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"The power of judges to legislate in Common Law. The case of Canada"

Prof. Richard W. Bauman

(Professor Emeritus of Law, University of Alberta, Canada)

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Seminar report by Andrea Cristina Robles Ustariz*

On Tuesday, November 14th, in the Aula Vitale at the Department of Business and Law, the "lunch seminar" was held by the visiting professor, Richard Bauman, who explained how the canadian judge legislates in private law. To illustrate how it happens, he used three Supreme Court´s leading cases as reference: 1. Tweddle v. Atkinson (1861); 2. London drugs (1992) and 3. Fraser River (1999).

Since a retrospective point of view, these three cases are the points of the time line which has been drawn by the canadian judge who has changed the general principle of the contract law, which establishes that only the parties to the contract have the legitimacy to demand its compliance, leaving out the third parties who could be interest on it. This judicial practice is truly interesting because it is proof that, however, in Canada, where the principles of the separation of powers and legal certainty rules, the judge can modify a norm by his jurisprudence: "only the parties to the contract can be the parties of the process", unless the judge take the decision to apply exceptions in order to get material justice, after the failed attempts to modify this "doctrine of the privity" by the legislator.

In the first case, Tweddle v. Atkinson (1861), the doctrine of privity of the contract remained untouchable, with any possibility that a third party could demand its compliance. Thus, Tweddle junior didn´t get the money that his father and his father-in-law had agreed to pay him, because the contract had been signed between them and he was not officially part of it, even when he was the only one beneficiary. The classic conception of the principle of privity of contract was an absolute

* PhD Student in Legal Studies, University of Siena

rule, he was the only beneficiary, but he had not signed the contract, therefor he didn´t have a legitimate interest to present a lawsuit asking its compliance, because in the strict sense, it wasn´t considered to be entitled into an agreement in which he hadn´t participated.

The case London drugs (1992) has been established as the first case of "relaxing the doctrine", because the clause of limitation of liability written in a contract signed by the plaintiff with the employer of the defendants was extended to them however they, the defendants, were the third parties of the contract. In this case, the third parties were two employees of one of the contracting parties. Some damages were causing by the acting negligently of those employees in the execution of activities foreseen into the contract. It is why the judge had established that the process was not a tort case (tort liability), but a contractual liability (responsibility inside the contract) and as consequence it must operate the clause of limitation of liability agreed in it, even when the employees have not signed the contract by themselves. This exception was named as “the employees exception".

In the last case, Fraser River (1999), a review of the exception set out in the previous case, was made by justice Lacobucci, regarding to clarify when a third party can demand the compliance of the contract. In this case, the owner of a barge secures it and rents it. The insurance contract contains a clause which stablishes that in the event of any damage caused to the barge, the insurance company can subrogate the rights of the owner as lessee and sue the lessor for the damages. Then, another agreement is signed in which the insurer waives that clause of subrogation of rights. Happening the damage of the barge due to the lessee's activity, the insurance company tried to subrogate the rights of the insured and sue the lessee. In response, the lessee asked to the Supreme Court if it can enforce the waive to the right of subrogation signed by the insurer in the last agreement with the owner, considering that, in that insurance agreement, the lessee is a third party. The Supreme Court takes the arguments of justice Frank Lacobucci, and expands the exception of the doctrine of privity, arguing that the lessor as third party of the insurance agreement can enforce what was agreed in it because it benefits him directly. This gives strength to the test which was applied in the precedent case to apply the exception, consisting in that any third party may sue based on what is contained in an agreement if: 1. In the agreement has been agreed clearly benefits toward that third party and, 2. The activities developed by the third party are part of the object of the contract. In this way, the exception expands and not only is been applied before employees.

The explanation of these three leading cases drives us to conclude that it exists a law-making function holds by the Supreme Court of Canada, who is a head into a mixed legal system where two traditions are taking place, the "common law" based on precedents, and the "civil law" based on codes. Besides, it’s interesting the fact that it happens in an area of law so rooted in traditional rules and which is too averse to the changes as it is the law of contracts. With these pioneering cases and

especially, with the opinions of justice Lacobucci, the law progresses and it´s coming to improve; something similar can be observed in the jurisprudential development regarding the principle of due diligence and good faith; about the standards that are applied, on this subject, the judge also has the power to legislate, to review rules and to apply exceptions based on an inductive methodology of analysis in which the arguments that are exposed in each case have a great value. Thus, while the power of the legislator lies in the votes, the power of the judge to legislate does in the worth of his arguments.