentators seems rather more than it deserves. Would we not be better to make a fresh start? This is the view of the Law Reform Commission of British Columbia. The Commission has recommended that the B.C. Infants Act should be repealed and replaced by a more comprehensible and straightforward statutory scheme. It is of interest here to

28 See generally, McCamus, supra, note 18.
29 This general principle is manifest in the case law. See generally, R. Goff and G. Jones, *The Law of Restitution* (2nd ed. 1979) at 39-42.
30 See generally, McCamus, supra, note 6, at 105-15.
consider the Commission's solution to the problem posed in this note: does property pass to the infant buyers of chattels under unenforceable contracts and what are the implications of the answer to this question for the restitutionary liabilities of the infant? In the main, the Commission's proposals seem, to this writer at least, quite sound. The Commission recommends that property should be deemed to pass under unenforceable agreements with minors until such time as a revesting has been ordered by the court. The Commission evinces concern in its report for the rights of bona fide third party purchasers and indicates that no revesting would be made where title has been passed on in this way. As far as restitutionary duties are concerned, the Commission proposes to sweep away the existing (and rather chaotic) jurisprudence and confer a broad discretion on the courts in the following terms:

3. If a contract is unenforceable against a minor because of his minority, an action for relief ought to be able to be brought
   (a) by the minor; and
   (b) after the minor has repudiated the contract, by an adult party.

4. In any action brought as a result of any enactment of the preceding recommendation the court ought to be able to
   (a) grant to any party such relief by way of compensation or restitution of property or both as is just; and
   (b) upon doing so ought to be able to discharge the parties from further obligation under the contract;
   provided that no grant of relief should enable the party contracting with a minor to recover more than is necessary to restore him to the position in which he found himself before entering into the contract.

5. In making any order under any enactment of the preceding recommendation, the court ought to have regard to
   (a) the circumstances surrounding the making of the contract;
   (b) the subject-matter and nature of the contract;
   (c) in the case of a contract relating to property, the nature and value of the property;
   (d) the age and the means (if any) of the minor; and
   (e) all other relevant circumstances.\(^\text{32}\)

A bill drafted along these lines would usefully free the courts from the complexities of the existing authorities and would direct consideration of what appear to be the material factors in fashioning

\(^{32}\) Id., 32.
relief for either party. One might however, enter a minor quibble. Would it not be desirable to structure the very broad discretion conferred on the courts by indicating that as a general rule, in the absence of wrongdoing by the adult party, an infant party who is capable of making restitution should be required to do so. The Commission appears to be in general sympathy with his proposition and there is no reason, in my view, to leave the courts in the dark on this point.

It is understandable that legislatures may not, at this particular point in our history, see infants' contracts legislation as an urgent priority. In Prokopetz however, we once again see the infants' contracts rules headed for troubled waters. Perhaps this might be considered to provide an additional reason for enacting legislation based on the quite sensible recommendations of the B.C. Law Reform Commission.

JOHN D. McCAMUS

33 Id., 31.
† Of the Faculty of Law, Osgoode Hall Law School, York University.