Clerk's stamp:

COURT FILE NUMBER:	2001 05482
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE:	Calgary
	In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, C C-36, as amended And in the Matter of the Compromise or Arrangement of JMB Crushing Systems Inc. and 2161889 Alberta Ltd.
APPLICANT:	KALINKO ENTERPRISES LTD.
RESPONDENT:	JMB CRUSHING SYSTEMS INC.
DOCUMENT:	**BRIEF OF THE APPLICANT KALINKO ENTERPRISES LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT:	Attention: Scott Matheson / Adam Ollenberger Field LLP Barristers and Solicitors #2500, 10175 - 101 Street NW Edmonton, AB T5J 0H3 Ph: 780-423-3003 Fax: 780-428-9329 File No. 55198-1 smatheson@fieldlaw.com

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1. OVERVIEW

1. Kalinko Enterprises Ltd. ("Kalinko") owns and administers surface mineral leases (SMLs) in central and northern Alberta. Between 2012 and 2019, JMB had a contractual licence to come onto Kalinko's SML lands to extract and crush Kalinko's aggregate, market it on Kalinko's behalf, and on sale, pay out Kalinko's royalty and keep the profit. JMB defaulted, and Kalinko terminated the agreement for breach in April 2019. Pursuant to a term of the agreement, on termination JMB lost any right to compensation for its work on the piles left on Kalinko's lands.

2. A year later, JMB entered CCAA protection and, in spite of the termination, sought to sell stockpiles of Kalinko's aggregate as if they were JMB assets, including piles on Kalinko's lands, on third-party land, and at JMB's yard.

3. Aggregate extracted from Kalinko's SMLs continues to belong to Kalinko. It does not form part of JMB's assets. Alarmed by JMB's attempts to sell its assets, Kalinko asked JMB to stop marketing stockpiles of Kalinko's aggregate in the SISP. When JMB refused, Kalinko brought this application to confirm its ownership and ensure the ongoing viability of its business.

4. JMB has advised it takes no position on the disposition of this application. It chose not to adduce any affidavit evidence, examine Kalinko's witness, or provide written submissions. By doing so, JMB has effectively acquiesced to Kalinko's position regarding ownership of the assets at issue. That addresses much of the application.

5. The remaining issue concerns a creditor of JMB, N.P.A. Ltd. o/a E Construction ("N.P.A."), which has come out of the woodwork. JMB was a subcontractor of N.P.A., providing aggregate and hauling on a job in Anzac, Alberta. N.P.A. is seeking independent relief regarding a contract it had with JMB regarding access to a pile of aggregate extracted from Kalinko's SMLs, which is stored on lands controlled by a third party, Al's Contracting.

6. N.P.A. likely has a breach of contract claim against JMB for failure to provide aggregate. But since this unsecured damages claim may not be valuable given JMB's financial position, N.P.A. is instead seeking specific performance: possession of the material it claims JMB was supposed to provide.

7. The procedural posture is unusual. N.P.A. never brought an action or application to obtain specific performance of a contract with JMB. Such a claim is subject to the *CCAA* stay of proceedings. But assuming such a claim is before the Court, the conditions for specific performance are not met, for a number of reasons—including because JMB never owned the gravel. Unfortunately, N.P.A. is, like most of JMB's creditors in this proceeding, unsecured.

2. FACTS

A. THE PARTIES

8. Kalinko is a small surface mineral extraction company owned by Tim Kalinski. It holds rights to extract sand and gravel pursuant to a number of SMLs granted by Her Majesty the Queen in right of Alberta (the "Kalinko SMLs"). The Kalinko SMLs are either owned by Kalinko outright or by members of the Kalinski family (referred to as the "SML Holders" in the Kalinski Affidavit), who have designated Kalinko to take on all of the burdens and benefits of the SMLs.[1]

9. JMB was in the commercial aggregate crushing and sales business. It operated as a middle-man. Its business consisted primarily of processing and selling aggregate owned by others, like Kalinko.[2]

10. N.P.A. is in the aggregate supply, road construction, granular base construction, utility building, and paving industry. It is a subsidiary of the national road construction company Colas Canada, which is a division of the French global road building firm Colas SA. It one of the largest paving contractors in Western Canada.[3]

B. KALINKO-JMB AGREEMENT

11. Kalinko, the SML Holders, and JMB entered into a contract, called the Sand & Gravel Operating Agreement, on June 12, 2012 (the "Operating Agreement"), for a five year term.[4]

12. Pursuant to the Operating Agreement, Kalinko granted JMB permission to use its SMLs for the purpose of extracting, processing, and selling aggregate. Relevant clauses of the Operating Agreement included:

    a. Article 2.1 granted JMB the right, among other things, remove and process sand and gravel under the Kalinko SMLs and transport and sell it, subject to the terms of the Operating Agreement;

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[1] Affidavit of Tim Kalinski, sworn July 16, 2020 ("Kalinski Affidavit"), paras 7-8. A list of the Kalinko SMLs is found in Schedule "A" of the Agreement and attached as Appendix "A" to this Brief for convenience. This relationship is explicitly stated in Article 3.2 of the Operating Agreement: "Kalinko has been irrevocably designated by the Owners to receive all the benefits and fulfill all the obligations of the Owners under the SM Leases and has the right to and shall receive all payments owing hereunder and perform all covenants made by the Owners hereunder notwithstanding the fact that the legal ownership of an SM Lease is not Kalinko."

[2] Kalinski Affidavit, paras 9-10.

[3] Transcript of the Questioning on Affidavits of William Turner, dated July 31, 2020 ("Turner Transcript"), 5:3-27.

[4] Kalinski Affidavit, para 11, Exhibit "A".

b. Article 2.2 reserved to Kalinko and the SML Holders "all of their rights whatsoever in respect of the Leased Lands" except where the Operating Agreement expressly provided otherwise;

c. Article 2.4 precluded JMB from obtaining any legal or beneficial interest in the SMLs, which remain the exclusive property of the SML Holders and Kalinko;

d. Article 5.10(c) provides that, if the Operating Agreement is terminated because of a Default by JMB, any stockpile of Sand & Gravel would become the property of the Owners at their option, without compensation to JMB;

e. Article 5.10(d) required JMB to pay fair market value royalties to Kalinko for any aggregate removed after termination of the Operating Agreement that was not captured by the operation of Article 5.10(c);

f. Article 6.4 required JMB to pay royalties owing to Kalinko, as set out in Articles 6.1-6.3, within 14 days of JMB receiving payment from its customers for the extracted aggregate;

g. Article 6.7 authorized Kalinko and its representatives to enter the SMLs and inspect JMB's operations; and

h. Articles 9.1 and 9.2 permitted Kalinko to terminate the Operating Agreement in the event of a default by JMB, which includes failure by JMB to pay amounts owing under the Operating Agreement within 10 days of receiving notice from Kalinko.[5]

13. The Kalinko SMLs were never assigned or transferred to JMB, and Kalinko retained full ownership of the Kalinko SMLs. The Operating Agreement was specifically drafted so that JMB did not have any rights independent of the Operating Agreement to use the Kalinko SMLs and Kalinko would retain ownership of the aggregate taken from the Kalinko SMLs until such time as JMB satisfied its obligations, including payment of royalties.[6] JMB concurred, through its then-counsel, in the understanding that ownership of the aggregate extracted from Kalinko's SMLs did not transfer until it was delivered to the ultimate customer.[7]

14. In June 2017, JMB threatened to sue Kalinko if it did not agree to amend the Operating Agreement to extend the five-year term. At the time, JMB owed Kalinko a substantial amount in outstanding royalties. Kalinko was concerned that JMB would default on its pre-existing payment and reclamation obligations. Kalinko did sign an Amending

[5] Kalinski Affidavit, paras 11-18, Exhibit "A".
[6] Kalinski Affidavit, paras 13-17.
[7] Kalinski Affidavit, para 26, Exhibit "F".

Agreement, which provided that JMB would pay the amounts already owing, which it eventually did, approximately three years after they were due.[89]

C. THE PRECAMBRIAN PILE

15. In December 2018, while the Operating Agreement was still in force, JMB's then-President, Jeff Buck, sent a letter to Zach Kalinski (one of the SML Owners) and Randall Lacombe. Buck sought permission for JMB to store aggregate extracted from Kalinski's SML 120004 under the Operating Agreement on a SML owned by Lacombe, SML 020038 (the "Precambrian Pile"). Though Tim Kalinski didn't sign it, Zach Kalinski did. The letter modified a term of the Operating Agreement: under the letter's terms, JMB was entitled to stockpile Kalinko aggregate in the Precambrian Pile until the end of 2019, and royalties would only be payable after the aggregate was removed from the Precambrian Pile for delivery to JMB's customer (rather than the contractual standard, which was when JMB received the money).[10]

16. JMB hired subcontractors, including Al's Contracting, to extract and transfer aggregate from SML 120004 to the Precambrian Pit. Kalinko's understanding is that Al's Contracting was not paid for its services by JMB.[11]

17. JMB never bought the aggregate in the Precambrian Pile or obtained title to it, as was consistent with its practice of selling Kalinko aggregate on Kalinko's behalf and not paying royalties owed to Kalinko prior to receiving payment from its customer. As the letter makes clear, JMB represented that it merely transported aggregate to the Precambrian Pile and sold it as Kalinski's "marketing agent", and it acknowledged that royalties would be payable on the material at the time it was removed from the Precambrian Pile.[12]

18. Kalinko's understanding is that the royalties which were owed for aggregate and sand held in the Precambrian Pile as of the date the Operating Agreement was terminated, total $608,600, using the royalty values set out in the Operating Agreement.[13]

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[8] Kalinski Affidavit, paras 21-25; Transcript of the Questioning on Affidavits of Tim Kalinski, dated July 30, 2020 ("Kalinski Transcript"), 15:14-19. There are three versions of the Amending Agreement in evidence, and given the passage of time, Kalinski is not confident which the final version was. Nothing turns on that for the purposes of this application.

[9] Kalinski's affidavit evidence was that Kalinko got nothing new in return for the amending agreement. Under examination, he admitted the document did provide certain concessions to Kalinko, including an increased royalty rate for certain specialty materials, and a stipulation that JMB would meet a certain minimum royalty amount per year. Kalinski Transcript, pgs 16-19. Since the main term of the amending agreement drastically extended the time available for JMB to pay existing royalty obligations (due in 2015, deadline extended to October 2017), these concessions are minor.

[10] Kalinski Affidavit, Exhibit "I".

[11] Kalinski Affidavit, paras 30-35.

[12] Kalinski Affidavit, paras 35-38; Affidavit of Bill Turner sworn July 30, 2020 ("Turner Affidavit"), Exhibit "dd".

[13] Kalinski Affidavit, para 55.

D. TERMINATION OF THE OPERATING AGREEMENT

19. JMB continued to remain in default of its obligations to pay royalties to Kalinko in early 2019.[14] On March 22, 2019, Kalinko delivered a Notice of Default to JMB regarding outstanding amounts owing under the Operating Agreement at the time, totaling $514,626.51.[15]

20. On April 10, 2019, Kalinko delivered a Notice of Termination of the Operating Agreement to JMB and its counsel pursuant to Article 9.2 of the Operating Agreement. As of that date, the Operating Agreement was no longer in existence, and JMB no longer had ongoing rights to access the Kalinko SMLs, extract and process aggregate from the lands, and sell it on behalf of Kalinko.[16] And by operation of s. 5.10(c), JMB had no right to compensation for any piles left on Kalinko's lands.

21. After the Operating Agreement was terminated, Kalinko permitted JMB ad hoc access to the SML lands on a job-to-job basis, and in order to perform its reclamation obligations.[17] Kalinko had inescapable reclamation obligations to the Crown for these lands, and so needed to ensure JMB performed its reclamation work (which survived the termination of the agreement). It knew that "if we didn't continue to sell [JMB] product, they were going to shut down their reclamation." And it had the "optimistic hope that [JMB] would pay us the amounts they owed us…." No new overarching agreement with JMB regarding ongoing rights to extract aggregate from the Kalinko SMLs was entered into.[18]

22. On April 23, 2019, Kalinko and the SML Holders registered a Security Agreement at the Personal Property Registry naming JMB as debtor. The collateral described in the PPR registration is "[a]ll alluvial sand and gravel material extracted from the Leased Lands pursuant to the SM Leases wherever situated".

23. JMB's counsel was aware of Kalinko's PPR registration no later than January 17, 2020.[19] N.P.A. has admitted its counsel would also have run PPR searches for JMB during its due diligence in January 2020.[20] That would reveal Kalinko's PPR registration, along with JMB's many other secured creditors.

24. Kalinko was not paid for stockpiles of its aggregate taken by JMB, more particularly 27,800 tonnes of aggregate from SML 120004 (which are being stored on lands subject

[14] Kalinski Affidavit, paras 26-28.
[15] Kalinski Affidavit, paras 39-40. The total royalty amounts owing presently, not including royalties for the Precambrian Pile, total $678,014.13.
[16] Kalinski Affidavit, para 41, Exhibit "J".
[17] Kalinski Affidavit, para 42, Kalinski Transcript, 14:20-23, 29:22-25, 36:10-21.
[18] Kalinski Affidavit, para 42.
[19] Kalinski Affidavit, para 47.
[20] Kalinski Affidavit, para 47, Exhibit "H"; Turner Transcript, 21:20-23:2.

to a SML owned by a company called Stony) (the "Stony Pile") and 10,200 tonnes of aggregate from SML 140046 stored on JMB's yard (the "JMB Yard Pile").[21]

E. N.P.A.-JMB AGREEMENT

25. N.P.A. and JMB entered into a subcontract dated March 8, 2018, under which JMB would provide labour, supervision, hauling, and materials for the supply of aggregate to be used for the construction of a water and sewer project in Anzac for the Regional Municipality of Wood Buffalo pursuant to a contract with a third party (the "Anzac Project"). Included in that scope of work was providing 70,000 tonnes of aggregate from the Precambrian Pile.[22]

26. Due to changes in scope of the Anzac Project, the volume of aggregate that was to be supplied by JMB was no longer needed. This was compounded when the Anzac Project was re-tendered, and N.P.A. was not successful in obtaining the work. In September 2019, JMB and N.P.A. had a dispute about whether JMB was entitled to payment for its work after N.P.A. no longer needed it.[23] JMB sued N.P.A. for $1,573,000 in damages for unpaid work, filing a Statement of Claim on September 25, 2019.[24]

27. On January 16, 2020, as part of a settlement of the dispute over the work JMB had contracted to perform on the Anzac Project, N.P.A. and JMB entered into an agreement for the purchase and removal of 70,000 tonnes of aggregate from the Precambrian Pile (the "January 2020 Agreement"). The discontinuance and release of the court action was a Schedule to the Agreement. N.P.A. acknowledges that this would not have been a typical transaction for JMB.[25]

28. In the Representations and Warranties section of the January 2020 Agreement, JMB inaccurately represented that it owned the aggregate in the Precambrian Pile free from any claims, liens, encumbrances or security interests. Those representations were wrong, since:

    a. JMB was aware of the terms of the Operating Agreement, which did not give it title to the aggregate;

    b. JMB knew the Operating Agreement had been terminated in April 2019;

    c. JMB had received demands for payment from Kalinko for outstanding royalties on the Kalinko Pile;

[21] Kalinski Affidavit, para 66.
[22] Turner Affidavit, paras 9-12, Exhibit "J".
[23] Turner Affidavit, paras 12-22; Kalinski Affidavit, paras 45-46.
[24] Kalinski Affidavit, para 26.
[25] Turner Transcript, 15:9-26; Kalinski Affidavit, paras 48-49.

d. Kalinko had filed a PPR registration, naming JMB as debtor, over all aggregate removed from its lands wherever situated;

e. JMB was aware it had not paid the royalties for the aggregate;

f. In the JMB-authored December 2018 letter, Buck admitted JMB was only dealing with the aggregate as Kalinko's "marketing agent" (i.e. not the owner), and agreed that it would owe royalties to Kalinko for the pile when the material was removed.

29. The January 2020 Agreement also contained a number of other relevant terms, including:

a. Under Article 2.1, N.P.A. was granted the right to enter on the lands and remove 70,000 tonnes of aggregate from the Precambrian Pile;

b. Under Article 2.5, aggregate removed from the Precambrian Pile by N.P.A. was its property, meaning that prior to its removal from the Precambrian Pile the aggregate did not belong to N.P.A.;

c. Under Article 6.2, JMB was required to deliver aggregate sourced from a location other than the Precambrian Pile in the event that the Precambrian Pile contained less than 70,000 tonnes of aggregate or the aggregate did not meet the agreed-upon specifications; and

d. Under Article 6.3, if JMB failed to deliver 70,000 tonnes of aggregate from the Precambrian Pile and failed to satisfy its obligations under Article 6.2, N.P.A. would be entitled to liquidated damages in the amount of the fair market value amount of revenue that it would have earned from reselling the aggregate.[26]

30. N.P.A. primarily seeks to resell aggregate from the Precambrian Pile to Wood Buffalo for construction of the Anzac Project.[27] Since JMB breached its agreement to provide N.P.A. with the aggregate, N.P.A. has been successfully obtaining alternate material from other sources.[28]

31. A recent drone survey, conducted at a meeting between interested parties while examinations in this matter were ongoing, determined that the Precambrian Pile in fact contains less than 70,000 tonnes of aggregate.[29] Since that meeting occurred during the preparation of this application, the details of what transpired are not on the record, but Kalinko has informed its counsel that Al's Contracting claims to have mixed in thousands of tonnes of its sand into the Precambrian Pile.

[26] Turner Affidavit, Exhibit "T".
[27] Supplemental Affidavit of Bill Turner sworn July 31, 2020, para 4.
[28] Turner Transcript, 20:13-20.
[29] Turner Transcript, 18:7-19:24.

F. THESE PROCEEDINGS

32. JMB entered into *CCAA* protection pursuant to an Order of this Court dated May 1, 2020, which was amended and restated on May 11, 2020 (the "CCAA Initial Order").[30]

33. The CCAA Initial Order, among other things, appoints a Monitor, FTI Consulting Canada Inc., and directs JMB to retain its current and future assets, undertakings and other property and carry on business in a manner consistent with the preservation of their business. A stay is imposed in respect of any rights or remedies affecting JMB or its property.[31]

34. N.P.A. has not commenced any claim or proceeding, to Kalinko's knowledge, to seek any relief in respect of the January 2020 Agreement.

35. The Monitor has issued three reports in this matter to date. In particular:

    a. In the Second Report, the Monitor reported that JMB's counsel had determined that JMB's records significantly overstated the amount and value of JMB's inventory, resulting in a material adverse change. JMB proposed a reduction of approximately 82.4% of its reported gravel inventory, meaning it initially overstated its inventory by a factor of seven.[32]

    b. In the Third Report, the Monitor expresses the view that this application is "moot" because the Termination Letter was included in the data room, JMB's legal counsel prepared a memorandum concluding that the Termination Letter was ineffective, and the SISP had been completed so the issues arising from this application will need to be determined as part of an application for Court approval of any transaction involving the "Kalinko Disputed Inventory".[33]

36. The Monitor and its sales agent, Sequeira Partners, have overseen a sale or investment solicitation process ("SISP"). The Monitor, through its counsel, has confirmed that the SISP purports to sell aggregate originating from Kalinko SMLs as an asset of JMB, but neither the Monitor nor JMB would provide the actual marketing materials to Kalinko. In its Third Report, the Monitor states that Kalinko's Notice of Termination was made available in the data room for the SISP, along with a memorandum from JMB's counsel.[34] That memorandum was provided to by JMB's counsel to the parties to this application on July 29th. It is two paragraphs long, and contains in operative part only a

[30] Order of Madam Justice Eidsvik, pronounced May 11, 2020.
[31] CCAA Initial Order, paras 4, 14-16, 23.
[32] Second Report of the Monitor, filed July 6, 2020, paras 24-28.
[33] Third Report of the Monitor, filed July 24, 2020, paras 18-23.
[34] Kalinski Affidavit, paras 70-71; Third Report of the Monitor, paras 18-23.

bare one-sentence assertion that in JMB's view, Kalinko's termination was "ineffective".[35]

37. As a result of the inclusion of the Kalinko SMLs and aggregate extracted from them in the SISP, Kalinko has been unable to effectively sell its aggregate, because of the uncertainty in the close-knit market about whether JMB's representations are true. These representations appear to have been widely-spread: according to the Third Monitor's Report, Sequeira contacted 196 potential bidders during the sales process.[36] Kalinko's revenues have been drastically reduced, and its ongoing business is in peril.[37]

3. LAW

A. *CCAA* PROCEEDINGS GENERALLY

38. While *CCAA* proceedings are generally directed toward reorganizing insolvent companies so that they may continue to operate as a going concern, where such restructuring is not feasible the Court may authorize the liquidation of some or all of the assets of the applicant.[38]

39. The Court's supervisory powers under the *CCAA* in liquidating *CCAA* proceedings are broad but not unlimited. Exercises of the Court's power must be appropriate in the circumstances and further the remedial purposes of the *CCAA*.[39]

40. It is particularly important for this application that only the assets of the applicant may be disposed of in *CCAA* proceedings. The Court does not have jurisdiction to approve the disposition of assets belonging to third parties that have not been brought into the proceedings as debtor companies.[40]

B. CONTRACTS

41. Contracts are interpreted to discern the objective intention of the parties, considered in light of the surrounding circumstances giving rise to the contract, at the time it was executed. Evidence of the factual matrix, including the nature of the industry in which the contract was made, is admissible to guide the interpretation of the contract. The interpretation of commercial contracts should also be done with a mind toward "sound commercial principles and good business sense."[41]

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[35] Memo from Gowling WLG (Canada) LLP to Sequeira Partners dated June 16, 2020. A copy of this memorandum is attached to this Brief for convenience as Appendix "B".
[36] Third Report of the Monitor, para. 14.
[37] Kalinski Affidavit, paras 72-75.
[38] *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40-46 [*Callidus*]. **[TAB 1]**
[39] *Callidus*, *supra* at para 49. **[TAB 1]**
[40] *Re 8640025 Canada Inc*, 2017 BCCA 303 at paras 54, 58. **[TAB 2]**
[41] *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 79-88. **[TAB 3]**

42. A commercial contract orders the business relationship between the parties. Strangers to a contract are barred, by the doctrine of privity of contract, from enforcing or intermeddling with contractual obligations to which they are not party. There is no exception to the requirement of privity for related contracts.[42]

43. Specific performance of a contract is only available where the plaintiff has a "substantial and legitimate interest" in the contracted-for property such that monetary damages cannot fully compensate the plaintiff for their loss. The property at issue must be unique to merit specific performance, since damages will be an adequate remedy where replacement property is readily available on the market.[43]

C. SURFACE MATERIAL LEASES AND INTERESTS IN LAND

44. SMLs are dispositions of land pursuant to the *Public Lands Act* and its regulations, by which the Crown may authorize people to extract surface material (clay, marl, sand, gravel, topsoil, silt and peat) from Crown land.[44]

45. SMLs create a *profit à prendre* to be enjoyed by the leaseholder in accordance with the terms of the SML. A *profit à prendre* is "a form of real property interest held by" the owner of a mineral lease. It is a "non-possessory interest in land, like an easement…[that] remains with the land".[45] When gravel is extracted from land pursuant to a *profit à prendre*, it becomes a chattel that is the property of the holder of the *profit à prendre*.[46]

46. In assessing the ownership interests of parties to agreements relating to surface minerals, the resolution of this issue comes down to the interpretation of the relevant contract.[47] Courts may refer to *profit à prendre* principles in assisting in that interpretative exercise.

D. *SALE OF GOODS ACT*

47. The *Sale of Goods Act* provides that property in goods is transferred to a buyer when the goods at issue are ascertained and when the parties intend for property to be transferred in accordance with the terms of the contract, the conduct of the parties and the circumstances of the case.[48] Where steps, such as weighing, must be done to ascertain the price of goods for sale, property does not pass to the buyer until those

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[42] *Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc*, 2013 ABCA 200 at para 95. **[TAB 4]**

[43] *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at paras 37-38 **[TAB 5]**; *Asamera Oil Corporation Ltd v Sea Oil & General Corporation*, [1979] 1 SCR 633 at 644-645. **[TAB 6]**

[44] *Public Lands Administration Regulation*, Alta Reg 187/2011, s 105-120. **[TAB 7]**

[45] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 11 **[TAB 8]**; *Last Mountain Valley No 250 (Rural Municipality) v Ter Keurs Bros Inc*, 2020 SKQB 37 at paras 31-36 [*Ter Keurs*]. **[TAB 9]**

[46] *Bussey Seed Farms Ltd v DBC Contractors Ltd*, 2016 ABQB 577 at paras 6-12 [*Bussey Seed*]. **[TAB 10]**

[47] *Ter Keurs*, *supra* at para 27. **[TAB 9]**

[48] *Sale of Goods Act*, RSA 2000, c S-2, s 19. **[TAB 11]**

steps are taken.[49] This provision of the *Sale of Goods Act* applies to subsequent sales of severed aggregate.[50]

48. In addition, a seller of goods may impose conditions on the disposal of goods pursuant to a contract of sale. Where conditions are imposed, property in the goods does not transfer until those conditions are satisfied.[51]

E. PROCEDURAL AND EVIDENTIARY ISSUES

49. The Court "should not take jurisdiction to grant an order that has not been sought by either party with a properly filed application and supported by evidence", because it is inconsistent with the adversarial nature of the legal system. "In the absence of an application, a party responding is unable to make a full answer".[52]

50. Litigants with expertise and knowledge about an industry can provide relevant opinion evidence relying on their own expertise without being qualified as experts or satisfying the test for admitting expert evidence.[53]

4. ARGUMENT

A. THIS APPLICATION IS RIPE

51. The Monitor's position, as stated in the Third Report, is that this application is premature because issues of ownership of rights of access to the Kalinko SMLs and aggregate extracted from them will need to be resolved when a sale of the disputed inventory is brought to the Court for approval.

52. Kalinko's application is ripe. The Operating Agreement was terminated over a year before the CCAA Initial Order was issued. JMB has never owned aggregate extracted from the Kalinko SMLs for which royalties were not paid. These assets are not JMB "Property" as set out in the CCAA Initial Order. These issues cannot be resolved in the course of the restructuring or disposition of JMB's business. Since the assets are Kalinko's, and so not JMB Property as defined in the Order, Kalinko should be able to deal with its own assets as it sees fit unless and until JMB brought an application seeking to have those assets brought into this Proceeding. That did not happen.

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[49] *Sale of Goods Act*, s 20(4) **[TAB 11]**. The principle is confirmed in Kevin P. McGuinness, *Sale & Supply of Goods* (Toronto: Lexis, 2010) (online), at 11.61, and *National Coal Board v. Gamble*, [1959] 1 Q.B. 11 at 18 (C.A.), in which Lord Goddard said, "no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer, and this is shown by the handing to him and the acceptance by him of a weighbridge ticket." **[TAB 12]**

[50] *Bussey Seed*, *supra* at para 27. **[TAB 10]**

[51] *Sale of Goods Act*, s 21. **[TAB 11]**

[52] *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2012 ABCA 36 at paras 35-36. **[TAB 13]**

[53] *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249 at paras 38-40. **[TAB 14]**

53. It does not facilitate the timely resolution of these proceedings to wait until a sale order is brought before the Court to determine issues of whether the assets claimed to belong to JMB actually do. The Court cannot approve a sale order that disposes of assets that do not belong to the *CCAA* applicant. Waiting until after the sale process is concluded prejudices non-debtor companies like Kalinko. Kalinko's uncontested evidence is JMB's ongoing attempts to sell assets which actually belong to Kalinko damages its ability to carry on business by selling those assets to its own customers.

54. It is appropriate to deal with this issue now.

B. N.P.A.'S CLAIM IS SEPARATE FROM KALINKO'S

55. N.P.A. has not commenced a claim or brought an application against JMB regarding the January 2020 Agreement or any breach thereof. In the absence of an application by N.P.A., this Court ought not grant it any relief. Neither Kalinko, nor any other party who may wish to oppose N.P.A.'s claim, knows what the case to meet is.

56. To the extent that N.P.A. has standing to seek relief at this time notwithstanding its failure to bring an application or proceeding, it raises a discrete claim from the issues before this Court in Kalinko's application:

a. As between Kalinko and JMB, there is a dispute about whether aggregate extracted from the Kalinko SMLs, for which JMB did not pay, Kalinko belongs to JMB; and

b. As between JMB and N.P.A., there is a dispute about whether JMB breached the terms of a subcontract with N.P.A. by failing to provide aggregate pursuant to the January 2020 Agreement.

57. In other words, N.P.A.'s argument is with the counterparty to its contract: JMB. But N.P.A. has not brought any proceedings against JMB and has not sought to lift the stay, which would be required in order to bring such proceedings.

C. JMB DOES NOT OPPOSE KALINKO'S APPLICATION

58. JMB has taken no position, and submitted no evidence, in response to Kalinko's application. As a result, its evidence as against JMB is unopposed, and so long as there is a basis in fact and law to justify its application, the Court should grant the relief sought.

D. THE OPERATING AGREEMENT AND AGGREGATE PILED ON KALINKO LANDS ARE NOT JMB ASSETS

59. Kalinko exercised its right to terminate the Operating Agreement in April 2019, well before the *CCAA* proceedings began. JMB does not contest this before the Court. N.P.A. does not have standing to enforce any relationship between Kalinko and JMB.

60. Whether JMB was allowed, on an *ad hoc* basis, to extract aggregate under the Kalinko SMLs is irrelevant to whether the Operating Agreement was terminated. Kalinko was entitled to terminate the Operating Agreement if JMB defaulted and did so.

61. When Kalinko terminated the Operating Agreement, Article 5.10(c) operated to confirm that all aggregate stockpiled on the Kalinko SMLs (the "Kalinko Land Piles") was Kalinko's property. JMB does not contest this.

62. JMB has not claimed or put in evidence that it is entitled to any ongoing interest in the Kalinko SMLs or access thereto.

63. JMB is not entitled to market the Operating Agreement or access to the Kalinko SMLs as assets, because JMB does not own those assets nor have an ongoing right to access the Kalinko SMLs. The Operating Agreement and access to the Kalinko SMLs are not JMB property and cannot be disposed of in the *CCAA* proceedings. The Monitor and Sales Agent should be directed to put bidders on notice of this fact and to cease any advertising that would tend to make potential bidders believe that the Kalinko SMLs are JMB assets.

E. KALINKO RETAINS OWNERSHIP OF EXTRACTED AGGREGATE UNTIL JMB PAYS ROYALTIES OWED

64. The Kalinko SMLs are *profits à prendre* that grant Kalinko and the SML Owners the right to extract aggregate from the lands. The Crown is the owner of the lands to which the SMLs apply.

65. Aggregate that is severed from the Kalinko SMLs does not belong to JMB. JMB has no agreement with the Crown to extract aggregate from Crown lands. It does not have a *profit à prendre* in respect of the Kalinko SMLs. Only Kalinko has rights to extract aggregate from Crown lands pursuant to the Kalinko SMLs.

66. The Operating Agreement is a subcontract or license authorizing JMB to process and sell gravel to which Kalinko retains title. The Kalinko SMLs were deliberately and expressly not assigned to JMB. The Operating Agreement expressly precludes JMB from obtaining a legal or equitable interest in the SMLs, which includes a *profit à prendre*.

67. The terms of the Operating Agreement and the factual matrix in which it operates, including the evidence of industry practices provided by Tim Kalinski, based on his experience in the aggregate industry, support that ownership of the aggregate only transferred from Kalinko after it was weighed and Kalinko's royalty was paid. The property interest in the aggregate is Kalinko's; JMB had a licence under a contract. More particularly:

    a. JMB operated its business as a middle-man that sold aggregate owned by others and took a cut of the profits from doing so;

b. The Operating Agreement was intended to ensure that Kalinko's reclamation and payment obligations to the Crown can be satisfied, which requires it to maintain ownership of extracted aggregate until payment for it is received;

c. JMB and Kalinko understood that JMB was selling Kalinko's gravel on Kalinko's behalf subject to the payment of royalties upon sale or delivery to the ultimate customer;

d. JMB understood that the Kalinko aggregate was sold when the ultimate customer took possession of it, and that interim crushing payments are common in the industry and do not constitute a transfer of ownership;

e. Article 2.1 of the Operating Agreement permits JMB to mine, process and sell Sand & Gravel from the Kalinko SMLs, which belongs to Kalinko as set out above, and does not expressly vest ownership in JMB prior to sale;

f. Article 2.2 reserved to Kalinko and the SML Holders "all of their rights whatsoever in respect of the Leased Lands" except where the Operating Agreement expressly provided otherwise;

g. Article 2.4 precluded JMB from obtaining any legal or beneficial interest in the SMLs, which remain the exclusive property of the SML Holders and Kalinko;

h. Article 5.1 of the Agreement requires Kalinko and the SML Owners to take all actions necessary to maintain the Kalinko SMLs, not JMB;

i. Article 5.4(m) requires JMB to issue invoices to its customers within 15 days of the removal of aggregate, which confirms that JMB was not intended to personally own and stockpile gravel for sale for an extended period of time;

j. Article 5.4(n) requires JMB to use all commercially reasonable efforts to ensure that any extracted aggregate is sold before the end of the Operating Agreement, which indicates that JMB was not intended to maintain an ownership interest in the aggregate or have independent rights to dispose of it;

k. Article 5.10(a) contemplates that, if the Operating Agreement was terminated for reasons other than default by JMB, JMB would be entitled to remove aggregate stockpiled on the Kalinko SMLs but only if "the Sand & Gravel Royalty in respect of the same has been paid in full to Kalinko";

l. Article 6.4 requires JMB to pay Kalinko any royalty amounts owing for aggregate extracted from the Kalinko SMLs within 14 days of receiving payment from its customers, which pursuant to section 21 of the *Sale of Goods Act* imposes conditions that must be satisfied before ownership of the aggregate is transferred; and

m. Article 10.1 prohibited JMB from assigning its rights under the Operating Agreement without Kalinko's prior consent, which is inconsistent with JMB owning the aggregate extracted from the Kalinko SMLs, since if JMB owned the aggregate it would have the right to sell it however it wanted.

68. Construed as a whole, and in its context, the Operating Agreement evinces that the intention of the parties was that Kalinko would retain ownership of the aggregate extracted pursuant to the Kalinko SMLs until JMB entered into an agreement for sale of that aggregate, weighed the aggregate and determined what royalty amounts were owing for it, and paid those royalty amounts to Kalinko.

69. As JMB has taken no position and provided no evidence regarding any ownership interest or the interpretation of the Operating Agreement, Kalinko's evidence and interpretation of the Operating Agreement are uncontested.

70. Kalinko's evidence is that it was not paid royalties owed by JMB for aggregate stored in the Stony Pile, the JMB Yard Pile, and the Precambrian Pile. Accordingly, that aggregate is not, and never has been, JMB's property. It has always belonged to Kalinko. The conditions for it becoming JMB's property were not satisfied.

71. Kalinko further notes that neither the Stony Pile nor the Precambrian Pile are in JMB's possession.

72. Because the aggregate in the Kalinko Land Piles, the Stony Pile, the JMB Yard Pile, and the Precambrian Pile does not, and never has, belonged to JMB, it does not form part of the property of JMB for the purposes of the *CCAA* proceedings. This outcome is consistent with the finding of the Monitor that JMB grossly overstated its gravel inventory.

F. N.P.A. DOES NOT OWN THE PRECAMBRIAN PILE

73. Kalinko, not JMB, owns the aggregate in the Precambrian Pile. Accordingly, after the Operating Agreement was terminated, that aggregate was not in fact JMB's to sell. *Nemo dat quod non habet*.[54] The principle is codified in s. 23 of the *Sale of Goods Act*.

74. *Nemo dat* is subject to narrow exceptions under s. 30 of the *PPSA* and s. 26 of the *Sale of Goods Act*. But N.P.A. does not qualify for them.

75. The *Sale of Goods Act* exceptions in s 26(1) and s. 26(3) for "bona fide purchasers" don't apply in this context. Those rather confusing sections say:

> 26(1) When a person who has sold goods [here JMB] continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the

[54] *Northwest Equipment Inc v Daewoo Heavy Industries America Corp*, 2002 ABCA 79 at para 11. **[TAB 15]**

> goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.
>
> 26(3) When a person who has bought or agreed to buy goods [here N.P.A.] obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

76. Here, JMB was not and is not in possession of the Precambrian Pile. Al's Contracting is. That is fatal to the application of s. 26(1). And s. 26(3) applies only where the buyer, here N.P.A., has obtained possession. It never did. In addition, s. 26(3) cannot apply to sales made where the seller's interest is subject to a PPSA registration, which was the case here: s. 26(4). Accordingly, s. 26(1) and (3) cannot apply.

77. Even if it did, N.P.A. could not clear the "without notice" hurdle in s. 26 of the *Sale of Goods Act* or the similar "without knowledge" requirement in s. 30 of the *PPSA*. It had clear notice. N.P.A. is aware, when buying from companies like JMB, that they have royalty obligations which must be paid out to the owners of the aggregate, either the Crown or the SML holders. As to the Precambrian Pile, N.P.A. admits it received the December 2018 letter prior to entering into the January 2020 Agreement. The letter said JMB was only the "marketing agent" for the aggregate, which was owned by Kalinski, and stipulated that his royalty had to be paid at the time any aggregate was removed.[55] Moreover, Kalinko's PPR financing statement was registered in April 2019. N.P.A. is part of a large, sophisticated, multinational construction consortium. It was represented by able counsel throughout the negotiation of the January 2020 Agreement, and it has admitted that its counsel would have performed a PPR search at that time during the due diligence process. This search would reveal JMB's secured creditors, including Kalinko's interest in any aggregate removed from its SMLs "wherever situated". Since N.P.A. had already received the December 2018 letter regarding the Precambrian Pile, it knew that the aggregate originated from Kalinski's SML and so was covered by the PPR registration. Taken together, the December 2018 letter and PPR registration identified Kalinko's ownership of the Precambrian Pile. But despite knowing the aggregate in the Precambrian Pile was in fact owned by Kalinko, royalties would be owed on it, and there

[55] Turner Transcript, pgs 7-8. Even if Kalinski had not been identified by name, which he was, according to N.P.A.'s Vice-President, the company "has tools at [its] fingertips every day that [it] can find the standing of a piece of land" and find out "everything that's going on there", including easily looking up SMLs by number to ascertain their owner and the owner's contact information

was a prior PPR registration attaching to it, N.P.A. did not contact Kalinko to ask it any questions about its interest.[56]

78. In addition, Section 26 of the *Sale of Goods Act* and s. 30 of the PPSA only protect buyers in sales made in the "ordinary course of business" of the seller. N.P.A. has acknowledged the January 2020 Agreement was not a transaction in the ordinary course of business for JMB, in that JMB was suing N.P.A. for $1.5m and accepting in settlement $1.3m as payment for further work.[57]

79. Even if N.P.A. could meet the requirements of s. 26 of the *Sale of Goods Act* or s. 30 of the *PPSA*, it would be for naught, because N.P.A. never got title under the terms of the January 2020 Agreement interpreted in context. The aggregate had to be measured, scaled, and reported when removed, meaning title would not pass to N.P.A. until that had occurred. And in any event, the agreement was for any 70,000 tonnes of this type of gravel, which was being re-sold to Wood Buffalo. The aggregate in the pile is not unique. That is why it was reasonable for the agreement to require, if less than 70,000 tonnes was present, for JMB to top it up with alternate aggregate. There was nothing in the January 2020 Agreement requiring JMB to keep the Precambrian Pile in the state it was in when the contract was signed: stopping JMB from selling parts of the Precambrian Pile to others and then topping up any difference before N.P.A. needed it. In sale-of-goods parlance, the aggregate was "unascertained" until delivered, so transfer of title is delayed until that happens. (It appears JMB did in fact deplete the pile, since it now consists of less than 70,000 tonnes).

80. Finally, and most importantly, even if JMB was the factual owner of the aggregate in the Precambrian Pile in January 2020 (which it was not), it does not follow that N.P.A. now has a property interest in it. N.P.A. has never had possession of the aggregate in the Precambrian Pile; no aggregate was removed pursuant to January 2020 Agreement. Rather, it paid JMB to deliver goods, and JMB has failed to do so, but this breach does not create a property interest.

81. N.P.A.'s claim is contractual, not proprietary. As N.P.A.'s affiant laboriously recounts in his July 30 and 31 affidavits, JMB was a subcontractor to N.P.A. for the extraction, stockpiling, and hauling of 70,000 tonnes of aggregate material. That relationship led to a dispute in which JMB claimed N.P.A. owed it $1.5m for its work, sued N.P.A., and the parties settled. The settlement was part of the January 2020 Agreement and was made in the context of JMB's subcontract for excavating, crushing, and hauling on the Anzac Project. In short, JMB was a supplier to many people, including N.P.A., but failed to deliver—which is not surprising, since it overstated its inventory by a factor of seven.

82. While N.P.A. has a contractual claim, it is for damages. But what it seeks is specific performance of the January 2020 Agreement, in the face of the CCAA Initial Order.

[56] Turner Transcript, 23:3-10.
[57] Turner Transcript, 15:18-26.

83. Specific performance is only available for unique property. Where damages are an available remedy, specific performance will not be ordered. Here, specific performance of the January 2020 Agreement is not available to N.P.A. The aggregate in the Precambrian Pile is not unique. N.P.A.'s interest in the aggregate is just in reselling it to Wood Buffalo.[58] Replacement aggregate can be obtained from other sources for that purpose, which N.P.A. has already been doing.[59] And N.P.A.'s own evidence is that the Precambrian Pile does not contain the 70,000 tonnes of aggregate that was to be made available under the January 2020 Agreement.

84. Indeed, rather than specific performance, the January 2020 Agreement expressly contemplates the relief to which N.P.A. is entitled in the event of a breach by JMB: an obligation by JMB to provide substitute gravel, or failing that to pay liquidated damages for lost profits. There is no evidence that damages against JMB would be an inadequate remedy for any claim that N.P.A. might have regarding a failure by JMB to deliver aggregate.

85. JMB breached its agreement to deliver aggregate to N.P.A. Unfortunately, N.P.A. is in the same position as any other party that has paid JMB for goods which were not delivered and services that were not provided. (Kalinko also has unsecured claims against JMB for hundreds of thousands of dollars of debts and unperformed reclamation obligations).

86. N.P.A. may have a damages claim against JMB for breach of contract, but that is subsumed in the *CCAA* proceedings. It cannot circumvent this by claiming a proprietary interest in unascertained and undelivered goods that JMB never even owned. The parties to those supply contracts don't have proprietary claims. That would be impossible: only one-seventh of JMB's claimed inventory actually exists.

5. RELIEF SOUGHT

87. Kalinko requests:

a. A declaration that it, and not JMB, owns the aggregate contained in the Kalinko Land Piles, the Stony Pile, the JMB Land Pile, and the Precambrian Pile.

b. A direction to JMB and the Monitor that the Operating Agreement and any aggregate contained in the Kalinko Land Piles, the Stony Pile, the JMB Land Pile, and the Precambrian Pile are not JMB property, for purposes of the CCAA Initial Order, and that these should not be marketed as JMB assets to potential purchasers;

c. That the relief improperly sought by N.P.A. in response to Kalinko's application be denied.

[58] Supplemental Turner Affidavit, para 4.
[59] Turner Transcript, 20:13-20.

88. In respect of the Precambrian Pile, the relief sought by Kalinko is without prejudice to any claim to a possessory lien by Al's Contracting, which is not before the Court and may be resolved in due course under the terms of the *Possessory Liens Act*.

89. In the event that the Court finds that some or all of the aggregate at issue in this application does not belong to Kalinko, Kalinko submits that JMB has been unjustly enriched as a result of its wrongful taking of Kalinko's property without payment. The appropriate remedy would be to impose a constructive trust over the aggregate, or over the purchase funds paid, in the amount of the unpaid royalties owed to Kalinko. Constructive trusts may be imposed where a personal remedy is inadequate and there is a connection between a claimant's contribution and the property over which the trust is claimed.[60] JMB was operating on behalf of Kalinko to sell Kalinko's property and there is a connection between Kalinko's contribution to the property, which was taken from the Kalinko SMLs, or paid in respect of it, and the royalty claimed. A personal remedy is inadequate here because the *CCAA* proceedings make it a virtual certainty that the aggregate or any royalty amounts connected to it will "be spent or accessed by other creditors in the interim."[61]

90. Finally, as to costs, notwithstanding that JMB has not taken a position on this application, some level of costs against JMB would still be appropriate. This application was necessary because Kalinko's assets were improperly represented as belonging to JMB, and it would be just and appropriate to require JMB to at least partially indemnify Kalinko for having to bring it. If Kalinko's position regarding the Precambrian Pile succeeds, it likewise seeks appropriate costs against N.P.A.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF AUGUST, 2020.

FIELD LLP

Scott A. Matheson/Adam L. Ollenberger
Counsel for the Applicant, Kalinko Enterprises Ltd.

[60] *Moore v Sweet*, 2018 SCC 52 at para 91 [*Moore*]. **[TAB 16]**
[61] *Ibid* at para 93. **[TAB 16]**

6. APPENDICES

TAB	APPENDIX
A.	List of Kalinko SMLs
B.	Memo from Gowling WLG (Canada) LLP to Sequeira Partners dated June 16, 2020

7. AUTHORITIES CITED

TAB	AUTHORITY
1.	*9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10
2.	*Re 8640025 Canada Inc*, 2017 BCCA 303
3.	*IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157
4.	*Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc*, 2013 ABCA 200
5.	*Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51
6.	*Asamera Oil Corporation Ltd v Sea Oil & General Corporation*, [1979] 1 SCR 633
7.	*Public Lands Administration Regulation*, Alta Reg 187/2011
8.	*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5
9.	*Last Mountain Valley No 250 (Rural Municipality) v Ter Keurs Bros Inc*, 2020 SKQB 37
10.	*Bussey Seed Farms Ltd v DBC Contractors Ltd*, 2016 ABQB 577
11.	*Sale of Goods Act*, RSA 2000, c S-2
12.	Kevin P. McGuinness, *Sale & Supply of Goods* (Toronto: Lexis, 2010) (online)
13.	*Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2012 ABCA 36
14.	*Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249
15.	*Northwest Equipment Inc v Daewoo Heavy Industries America Corp*, 2002 ABCA 79
16.	*Moore v Sweet*, 2018 SCC 52

APPENDIX “A”

Schedule A

SM Leases

1	**SML 00034**	Kalinko Enterprises Ltd.	11-63-08-W4M	LOC 001561
2	**SML 010005**	Kalinko Enterprises Ltd.	13-62-8-W4M	LOC 012255
3	**SML 010032**	Kalinko Enterprises Ltd.	SE 34-66-4 W4M	
4	**SML 020014**	Tim Kalinski	7-62-74-W4M	LOC 031103
5	**SML 030046**	Kalinko Enterprises Ltd.	9-62-74-W4M	
6	**SML 040122**	Kalinko Enterprises Ltd.	21-66-5-W4M	
7	**SML 100016**	Kalinko Enterprises Ltd.	2-66-03-W4M	LOC 100514
8	**SML 100050**	Jessica Brennan	10-66-03-W4M	LOC 10040
9	**SML 100057**	Jessica Brennan	14-82-07-W4M	
10	**SML 100075**	Jessica Brennan	14-82-07-W4M	
11	**SML 100101**	Kalinko Enterprises Ltd.	1-84-06-W4M	
12	**SML 100112**	Kalinko Enterprises Ltd.	9-82-07-W5M	LOC 101008
13	**SML 110037**	Jessica Brennan	18&19-62-7-W4M	
14	**SML 110044**	Kalinko Enterprises Ltd.	13-75-08-W4M	LOC 111470
15	**SML 110059**	Matthew Kalinski	22-62-8-W4M	
16	**SML 110060**	Zachary Kalinski	21-62-8-W4M	
17	**SML 110061**	Elisha Kalinski	28-62-84-W4M	
18	**SML 110065**	Jessica Brennan	SE9&16&20-66-4-W4M	
19	**SML 110072**	Matthew Kalinski	9-82-7-W4M	LOC 101008
20	**SML 120004**	Zachary Kalinski	2&3-82-7-W4M	LOC 120154

APPENDIX “B ”

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File no. A163514

MEMORANDUM

To: Sequeira Partners
From: Gowling WLG (Canada) LLP as counsel to JMB Crushing Systems Inc. and 2161889 Alberta Ltd.
Re: Sand and Gravel Operating Agreement between Tim Kalinski, Jessica Brennan, Matthew Kalinski, Zachariah Kalinski, Elisha Kalinski, Kalinko Enterprises Ltd. and JMB Crushing Systems ULC dated June 12, 2012, as amended on June 12, 2017 (collectively, the "**Agreement**")
Date: June 16, 2020

The above mentioned Agreement has been included in the data room as one of the assets to be sold pursuant to the sale and investment solicitation process ("**SISP**") currently underway as part of the proceedings under the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended, for JMB Crushing Systems Inc. and 2161889 Alberta Ltd. (collectively, "**JMB**").

We have been advised that Kalinko Enterprises Ltd. ("**Kalinko**") takes the position that the Agreement was terminated as the result of a Notice of Termination dated April 10, 2019 (the "**Notice**") provided to JMB by Kalinko. However, JMB is of the view that the Notice was ineffective and did not result in the Agreement being terminated.

Caireen E. Hanert

CEH

TAB 1

Most Negative Treatment: Check subsequent history and related treatments.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 317 A.C.W.S. (3d) 532

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking

authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers
Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of

the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une

ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la

créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets

and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) (*"Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of

TAB 2

2017 BCCA 303
British Columbia Court of Appeal

8640025 Canada Inc. (Re)

2017 CarswellBC 2250, 2017 BCCA 303, [2017] B.C.W.L.D. 5264, [2018] 2 W.W.R. 683, 100 B.C.L.R. (5th) 256, 282 A.C.W.S. (3d) 13, 415 D.L.R. (4th) 758, 51 C.B.R. (6th) 171

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

8640025 Canada Inc. and Teliphone Data Centers Inc. (Respondents / Petitioners) and TNW Networks Corp. (Appellant / Respondent) and Ernst & Young Inc., Court Appointed Monitor for the Petitioners (Respondent)

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

8640025 Canada Inc. and Teliphone Data Centers Inc. (Respondents / Petitioners) and Teliphone Corp. (Appellant / Respondent) and Ernst & Young Inc., Court Appointed Monitor for the Petitioners (Respondent)

Goepel, Fitch, Hunter JJ.A.

Heard: August 14, 2017
Judgment: August 17, 2017
Docket: Vancouver CA44619, CA44620

Proceedings: reversing *8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)* (2017), 2017 CarswellBC 2025, 2017 BCSC 1291, Macintosh J., In Chambers (B.C. S.C.)

Counsel: G.F. Gregory, for Appellant, TNW Networks Corp.
C.R. Clarke, Q.C., for Appellant, Teliphone Corp.
Sandeep Panesar, for 8640025 Canada Inc. and Teliphone Navigata-Western Inc.
S.F. Collins, for Respondent, Ernst & Young Inc.
H.L. Williams, for Bank of Nova Scotia
J.R. Sandrelli, for TELUS Communications
D.F. Hepburn, for Cascade Divide Enterprises

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Petitioners were part of complex group of interrelated telecommunications companies — Petitioners sought Companies'

Creditors Arrangement Act (CCAA) protection — Monitor was authorized to sell, convey, transfer, lease or assign petitioners' assets with court's approval — Monitor brought successful application for approval of sale of petitioners' assets as set out in asset schedule — Court held that no better sale was available, that monitor had support of secured creditors, that monitor had requisite interest in sale assets, and that there were no issues of integrity or fairness — Related companies appealed — Appeal allowed — Court had no jurisdiction to authorize sale of assets which related companies not brought within CCAA proceedings had interests in — Order on its face did not purport to sell third party assets, but schedules included property which related companies alleged included third party assets and order contained provision expunging other entities' ownership and other adverse claims — Lower court made no finding on question of whether assets to be conveyed included third party assets; finding which was necessary to assess whether jurisdictional issue arose — Preponderance of evidence was that third party assets were included in asset schedules — Petitioners and subsidiaries were separate legal entities — Fact that assets of other companies might be subject to security held by secured creditors of petitioners could not be basis for authorizing their sale in transaction.

APPEAL from judgment reported at *8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)* (2017), 2017 BCSC 1291, 2017 CarswellBC 2025 (B.C. S.C.), approving sale of petitioner's assets.

***Hunter J.A.* (orally):**

1 These appeals from an order made under the *Companies' Creditors Arrangement Act* ("*CCAA*") come to the Court with leave.

2 The order under appeal authorizes a sale of certain assets pursuant to s. 36 of the *CCAA*. The appellants argue that some of the assets to be sold under this authorization are owned by parties other than the companies that are subject to the *CCAA* proceeding. This, they say, goes beyond the jurisdiction of the *CCAA* court. If that is a correct characterization of the effect of the order under appeal, the issue is one of law and the standard of review is one of correctness.

3 The respondents' position is that the intent of the asset purchase agreement is to restrict the sale to the Petitioners' assets, but if some of the assets do in fact belong to other entities, the Monitor is nonetheless entitled to sell them with the Court's approval. The Monitor relies on orders of the *CCAA* court leading up to the sale approval and the broad discretion of a *CCAA* court under s. 11 of the *CCAA*.

4 Given the need for a decision on this appeal in a compressed timeline, I will not review all of the background to the order under appeal, but a brief review of the proceedings is necessary to provide context both for the order for sale and some of the arguments raised by the parties in this appeal.

5 These proceedings commenced on November 25, 2016, when 8640025 Canada Inc., which I will refer to as 864, and Teliphone Data Centres Inc. filed a petition pursuant to the *CCAA* seeking the protection of that legislative regime in order to file a plan of compromise or arrangement. A third company, Teliphone Canada Corp., was subsequently added as a Petitioner. I will refer to these three companies as the Petitioners.

6 The Petitioners are members of a group of telecommunication companies, referred to as the TNW Group of Companies. The appellants are also part of the TNW Group of Companies, although neither of the appellants is a petitioner in these proceedings.

7 The TNW Group sells telephone and long distance services to business and residential customers. They currently utilize the facilities of Telus Communications Company and Bell Canada, although Telus has served notice of its intention to disconnect the TNW Group for failure to meet their financial obligations to Telus.

8 On November 30, 2016, an amended and restated initial order was made by the Supreme Court of British Columbia pursuant to the *CCAA*. The order stated that the petitioners were companies to which the *CCAA* applies, thereby founding jurisdiction. The order went on to extend the stay of proceedings which had been issued a few days earlier and appointed a monitor to monitor the business and financial affairs of the Petitioners.

> review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any, was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the security interests of the Secured Creditors.
>
> If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking.

> [20] In my view, the further work offered by the Monitor in paragraph 123, quoted above, would be wasteful of time and money, and the Court does not require it. The ownership and transfer of assets among the group of companies owned and controlled by the Respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's eighth report, dated July 7, 2017, which contains an acknowledgment and undertaking on behalf of the Respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor.

40 After commenting on the second ground advanced by the appellants, the chambers judge approved the sale in the terms sought.

41 In considering the issues before this Court, I note that the chambers judge who heard the application for approval of the APA was the third judge to hear and determine applications in this *CCAA* proceeding. It is unclear how much of the voluminous material presented to us was presented and explained to the chambers judge hearing the application for approval of the sale. I recognize that trial scheduling for an ongoing matter such as this can be very complicated, but if possible, given the complexity of proceedings such as this it would be desirable to have a single judge supervise the proceedings throughout.

42 On this appeal, the appellants renew their jurisdictional argument that the *CCAA* court did not have the authority to approve this APA because some of the assets included in the sale belonged to parties not within the *CCAA* proceedings. The threshold question on this appeal is whether the APA does in fact purport to sell assets belonging to Teliphone Corp. or the other parties not before the Court. In these reasons I will refer to these assets as third party assets.

43 The July 18 order on its face does not purport to sell third party assets, but the APA approved by the order does contain asset schedules including both physical assets and intellectual property which the appellants say demonstrably include third party assets. The order approving the sale also includes a provision whereby the "ownership and other adverse claims" of Teliphone Corp. in addition to seven other entities not before the Court are "expunged and discharged".

44 Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA, we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

45 In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

46 The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

47 The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets of the *Business* lends support to

the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

48 I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

49 The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

50 The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

51 In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category. Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.

52 These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.

53 The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:

> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as **Appendix "H"** to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

54 With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.

55 The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process.

56 The final argument raised by the Monitor before the chambers judge and briefly addressed before us is that the while the ownership claims of Teliphone Corp. and the other entities were being "expunged and discharged" by the order under appeal, the expungement related to claims to the assets themselves, whereas the order deferred the question of distribution of the proceeds to another day. The suggestion was that Teliphone Corp. and the other entities in question could still advance a claim against the purchase funds. The July 18 order is based on the B.C. Model Approval and Vesting Order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-83, and the Monitor pointed out that Explanatory Note 6 from the B.C. Model Insolvency Order Committee states that claims being vested out may in some cases include ownership claims.

57 This submission was not fully argued before us and it would not be appropriate for this Court to embark upon a detailed assessment of whether this Model Order has the meaning suggested in relation to ownership claims or whether such a process is appropriate for a sale under s. 36 of the *CCAA*. I note that even if there was authority to convert third party assets into cash, the claims preserved for further assessment appear to be limited to security interests or other financial or monetary claims, not claims of outright ownership. In any event, it is sufficient for purposes of this appeal to observe that to give effect to this argument would not only be inconsistent with the previous order of Affleck J. refusing to include Teliphone Corp. in these proceedings, but would also require a source of jurisdiction under the *CCAA* that has not been established in this appeal.

58 In my opinion, the documented evidence of Teliphone Corp. that some of the assets scheduled to the APA belonged to it or other entities not before the Court, in combination with the inability of the Monitor to confirm that the assets were all the property of the Petitioners, precluded the ability of the Court to approve the asset purchase agreement presented for approval. The *CCAA* Court had no jurisdiction to authorize the sale of assets other than the assets of the Petitioners and TNW Networks Corp.

59 In light of my conclusions concerning the assets that are included in the APA, it is not necessary to consider the appellants' further argument concerning the process of this *CCAA* proceeding.

60 For these reasons, I would allow the appeals and set aside the order approving the Distributel APA. I would extend the stay of proceedings to August 28, 2017 in order to give interested parties an opportunity to consider the implications of this judgment. Further proceedings in this matter are remitted back to the Supreme Court of British Columbia.

***Goepel J.A.*:**

61 I agree.

***Fitch J.A.*:**

62 I agree.

[submissions by counsel re. costs]

***Goepel J.A.*:**

63 If the appellants wish to pursue the question of costs, they are at liberty to file written submissions concerning that because, it seems to me, that it raises a somewhat potentially important practice point which we are not going to attempt to deal with summarily. If, as I say, the appellants wish to seek costs, they have liberty to file written submissions. Those submissions should be filed within the next 15 days. The Monitor will have a week to respond to those submissions. If the appellants, upon reflection, decide not to pursue the issue of costs, then there will be no costs of the appeal.

Appeal allowed.

End of Document

TAB 3

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: EnCana Midstream and Marketing v. IFP Technologies (Canada) Inc. | 2017 CarswellAlta 1669, [2017] S.C.C.A. No. 303 | (S.C.C., Aug 25, 2017)

2017 ABCA 157
Alberta Court of Appeal

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing

2017 CarswellAlta 1133, 2017 ABCA 157, [2017] 12 W.W.R. 261, [2017] A.W.L.D. 3423, [2017] A.W.L.D. 3424, [2017] A.W.L.D. 3448, [2017] A.W.L.D. 3756, [2017] A.W.L.D. 3757, [2017] A.J. No. 666, 280 A.C.W.S. (3d) 752, 53 Alta. L.R. (6th) 96, 70 B.L.R. (5th) 173

IFP Technologies (Canada) Inc. (Appellant) and EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company (Respondents)

Catherine Fraser C.J.A., Jack Watson, Patricia Rowbotham JJ.A.

Heard: October 16, 2015; November 10, 2015
Judgment: May 26, 2017
Docket: Calgary Appeal 1401-0235-AC

Proceedings: reversing *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 CarswellAlta 1423, 591 A.R. 202, 2014 ABQB 470, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: P. Edwards, R. de Waal, for Appellant
G.N. Stapon, Q.C., L.M. Gill, for Respondents

Subject: Contracts; Evidence; Natural Resources

Headnote

Contracts --- Construction and interpretation — Resolving ambiguities — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that joint operating agreement did not supersede asset exchange agreement — Trial judge ruled that working interest was not defined in asset exchange agreement — Trail judge found that provision in JOA, stating that working interest was limited to thermal and other enhanced recovery, was not conflict but rather provided definition — Trial judge held that under agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods — I Inc. appealed — Appeal allowed — Trial judge erred in law in failing to recognize that "working interest" was legal term of art with specific meaning in oil and gas industry — Trial judge disregarded in their entirety clear, compelling substantive provisions in AEA relating to 20 per cent of PCR's working interest that PCR conveyed to I Inc. — Trial judge wrongly relied on preamble provision in AEA to trump its substantive textual provisions — This led the trial judge into further errors and, in end, it led him to interpretation of the contract that would have given I Inc. not only interest incompatible with parties'

objective intentions but one incompatible with law on working interests in oil and gas industry — Trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to farmout to W Co. I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that agreements did not prohibit and actually contemplated primary production, and did not require PCR to undertake enhanced recovery operations — Trial judge found that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — I Inc. appealed — Appeal allowed — Law is clear that "working interest" in relation to mineral substances in situ is particular kind of property right or interest in land — When owner of minerals in situ leases right to extract these minerals, right to extract is known as "working interest" — "Working interest" constitutes percentage of ownership that owner has to explore, drill and produce minerals from lands in question — Trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation — I Inc.'s working interest remained undivided interest tenant in common equal to 20 per cent of PCR's working interest in site's petroleum and natural gas rights and in PCR miscellaneous interests in site, as both terms were defined in AEA — I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Damages for breach
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trail judge held that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — Trial judge held that accumulation of errors by I Inc.'s experts was such that valuation based on their evidence could not accepted and that any figure selected for damages would be guess unsupported by method, principle or evidence — Trial judge held that I Inc. was never in position to realize upon its working interest, and there was no chance of thermal development at site within reasonable time of alleged breach of contract — I Inc. appealed — Appeal allowed on other grounds — Despite breach of contract when PCR transferred its interest to W Co., I Inc. merely lost opportunity to convince PCR that thermal project should be "go" — Realistically, having regard to all relevant considerations and factors, trial judge's conclusion that there was no chance thermal project would be implemented was correct — Therefore, trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect chance of non-occurrence of thermal project.

The plaintiff I Inc., a research and development company, entered into a deal with the defendant PCR, a Canadian oil and gas partnership, over plans to jointly work on enhanced recovery technology at a property in Alberta ("site"). The deal made between PCR and I Inc. involved a number of agreements. There was a Memorandum of Understanding ("MOU") and a formal Asset Exchange Agreement ("AEA)". Attached to the AEA as schedules were a number of agreements, including a Joint Operating Agreement ("JOA").

I Inc. was granted a 20 per cent working interest in the AEA.The JOA specified that a working interest was limited to enhanced recovery. PCR had to establish economically producing wells on site to prevent the expiry of leases. PCR entered into an agreement with the defendant W Co. for it to act as operator on site, dealing with existing wells and taking over the

working interest. I Inc. waived its right of first refusal but refused to consent to the transaction. I Inc. brought an action against the defendants for breach of agreement. The action was dismissed.

The trial judge ruled that "working interest" was not defined in the AEA and that the provision in the JOA stating that working interest was limited to thermal and other enhanced recovery, was not in conflict but rather provided the definition. The trial judge held that under the agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods. I Inc. appealed.

Held: The appeal was allowed.

Per Fraser C.J.A. (Rowbotham J.A. concurring) The term "working interest" has an accepted meaning and usage in the oil and gas industry sector Its interpretation has precedential value, therefore it must be interpreted consistently. While a legal term of art may be modified by the parties to an agreement, that does not permit a trial judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That is a question of law reviewable for correctness.

In a recent contractual interpretation case, the Supreme Court of Canada clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract." While the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. An antecedent agreement like the MOU, which was agreed to in writing by both PCR and I Inc., fell within the category of objective evidence of background facts. Netiations preceding the conclusion of the MOU were also relevant to the extent that they shed light on the factual matrix.

The AEA referred to PCR's conveying to I Inc. 20 per cent of PCR's "working interest" in the site. "Working interest", as that term was used in the AEA, had a specific legal meaning. Unfortunately, the trial judge failed to recognize this, then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

The fact that the AEA did not expressly define the term "working interest" was irrelevant, since it is a legal term of art. The law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* leases the right to extract these minerals, the right to extract is known as a "working interest." Simply stated, "working interest" constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question.

The trial judge found that the JOA was determinative of the nature and extent of I Inc.'s working interest in the site. In so finding, however, the trial judge failed to consider surrounding circumstances on the basis the contract was not ambiguous. This interpretive approach constituted a reviewable error of law. Had the surrounding circumstances been taken into account, it would have been apparent that the JOA was not intended to, and did not, limit I Inc.'s working interest in the site.

The incontrovertible facts, as revealed in the supporting documentary evidence, confirmed that PCR and I Inc. agreed, following negotiations between the parties, that I Inc. would receive 20 per cent of PCR's working interest in all development in the site. That agreement, documented in the MOU, did not limit I Inc.'s interest in the site to thermal or enhanced production only. In ignoring this factual matrix, the trial judge also relied on Article 7.3 of the AEA, which provided that the AEA "supercedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof." On this basis, the trial judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear when it is not.

The trial judge failed to recognize that the AEA and the JOA served fundamentally different objectives. The AEA dealt with ownership of the assets. The JOA outlined the terms under which the parties would operate to exploit those assets.

The record was replete with evidence that both PCR and I Inc. considered primary production to be finished at the site. The JOA did not address the terms and conditions under which primary production could be restarted or initiated without I Inc.'s agreement. Consequently, the trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation and in further concluding that W Co. did no more than PCR was entitled to do when it reactivated primary production at the site.

I Inc.'s working interest remained an undivided interest as a tenant in common equal to 20 per cent of PCR's working interest in the site's petroleum and natural gas rights and in the PCR miscellaneous interests in the site, as both terms were defined in the AEA.

The trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to the farmout to W Co. I Inc.'s withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the contract by proceeding as it did.

The JOA did not obligate PCR to implement a thermal project. Corporate priorities, financial circumstances and the economy can all change, but that does not end the analysis. The trial judge failed to consider whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production in a manner that substantially nullified the contractual objectives or caused significant harm. Having regard to the entirety of the contract and the factual matrix, such an expectation was a reasonable one.

Despite the breach of contract when PCR transferred its interest to W Co., I Inc. merely lost an opportunity to convince PCR that a thermal project should be a "go" and an opportunity to agree with PCR on other methods to exploit the minerals at the site. Realistically, having regard to all relevant considerations and factors, the trial judge's conclusion that there was no chance a thermal project would be implemented was correct. Therefore, the trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect the chance of non-occurrence of a thermal project.

Per Watson J.A. (dissenting): The trial judge's reasons properly accepted that the onus was on PCR to prove consent was unreasonably withheld. It was not a palpable error to find that I Inc.'s rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same deal. There was no reasonable refusal under the terms of the deal. As a matter of law, I Inc. was in no worse position after the farm-out to W Co. than it was before. PCR was under no obligation to develop the thermal and enhanced recovery potential of the site. I Inc. did not contract for that obligation.

If a reasonable reading of the deal did not support the sort of veto that I Inc. asserted could be based on its reasonable expectations, a veto could not be grounded in reasonable expectations in law. Reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an ambiguous clause or term of a contract should be given a specific meaning. Such expectations are not subjective. In a sense, reasonable expectations grounded in the practice of the relevant industry may be circumstantial evidence of what would be the likely objective meaning of the clause or term and therefore its case-specific meaning.

The trial judge's finding of that there was no breach of the deal was reasonable.

The appeal should be dismissed.

APPEAL from judgment reported at *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 ABQB 470, 2014 CarswellAlta 1423, 591 A.R. 202 (Alta. Q.B.), dismissing action for breach of agreement.

***Catherine Fraser C.J.A.*:**

I. Introduction

1 Even large multi-national companies are entitled to expect that the contracts they make in Canada will be honoured — and that they will not be subject to the "gotcha" approach to contractual dealings. This appeal involves a decades-long dispute over the interpretation of a contract. A French-owned research and development company, IFP Technologies (Canada) Inc. (IFP), insists that the contract conveyed to it an undivided 20% working interest in oil and gas leases for a property in Alberta known as "Eyehill Creek".[1] The respondents, including PanCanadian Resources (PCR),[2] a Canadian oil and gas partnership, insist that IFP's interest is limited to an undivided 20% interest in oil and gas produced only through thermal and other enhanced recovery methods at Eyehill Creek. A fundamental point is whether the term "working interest" with respect to oil and gas leases has any meaning in Canadian oil and gas law. In my view, it most assuredly does. This phrase is a legal term of art with a specific meaning in the oil and gas industry, a meaning which this Court should uphold in keeping with what were undoubtedly the parties' mutual intentions when the subject contract was concluded.

2 Ensuring that contractual obligations are discharged in good faith and in accordance with the reasonable expectations of the parties is essential to the economic well-being of this country. This is especially so in Alberta where the magnitude of projects in the oil and gas sector requires heavy financial commitments. The reality is that many companies prefer to spread the risks involved in oil and gas mega-projects by entering into contracts with other well-capitalized companies. Hence, development in this sector is often contingent on multi-party investment.

3 If companies, and that includes sophisticated corporations, cannot rely on other companies with whom they contract to conduct themselves in a manner faithful to the parties' contractual intentions, then that is not only hurtful to the company left with the problem. It is also harmful to the citizens of this country. Business craves certainty; it is understandably risk averse. Canadians lose if companies have to look over their shoulder to ensure that they are not being stabbed in the contractual back, especially where investments are measured in millions, if not billions, of dollars. Who would choose to invest under these circumstances? If this were truly the contractual regime in Canada — and I do not agree it is — then companies would need to account for this contingency in assessing whether to invest with others in a proposed project. That would materially increase both risk and cost and weigh against investment. This is contrary to society's enlightened collective self-interest.

4 Companies are entitled to expect that the parties with whom they contract will be honest, reasonable, candid and forthright in their contractual dealings: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 (S.C.C.) at para 99, [2015] 1 S.C.R. 500 (S.C.C.). As a corollary to this, they are also entitled to expect that contractual terms intended to protect one contracting party from future liability will not then be turned on their head and used to gut the purpose of the contract. Consequently, courts should be slow — indeed I suggest, unwilling — to permit companies to ignore their contractual obligations on the basis that, after problems start, someone can think of another term that might have been included to put what turns out to be a contentious issue beyond doubt. Interpreting contracts is a civil law exercise; it is not necessary to prove anything beyond a reasonable doubt.

5 The road to this appeal has been long and twisting. Back in early 2011, the parties were involved in a six-week trial. At the start of the trial, the parties filed a statement of agreed facts along with more than 500 agreed exhibits. The trial involved over 600 exhibits in total and 25 witnesses. Tragically, the initial trial judge who oversaw the proceedings passed away some time after the trial had concluded but without ever rendering a decision. The parties elected to have the Chief Justice of the Queen's Bench (Trial Judge) decide the case based on the written record and materials submitted rather than proceeding with a new trial: *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing*, 2014 ABQB 470, 591 A.R. 202 (Alta. Q.B.) (QB Reasons).

6 IFP submits that the Trial Judge made a number of errors of law and palpable and overriding errors of fact in his interpretation of the contract. PCR and the other respondents submit that deference to the Trial Judge's findings should rule the day. Given the complex nature of the appeal, oral arguments took an unusually long time, that is two full days in this Court. For the reasons explained below, I have concluded that the Trial Judge's interpretation of the contract is fatally flawed and cannot stand. In fairness to the Trial Judge, his decision predated two groundbreaking decisions of the Supreme Court on contractual interpretation: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) [*Sattva*] and *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) [*Bhasin*].

7 This tangled contractual web raises issues of law fundamental to the effective operation of the oil and gas industry in

V. Principles of Contractual Interpretation

A. Goal of Contractual Interpretation

79 I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: *Sattva*, *supra* at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 (S.C.C.) at para 64, [2010] 1 S.C.R. 69 (S.C.C.).

1. Requirement to Consider Factual Matrix

80 One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In *Sattva*, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

81 Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an *objective* interpretive aid to determine the meaning of the words the parties used: *Sattva*, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in *R. (on the application of Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26 (Eng. H.L.) at para 28 that "[i]n law context is everything".

82 Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; *Bighorn*, *supra* at para 10; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106 (Sask. C.A.) at para 13, (2014), 446 Sask. R. 89 (Sask. C.A.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 31, (2013), 542 A.R. 212 (Alta. C.A.) [*Nexxtep*], citing *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59 (Ont. C.A.) at para 54, (2007), 85 O.R. (3d) 616 (Ont. C.A.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, 2001 CanLII 24049 at para 23, (2001), 52 O.R. (3d) 97 (Ont. C.A.) [*Hi-Tech*]; *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21 (Nfld. C.A.) at para 10, (2000), 5 C.L.R. (3d) 55 (Nfld. C.A.).

83 Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva*, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: *Sattva*, *supra* at paras 47-48; *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (Man. C.A.) at para 15, (2003), 173 Man. R. (2d) 300 (Man. C.A.); *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 (Man. C.A.) at para 72, (2011), 270 Man. R. (2d) 63 (Man. C.A.); *Ledcor*, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva*, *supra* at para 58, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

84 All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

85 Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, *supra* at 29; *Keephills Aggregate Co. v. Riverview Properties Inc.*, 2011 ABCA 101 (Alta. C.A.) at para 13, (2011), 44 Alta. L.R. (5th) 264 (Alta. C.A.) [*Keephills*]. Nor generally are prior drafts of an agreement: *Wesbell Networks Inc. (Receiver of) v. Bell Canada*, 2015 ONCA 33 (Ont. C.A.) at para 13, (2015), 248 A.C.W.S. (3d) 820 (Ont. C.A.). However, evidence of negotiations is relevant insofar as that evidence *shows* the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, *supra* at 30, 80; *Nexxtep*, *supra* at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

86 Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, *supra* at 59; McCamus, *supra* at 205; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 (Alta. C.A.) at para 28, (1998), 223 A.R. 180 (Alta. C.A.) [*Paddon Hughes*]; *Guaranty Properties Ltd. v. Edmonton (City)*, 2000 ABCA 215 (Alta. C.A.) at para 23, 261 AR 376; *Nexxtep*, *supra* at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: *Keephills*, *supra* at para 12; Hall, *supra* at 38-47.

87 Mere difficulty in interpreting a contract is not the same as ambiguity: *Paddon Hughes*, *supra* at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": *Hi-Tech*, *supra* at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 (Ont. C.A.) at paras 46, 56, (2016), 404 D.L.R. (4th) 512 (Ont. C.A.); Hall, *supra* at 83-85. But it must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

3. Interpreting Commercial Contracts

88 Also of particular importance on this appeal, commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: McCamus, *supra* at 763-766. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

B. Conclusion

89 In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

VI. Analysis

A. Overview of IFP's Interest in Eyehill Creek

90 Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded

TAB 4

2013 ABCA 200
Alberta Court of Appeal

Benfield Corporate Risk Canada Ltd. v. Beaufort International Insurance Inc.

2013 CarswellAlta 979, 2013 ABCA 200, [2013] A.J. No. 610, [2014] 1 W.W.R. 772, [2014] A.W.L.D. 179, [2014] A.W.L.D. 180, [2014] A.W.L.D. 208, 15 B.L.R. (5th) 173, 228 A.C.W.S. (3d) 104, 365 D.L.R. (4th) 628, 553 A.R. 204, 583 A.R. 204, 87 Alta. L.R. (5th) 161

Benfield Corporate Risk Canada Limited Respondent (Applicant) and Beaufort International Insurance Inc. and Beaufort Insurance Services Inc. Appellants (Respondents)

Jean Côté, Carole Conrad, Jack Watson JJ.A.

Heard: January 16, 2013
Judgment: June 13, 2013
Docket: Calgary Appeal 1201-0095-AC

Proceedings: affirming *Benfield Corporate Risk Canada Ltd. v. Beaufort International Insurance Inc.* (2011), 2011 CarswellAlta 1763, 2011 ABQB 602 (Alta. Q.B.)

Counsel: M.E. Mestinsek, A. Rennebohm, for Respondent / Applicant
J.G. Shea, R. Wizbicki, for Appellants / Respondents

Subject: Contracts; Employment; Public; Civil Practice and Procedure; Corporate and Commercial

Headnote

Contracts --- Construction and interpretation — Implied terms — Miscellaneous
Respondent corporate plaintiff BC Ltd. wished to buy special insurance broker business of appellant corporate defendant, BI Inc., along with associated registrations and authorizations — Parties signed complex asset purchase agreement ("APA") that permitted BC Ltd. to draft employment contract and have BI Inc.'s top employee, S, sign it — S was terminated with full pay in lieu of notice and signed full release shortly after parties failed to agree on price for S to buy back some or all assets previously sold — S accepted payment and released BC Ltd. — BC Ltd. brought interpleader action to recover bonus payment — Chambers judge held BC Ltd. entitled to bonus — BI Inc. appealed — Appeal dismissed — Express words of two contracts made employment contract ancillary to APA — APA did not include provision that employment contract must bar termination in first two years nor did employment contract guarantee tenure for two years — At most, employment contract gave S right to two years' salary — Payment of bonus expressly conditional on business making high level of profits and S still being chief executive officer, but S was no longer employed — Condition precedents were fair and contracts negotiated for some time by sophisticated parties with legal counsel — There was no gap in contract that would have entitled court to imply terms, nor was court entitled to imply term simply because parties could foresee certain possible occurrence — No common law duty to act in good faith, independent of express terms — Chambers judge correctly found there was no bad faith.

Labour and employment law --- Employment law — Relationship to third parties — Miscellaneous
Respondent corporate plaintiff BC Ltd. wished to buy special insurance broker business of appellant corporate defendant, BI Inc., along with associated registrations and authorizations — Parties signed complex asset purchase agreement ("APA") that permitted BC Ltd. to draft employment contract and have BI Inc.'s top employee, S, sign it — S was terminated with full pay in lieu of notice and signed full release shortly after parties failed to agree on price for S to buy back some or all assets previously sold — S accepted payment and released BC Ltd. — BC Ltd. brought interpleader action to recover bonus payment — Chambers judge held BC Ltd. entitled to bonus — BI Inc. appealed — Appeal dismissed — Payment of bonus

expressly conditional on business making high level of profits and S still being chief executive officer, but S was no longer employed — BI Inc. could not sue on S's cause of action for wrongful termination as it was not party to employment contract.

Contracts --- Construction and interpretation — Surrounding circumstances
S was president of appellant corporate defendant, BI Inc. — BI Inc. entered into asset purchase agreement ("APA") with corporate plaintiff BC Ltd, — Section 3.3(c) of APA contemplated payment of certain amount if S remained employed 24 months after closing date (disputed amount) — BC Ltd. and S entered into employment contract effective on same date as closing of APA — Employment contract provided for 24 months' employment subject to termination for cause — BC Ltd. terminated S without cause after 16 months — S accepted payment for wrongful dismissal and signed release — BC Ltd. declined to pay disputed amount to BI Inc. but instead paid it into court — BC Ltd. brought interpleader action to recover bonus payment — Chambers judge held that release extinguished S's rights against BI Inc. and that once S acceded to no longer being employed, BI Inc. lost its right under APA — Chambers judge held that as APA and employment contract were distinct contracts, there was no requirement that they be interpreted together — It was chambers judge's finding that statement in s. 13.11 of APA that APA and ancillary agreements constituted "the entire agreement between the Parties" did not create one agreement to which all were parties but rather stipulated that each of APA and ancillary agreements were "entire agreements" between parties to those agreements — BI Inc. appealed — Appeal dismissed — There was no trace of palpable and overriding error in findings of chambers judge.

The respondent corporate plaintiff, BC Ltd., wished to buy the assets of the special insurance broker business owned by the appellant corporate defendant, BI Inc., along with associated registrations and authorizations. The parties signed an asset purchase agreement ("APA"), which was a complex contract that permitted BC Ltd. to draft an employment contract and have BI Inc.'s top employee, S, sign it.

The APA provided for an additional "bonus" payment, expressly payable only in the case of both the continued employment of S and the business earning high revenues while S was employed. The bonus was held in escrow.

S wanted to buy back some or all of the assets previously sold, but the parties could not agree on a price. S also sought waiver of the confidentiality and non-solicitation clauses that bound him. Shortly thereafter, S was terminated with full pay in lieu of notice. S accepted the payment and signed a full release, giving up liability, actions, claims and demands "arising from or related in any way to" S's employment or termination.

BC Ltd. brought an interpleader action to recover the bonus payment.

The chambers judge held that BC Ltd. was entitled to the funds.

BI Inc. appealed.

Held: The appeal was dismissed.

Cote J.A. (Watson J.A. concurring): At most, the employment contract gave S a right to two years' salary and nothing else and allowed his termination without cause after two years. BC Ltd. paid S his full salary to the end of the two years. There was no guarantee of tenure in the employment contract. Employment law establishes that an employee can be fired without cause but with notice.

S's desire to get back at least a portion of the assets sold and to end the confidentiality and solicitation covenants was inconsistent with his desire to remain exclusively loyal to BC Ltd. It was not unreasonable for BC Ltd. to have qualms about S's future dedication and loyalty, even in the absence of bad faith.

The contracts were negotiated for some time by sophisticated parties with legal counsel. The express words of the two contracts made the employment contract ancillary to the APA, which prevails in the event of a wide variety of differences between the two contracts. The APA did not include a provision that the employment contract must bar any termination in the first two years, nor did the employment contract itself guarantee tenure for two years.

BI Inc. could not have sued on S's cause of action for wrongful termination as it was not a party to the employment contract. The conditional bonus payment under the APA was conditional on S's continued employment, and he was no longer

employed.

The APA and the employment contract were two different contracts. There was no privity of contract, which is required in a suit in contract. There is no exception in law for related or simultaneously-made contracts.

There was no gap in the contract that would have entitled the court to imply terms, nor was the court entitled to imply a term simply because the parties could foresee a certain possible happening.

There is no common law duty to act in good faith, independent of a contract's express terms. Incompatibility leading to termination is not necessarily a question of fault and does not found an inference that would lead to bad faith.

Firing without cause is effective and only lack of notice is compensated, as it was here, almost *ab initio*.

The chambers judge correctly found no evidence of unconscionability or bad faith. There was not a trace of palpable and overriding error.

Per Conrad J.A. (dissenting): The employment agreement was an ancillary agreement and therefore part of the entire agreement between the parties. BC Ltd. could not breach its promise to employ S for two years and use that breach to deny payment of the bonus. The fact that it paid full damages owing to S for the breach was irrelevant.

The chambers judge accepted the employment agreement as an ancillary contract. Having so found, he erred in finding that the employment contract played no part in his analysis of the APA.

Agreements with a third party can, if referenced and included, demonstrate what the parties intended

BI Inc. and BC Ltd. agreed that the APA and the ancillary agreements were their entire agreement. Not all parties need to be party to each agreement: there was no reason for BCI Inc. to be a party to the employment agreement, nor similarly was there any need for S to be a party to the APA.

The language of agreement clause contemplated that representations, warranties, covenants and agreements could be found in either the APA or ancillary agreements and the clause's final sentence made the APA the master agreement. The chambers judge erred when he concluded that the employment agreement was not to be considered when interpreting the APA.

The fact that BC Ltd. paid S the full amount of damages for the two-year term did not make it less of a breach. Neither the breach of S's employment agreement nor S's release affected the interpretation of the APA. The fact that S was no longer employed at the end of 24 months, because of that breach, did not relieve BC Ltd. of its final payment obligation.

The appeal should have been allowed and the amount paid out of court to BC Ltd. should instead have been paid to BI Inc.

APPEAL from judgment reported at *Benfield Corporate Risk Canada Ltd. v. Beaufort International Insurance Inc.* (2011), 2011 CarswellAlta 1763, 2011 ABQB 602 (Alta. Q.B.), allowing interpleader action by purchaser of corporate assets claiming return of funds representing conditional payment contemplated by asset purchase agreement.

***Jean Côté, Jack Watson JJ.A.*:**

A. Introduction

1. Main Issues

1 The important questions here are

(a) the ability of a party to have the court imply a term in a contract to promote perceived fairness;

(b) whether two sale and employment contracts here were in law one contract, despite different parties;

(c) privity of contract;

(d) whether there is a general duty of good faith; and

(e) unconscionability doctrine.

2. Parties

2 This is an appeal from a decision in an interpleader matter, about which of the parties had the right to funds held in escrow. The decision is cited as *Benfield Corporate Risk Canada Ltd. v. Beaufort International Insurance Inc.*, 2011 ABQB 602 (Alta. Q.B.). The amended notice of appeal (not in the appeal book) makes it clear that the appellants are the two Beaufort companies who were the "respondents" in the Court of Queen's Bench motion. We will call them the defendants, and call the other party (Benfield) the plaintiff.

3. Pleadings

3 The pleadings are skimpy. An escrow agent faced with conflicting demands (by the two parties) to the trust funds, interpled and paid the funds into court. The plaintiff then issued an originating notice seeking payment to it. That is the only commencement document in the Court of Queen's Bench. The claim is to the bonus in the sale of assets contract, even though the condition precedent for it (continued employment) was not satisfied.

4. Overview

4 The defendants' arguments hop back and forth between law and fairness, and between one contract and another. No one contract or one basis works for them, so they try to cobble together a patchwork contraption.

5 To answer all the suggestions of unfairness, we review the facts in Part B below, and then discuss many aspects of fairness in Part C.

6 Then we discuss the two contracts and how to interpret them in Part D. There we rebut the appellants' suggestion that the employment contract is part of the sale contract, or even governs the sale contract. And we discuss the law of employment contracts.

7 Then we describe some relevant general rules of contract law: privity (Part E), when one can and cannot imply terms (Part F), extrinsic evidence (Part G), whether there is a duty of good faith (Part H), and unconscionability (Part I).

8 Part F is very important, as the appellants do not wish to interpret a contract at all, whether in light of something else or otherwise. They wish to repeal an express condition precedent and to substitute for it a new "implied term" which is contrary to the express terms of the contract.

B. Facts

1. Parties and Business

9 The defendants carried on business as special insurance brokers in much of Western Canada. Mr. Simpson was the top employee, and an important shareholder and officer.

10 The plaintiff was also in the insurance business. It wished to buy all the assets of the appellants' business, along with

amendment's root would be yet another implied term, in the employment contract.

89 In any event, continuous employment is an express condition precedent to paying the profit bonus. The defendants try to argue that payment prevails over whether employment continues, which is therefore backwards in more than one way.

90 One might ask how it matters whether all that is unusual or unforeseeable. The answer is that courts cannot imply terms in contracts by *ad hoc* or "palm tree" notions of justice. That would hijack most of the law of contracts. See Part G below.

(d) Does Asset Sale Contract Require a No-cut Employment Contract?

91 The asset sale contract nowhere says what the employment contract is to contain, let alone that it must bar any termination in the first two years. Clause 7.2(b)(ii) only requires "employment agreements duly executed by... W. Dougal Simpson... on terms satisfactory to the Purchaser," to be delivered on closing the sale.

3. Employment Contract

(a) Does this Employment Contract Say No-Cut?

92 Nor does the employment contract itself guarantee tenure for two years: see Part C.2, above.

(b) Entire-Contract Clause

93 This contract also has its own entire-contract clause (cl 11.2).

4. Release by Simpson

94 See Part C.5, *supra*.

E. Privity of Contract

95 This suit is hopeless if one sees that the asset purchase contract and the employment contract are two different contracts. There is no privity of contract. A suit in contract needs privity. There is no exception in law for related or simultaneously-made contracts. The rules of privity still apply.

96 The form of the interpleader proceedings make each party a claimant to the funds in trust. So who is called "applicant" or "respondent" or (loosely) "plaintiff" or "defendant" does not matter.

97 The defendants seek an order awarding them the funds, which money they have never had. For that, they need a cause of action to sue on.

98 The defendants have two insoluble privity problems. First, the breach alleged is firing Mr. Simpson. But he is not a claimant (or a party to the suit at all). The two companies which are defendants cannot sue on his cause of action. They are not parties to the employment contract. And even if we are wrong and there was a covenant not to terminate Mr. Simpson without cause, that was a covenant with Mr. Simpson only, not with the defendants (which are not parties to the employment contract).

99 Second, the suit is only for the third (conditional) bonus payment under the asset sale contract. It is conditional on Mr. Simpson's continued employment, and he was no longer employed. Even if firing him was a wrong (and he could somehow sue despite the release), he has not sued.

100 The employment contract does not even purport to give benefits to persons not party to that contract. Nor does it create no trust or agency which could be relevant to privity.

101 Privity of contract is a vital distinction between the law of contract and the law of property. See the quotations from Anson's *Law of Contract* and a textbook on property law, in *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737, 374 N.R. 77 (S.C.C.) (para 39). Privity is not a technicality.

102 About 40 years ago, a number of English academics found the rules of privity distasteful, but that fashion seems to have ebbed, leaving little imprint on binding Canadian authority. The doctrine of privity remains. See *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228, 32 N.R. 163 (S.C.C.) (para 9); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 143 N.R. 1 (S.C.C.) (paras 46 ff, 84-85); *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, 245 N.R. 88 (S.C.C.) (para 43).

103 Agency and trust are exceptions to a degree, but do not apply here. The same is true of exculpatory clauses expressly covering employees: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*; and to waivers of subrogation against charterers: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra* (para 44).

F. Implying Terms

1. The General Law

104 The defendants expressly ask the court to imply one or more terms which are not found in this detailed purchase contract, indeed are inconsistent with its express words. There is no gap in the contract, which expressly gives conditions precedent to owing the sum now sued for. The law governing implying terms is well settled, but the appellant defendants do not cite that law.

105 Sometimes there is a custom in a certain trade or industry, but that is obviously irrelevant here. And sometimes a statute expressly deems a certain term to be part of every contract, but that is not so here. Apart from that, the courts can insert an implied term in a contract in only two situations.

106 The first situation is where the term suggested is so obvious that it is not worth mentioning expressly. The classic example is as follows. Had some officious bystander observed the contract being made and asked the parties whether they intended a certain term to apply which is not expressly mentioned, they would have brushed off the bystander impatiently, saying "Oh, of course!" See *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592, 87 L.J.K.B. 724 (Eng. C.A.), 730; *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206, [1939] 2 All E.R. 113 (Eng. C.A.), 124, *affd* [1940] A.C. 701, [1940] 2 All E.R. 445 (U.K. H.L.); 1 *Chitty on Contracts*, para 13-008 (31st ed 2012).

107 The second situation where the courts will imply a term in a contract is where it is needed "to give business efficacy". In other words, without the term, the contract would fail completely: *Anson's Law of Contract* 147 (28th ed 2002); cf *"Moorcock" (The)*, *infra*. It is needed to make the contract work at all.

108 Some counsel find it easy to overlook or to misunderstand that doctrine of necessity, so its limits are very important. An implied term requires actual necessity; mere reasonableness or fairness is not enough: 1 *Chitty on Contracts*, para 13-010 (31st ed 2012); *Luxor (Eastbourne) Ltd. v. Cooper* (1940), [1941] A.C. 108, [1941] 1 All E.R. 33 (U.K. H.L.), 52-53); *British Movietonews Ltd. v. London & District Cinemas Ltd.* (1951), [1952] A.C. 166, [1951] 2 All E.R. 617 (U.K. H.L.)); *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, [1973] 1 W.L.R. 601 (U.K. H.L.), 609C, [1973] 2 All E.R. 260 (U.K. H.L.), 268 a-b (HL(E)); *Liverpool City Council v. Irwin* (1976), [1977] A.C. 239 (U.K. H.L.), 262B-C, [1976] 2 All E.R. 39 (U.K. H.L.), 50 d-e (HL(E)); *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 77 N.R. 161 (S.C.C.) (para 44), (1987), 40 D.L.R. (4th) 385 (S.C.C.), 430-31; *Catre Industries Ltd. v. Alberta* (1989), 99 A.R. 321, 63 D.L.R. (4th) 74 (Alta. C.A.), at pp 84, 85, *leave den* (1990), 108 N.R. 170 (note) (S.C.C.); *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 237 N.R. 334 (S.C.C.) (para 29); *Highwood Distillers Ltd. v. Panorama Public & Industrial Communications Ltd.*, 2005 ABCA 107, 363 A.R. 239 (Alta. C.A.) (paras 13-14).

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2012 SCC 51
Supreme Court of Canada

Southcott Estates Inc. v. Toronto Catholic District School Board

2012 CarswellOnt 12505, 2012 CarswellOnt 12506, 2012 SCC 51, [2012] 2 S.C.R. 675, [2012] S.C.J. No. 51, 220 A.C.W.S. (3d) 348, 24 R.P.R. (5th) 1, 296 O.A.C. 41, 351 D.L.R. (4th) 476, 3 B.L.R. (5th) 1, 435 N.R. 41, J.E. 2012-1952

Southcott Estates Inc., Appellant / Respondent on cross-appeal and Toronto Catholic District School Board, Respondent / Appellant on cross-appeal

McLachlin C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell, Karakatsanis JJ.

Heard: March 20, 2012
Judgment: October 17, 2012
Docket: 33778

Proceedings: affirming *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.); varying *Southcott Estates Inc. v. Toronto Catholic District School Board* (2009), 78 R.P.R. (4th) 285, 2009 CarswellOnt 494 (Ont. S.C.J.)

Counsel: J. Thomas Curry, Milton A. Davis, Paul-Erik Veel, for Appellant / Respondent on cross-appeal
Andrew M. Robinson, Elizabeth K. Ackman, Andrea Farkouh, for Respondent / Appellant on cross-appeal

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Contracts --- Remedies for breach — Specific performance — Availability in particular contracts — Sale of land
Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to $1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties.

Remedies --- Damages — Valuation of damages — Measure of damages — Real property — Miscellaneous
Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to $1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Fact that corporation was incorporated for single purpose did not

relieve developer of duty to mitigate — Developer still had ability to purchase other properties and to extent that this was limited, it was part of risk of incorporation — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties — Subsequent purchases by parent company of developer showed that mitigation was possible, and trial judge failed to take this into account — General availability of similar properties was put into evidence by board.

Remedies --- Damages — Valuation of damages — Duty to mitigate — General principles
Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to $1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Fact that corporation was incorporated for single purpose did not relieve developer of duty to mitigate — Developer still had ability to purchase other properties and to extent that this was limited, it was part of risk of incorporation — Subsequent purchases by parent company of developer showed that mitigation was possible, and trial judge failed to take this into account — General availability of similar properties was put into evidence by board.

Remedies --- Specific performance — Availability in particular contracts — Sale of land
Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to $1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties.

Contrats --- Réparation du défaut — Exécution intégrale — Possible dans certains contrats — Vente d'un terrain
Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à $1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels.

Réparations --- Dommages-intérêts — Évaluation des dommages — Évaluation des dommages — Biens immeubles — Divers
Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des

dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à $1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait que la société ait été constituée en vue d'un projet unique ne libérait pas le promoteur de son obligation de mitiger le préjudice — Promoteur avait toujours la possibilité d'acquérir d'autres terrains et le fait que cette possibilité était limitée faisait partie des inconvénients de la constitution en société — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels — Acquisitions subséquentes de terrains par la compagnie mère du promoteur démontraient qu'il était possible de mitiger le préjudice, ce que le juge du procès n'avait pas considéré — Disponibilité générale de terrains similaires a été mise en preuve par la commission.

Réparations --- Dommages-intérêts — Évaluation des dommages — Devoir de mitiger — Principes généraux
Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à $1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait que la société ait été constituée en vue d'un projet unique ne libérait pas le promoteur de son obligation de mitiger le préjudice — Promoteur avait toujours la possibilité d'acquérir d'autres terrains et le fait que cette possibilité était limitée faisait partie des inconvénients de la constitution en société — Acquisitions subséquentes de terrains par la compagnie mère du promoteur démontraient qu'il était possible de mitiger le préjudice, ce que le juge du procès n'avait pas considéré — Disponibilité générale de terrains similaires a été mise en preuve par la commission.

Réparations --- Exécution intégrale — Possible dans certains contrats — Vente d'un terrain
Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à $1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels.

The plaintiff developer was a corporation which was incorporated for the purpose of developing a specific piece of property. The defendant school board failed to satisfy a condition of the contract between the parties, leading the developer to bring an action for specific performance against the board.

The developer claimed it did not have to mitigate its damages by attempting to purchase another property, and as such made

no efforts to do so. At trial, it was found that the developer was entitled to damages for loss of profit even though it was not entitled to damages for specific performance.

On appeal, it was found that the developer should have taken steps to mitigate its damages, and as such the damage award at trial was reduced to nominal damages of $1. The developer appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Karakatsanis J. (LeBel, Deschamps, Abella, Rothstein, Cromwell JJ. concurring): The fact that the plaintiff was incorporated for a single purpose did not relieve the developer of the duty to mitigate. The developer had the ability to purchase other properties and any difficulty with doing so was a risk of incorporation. The property itself was not unique in a way that should have led to a specific performance claim. The subsequent purchases of property by the parent company of the developer and the general availability of similar properties argued for the duty to mitigate. The findings of the appeal court were upheld.

Per McLachlin C.J.C. (dissenting): The trial judge's conclusion that there was no opportunity to mitigate by the developer was grounded in the evidence and was not to be disturbed. Even if there had been an opportunity to mitigate, the developer acted reasonably in not doing so. The properties held out, as examples of similar properties were in fact different in size and features, and so were not comparable for mitigation purposes. It would have been inconsistent for the developer to mitigate its damages while seeking specific performance.

La demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée dans le but d'acheter et de mettre en valeur un terrain en particulier. La défenderesse était une commission scolaire qui n'avait pas satisfait à une des conditions d'une entente conclue entre les parties et qui avait ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat.

Le promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes en tentant d'acheter un autre terrain et n'a fait aucun effort en ce sens. Lors du procès, le juge de première instance a conclu que le promoteur avait droit à des dommages-intérêts pour compenser la perte de profits mais n'avait pas droit à des dommages-intérêts pour compenser l'inexécution du contrat.

En appel, la Cour d'appel a conclu que le promoteur aurait dû entreprendre les démarches appropriées pour mitiger ses pertes de sorte que le montant des dommages-intérêts octroyés au terme du procès a été réduit à un montant symbolique de $1. Le promoteur a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (LeBel, Deschamps, Abella, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Le fait que la demanderesse ait été constituée en vue d'un projet unique ne libérait pas le promoteur de son obligation de mitiger le préjudice. Le promoteur avait la possibilité d'acquérir d'autres terrains et toute difficulté découlant de ces démarches faisait partie des inconvénients de la constitution en société. Le terrain lui-même n'était pas unique au point de justifier une action en exécution intégrale d'un contrat. Les acquisitions subséquentes de terrains par la compagnie mère du promoteur ainsi que la disponibilité générale de terrains similaires plaidaient en faveur de l'obligation de mitiger le préjudice. Les conclusions de la Cour d'appel ont été confirmées.

McLachlin, J.C.C. (dissidente) : La conclusion du juge du procès selon laquelle le promoteur n'avait aucune possibilité lui permettant de mitiger ses pertes était fondée sur la preuve, et la Cour ne devrait pas intervenir sur cet aspect du jugement. Même si le promoteur avait eu la possibilité de mitiger ses pertes, il a agi de façon raisonnable en ne le faisant pas. Les terrains présentaient un véritable attrait, dans la mesure où les terrains similaires étaient en fait de superficie différente et possédaient d'autres caractéristiques et n'étaient ainsi pas comparables pour les fins de l'obligation qui revenait au promoteur de mitiger ses pertes. Du point de vue du promoteur, il aurait été contradictoire de mitiger ses pertes tout en demandant l'exécution intégrale du contrat.

APPEAL by plaintiff developer from judgment reported at *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.), allowing appeal by defendant school board.

POURVOI formé par le promoteur demandeur à l'encontre d'un jugement publié à *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.), ayant accueilli l'appel interjeté par la commission scolaire défenderesse.

***Karakatsanis J.*:**

I. Introduction

1 Real estate developers frequently create single-purpose corporations for the sole purpose of purchasing and developing properties for profit. The corporation has limited liability and no assets other than those that arise from the particular real estate investment. The issue raised in this appeal is whether such a single-purpose corporation is excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and particularly when it has promptly brought an action for specific performance. The further issue is whether the trial judge erred in his finding that there were no other "comparable" properties available to mitigate the loss.

2 The appellant, Southcott Estates Inc., was part of the Ballantry Group of associated companies that acquired and developed land in the Greater Toronto Area ("GTA"). Southcott was a single-purpose corporation, without assets, created for the sole purpose of developing the property that is the subject of this action. When the vendor, the Toronto Catholic District School Board, failed to satisfy a condition and refused to extend the closing date, Southcott sought specific performance of the contract. It argues that it was not required to mitigate its losses.

3 The trial judge ((2009), 78 R.P.R. (4th) 285 (Ont. S.C.J.)) found that the Board had breached the agreement of purchase and sale and had failed to prove that Southcott could have mitigated its damages. He awarded damages for loss of chance of profit. He refused to order specific performance, finding that the property was not "unique" and damages were an adequate remedy.

4 The Ontario Court of Appeal (2010 ONCA 310, 104 O.R. (3d) 784 (Ont. C.A.)) concluded that while the trial judge correctly found that the Board had breached its contractual obligations, he had erred in his approach to mitigation. The court concluded that Southcott had unreasonably failed to take available steps to mitigate its loss and reduced the damage award granted at trial to a nominal sum.

5 Southcott did not appeal the trial judge's refusal to award specific performance. However, it maintains its losses were not avoidable. The questions raised in this appeal are:

1. Should a Single-Purpose Company Mitigate its Losses?

2. To what extent must a plaintiff mitigate where the plaintiff has made a claim for specific performance?

3. Did the trial judge err in concluding that there was no evidence of comparable profitable properties available for mitigation?

6 For the reasons that follow, I conclude that Southcott cannot recover losses that it could reasonably have avoided. I agree with the Court of Appeal that the trial judge erred in concluding that there was no evidence of other development properties that Southcott could have purchased in mitigation. I would dismiss the appeal.

II. Facts

7 Southcott is a wholly owned subsidiary of Ballantry Homes Inc. and part of a larger group of companies called Ballantry Group of Companies ("Ballantry" or "Ballantry Group"). The Board is a School Board created pursuant to the *Education Act*, R.S.O. 1990, c. E.2, whose affairs were run by a publicly elected Board of Trustees.

A. Should a Single-Purpose Company Mitigate its Losses?

26 Southcott argues that the Court of Appeal failed to recognize the unique circumstance of a single-purpose corporation in mitigating contractual loss; as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. Further, it submits that it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate. In this case, Southcott acted reasonably, within its ordinary course of business and promptly brought this lawsuit.

27 Southcott sought specific performance and was therefore ready to complete the purchase. In any event, its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources, resources that were not tied up as a result of the breach alleged. Indeed, the alleged breach in this case did not affect Southcott's ability to obtain capital. Southcott can hardly argue that the same money would not have been available for mitigation.

28 Further, the question is factual and it was not suggested at trial that Southcott had no access to capital or that borrowing money would have been unreasonably risky or costly. Southcott did not argue that it was impecunious at trial.

29 In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

30 The trial judge found that the purchases of development land by other corporations within the Ballantry Group did not in fact mitigate Southcott's loss; that finding is not challenged here. As noted above, he found that the other properties purchased by other members of the Ballantry group were "collateral" in the sense that the purchases would have occurred whether or not the defendant had breached its contract with Southcott (para. 143). However, because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens: *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.), at pp. 10-12. Southcott is entitled to the benefits of limited liability, but it is also saddled with the responsibilities that all legal entities have. The requirement to take steps to mitigate losses is one such responsibility. A plaintiff cannot recover losses that could reasonably have been avoided. The overriding issue here is whether Southcott's inaction was reasonable, and if not, whether it could have reasonably mitigated if it had tried to do so.

B. Southcott Was Required to Mitigate Losses Despite its Claim for Specific Performance

31 Specific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation. Obviously, if Southcott had purchased a property in mitigation, it may not have been able to complete its agreement of purchase and sale of the Board's surplus land if ultimately successful in its claim for specific performance. When can a plaintiff seeking specific performance justify inaction and recover losses which may otherwise have been classified as avoidable?

32 The trial judge found that Southcott did not have a viable claim for specific performance. He found that while the business opportunity may have been unique, the property itself was not. The trial judge found that what was at issue here was a straightforward business plan, the failure of which could be measured in damages (para. 132). The Court of Appeal agreed. The trial judge's decision not to order specific performance is not challenged in this appeal.

33 However, Southcott submits that even though it was unsuccessful in its claim for specific performance, it proceeded expeditiously and the claim had real substance because the property was a unique opportunity, given its location and the rarity of such properties in the GTA. As a result, it says that it was not reasonable to attempt to mitigate; the remedy of

specific performance would become illusory.

34 Southcott suggests that there are two separate questions that a court must ask in cases where a plaintiff seeks specific performance: (1) should specific performance be awarded? And if the answer is no, (2) is this plaintiff justified in its mitigatory inaction? Southcott says that the trial judge conflated these two questions and did not consider whether it was justified in failing to mitigate.

35 This Court dealt with this issue in *Asamera Oil Corp.*, at pp. 668-69:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found....
>
> Where ... circumstances reveal a substantial and legitimate interest in seeking [specific] performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then [be able to] recover losses which in other circumstances might be classified as avoidable and thus unrecoverable.

36 This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "some fair, real, and substantial justification" for his claim or "a substantial and legitimate interest" in seeking specific performance. (*Asamera Oil Corp.*, at pp. 668-69 (emphasis added)) This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation. See N. Siebrasse, "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

37 *Asamera Oil Corp.* set out the general principles governing mitigation: was the plaintiff's inaction reasonable in the circumstances, and could the plaintiff have mitigated if it chose to do so. Those principles apply to a plaintiff seeking specific performance. If the plaintiff has a "substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case.

38 The statements in *Asamera Oil Corp.* dealing with specific performance and the determination of what is reasonable conduct must be read in light of *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.). In that case, the Court acknowledged that "[w]hile at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case" (para. 20). The Court thus found that it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases" (para. 21). Specific performance will be available only where money cannot compensate fully for the loss, because of some "peculiar and special value" of the land to the plaintiff" (para. 21, citing *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239 (Eng. V.-C.), at p. 240).

39 The overriding issue is therefore whether Southcott's inaction was reasonable. Southcott argued at trial that the fact that the property was uniquely well situated gives it the unique character required to constitute a fair justification for specific performance (para. 119 of the trial judge's decision).

40 I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding the quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

41 A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera Oil Corp.*, at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing *Adderley*, at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit.

The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

C. The Trial Judge Erred in Finding no Evidence of Comparable Profitable Properties Available for Mitigation

42 In this case, Southcott admitted that it made no efforts to mitigate — on the basis that it was not obliged to do so. Southcott submits that the Court of Appeal erred in shifting the onus to the plaintiff based on the admission by Southcott's principal that he had no intention to mitigate through Southcott. Southcott says that the Board did not provide the trial judge with evidence that there was a comparable profitable investment property available for sale. The trial judge found that there were no comparable or profitable properties. Southcott submits that the Court of Appeal erred in disregarding the trial judge's finding of fact and in substituting its own.

43 The entirety of the trial judge's analysis on this issue was as follows:

> There was no evidence that the properties referred to [by the Board's expert] were actually available to the public for sale but only that they had been sold. Also there was no evidence that had these properties been purchased that they could have been profitably developed. In any event, I am not satisfied that the evidence established that these were comparable properties or that had they been purchased, that the plaintiff's loss would have been avoided or reduced. [para. 144]

44 Regarding the failure to mitigate, the Court of Appeal found that the trial judge had erred in law:

> First, Southcott's admission that it had no intention of taking any steps to mitigate its loss was sufficient to satisfy the onus resting upon the Board to prove failure to mitigate and to shift the evidentiary onus to Southcott of demonstrating that, even if it had attempted to mitigate, it could not have done so. Southcott led no evidence to that effect. In my view, the trial judge erred by holding that the Board had failed to meet the onus imposed upon it to prove that Southcott had failed to mitigate its damages.
>
> ... By requiring the Board to prove the precise manner in which 81 parcels of investment land had been sold or to prove the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level, particularly in the face of Southcott's admission that it had no intention to mitigate and of the evidence that Ballantry actually did find other suitable development properties to purchase.
>
> Third, the trial judge erred in the manner in which he dealt with the evidence of purchases made by Ballantry. Those purchases clearly demonstrate that the directing mind of Southcott knew that investment-quality lands, suitable for profitable development, were available on the market. [paras. 24-26]

45 As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found.

46 Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. Further, while I agree that the trial judge erred in dealing with the Board's evidence regarding the availability of the 81 properties, the error is best approached as an evidentiary issue rather than as one engaging the burden of proof.

47 The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

48 For the reasons that follow, I agree with the Court of Appeal that the trial judge erred in principle by failing to consider relevant evidence. In particular, Ballantry's subsequent purchases were evidence that other development properties were

TAB 6

63482

Asamera Oil Corporation Ltd. (*Plaintiff*) *Appellant*;

and

Sea Oil & General Corporation and Baud Corporation, N.V. (*Defendants*) *Respondents*.

63472

Baud Corporation, N.V. (*Plaintiff*) *Appellant*;

and

Thomas L. Brook (*Defendant*) *Respondent*.

87405

Baud Corporation, N.V. (*Plaintiff*) *Appellant*;

and

Thomas L. Brook (*Defendant*) *Respondent*.

1977: November 23, 24; 1978: October 3.

Present: Laskin C.J. and Martland, Spence, Pigeon, Dickson, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages — Agreements concerning shares and operations of oil exploration company — Breach of contract by company's chief officer to return shares loaned to him by another company — Appraisal of damages — Applicable principles.

These appeals arose out of a long series of agreements concerning the shares and operations of the appellant, Asamera Oil Corporation Ltd., which company was in one way or another involved in exploration for oil in Indonesia. Three separate actions were commenced by the parties.

1. *Baud Corporation, N.V. v. Thomas L. Brook*, (commenced on July 26, 1960) wherein Baud, a wholly owned subsidiary of Sea Oil & General Corporation (SOG), sought the return of 125,000 Asamera shares from Brook, the president and chief officer of Asamera. Baud alleged that 125,000 Asamera shares were loaned

63482

Asamera Oil Corporation Ltd. (*Demanderesse*) *Appelante*;

et

Sea Oil & General Corporation et Baud Corporation, N.V. (*Défenderesses*) *Intimées*.

63472

Baud Corporation, N.V. (*Demanderesse*) *Appelante*;

et

Thomas L. Brook (*Défendeur*) *Intimé*.

87405

Baud Corporation, N.V. (*Demanderesse*) *Appelante*;

et

Thomas L. Brook (*Defendeur*) *Intimé*.

1977: 23 et 24 novembre; 1978: 3 octobre.

Présents: Le juge en chef Laskin et les juges Martland, Spence, Pigeon, Dickson, Estey et Pratte.

EN APPEL DE LA DIVISION D'APPEL DE LA COUR SUPRÊME DE L'ALBERTA

Dommages-intérêts — Accords concernant les actions et les opérations d'une corporation d'exploration pétrolière — Rupture d'un contrat en raison du défaut du directeur général de restituer les actions que lui avait prêtées une autre compagnie — Évaluation des dommages-intérêts — Principes applicables.

Ces pourvois résultent d'une longue série d'accords concernant les actions et les opérations de l'appelante, Asamera Oil Corporation Ltd., une compagnie engagée de diverses façons dans l'exploitation pétrolière en Indonésie. Les parties ont intenté trois actions distinctes.

1. *Baud Corporation, N.V. c. Thomas L. Brook*, intentée le 26 juillet 1960, dans laquelle Baud, une filiale en propriété exclusive de Sea Oil & General Corporation (SOG), demande que l'intimé Brook (qui, à toutes les époques en cause, était le président directeur général d'Asamera) lui rende 125,000 actions d'Asa-

by it in October and November of 1957 to Brook under an agreement dated November 10, 1958, requiring their return by the end of 1959. In addition, Baud claimed damages in the sum of $150,750 representing the difference in the market value of the 125,000 shares between the date upon which they were to have been returned and the date of the writ.

2. *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation and Baud Corporation, N.V.*, (commenced July 27, 1960) wherein Asamera sought rescission of the basic agreement between the two groups of entrepreneurs represented by Baud on the one hand, and Brook on the other. Under the basic agreement, entered into on June 18, 1957, Baud was to receive 3,500,000 shares of Asamera, and SOG was to receive 500,000 shares in that company. In return Asamera was to receive $250,000 together with 196 shares in an Indonesian corporation known as Nusantara, which shares represented a 49 per cent interest therein.

3. *Baud Corporation, N.V. v. Thomas L. Brook*, (commenced December 6, 1966) wherein Baud repeated its allegations as asserted in Action No. 1, and claimed the return of 125,000 Asamera shares, which Brook was required to return under the agreements mentioned in Action No. 1. The third action arose out of the allegation by Brook that the first action was premature since the date for the return of the shares had been extended by the parties until December 31, 1960. In addition to its claim for the return of the shares, Baud claimed damages in the sum of $400,000. An amendment to the statement of claim whereby the damage claim was raised to $6,000,000 was allowed at trial. In this action, Brook counterclaimed for substantially the same relief sought by him in Action No. 2.

Held: 1. The appeal of Baud from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the dismissal at trial, because premature, of its action of July 26, 1960, against Brook should be dismissed. 2. The appeal of Asamera from the judgment of the Appellate Division affirming dismissal of its action of July 27, 1960, against SOG and Baud should be dismissed. 3. The appeal of Baud from the judgment of the Appellate Division affirming the judgment of the trial judge awarding it damages of $250,000 against Brook should be allowed and there should be substituted an award of damages to the appellant of $812,500.

The first action was dismissed by the trial judge when he found that there was indeed an agreement extending the loan of the 125,000 Asamera shares beyond the

mera. Baud prétend avoir prêté à l'intimé, Brook, en octobre et novembre 1957, 125,000 actions d'Asamera en conformité d'un accord daté du 10 novembre 1958, qui prévoyait leur restitution avant la fin de 1959. En outre, Baud réclame des dommages-intérêts au montant de $150,750, au titre de la variation de la valeur marchande des 125,000 actions entre la date où elles devaient être rendues et la date du bref.

2. *Asamera Oil Corporation Ltd. c. Sea Oil & General Corporation et Baud Corporation, N.V.*, intentée le 27 juillet 1960. Asamera y réclame la rescision de l'accord principal conclu entre les deux groupes d'entrepreneurs, représentés respectivement par Baud et par Brook. En vertu de cet accord (conclu le 18 juin 1957), Baud et SOG devaient respectivement recevoir 3,500,000 et 500,000 actions d'Asamera. En contrepartie, Asamera devait recevoir $250,000 et 196 actions de Nusantara, une compagnie indonésienne, soit une participation de 49 pour cent.

3. *Baud Corporation, N.V. c. Thomas L. Brook*, intentée le 6 décembre 1966. Dans cette action, Baud reprend les allégations formulées dans l'action nº 1 et réclame la restitution des 125,000 actions d'Asamera que Brook devait rendre en vertu des accords mentionnés dans l'action nº 1. Cette troisième action résulte de ce que Brook affirme que l'action initiale était prématurée puisque les parties avaient convenu de proroger la date de restitution des actions jusqu'au 31 décembre 1960. En plus du recouvrement des actions, Baud réclame des dommages-intérêts au montant de $400,000. Sur autorisation du tribunal de première instance, la déclaration a été modifiée pour porter le montant des dommages-intérêts réclamés à $6,000,000. Dans cette action, Brook a fait une demande reconventionnelle pour obtenir à peu près le même redressement que dans l'action nº 2.

Arrêt: 1. Le pourvoi de Baud à l'encontre du jugement de la Division d'appel de la Cour suprême de l'Alberta confirmant le rejet de l'action intentée contre Brook le 26 juillet 1960 est, parce qu'elle était prématurée, rejeté. 2. Le pourvoi d'Asamera à l'encontre du jugement de la Division d'appel confirmant le rejet de l'action intentée contre SOG et Baud le 27 juillet 1960 est rejeté. 3. Le pourvoi de Baud à l'encontre du jugement de la Division d'appel confirmant le jugement de première instance condamnant Brook à payer $250,000 de dommages-intérêts est accueilli et le montant des dommages-intérêts payables à l'appelante est porté à $812,500.

Le savant juge de première instance a rejeté la première action au motif qu'une entente prorogeait effectivement le contrat de prêt des 125,000 actions d'Asamera

original expiry date, December 31, 1959, until December 31, 1960. The record included considerable evidence in support of such a finding which was confirmed on appeal. There being no demonstration of any error in law in the Courts below in so disposing of Action No. 1, the appeal with reference to that action should be dismissed.

The trial judge dismissed the second action, finding that the parties had settled their differences in respect of this action by an agreement dated October 28, 1958. The evidence amply supported the finding of the trial judge relating to the scope and effect of the settlement agreement. This finding was confirmed on appeal. Accordingly, the appeal to this Court with respect to the second action and the counterclaim by the respondent in Action No. 3 should be dismissed.

As to Action No. 3, the trial judge dismissed Baud's claims in detinue and conversion and assessed damages on the basis that Brook's failure to deliver constituted a breach of contract. The action in substance was a simple case of breach of contract to return 125,000 Asamera shares and the claims made and the issues arising in this action should be disposed of on that basis. The circumstances were such that damages constituted an adequate remedy.

The Court approached the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach; that Baud was under the general duty to mitigate its losses and may not escape this duty by relying interminably on an injunction obtained by it in 1960, restraining the sale of 125,000 Asamera shares held by Brook; that the specific duty to mitigate and to crystallize its claim for damages within a reasonable time of the breach of contract by bringing action seeking appropriate remedies and to prosecute such action with due diligence, was qualified or postponed by Brook's request of Baud sometime prior to 1966 to refrain from enforcing its claims; that any postponement of such requirement to prosecute and to acquire replacement shares had come to an end at the latest on the awareness of Baud that the defaulting party was not only in breach of the duty to return the shares but had disposed of shares at least equal in

au-delà de la date initiale d'expiration, soit le 31 décembre 1959, jusqu'au 31 décembre 1960. Le dossier contient une preuve volumineuse à l'appui de cette conclusion, confirmée en appel. La preuve ne révélant aucune erreur de droit dans la façon dont les tribunaux d'instance inférieure sont arrivés à cette conclusion quant à l'action nº 1, le pourvoi relatif à cette action est rejeté.

Le savant juge de première instance a rejeté la deuxième action, concluant que les parties avaient réglé leurs différends relatifs à l'action nº 2 dans un règlement daté du 28 octobre 1958. La preuve étayait amplement cette conclusion du juge de première instance quant à la portée et à l'effet du règlement, conclusion qui a été confirmée en appel. En conséquence, le pourvoi interjeté devant cette Cour relativement à la deuxième action ainsi que la demande reconventionnelle de l'intimé dans l'action nº 3 sont rejetés.

En ce qui concerne l'action nº 3, le savant juge de première instance a rejeté les réclamations de Baud en restitution et pour appropriation illégale, et a évalué les dommages-intérêts en tenant pour acquis que l'omission de Brook de rendre les actions constituait une rupture de contrat. En fait, l'action est un cas de simple rupture de contrat, savoir de l'engagement de rendre 125,000 actions d'Asamera, et les réclamations et les questions soulevées dans cette affaire doivent être tranchées sur cette base. Dans ces circonstances, l'adjudication de dommages-intérêts est un redressement approprié.

La Cour a abordé comme suit la question de l'évaluation des dommages exigibles dans les circonstances particulières de cette affaire: les principes relatifs au caractère prévisible s'appliquent également que la réclamation soit fondée sur la responsabilité délictuelle ou contractuelle, sous réserve cependant de connaissances, ententes ou relations particulières entre les parties contractantes ou de toute disposition expresse ou implicite dans le contrat au sujet des dommages recouvrables en cas d'inexécution; Baud avait l'obligation générale de limiter le préjudice et ne peut s'en dégager en invoquant indéfiniment l'injonction de 1960 interdisant à Brook de vendre 125,000 actions d'Asamera; l'obligation spécifique de Baud de limiter le préjudice et d'établir sa demande de dommages-intérêts en intentant l'action appropriée dans un délai raisonnable après la rupture et en procédant avec diligence a été repoussée dans le temps parce que Brook lui avait demandé, avant 1966, de ne pas poursuivre l'affaire; Baud aurait dû corriger son manque de diligence à poursuivre son action et à acheter des actions de remplacement dès qu'elle a appris que la partie contrevenante refusait non seulement de lui rendre les actions, mais en avait vendu un nombre identique; le retard apporté par Baud à l'achat d'actions

number to those loaned by Baud; that any postponement of the duty to acquire replacement shares which may have been due to the sharp reduction in the value of the shares which occurred during the loan, was ended with the revival in values on the public market at least by the end of 1966; that a plaintiff in the position of Baud may not successfully assert throughout the years of litigation a right to specific performance of the contract to redeliver the subject-matter of the contract and at the same time seek to avoid or reduce his losses on the grounds that to do so by buying replacement shares would involve him in investing his funds in the shares of a company managed or dominated by his adversary, Brook; that having regard to the nature of a common share neither the terms of the injunction or the loan contract, nor the action by Brook in disposing of shares in number equal to those loaned, have any effect on the characterization of the rights of Baud or the obligation of Brook throughout this long and tortuous transaction; that damages are an adequate remedy and that a court in these complex and particular circumstances will not invoke the extraordinary remedies of equity.

The application of these principles and determinations to the particular circumstances in this case requires a determination of the damages payable by Brook on the assumption that Baud ought to have crystallized these damages by the acquisition of replacement shares so as to minimize the avoidable losses flowing from the deprivation by Brook of Baud's opportunity to market the 125,000 shares. Such share purchases should have taken place within a reasonable time after the date of breach. Having regard to all the special circumstances, the time for purchase was the fall of 1966 when Baud was by its own admission free from any agreed restraint not to press its claims against Brook. It would be unreasonable to impose on Baud the burden of going into the market and acquiring replacement shares at a time when the litigation of its claims was in a dormant state at Brook's request. Furthermore Baud acknowledged that by the fall of 1966 the fortunes of Asamera had improved and this had begun to be reflected in the market price of its shares. In short, the appellant is not entitled in law to any compensation for the loss of opportunity to sell its shares after that date. Thereafter its loss of this opportunity is of its own making. The theory of such a damage award is to provide the funds needed to replace the shares at the time the law required it to do so in order to avoid an accumulating claim. There should be an allowance of a reasonable time to permit the organization of the finances and the mechanics required for the careful acquisition of 125,000 shares either by a series of relatively small purchases or by negotiated block purchases. This would carry the matter into the fall of 1967. By

de remplacement justifié par la baisse importante de la valeur des actions à l'époque du prêt ne tient plus après la fin de 1966, les actions ayant dès lors repris de la valeur; un demandeur dans la situation de Baud ne peut pendant toutes ces années à la fois prétendre avoir droit à l'exécution intégrale du contrat de restitution des biens et tenter d'éviter de limiter le préjudice en invoquant le fait que l'achat d'actions de remplacement l'obligerait à investir dans une compagnie gérée ou contrôlée par son adversaire, Brook; compte tenu de la nature d'une action ordinaire, ni des dispositions de l'injonction ni celles du contrat de prêt, ni le fait que Brook ait vendu le même nombre d'actions que celles prêtées, n'ont d'effet sur le caractère des droits de Baud ou sur les obligations de Brook aux termes d'une opération aussi complexe; l'adjudication de dommages-intérêts est une solution adéquate et, dans des circonstances aussi particulières que complexes, la Cour ne doit pas recourir aux redressements extraordinaires prévus en *equity*.

L'application de ces principes et solutions aux circonstances particulières de l'espèce exige une évaluation des dommages-intérêts payables par Brook fondée sur la supposition que Baud aurait dû établir les dommages en achetant des actions de remplacement de façon à limiter les pertes évitables résultant de l'impossibilité pour Baud, du fait de Brook, de mettre les 125,000 actions sur le marché. Cet achat d'actions aurait dû être effectué dans un délai raisonnable après la rupture du contrat. Compte tenu de toutes les circonstances particulières susmentionnées, cet achat aurait dû être effectué à l'automne de 1966 alors que Baud, de son propre aveu, n'était plus assujettie à l'entente conclue avec Brook de ne pas poursuivre l'affaire. Il ne serait pas raisonnable en effet de s'attendre à ce que Baud ait acheté des actions de remplacement alors que les procédures judiciaires étaient en veilleuse, à la demande même de Brook. En outre, Baud a reconnu qu'à l'automne de 1966, la situation d'Asamera s'était améliorée, résultant en une augmentation de la valeur marchande de ses actions. Bref l'appelante n'a aucun droit à une indemnisation pour la perte de la possibilité de vendre les actions après cette date. Elle est alors devenue l'auteur du préjudice qu'elle a subi. Le principe sous-jacent à l'adjudication des dommages-intérêts est d'accorder une indemnisation correspondant au prix de remplacement des actions à leurs cours au moment où la demanderesse était tenue en droit de les remplacer afin d'éviter l'accroissement de sa réclamation. On doit laisser à la demanderesse un délai raisonnable pour procéder de façon ordonnée au financement et à l'acquisition des

this time the price had risen to a range of $5 to $6. Making allowance for the upward pressure on the market price which would be generated by the purchase of such a large number of shares on a relatively low volume stock, the purchase price would surely have exceeded the $6 price reached in mid-1967 without any market intervention by Baud. For this factor an allowance of $1 per share should be made. Taking into account the effect of market intervention by Baud, the median price during the period from late 1966 to mid-1967, adjusted accordingly, would be about $6.50, and the damages should be awarded to Baud on that basis; that is, the total damages for breach of agreement to return the Asamera shares should amount to $812,500. In weighing the magnitude of this award one should not lose sight of the essential fact that Brook at any time right down to trial could, if he had remained in compliance with the injunction of July 1960, have avoided this result or the risk of this award by delivering from any source 125,000 Asamera shares.

As held by the Courts below, Brook's claim for damages in respect of the undertaking given by Baud upon the issuance of the interim injunction in July 1960 should be dismissed.

APPEALS from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing appeals from a judgment of Kirby J. in three actions consolidated for trial. Appeals dismissed in two actions; appeal allowed in third action and cross-appeal dismissed.

P. B. C. Pepper, Q.C., and *J. L. McDougall*, for the plaintiffs, appellants.

R. A. MacKimmie, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

ESTEY J.—These appeals arise out of a long series of agreements concerning the shares and operations of the appellant, Asamera Oil Corporation Ltd. (hereinafter referred to as Asamera), which company was in one way or another involved in exploration for oil in Indonesia. Three separate actions were commenced by the parties.

[1] (1973), 40 D.L.R. (3d) 418.

125,000 actions d'Asamera, soit par de petits achats soit en bloc. Ceci nous mène à l'automne de 1967. A ce moment-là, la valeur des actions était de $5 à $6. Compte tenu de la tendance à la hausse qu'aurait entraîné l'achat d'un aussi grand nombre d'actions dans un marché restreint, le prix des actions aurait certainement dépassé les $6 l'unité atteints vers la mi-1967, sans que Baud intervienne sur le marché. En conséquence, la somme d'un dollar est ajoutée à la valeur des actions à cette date. Prenant en considération l'effet d'une intervention de Baud sur le marché, la valeur moyenne des actions entre la fin de l'année 1966 et le milieu de l'année 1967 serait d'environ $6.50 et c'est ce chiffre qui doit fonder les dommages-intérêts dus à Baud; en conséquence, le montant total des dommages-intérêts dus pour la nonrestitution des actions d'Asamera est de $812,500. Devant ce chiffre important, il ne faut pas oublier que jusqu'au procès, Brook aurait pu, s'il avait respecté l'injonction prononcée en juillet 1960, éviter le risque et les effets d'une telle décision en procédant à la remise de 125,000 actions d'Asamera, sans égard à leur provenance.

Comme l'ont décidé les tribunaux d'instance inférieure, la réclamation de Brook en dommages-intérêts relativement à l'engagement pris par Baud lors de la délivrance de l'injonction interlocutoire de juillet 1960 doit être rejetée.

POURVOIS interjetés à l'encontre d'un arrêt de la Division d'appel de la Cour suprême de l'Alberta[1] rejetant des appels d'un jugement du juge Kirby relativement à trois actions entendues ensemble. Pourvois rejetés relativement à deux actions; pourvoi accueilli relativement à la troisième action et pourvoi incident rejeté.

P. B. C. Pepper, c.r., et *J. L. McDougall*, pour les demanderesses, appelantes.

R. A. MacKimmie, c.r., pour les défendeurs, intimés.

Le jugement de la Cour a été rendu par

LE JUGE ESTEY—Ces pourvois résultent d'une longue série d'accords concernant les actions et les opérations de l'appelante, Asamera Oil Corporation Ltd. (ci-après appelée Asamera), une compagnie engagée de diverses façons dans l'exploration pétrolière en Indonésie. Les parties ont intenté trois actions distinctes.

[1] (1973), 40 D.L.R. (3d) 418.

125,000 shares . . . referred to in paragraphs 2 and 3 of the Statement of Claim . . .". Baud's reference in its statement of claim is directed to the 125,000 shares loaned to Brook in 1957. The injunction therefore may be construed as restraining dealing by Brook with those specific 125,000 shares. But this relation of the history of the transaction does not dispose of the matter. In the course of the trial the appellant moved for an order that the shares be deposited in court by Brook. This application was dismissed by the trial judge apparently on the basis that the retention of 125,000 shares by Brook would be sufficient compliance with the order. Since all the shares of Asamera are identical in class and conditions attaching thereto, no practical consideration arises which requires retention in specie, if that be technically possible, of the actual 125,000 shares loaned to Brook. The background against which the loan of the shares was made and the subsequent option granted for their purchase lead one to the view that should a determination of this issue become necessary, Baud is protected by the order and Brook from its contravention by the retention by Brook of a like number of shares of Asamera. To other aspects of this issue I will return later.

It is trite law that under the applicable statutes and common law a certificate is not in itself a share or shares of the corporation but only evidence thereof. (*Vide Solloway v. Blumberger*[2], *per* Rinfret J. at p. 167.) These shares are intangible, incorporeal property rights represented or evidenced by share certificates. They are not in themselves capable of individual identification and isolation from all other shares of the corporation of the same class. Therefore, once these shares were pledged by Brook in fully negotiable form and placed in the name of the broker, as was the evidence here, it was not possible to determine whether some or all of these 125,000 shares had been sold even presuming that at any time a specific share of a corporation as distinct from the certificate representing the share can be isolated and given an existence separate and apart from all other shares of the same class. In any case, it

[2] [1933] S.C.R. 163.

paragraphes 2 et 3 de la déclaration . . .» , de les vendre ou de les aliéner. Dans sa déclaration, Baud parle des 125,000 actions prêtées à Brook en 1957. L'injonction peut donc être interprétée comme interdisant à Brook d'aliéner ces 125,000 actions en particulier. Mais cet historique ne rend pas compte de toute la réalité. En première instance, l'appelante a demandé une ordonnance enjoignant à Brook de consigner les actions à la cour. Le juge de première instance a rejeté cette requête, au motif semble-t-il qu'en demeurant en possession de 125,000 actions, Brook se conformait suffisamment à l'ordonnance. Comme toutes les actions d'Asamera sont de même classe et son assujetties aux mêmes conditions, aucune considération pratique ne justifie la conservation des actions mêmes prêtées à Brook, à supposer que la chose soit matériellement possible. Les circonstances dans lesquelles on a d'abord consenti le prêt des actions et ensuite accordé une option d'achat à leur égard nous amènent à conclure, s'il devenait nécessaire de trancher cette question, que Baud est protégée par l'ordonnance et que Brook est à l'abri de tout reproche de violation en retenant le nombre spécifié d'actions d'Asamera. Je reviendrai aux autres aspects de cette question ultérieurement.

Il est constant en droit qu'en vertu des lois applicables et de la *common law*, un certificat d'action ne constitue pas en lui-même une action de la compagnie, mais en est seulement la preuve. (Voir *Solloway c. Blumberger*[2], le juge Rinfret, à la p. 167.) Les actions sont des droits de propriété incorporels et les certificats en constituent une attestation ou une preuve. Elles ne peuvent être identifiées séparément ni isolées des autres actions de même classe de la compagnie. En conséquence, dès que Brook a mis les actions en gage au nom du courtier, sous une forme entièrement négociable, comme le révèle la preuve présentée en l'espèce, il est devenu impossible de déterminer si une partie ou la totalité des 125,000 actions avaient été vendues, à supposer même qu'on puisse, à un moment donné, isoler une action (et non le certificat qui en constitue la représentation tangible) et la considérer séparément des autres actions de même classe.

[2] [1933] R.C.S. 163.

seems almost academic to argue that Baud could assert such a position in this regard when the shares were delivered through Diamantidi in fully negotiable form to Brook after Brook had announced that the purpose of the loan was to pledge the shares with his broker as security for his marginal transactions in other Asamera shares, and this apart altogether from the fact that redelivery of 125,000 Asamera shares free of encumbrance by Brook from any source would meet his obligation of redelivery.

The learned trial judge dismissed Baud's claims in detinue and conversion and assessed damages on the basis that Brook's failure to deliver constituted a breach of contract. The action in substance is a simple case of breach of contract to return 125,000 Asamera shares and in my view the claims made and the issues arising in this action should be disposed of on that basis. That being so, we come to the only real issue in this appeal, namely, to what recovery is the appellant, Baud, in these circumstances entitled and, if the appropriate relief be a monetary award, the quantum of damages.

Baud has asked this Court to award specific performance of the agreement to return 125,000 Asamera shares, and in particular, in its statement of claim has requested an order directing the return or replacement of the shares. The jurisdiction to award specific performance of contractual obligations is ordinarily exercised only where damages would be inadequate to compensate a plaintiff for his losses. As the original 125,000 shares are indistinguishable from all other Asamera shares, and since there has been no suggestion that corporate control is at issue in this case, or that shares were not readily available in the stock market, an order for delivery of shares would merely be another method or form for the payment of any judgment awarded. Asamera shares are listed on the public stock exchanges and consequently some estimate of their market value can be readily ascertained from day to day. The parties themselves therefore throughout the 21 years since

Quoi qu'il en soit, l'argument de Baud à ce sujet semble purement théorique puisque Baud a remis les actions à Brook, par l'intermédiaire de Diamantidi, sous une forme entièrement négociable, quand Brook a indiqué que les actions prêtées seraient mises en garde auprès de son courtier afin de garantir ses opérations sur marge visant ses autres actions d'Asamera et ce, mis à part le fait que pour remplir son obligation, Brook n'avait qu'à remettre 125,000 actions d'Asamera, sans indication de provenance, à condition qu'elles soient libres de toute charge.

Le savant juge de première instance a rejeté l'action de Baud en restitution et l'action pour appropriation illégale, et a évalué les dommages-intérêts en tenant pour acquis que l'omission de Brook de rendre les actions constituait une rupture de contrat. En fait, l'action est une affaire de simple rupture de contrat, savoir de l'engagement de rendre 125,000 actions d'Asamera et, à mon avis, les réclamations et les questions soulevées dans cette affaire doivent être tranchées sur cette base. Nous en venons donc à la véritable question en litige dans ce pourvoi: à quel dédommagement l'appelante Baud a-t-elle droit en l'instance et, si ce redressement est pécuniaire, quel doit être le montant des dommages-intérêts?

Baud demande à cette Cour d'ordonner l'exécution intégrale de l'accord pour la restitution des 125,000 actions d'Asamera et, plus précisément, elle demande dans sa déclaration une ordonnance exigeant la restitution ou le remplacement des actions. Habituellement, le pouvoir d'ordonner l'exécution intégrale d'une obligation contractuelle n'est exercé que dans les cas où des dommages-intérêts ne sauraient indemniser le demandeur du préjudice subi. Comme les 125,000 actions en cause ne peuvent être différenciées des autres actions d'Asamera et comme il n'est pas question que le contrôle de la compagnie soit en cause ou qu'il y ait eu un problème de disponibilité des actions sur le marché des valeurs, une ordonnance de restitution des actions ne serait qu'une façon d'exiger le paiement de tout montant accordé par jugement. Les actions d'Asamera sont cotées en bourse et il est en conséquence facile d'obtenir une estimation quotidienne de leur valeur marchande.

these transactions began have had the benefit of the daily assessment by the stock market of the value of these shares. It is obvious that damages are an adequate remedy and that the courts in such circumstances do not resort to the equitable remedy of specific performance.

The assessment of the quantum of damages for this breach of contract is somewhat complex. The calculation of damages relating to a breach of contract is, of course, governed by well-established principles of common law. Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised.

Not all kinds of losses are recoverable in actions for breach of contract. The limitations on damages recoverable in contract were discussed in *Victoria Laundry (Windsor) LD. v. Newman Industries LD.*[3], wherein Asquith L.J. at p. 539 went to great lengths to explain such limits:

(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Company*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

[3] [1949] 2 K.B. 528.

Les parties ont donc, pendant les 21 années écoulées depuis le début de ces opérations, bénéficié d'une évaluation boursière quotidienne de ces actions. Il est évident que des dommages-intérêts sont un redressement approprié et qu'il n'est pas question, dans un tel cas, que les tribunaux aient recours au redressement en *equity* que constitue l'exécution intégrale.

L'évaluation des dommages-intérêts pour cette rupture de contrat est assez complexe. Bien sûr, le calcul des dommages-intérêts pour rupture de contrat est régi par des principes de *common law* bien établis. Les pertes recouvrables dans une action fondée sur l'inexécution d'une obligation contractuelle sont limitées au montant qui placera la partie lésée dans la situation qui aurait existé si le contrevenant avait respecté son engagement.

Dans une action fondée sur une rupture de contrat, les pertes ne donnent pas toutes lieu à une indemnisation. Les restrictions applicables aux dommages-intérêts recouvrables en matière de contrat ont été analysées en profondeur dans l'arrêt *Victoria Laundry (Windsor) LD. v. Newman Industries LD.*[3], par le lord juge Asquith (à la p. 539):

[TRADUCTION] (1) Il est bien établi que les dommages-intérêts ont pour objet principal de placer, dans la mesure où l'argent peut le faire, la partie dont les droits ont été violés dans la situation qui aurait existé si ses droits avaient été respectés: (*Sally Wertheim v. Chicoutimi Pulp Company*). Cet objet, s'il est poursuivi jusqu'au bout, lui permettra d'être totalement indemnisée de toute perte résultant de facto d'une violation particulière, même improbable ou imprévisible. En matière de contrat, tout au moins, cette règle est considérée comme trop stricte. D'où,

(2) En cas de rupture de contrat, la partie lésée n'a droit à une indemnité que pour la perte qui en découle effectivement et qui était, à la date du contrat, susceptible d'en découler d'après ce qu'on pouvait raisonnablement prévoir.

(3) On apprécie les faits raisonnablement prévisibles à cette date en fonction des renseignements que possédaient alors les parties, ou du moins la partie qui rompt par la suite le contrat.

[3] [1949] 2 K.B. 528.

TAB 7

Province of Alberta

PUBLIC LANDS ACT

PUBLIC LANDS ADMINISTRATION REGULATION

Alberta Regulation 187/2011

With amendments up to and including Alberta Regulation 59/2020

Current as of April 2, 2020

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Term of lease

102 A mineral surface lease must not be issued for a term that is greater than 25 years.

Proof of right to work minerals

103 The director may require an applicant for a mineral surface lease to produce proof of the applicant's right to work the mines and minerals the recovery and production of which are the subject of the application.

Crossing roadway

104 If the whole or part of land under a mineral surface lease is intended for use as an access roadway, the lessee shall permit the holder or occupant of the land on either side of the roadway to cross the roadway without charge at all reasonable times and at the place or places designated for that purpose by the lessee.

Division 6
Surface Material Dispositions

Definitions

105 In this Division,

(a) "lease" means a surface material lease;

(b) "licence" means a surface material licence;

(c) "operations" means the clearing, stripping, excavating, processing and removal of surface material from, and the restoration and reclamation of, public land described in a lease or licence;

(d) "operator" means the holder of a lease or licence;

(e) "public pit" means a pit that is on public land and is designated for use by one or more operators under a licence;

(f) "surcharge" means an amount of money prescribed by the Minister to be paid by an operator for the purpose of the development, administration, management, restoration or reclamation of public pits;

(g) "surface material" means clay, marl, sand, gravel, topsoil, silt and peat.

Surface Material Licences

Issuance and effect of licence

106(1) The director may issue licences in respect of public land.

(2) A licence entitles the holder to occupy the public land under the licence to remove surface material by surface excavation.

Amounts payable

107 In addition to any other application requirements, an applicant for a licence must submit with the application

(a) a sum equal to the royalty prescribed by the Minister for the amount of surface material the applicant intends to remove, and

(b) if the area to which the application relates is a public pit, a surcharge in an amount prescribed by the Minister.

Term

108 A licence must not be issued for a term greater than one year.

Licence not assignable

109 A licence is not assignable.

Surface Material Leases

Issuance and effect of lease

110(1) The director may issue surface material leases in respect of public land.

(2) A lease entitles the operator to occupy the public land under the lease to remove surface material by surface excavation.

Term

111 The term of a lease must not exceed 25 years.

Detailed operating plan

112(1) An operator shall not commence active operations on the land under a lease without first obtaining an approval under this section.

(2) An application for an approval under this section must be in the form approved by the Minister.

(3) An approval under this section may be given subject to any terms and conditions the director considers appropriate, including without limitation terms and conditions requiring the operator to develop, amend or complete a detailed operating plan showing the area or areas of land from which the holder intends to remove surface material and describing the methods the operator proposes to employ for removal of the surface material.

(4) The director may, by notice in writing given to an operator at any time after giving an approval to the operator under this section, require the operator

(a) to commence work in accordance with the approval, and

(b) to remove the amount of surface material specified in the notice within the time specified in the notice.

Annual return

113(1) An operator must annually,

(a) on or before the date prescribed by the director in a directive issued for the purposes of this section, or

(b) if no directive is issued under clause (a) in respect of a particular year, within 30 days after the end of the anniversary month of the lease,

file with the director a surface materials return in a form acceptable to the director that states the quantity of surface material removed in the preceding 12-month period from the land under the lease.

(2) A directive under subsection (1)(a) must be made publicly available and copies of it must be made available to any person on request.

(3) Subsection (1) is prescribed for the purposes of section 59.3 of the Act and the director may, by notice to an operator that contravenes subsection (1), require the operator to pay a late filing fee in an amount determined by the director.

Payment of royalty

114 An operator must remit with the return filed under section 113(1) the royalty on all surface material removed during the preceding 12-month period, at the rates prescribed by the Minister.

Removal of surface material by others

115(1) The Minister may, by order, authorize the Minister of Infrastructure, the Minister of Transportation or any other person to

enter the land under a lease and remove surface material required for the construction or maintenance of public roads or other public works.

(2) Where an order under subsection (1) is made in respect of the Minister of Infrastructure or the Minister of Transportation, the operator is not entitled to compensation for any surface material removed under the authority of the order but the Minister of Infrastructure or the Minister of Transportation, as the case may be, may pay the operator any compensation that Minister considers appropriate.

(3) Where an order under subsection (1) is made in respect of a person other than the Minister of Infrastructure or the Minister of Transportation, the Minister of Environment and Sustainable Resource Development may require the person

(a) to pay the operator compensation in an amount that the Minister of Environment and Sustainable Resource Development considers appropriate, and

(b) to pay the Minister of Environment and Sustainable Resource Development a deposit before entering on the land, in a form, manner and amount determined by that Minister, to secure payment of the compensation referred to in clause (a).

AR 187/2011 s115;170/2012

General

Operator's duties

116 An operator shall not

(a) damage any road, bridge, ferry, pipeline, dam, causeway or other work, or

(b) do anything that is likely to cause damage to or adversely affect the interest of other persons.

Exploration program

117 The director may, by order, require an operator to conduct an exploration program in order to provide proof of the existence of surface material on public land to which an application for a lease or licence relates.

Records

118(1) An operator must

(a) keep and maintain for each lease or licence complete and accurate books and records relating to the removal, sale and delivery of surface material from the land under the lease or licence, and

(b) make the books and records available on the written request of the director or an officer for the purpose of auditing.

(2) An operator must keep the information in books and records referred to in subsection (1) for the entire term of the lease or licence and for a further period of 3 years following the expiry or cancellation of the lease or licence.

Information to director

119 An operator must, on the written request of the director, provide to the director

(a) in a form acceptable to the director. any information the director requests respecting the work performed on the land under the lease or licence,

(b) copies of invoices, bills of lading and other records respecting the removal, sale and delivery of surface material, and

(c) any other records, documents and information the director requests respecting the work performed on the land under the lease or licence.

Surface materials auditor

120(1) It is a condition of a lease or licence that a surface materials auditor designated by the director may, without warrant, at any time during normal business hours, enter the premises or place of business of the operator or former operator where the operator or former operator's records are kept to

(a) audit or examine any books or records referred to in section 118 for the purposes of verifying or calculating the royalty payable on surface materials removed under the lease or licence, and

(b) examine any property, process or matter that may, in the auditor's opinion, provide assistance in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records of the operator or in ascertaining the amount of royalty that is payable.

(2) The condition referred to in subsection (1) survives the cancellation or expiration of the lease or licence.

Division 7
Pipeline Dispositions

Definitions

121 In this Division,

(a) "agreement" means an agreement referred to in section 122;

(b) "lease" means a lease referred to in section 128(1);

(c) "operator" means a person that, in the course of business authorized under an Act of Alberta or Canada,

(i) constructs a pipeline or undertakes any operations preparatory to its construction, or

(ii) operates a pipeline;

(d) "pipeline" means a pipeline for the transmission of fluid or gaseous substances;

(e) "pipeline installation" means any equipment, apparatus, mechanism, machinery or instrument that is incidental to the operation of a pipeline, including, without limitation,

(i) a separator, pumping station, metering facility, tank, pump, rack, storage facility or loading or other terminal facility or other structure connected to the pipeline for treating the substance that is being or that is to be transmitted, and

(ii) any other installation that the director considers to be a pipeline installation,

but does not include a refinery, processing plant, marketing plant or a right of way installation;

(f) "right of way" means the public land that is the subject of an agreement;

(g) "right of way installation" means any equipment, apparatus, mechanism, machinery or instrument that is incidental to the operation of a pipeline and is within a right of way, including, without limitation,

TAB 8

Most Negative Treatment: Check subsequent history and related treatments.

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Gareth Morley, Aaron Welch, Barbara Thomson, for Intervener, Attorney General of British Columbia
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
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Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil

wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Natural resources --- Oil and gas — Constitutional issues — Miscellaneous
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was

no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations

environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as

encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en

état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient

toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), s. 1(ddd), and ***Oil and Gas Conservation Act***, R.S.A. 2000, c. O-6 ("OGCA"), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the *BIA* empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the *BIA* did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

7 For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree

with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

10 A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

11 Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

12 The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act*, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (*OGCA*, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (*OGCA*, s. 12(1)).

13 The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled ... for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator

is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 (”*REDA*”). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta’s more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator’s mandate is set out in the *REDA* and includes “the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta” (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

15 The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

16 ”Abandonment” refers to “the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules” made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as “the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe” (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 (Alta. C.A.) (”*Northern Badger*”), at para. 2). The abandonment of a pipeline refers to its “permanent deactivation ... in the manner prescribed by the rules” (*Pipeline Act*, s. 1(1)(a)). “Reclamation” includes “the removal of equipment or buildings”, “the decontamination of buildings ... land or water”, and the “stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land” (*EPEA*, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

17 A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when “the Regulator considers that it is necessary to do so in order to protect the public or the environment” (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an “operator”, a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

18 The Licensee Liability Rating Program, which was, at the time of Redwater’s insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) (”Directive 006”) is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating (”LMR”), which is the ratio between the aggregate value attributed by the Regulator to a company’s licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee’s LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater’s insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee’s “deemed assets” and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company’s licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

19 Licences can be transferred only with the Regulator’s approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an

TAB 9

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Last Mountain Valley No. 250 (Rural Municipality) v. Ter Keurs Bros. Inc.

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RURAL MUNICIPALITY OF LAST MOUNTAIN VALLEY NO. 250 (PLAINTIFF) and TER KEURS BROS. INC. (DEFENDANT)

B.L. Klatt J.

Judgment: February 11, 2020
Docket: Regina QBG 1468/17

Counsel: William R. Howe, Tarissa Peterson, for Plaintiff
Kevin C. Mellor, Nicolas L. Brown, for Defendant

Subject: Civil Practice and Procedure; Contracts; Public; Municipal

Headnote

Contracts --- Construction and interpretation — Surrounding circumstances
In 1987, former landlord entered agreement allowing former tenants to excavate, process and remove all sand and gravel found on or beneath land for fixed sum plus amount per cubic yard of sand or gravel removed — Agreement also permitted tenants to stockpile gravel on land during 10-year term — In 1988, tenants assigned agreement to plaintiff municipality and term was extended from 10 to 20 years — Upon expiry in 2007, landlord and municipality negotiated new agreement with different rates — In 2014, municipality decided to increase production significantly as result emergency created by flooding — Not long after, landlord sold land and assigned rights under agreement to defendant owner — There was approximately 8,500 yards of gravel stockpiled on land at that time — New owner claimed that it had concerns about amount of gravel being extracted from and stockpiled on land, and that its representative asked municipality to remove all gravel it intended to take before agreement expired — Municipality claimed owner asked it to cease production until renewal agreement was entered, and that it agreed to do so on basis existing stockpile was sufficient to meet its needs — When renewal agreement was not entered before existing agreement expired, owner refused to renew and claimed ownership over existing stockpile — Municipality brought action for declaration it owned existing stockpile and order giving it reasonable time to remove it, and brought motion for summary judgment — Motion granted in part — Interpreting lease agreement on basis of words used as well as factual matrix surrounding its making, agreement between parties was in nature of profit a prendre and municipality was owner of gravel that had been extracted and stockpiled — In absence of provision requiring otherwise, municipality was entitled to reasonable time to remove it — Although agreement referred to stockpiling for term, ownership of stockpile did not revert to owner upon expiration of term — Such interpretation would be patently unfair — What constituted reasonable time could not be determined on basis of available record and, in absence of agreement, was left to be determined by further application.

MOTION by municipality for summary judgment in action for declaration it owned stockpile of gravel on leased land and order granting reasonable time to remove it.

***B.L. Klatt J.*:**

1 The plaintiff, the Rural Municipality of Last Mountain Valley No. 250 [RM] has applied for summary judgment against the defendant, Ter Keurs Bros. Inc. [Ter Keurs]. The RM seeks a declaration that it is the owner of extracted, processed

gravel that was stockpiled on land owned by Ter Keurs and an order that it be given reasonable time to remove the stockpile from the land.

2 Rule 7-5(1)(a) of *The Queen's Bench Rules* authorizes a summary judgment procedure if the court is satisfied that there is no genuine issue requiring a trial. In this case, there was considerable affidavit evidence as well as questions and answers taken at a formal questioning of several witnesses.

3 Both parties agree that this matter can and should be resolved by a summary judgment proceeding. There were several affidavits filed, mostly on behalf of the RM. Cross-examination of several witnesses occurred in 2019 and the parties filed transcripts of questions and answers from those proceedings.

4 I have considered the framework as set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) as well as the principles emerging from the more recent cases of *Tchozewski v. Lamontagne*, 2014 SKQB 71, 440 Sask. R. 34 (Sask. Q.B.) and *Viczko v. Choquette*, 2016 SKCA 52, 476 Sask. R. 273 (Sask. C.A.). I am satisfied that both parties have had the opportunity to put "their best foot forward" and that the issue in this case can be resolved through the summary judgment process.

Background

5 At the heart of this dispute is the interpretation of the terms of an agreement between the parties that pertained to the RM's right to extract and stockpile gravel on the land, NW 13-24-23 W2 [the Land], owned by Ter Keurs. Pursuant to some gravel extraction leases, the RM has been a continuous tenant of the Land. This is not in dispute.

6 On August 6, 1987, a former owner of the Land, Alvin Kelln, entered into a 10-year lease agreement with Sherman Stenson and James Bleackley [original tenants]. This agreement [1987 Lease] granted the original tenants the exclusive right to excavate, sift, process, remove and sell all sand and gravel found on or beneath the Land. In consideration, the original tenants agreed to pay the initial sum of $10,000.00 and $0.35 per cubic yard of sand or gravel removed from the Land. The 1987 Lease also granted the original tenants the right to stockpile gravel during the term of the agreement.

7 In May 1988, the original tenants assigned their interest in the 1987 Lease to the RM. The assignment also extended the term of the lease to 20 years and continued to permit the RM to excavate, process and remove sand and gravel as well as to stockpile it on the Land.

8 Upon the expiration of the 1987 Lease in 2007, Alvin and Marlene Kelln [the Kellns] negotiated a new agreement with the RM, entitled the "Gravel Removal Agreement" [Gravel Agreement]. Some of those terms include:

(a) The RM has the right to enter upon the Land to "test, search for, dig and carry away such sand, gravel or stone deposits found in any part of the lands as it may desire...";

(b) Upon expiration of the Gravel Agreement, the RM has the right "to remove any of its fixtures within a reasonable time period as agreed to by both parties";

(c) The RM may at any time during the term of the Gravel Agreement stockpile any sand or gravel on the Land;

(d) The RM will pay $1.00 for each cubic yard of sand, gravel or stone deposits removed from the Land, "payable following the excavation of the gravel during each consecutive year of the Term of the Agreement and no later than December 31 of each year";

(e) The RM will pay to the owner the amount owing for stockpiled materials from the previous agreement at the rate provided for in that agreement; and

(f) The RM was entitled to stockpile any sand or gravel on the Land during the term of the agreement.

9 In October 2014, the Kellns sold the Land to Ter Keurs and assigned their rights under the Gravel Agreement to them.

10 At the time the Land was sold to Ter Keurs, there was an inventory of about 8,500 yards of gravel on the Land. The RM made the payments required pursuant to the Gravel Agreement to Ter Keurs as the new owners of the Land.

11 The parties filed some of the cross-examination questions and answers taken on May 14, 2019. Arend Jan Ter Keurs [Mr. Ter Keurs] was questioned and stated that before buying the Land, he reviewed the Gravel Agreement with the Kellns and "it looked okay". He stated he also understood from the Gravel Agreement that the RM could excavate, stockpile and remove as much gravel as they wanted.

12 According to the August 15, 2017 affidavit of Allan Magel [Mr. Magel], the reeve of the RM, the stockpiles ranged from a low of 22,324 yards to a high of 69,644 yards for the period 2007 to 2014 inclusive. He deposed that for the 10-year period up to 2016, the average crushed product was 26,875 yards, the average annual amount used was 20,116 yards and the average stockpile was 58,446 yards. Specifically, the documents show that in 2013 and 2014 respectively the stockpiles were 23,890 yards and 36,098 yards. The amounts crushed in 2013 and 2014 were 30,000 yards and 27,500 yards respectively. In 2015, the amount crushed was 109,800 yards with a stockpile of 119,723 yards. By the end of 2016, the stockpile was 109,634 yards.

13 In July 2014, the disastrous flooding resulted in the RM declaring a state of local emergency. Mr. Magel deposed that due to the extreme flooding, road washouts and severe road deterioration caused by the high water levels, the RM began to experience financial pressures. Mr. Magel deposed that as a result of the flood devastation, it was decided to substantially increase the amount of gravel crushing to ensure healthy stockpiles were maintained and to repair the damage caused to the RM's roadways. Accordingly, the RM contracted with L & G Crushing Corp. [L & G] to extract as much gravel from the Land as was available. In early spring of 2015, L & G advised the RM that they could extract approximately 100,000 cubic yards of gravel from the Land.

14 Mr. Magel deposed that because the RM had contracted with L & G to do such a significant extraction, it was necessary to obtain a $650,000.00 loan from the bank to pay the new owner, Ter Keurs, as well as L & G. Due to other commitments, L & G could not start the extraction on the Land until March 2015 with the majority being done in the fall and into December 2015. The invoice indicates that the RM paid L & G a total of $627,322.50 for the excavation and crushing of 109,800 yards of gravel in 2015. In December 2015, the RM contacted Mr. Ter Keurs to advise him that he would be receiving a cheque for $137,300.00 which was paid to him in January 2016. This cheque represented an amount outstanding pursuant to the Gravel Agreement as well as the 109,800 cubic yards of gravel that the RM paid to be crushed and stockpiled on the Lands in 2015.

15 None of the facts outlined thus far appear to be in dispute. The conflicting evidence arises as to the discussions the parties had thereafter.

16 Mr. Ter Keurs deposed that he had concerns with the amount of excavation that was being done on the Land and went to the council meeting in February 2016. He said he told the council he did not think it was fair for the RM to "suddenly extract so much gravel just before their contract expired" and that the RM should remove all the gravel it intended to take from the Land before the contract expired. He said he told them Ter Keurs was not in the business of storage.

17 Mr. Magel and RM councillor Kenneth Hagen [Mr. Hagen] both stated there was no discussion of any kind at the meeting about the RM having to remove their stockpiles if the lease was not renewed. Further, they said there was no suggestion at that time that the lease would not be renewed after its expiry in 2017. They both deposed that Mr. Ter Keurs spoke about the anticipated increase in the royalty rate in a renewal contract and asked that no more processing be done until then. Mr. Magel said the council explained to him that the decision to increase extraction was made before he bought the Land from the Kellns but that since the RM had the much-needed stockpile, the RM would not process any more until after the renewal agreement was entered into. Mr. Hagen confirmed this in his affidavit. Mr. Magel said they agreed the RM representatives would attend to Mr. Ter Keurs' residence to discuss renewal terms.

18 Mr. Magel said he and three other councillors went to Mr. Ter Keurs' residence on February 15, 2016 to discuss the renewal contract and the terms of compensation. They told Mr. Ter Keurs that the new royalty rate was $4.50 per yard of gravel processed and, additionally, that there was a new policy to pay $100.00 per acre of land used for storage. Mr. Magel

said there was no discussion that led him to believe the lease would not be renewed.

19 Mr. Magel said as they had no response from Mr. Ter Keurs, they went to see him on April 22, 2016. Mr. Hagen also attended and deposed that Mr. Ter Keurs spoke to them about needing gravel to shore up some bins but, because of the lease, they did not have access to the gravel. Mr. Hagen said they discussed the possibility of reaching an agreement whereby the RM would give up their claim on the other quarter section Ter Keurs had bought from the Kellns and then they could use as much gravel as they needed. He said they reiterated the RM's proposal and told Mr. Ter Keurs that although the RM was seeking a 10-year lease, the proposed price of $4.50 per yard would be adjusted after five years. He said the discussion was very cordial and, again, there was no indication a new agreement would not be reached.

20 Mr. Hagen deposed that they had still not had a response from Ter Keurs so another councillor, Shawn Flavel [Mr. Flavel], went to see Mr. Ter Keurs. At the council meeting on January 30, 2017, Mr. Flavel advised the council that Ter Keurs did not want to enter into a renewal agreement at the terms proposed and that they wanted $1.00 per yard of gravel for each year of storage. Mr. Hagen said the RM instructed their lawyer to send a formal renewal agreement package to Ter Keurs to "ensure there was no misunderstanding".

21 Mr. Hagen deposed that in March 2017, he spoke with Mr. Ter Keurs' brother, Gerrit Ter Keurs [Gerrit], about the agreement. He said they discussed the storage fee proposed by Mr. Ter Keurs and he told Gerrit the RM could not afford such a fee. He said Gerrit told him they were displeased that the lawyers got involved because they thought an agreement could be reached without them. The discussion ended with Gerrit stating they would call the RM when they returned from their vacation in Holland. There was no evidence from Gerrit.

22 Mr. Hagen deposed that the RM had no response whatsoever from Ter Keurs until they received the letter on April 4, 2017, which was the day the lease expired. In the letter, Ter Keurs stated they were not renewing the agreement and that they were claiming ownership of the gravel stockpiles. Ter Keurs prohibited the RM from entering the Land and erected "No Trespassing" signage.

23 Mr. Ter Keurs deposed that after the February 2016 RM meeting, the RM tried to get them to renew the agreement but they refused every time. When he was questioned on May 14, 2019, he stated that he told the RM at the meeting in February 2016 that the RM should clean everything on the Land up. Ter Keurs thought possibly they would renew at some point but on their terms. Later, he said they were not going to renew because they wanted to farm the Land and that Ter Keurs did not want to be in the gravel business.

24 The RM acknowledges that at no time did they arrange for their stockpiles to be removed from the Land prior to the expiration of the lease. They thought an agreement could be reached and that they owned the stockpiles.

Positions of the Parties

25 The RM's position is that it owns the gravel stockpiles that it paid L & G to extract and process gravel. The RM asserts that the Gravel Agreement constituted a *profit á prendre* whereby the RM acquired ownership of the gravel at the time it was severed from the soil. It also posits that upon expiration of the Gravel Agreement, the ownership of the stockpiles that already existed did not revert to Ter Keurs.

26 Ter Keurs asserts that the Gravel Agreement was a typical lease agreement and that once the agreement expired, any gravel the RM left on the Land became their property. Ter Keurs relies on the wording of the agreement and states that the RM had the contractual right to stockpile gravel and sand but only for the term of the agreement. Thus, it contends, once the agreement expired, so did the right to stockpile gravel and any stockpiles left on the Land belonged to Ter Keurs.

Analysis

27 The issue in this case is the ownership of the gravel stockpiles. Resolution of this issue comes down to the interpretation of the Gravel Agreement.

28 The Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) [*Sattva Capital Corp.*], changed the landscape of contract interpretation, rejecting the historical approach of considering solely the language and terms of the contract. Rather, the court adopted a practical approach and favoured a more contextual exercise that would better lend itself to determining the intention of the parties and the scope of their understanding of the agreement. Rothstein J., in writing for the court, said:

> [47] ...[A] decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line* [*Reardon Smith Line Ltd. v Hansen-Tangen*, [1976] 3 All ER 570] at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall [Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis, 2012], at p. 22; and McCamus [John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012)], at pp. 749 - 50).

29 What this means is that contractual interpretation is not confined to the words used in the contract, but also to the factual matrix surrounding the making of it. Here, I must determine what the parties agreed to when they entered into the Gravel Agreement as it relates to the ownership of the gravel and the rights of the RM to stockpile gravel, particularly after the expiration of the agreement.

30 The parties agree that, in following the guidance set out in *Sattva Capital Corp.*, I am not confined by the language and terms of the agreement itself. Ter Keurs, however, urges me to consider only the terms of the Gravel Agreement and argues that it is unnecessary to consider any of the other evidence. I disagree. There is considerable evidence in the various affidavits to assist me in a proper interpretation of the rights of the parties under the Gravel Agreement.

31 Ter Keurs, in their brief of law and in the hearing before me, indicated that this case does not turn on whether the contract amounts to a *profit à prendre*. In my view, however, it is necessary to determine if and when ownership of the gravel passed to the RM. To answer this question, I must assess whether the contractual relationship was a *profit à prendre*.

32 In *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.) (QL) [*Tener*], Wilson J., in her dissenting decision, analyzed the right conferred by a *profit á prendre* as follows:

> 12 A profit à prendre is defined in *Stroud's Judicial Dictionary*, 4th ed., vol. 4, at p. 2141, as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In *Black's Law Dictionary*, 5th ed. (1979), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for the exercise of the profit".
>
> 13 Wells J. elaborated on the nature of a profit à prendre in *Cherry v. Petch*, [1948] O.W.N. 378 (H.C.), where he said at p. 380:
>
> > It has been said that a *profit à prendre* is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike

> an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property.
>
> It is important to note that it is the right of severance which results in the holder of the profit à prendre acquiring title to the thing severed. The holder of the profit does not own the minerals *in situ*. They form part of the fee. What he owns are mineral claims and the right to exploit them through the process of severance. ...
>
> [Emphasis in original]

33 The RM relies on the seminal decision of *Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248 (Sask. Q.B.) (QL) [*Saskatoon Sand*] in support of its position that once the RM severed the gravel from the soil, it owned it. It asserts that the expiration of the Gravel Agreement did not have the effect of ownership of the gravel reverting to Ter Keurs.

34 The facts in *Saskatoon Sand* are similar to the facts in this case. The parties had an agreement allowing the plaintiff to process and remove gravel from the land. The agreement expired and there was a dispute over who owned the stockpile. The 1966 agreement was a simple, one-page document that provided for payment to the owner of $0.15 per cubic yard for the "removal of gravel from the ...land by Saskatoon Sand and Gravel Ltd or their authorized agents" (para. 1). The agreement was to end on April 1, 1968.

35 The plaintiff paid a contractor to excavate the gravel, crush, process and stockpile it. At the end of 1966, there were just over 20,000 cubic yards of processed, stockpiled gravel. The plaintiff had not paid the defendant for this and nor had the defendant asked for payment. In all of 1967, the plaintiff removed only about 4,000 cubic yards from the stockpile and it became apparent that its anticipated contracts were not going to materialize. The defendant testified that he told the plaintiff's representative that the stockpiles would have to be moved by April 1,1968, the expiry date of the contract. The plaintiff did not remove any of the stockpiled gravel and, on the date the contract expired, the stockpiles contained about 16,500 cubic yards of processed gravel.

36 The question that Bayda J. (as he then was) grappled with in *Saskatoon Sand* concerned the ownership of the gravel. The subordinate question was at what point did the parties intend ownership to pass? To resolve those issues, Bayda J. looked to the essence of the agreement. On the basis that the contract gave the plaintiff rights to enter the lands, dig for and sever the gravel from the soil and haul away the severed gravel, he concluded that the nature of the interest intended to be conferred was that of a *profit á prendre*. Thus, he said:

> [20] ...[W]here a *profit à prendre* is created by an agreement of the kind we have in the present case, the grantee (here the plaintiff) acquires a terminable right to sever the subject-matter from the soil together with a right to remove such subject-matter from the premises and, unless the agreement provides otherwise, ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil. It follows that unless the agreement before me contains some clause of which it can be said that it "provides otherwise", my finding should be that the plaintiff acquired ownership of the gravel at the time the gravel was severed from the soil. This is a right which flows from the legal relationship created by the written agreement between the parties and a right accorded, by implication of law, to the plaintiff as the grantee of a *profit à prendre*.

37 In this case, the essence of the Gravel Agreement was to create an interest in the gravel severed from the soil. There was no evidence that the intention of the parties was that the Gravel Agreement would provide "otherwise". The RM had the right to enter the Lands, to dig for, sever and stockpile the gravel and to haul away the stockpiled gravel. On the basis of the evidence presented, I find that when the Gravel Agreement was reached, the parties understood and intended that the processed and stockpiled gravel belonged to the RM. Thus, I conclude, as Bayda J. did in *Saskatoon Sand*, that the nature of the interest in this case is a *profit á prendre*.

38 Other cases establish that ownership of materials in the context of a *profit á prendre* arises upon severance of the material from the land (see for example: *Saskatoon Sand*; *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.* (1975), 62 D.L.R. (3d) 663 (N.S. C.A.); *Tener*). In applying these principles, I find that ownership of the stockpile had

already transferred to the RM and, without a contractual provision stating otherwise, it follows that the RM should have reasonable time to remove the gravel they processed.

39 On the issue of whether the ownership of the gravel reverted to the landowner when the agreement came to an end, Bayda J. said:

> [23] I now turn to the first alternative argument put forward by the defendants: even if the gravel were at one point owned by the plaintiff, the ownership came to an automatic end on April 1, 1968, and such ownership reverted to the defendants. The basis for this assertion is found in the term "This agreement expires April First 1968." The proper construction to be placed on this term is that on April 1,1968, the plaintiff's right to enter the defendants' lands for the purpose of digging for and severing the gravel from the soil was terminated. The term, however, cannot be said to operate as a conveyance of or as a transfer of the ownership in the severed and stockpiled gravel. To impute to the term a meaning such as that would be to add words to the term or read words into it which are not there. It is not for me to rewrite the parties' contract.

40 Ter Keurs suggests that clause 5(b) of the Gravel Agreement provides that the parties did not intend for the RM to have stockpile remaining after the Gravel Agreement expired. Ter Keurs asserts that this language precludes stockpiling once the term has ended. I do not find this conclusion is supported by the words of the document or the surrounding circumstances. Although the Gravel Agreement would certainly preclude the RM from adding gravel to the stockpile, it does not suggest it should not have reasonable time to remove the gravel or that there would be a reversion of ownership to Ter Keurs if it did not. This would be patently unfair.

41 To be precise here, Ter Keurs was not under any misapprehension about the rights of the RM. They knew that there was a substantial amount of gravel extraction being done in 2015 because they were farming around the gravel pit and could see the operation. They also had to know that any gravel stockpiles belonged to the RM because the RM had already paid for them: $137,300.00 in fact, most of which was for the 109,800 cubic yards of gravel processed and stockpiled in 2015. It was unreasonable for Ter Keurs to assume that once the agreement ended, they automatically became owners of stockpiles they had already been paid for but that remained on the Land when the agreement expired. Such a position is not only unsupported by the law but is wholly unjust.

42 Ter Keurs also argues that the RM was motivated by greed and, knowing the contract was soon to expire and not be renewed, they moved to extract and process as much gravel as they possibly could. I am not convinced that the RM knew the agreement would not be renewed. Mr. Ter Keurs says he expressed concern to the RM at the council meeting in February 2016 over the amount of excavation the RM was doing. He also says he told the RM the agreement would not be renewed. I do not accept that he was as unequivocal as he suggests. The RM visited him at his farm on three occasions to discuss negotiations for a new agreement. I accept that the RM believed that a new agreement could be reached as, historically, it always was. According to Mr. Hagen and Mr. Magel, there continued to be discussions with both parties suggesting possible terms. Even by Mr. Ter Keurs' own evidence, he was willing to enter a new agreement on "his terms". Although he said he just wanted to farm, it is clear that he would continue to negotiate and enter into a gravel agreement with the RM if the price was right. These discussions continued, one being with Gerrit, up until shortly before the agreement expired.

43 As to the assertion that the RM was being greedy and excavating as much as they could for as cheaply as possible, all the excavation and stockpiling had been done before Mr. Ter Keurs raised his concerns at the February 2016 council meeting. In any event, the disastrous 2014 flooding placed the RM in a precarious position. I do not find that its decision to substantially increase its gravel reserves was an unreasonable one in the circumstances.

44 I have found that the RM is the owner of the processed gravel stockpiles on Ter Keurs' Lands. The question next to be addressed is how the RM can remove its stockpiles and the time limitations within which to do it.

45 This issue was also dealt with in *Saskatoon Sand*:

> [30] There is no doubt that the plaintiff by an oral agreement collateral to the written agreement or by an implied term to the written agreement (it is not necessary for me to decide which) acquired the right, the licence, to use the defendants lands for the purpose of storing in stockpiles its processed gravel. The right or licence to store is separate and apart from

> the plaintiff's express recorded right to dig for, sever from the soil and haul away the gravel so dug and severed. It is either a bare (gratuitous) licence or a contractual one. It is not necessary to decide the category. If the category is the first one, then the licence is revocable at will and the licensee (the plaintiff) is to be given a reasonable time to remove its property, namely, the processed gravel (see *Minister of Health v. Bellotti*, [1944] K.B. 298; *C.P.R. v. The King*, [1931] 2 D.L.R. 386, [1931] A.C. 414, [1931] 1 W.W.R. 673; *Winter Garden Theatre (London), Ltd. v. Millennium Productions Ltd.*, [1948] A.C. 173 at p. 179; *Australian Blue Metal Ltd. v. Hughes*, [1963] A.C. 74). If the second, then, it is revocable on reasonable notice (see *Lttxor (Eastbourne) Ltd. et al. v. Cooper*, [1941] 1 All E.R. 33 at pp. 52-3, [1941] A.C. 108; *Winter Garden Theatre v. Millennium, supra*; *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, [1973] 2 All E.R. 260 at p. 265.

46 If the right to stockpile was a contractual one, then it could be revoked on reasonable notice. If it was a "gratuitous license", then Ter Keurs was obliged to give the RM a reasonable time within which to remove its stockpiles. Either way, Ter Keurs did not give reasonable notice to the RM nor did they give it a reasonable time to remove its gravel. Rather, they elected to wrongfully appropriate the processed gravel and assert ownership over it on the date the contract expired. They erected "No Trespassing" signs and gave the RM immediate notice that it was prohibited from entering the Land to remove its property.

47 Ter Keurs understood that the RM could extract and stockpile as much gravel as it desired. I find that implicit in the Gravel Agreement was an intention by the parties that should the agreement expire before the RM could remove its stockpiles, a reasonable opportunity should be afforded to it to remove the stockpiles. To find otherwise would mean that excavation and extraction would have to cease long before the contract expired so that removal could be effected by that time. As I said earlier, I am not satisfied that Ter Keurs gave notice in 2016 that the Gravel Agreement would not be renewed and that the RM would have to remove its stockpiles by the expiration date. I find as a fact that negotiations were ongoing up until a few months before the expiration date and that the RM genuinely believed a new agreement would be reached. I also find that even after Mr. Ter Keurs told Mr. Flavel he did not want to renew the agreement, the negotiations were renewed to some extent with Gerrit.

48 Even if there was a misunderstanding about the likelihood of the Gravel Agreement being renewed, it does not change the nature of the agreement. The RM still owned the stockpile. While it was obviously imprudent for the RM to not pursue inking a deal with Ter Keurs more aggressively, equity demands that it be given a reasonable time to remove its stockpiled gravel. The RM suggests that it be given five years to remove its gravel, based on the historical use of 20,000 cubic yards per year. I find that to tether Ter Keurs to the RM, allowing it access for five years is unreasonable; it would be equivalent to half the term of another lease and the current standard gravel agreements provide for storage fees which is not provided for in the Gravel Agreement. The RM cannot expect to be able to store its stockpile for that length of time, without adequate and fair compensation, especially in light of the fact it processed, with reason, significantly more than it had historically.

49 Just what would be a reasonable period of time is difficult to assess. Although I find a term of five years is wholly inappropriate, I find I have insufficient evidence before me to decide what is just and equitable in the circumstances. It may be that the RM will need to pay to have the stockpile hauled away to another location. It would be preferable for the parties to reach a settlement on this issue but if they are unable to do so, I give them leave to file additional affidavit evidence addressing this.

Conclusion

50 In summary, I order:

1. There shall be a declaration that the RM is the owner of the processed gravel currently stockpiled on the Land;

2. Ter Keurs is required to give the RM reasonable time to remove its stockpiles for processed gravel on the Land;

3. The issues of what constitutes reasonable time for the RM to remove its gravel stockpiles for the Land and any damages that result from its failure to do so are left to be determined by an application brought before me, with further affidavit evidence on the issues and in any manner as the parties may agree;

4. The RM has the right to enter upon the Land, with 48 hours' notice to Ter Keurs, for the purpose of removing all or part of its gravel stockpiles without further compensation to Ter Keurs until further court order or written agreement between the parties; and

5. As the RM has been successful on its application, it is entitled to its costs. I find that Ter Keurs' position was completely without merit and unnecessary. It has resulted in detriment to the RM because it has been unable to access and use its stockpile that it compensated Ter Keurs for. The RM is entitled to costs assessed under the Tariff of Costs, Column 2 of tariff items 29, 30, 31 and 32.

Motion granted in part.

End of Document

TAB 10

2016 ABQB 577, 2016 CarswellAlta 2026, [2016] A.W.L.D. 5007, 272 A.C.W.S. (3d) 178

2016 ABQB 577
Alberta Court of Queen's Bench

Bussey Seed Farms Ltd. v. DBC Contractors Ltd.

2016 CarswellAlta 2026, 2016 ABQB 577, [2016] A.W.L.D. 5007, 272 A.C.W.S. (3d) 178

Bussey Seed Farms Ltd., Gordon J. Bussey and Joanne Bussey (Plaintiffs) and DBC Contractors Ltd. (Defendant)

Master J.T. Prowse, In Chambers

Heard: October 6, 2016
Judgment: October 13, 2016
Docket: Calgary 1601-03841

Counsel: Terry L. Czechowskyj, for Plaintiffs
Elmer S. Chiu, for Defendant

Subject: Contracts; Corporate and Commercial; Property

Headnote

Commercial law --- Sale of goods — Transfer of property — Miscellaneous
Plaintiffs signed written contract allowing defendant to extract gravel aggregates from their land — Plaintiffs took position that defendant was in arrears of payments under agreement and they barred defendants from entering onto land to remove 42000 tonnes of crushed gravel which defendant had stockpiled on land — Plaintiffs brought application to determine preliminary issue of ownership of stockpiled aggregate — Defendant was owner of stockpiled aggregate — Both case law and wording of agreement support conclusion that agreement in question was profit a prendre — Review of agreement showed that it did not grant exclusive possession to defendant — Plaintiff's contention that it was lease was rejected — Payments to be made to plaintiffs were royalties and not rent.

APPLICATION by plaintiffs to determine preliminary issue of ownership of stockpiled aggregate.

***Master J.T. Prowse, In Chambers*:**

1 The issue to be determined is the ownership of gravel aggregate crushed and stockpiled on the plaintiffs' land.

2 On December 1, 2010, the plaintiffs signed a written contract allowing the defendant DBC Contractors Ltd. ("DBC") to extract gravel aggregates from their land until 2015. The term was subsequently extended to March 31, 2018. I will refer to this agreement and the extending agreement together as "the agreement".

3 In January of 2016 the plaintiffs took the position that DBC was in arrears of payments under the agreement, and they barred DBC from entering onto the land to remove 42,000 tonnes of crushed gravel which DBC had stockpiled on the land.

4 The plaintiffs seek the Court's ruling on a preliminary issue pursuant to Rule 7.1, namely, the ownership of the stockpiled aggregate.

5 For the reasons which follow and based on the written agreement between the parties, it is my conclusion that DBC is the owner of the stockpiled aggregate.

Case law on the ownership of stockpiled aggregate

6 The leading case is *Saskatoon Sand & Gravel Ltd. v. Steve*, 1973 CarswellSask 175, 40 D.L.R. (3d) 248 (Sask. Q.B.), a decision of Bayda, J. He stated:

> The gist of the defendants' argument is that the formula for ascertaining the price as prescribed by the agreement is such that the defendants were bound to weigh or measure the gravel for the purpose of ascertaining the price; as a matter of normal procedure the weighing and measuring was done after the gravel was taken off the premises; and because the provisions of this Rule stipulate that the property does not pass until that act of weighing or measuring occurs, it follows that the ownership in the gravel was not intended to pass to the plaintiff until after the gravel was hauled off the premises. The short answer to the defendants' argument is that the *Sale of Goods Act* does not apply for the simple yet cogent reason that the sale of the gravel in question was not a sale of goods (see *Morgan v Russell & Sons*, [1909] 1 K.B. 357).
>
> My answer to the secondary question is that ownership in the gravel passed to the plaintiff at the time of severance from the soil.

7 This decision was followed by the Nova Scotia Supreme Court, Appeal Division, in *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.*, 1975 CarswellNS 92 (N.S. C.A.) where Cooper, J.A. stated at para's 71 and 76:

> The respondent, which I shall also refer to as "B & D", entered into an oral agreement with Angus A. MacDonald to extract rock from the quarry at George's River and to pay ten cents per ton by way of royalty for the rock that B & D "moved over the scale at the quarry" . . .
>
> I am in respectful agreement with Mr. Justice Bayda that where an interest in land of the nature of a profit à prendre is conferred "ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil".

8 In his concurring reasons, Coffin, J.A. stated at para's 90 and 94:

> . . . the trial judge was not in error in adopting the reasoning of Bayda, J., in *Saskatoon Sand & Gravel Ltd. v. Steve* (1974), 40 D.L.R. (3d) 248.
>
> I realize that in the Saskatoon Sand and Gravel case the gravel was stockpiled, but none the less Bayda, J. set forth the general principle that transfer of ownership takes place "at the moment the subject matter is severed from the soil."

9 In *1056 Enterprises Co. v. Katchmar Enterprises Inc.*, 1987 CarswellBC 2491 (B.C. S.C.), the Court stated:

> *Saskatoon Sand & Gravel Ltd. v. Steve et al*, 40 D.L.R. (3d) 248 bears directly on the issue. It is apparent from that case that gravel is, prior to its severance from the soil, a profit a prendre. Once it is severed from the soil and processed, it becomes a chattel. Furthermore, paragraph 3 of the agreement between Cantex and Block Bros. Contracting Ltd. leads to the inference that the plaintiff [lessee] was to obtain title to the gravel once it was processed.
>
> In my opinion therefore the stockpiled gravel belonged to the plaintiff. It is also clear from the *Saskatoon Sand & Gravel* case that the *Sale of Goods Act* has no application to situations of this type. The conclusion I have reached is that the plaintiff, 1056 Enterprises Inc. is the owner of the stockpiled gravel . . .

10 In *Lenko v. Grabler*, 1993 CarswellAlta 201, 14 Alta. L.R. (3d) 414 (Alta. Q.B.) at para. 26, the Court stated:

> At best, the 1976 agreement is a profit à prendre. Case authorities establish that the grantee acquires ownership of the

> material severed from lands when the material is taken out of the ground. See *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.* and *Saskatoon Sand & Gravel Ltd. v. Steve*.

11 In *BC Rail Ltd. v. Biro*, 2001 BCSC 264 (B.C. S.C. [In Chambers]), the Court stated:

> In this regard, I find that the residual rail ballast and the spur line were not the property of Graehold [lessee] at the expiration of the lease and the grace period for several reasons. First, clause 5.2 provides that rock product, equipment and stockpiles not removed at the end of the grace period "will become the property" of the Owners Group. However, with respect to the residual rail ballast, Graehold sold it to BCR during the term of the lease at a time when it had an ownership interest in the rock and authority to manufacture it into rail ballast and stockpile it in the quarry.
>
> Furthermore, while I accept that the [*Sale of Goods*] Act does not apply to the issue of whether Graehold acquired an ownership interest in the rock, in my opinion, insofar as the sale of rail ballast by Graehold to BCR is concerned, the [*Sale of Goods*] Act does apply. As between these parties it was a contract for the sale of goods. Thus, in my opinion, the residual rail ballast became the property of BCR from the moment that it was weighed and stockpiled alongside the spur line in the quarry for removal by BCR. At that point the rail ballast became "ascertained" goods.

Is the agreement a lease or a profit a prendre?

12 The case law cited above makes it clear that one must have regard to the provisions in the agreement between the parties when considering the question of ownership of stockpiled aggregate.

13 The plaintiffs attempt to support their claim to ownership of the stockpiled aggregate by asserting that the agreement was simply a lease, and when the lease came to an end so did DBC's right to the stockpiled aggregates.

14 In my view, the amended agreement is a classic profit a prendre. I reject the contention of the plaintiffs that it is a lease. It contains the three key ingredients of a profit a prendre, namely:

> (1) The right to enter the lands of the plaintiffs, and
>
> (2) The right to dig for and sever the gravel from the soil, and
>
> (3) The right to haul away the gravel so severed for the use of the defendant.

15 The primary right given to DBC, under clause 2.01 (which describes the plaintiffs as "the vendors" and not as "the lessors") is as follows:

> The Vendors agree to allow DBC, during the term of and in accordance with the provisions of this agreement, the exclusive right to, at its sole expense, on the land, explore for, prospect for, test for, extract, remove, process, crush, wash, stockpile, mix and dispose of aggregates located within or on the land . . .

16 The plaintiffs base their argument that the agreement on the assertion that it provides exclusive possession of the land to DBC. A close review of the agreement shows that it does *not* grant exclusive possession to DBC.

17 Firstly, the only exclusive grant to DBC is an exclusive grant to gravel aggregates. See clause 2.01 quoted above.

18 The payments to be made to the plaintiffs by DBC are "royalties" and not rent.

19 Clause 3.08 makes it clear that the plaintiffs reserve rights to concurrently use the land, such as the right to conduct mines and minerals exploration on the land. This is inconsistent with an allegation that DBC has exclusive possession.

20 One clause which is consistent with a lease is the plaintiffs' promise to provide 'quiet enjoyment' of the land, which is a phrase more commonly associated with a lease, but this can simply be construed as a promise not to interfere with DBC's exclusive right to the aggregates.

21 The plaintiffs also support their argument that the agreement is a lease, and not a profit a prendre, by pointing to clause 3.05, which requires the plaintiffs to pay:

> any assessment, levy or other charge to be paid to Rocky View County with respect to the Aggregates produced or removed from the Land . . .

22 The plaintiffs note that this type of clause was discussed in *Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.) at para 13, as being consistent with a lease, but it is not conclusive. I note that a similar clause was in the agreement being considered by the Supreme Court of Canada in *Berkheiser* and it concluded that the agreement was a profit a prendre or an irrevocable license to search for and to win the substances named.

23 In my view, both the case law and the wording of the agreement support the conclusion that the agreement in question is a profit a prendre.

If the agreement is a profit a prendre, who is the owner of the stockpiled aggregate?

24 The plaintiffs argue that, even if the agreement is a profit a prendre, the ownership of the stockpiled aggregate would remain with the plaintiffs until it was removed from the land, weighed and paid for.

25 The plaintiffs invoke section 19 of the *Sale of Goods Act*, RSA 2000, c.S-2, but the more pertinent reference is to section 20(4) of the *Act* which states:

> When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice of it.

26 The argument that section 20(4) of the *Sales of Goods Act* supports the land owner's claim to ownership of stockpiled aggregates was considered and rejected in the cases cited previously, which determined that the *Act* does not apply to the relationship between parties to a profit a prendre. See: *Saskatoon Sand & Gravel*, *supra*, *1056 Enterprises Co.*, *supra*, and *BC Rail*, *supra*.

27 While the *Sale of Goods* Act would apply to subsequent sale by DBC to an ultimate purchaser, it does not apply to the profit a prendre between the plaintiffs and DBC.

28 More importantly, the agreement itself provides that DBC owns the stockpiled aggregate. Specifically, clause 5.04 states:

> Notwithstanding the term granted herein, at the expiration of this agreement, DBC shall have the right to remove its stockpiles of aggregates from the land for a further period of one year immediately following the last day of the term of this agreement, provided however, that DBC shall continue to be obligated, in accordance with the provisions of this agreement, to pay royalty payments to the vendors for these aggregates removed from the land. (emphasis added)

29 Clause 5.04 clearly envisages ownership of the stockpiled aggregate belonging to DBC prior to the aggregates being removed from the lands and weighed.

Conclusion

30 My conclusion on the preliminary issue of ownership of the stockpiled aggregates, is that they are owned by DBC, and I so declare.

Costs

31 If the parties cannot agree on costs of this application, they may approach me for a ruling in that regard.

Defendant was owner.

TAB 11

Province of Alberta

SALE OF GOODS ACT

Revised Statutes of Alberta 2000
Chapter S-2

Current as of January 1, 2002

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Time of transfer

19(1) When there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time that the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

RSA 1980 cS-2 s20

Rules for ascertaining intention

20(1) Unless a different intention appears, the rules set out in this section are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

(2) When there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

(3) When there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice of it.

(4) When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice of it.

(5) When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property in them passes to the buyer

(a) when the buyer signifies the buyer's approval or acceptance to the seller or does any other act adopting the transaction, or

(b) if the buyer does not signify the buyer's approval or acceptance to the seller but retains the goods without giving notice of rejection then if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

(6) When there is a contract for the sale of unascertained or future goods by description and goods of that description and in a

deliverable state are unconditionally appropriated to the contract either

(a) by the seller with the assent of the buyer, or

(b) by the buyer with the assent of the seller,

the property in the goods passes on that appropriation to the buyer.

(7) For the purpose of subsection (6),

(a) the assent may be expressed or implied and may be given either before or after the appropriation is made, and

(b) if pursuant to the contract the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to the buyer and does not reserve the right to disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.

RSA 1980 cS-2 s21

Reservation of right of disposal

21(1) When there is a contract for the sale of specific goods or when goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled.

(2) In that case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(3) When goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or the seller's agent, the seller in the absence of evidence to the contrary has the right of disposal.

(4) When the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if the buyer does not honour the bill of exchange and if the buyer wrongfully retains the bill of lading the property in the goods does not pass to the buyer.

RSA 1980 cS-2 s22

Risk transferred with property

22(1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer but when

TAB 12

11.8 WHEN PROPERTY PASSES

Sale & Supply of Goods

Kevin P. McGuinness

Sale and Supply of Goods (McGuinness) > CHAPTER 11 PERFORMANCE

CHAPTER 11 PERFORMANCE

11.8 WHEN PROPERTY PASSES

§11.58 Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained.[1] Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.[2] For the purpose of ascertaining the intention of the parties, subsection 18(2) of the Ontario SGA provides that regard must be paid to the terms of the contract, the conduct of the parties and the circumstances of the case.

§11.59 The application of a provision like subsection 18(2) is obviously determined by the unique facts of each individual contract. In *Hammerton v. MGM Ford-Lincoln Sales Ltd.*,[3] the appellant dealer retained title to a truck after entering into a contract of purchase and sale with Frontline Ventures, a wholesale vehicle exporter. An auto broker was driving the truck from the auction house on MGM's behalf when an accident occurred. The trial judge determined that the parties intended that title would be retained by MGM until the purchase price had been paid in full. She therefore found that at the time of the accident MGM was still the owner of the truck. In the British Columbia Court of Appeal, Levine J.A. focused on the following circumstances in dismissing the appeal:

> The evidence considered in these cases included, as in this case, evidence of what the parties said or did when the contract was made, and the custom in the industry. The evidence of Mr. Hagen and Mr. Hazzi concerning their intentions was relevant and accepted by the trial judge as confirmatory of “commercial reality” and custom. The fact that the form of contract used by MGM is a standard form contract is further evidence of the custom in the industry. It is also relevant that Frontline did not arrange for delivery of the vehicle in accordance with its usual practice when it has purchased a vehicle, which is to use a carrier rather than a driver, and did not in fact pay for the truck until after it received it.[4]

§11.60 Under subsection 2(3) of the Ontario SGA, goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them. Generally, if the contract is for an unconditional sale of specific goods, property passes when the contract for the sale of the goods is made, but the parties may determine an alternative date for when they intend the property to pass. If a party undertakes to perform certain things in relation to the contract it must be determined whether or not performance of those is meant to precede vesting of property.[5] This is a question of construction. The intention of the parties may be express, but if it is not, intention must be construed by looking to the whole agreement.[6] If the intentions of the parties cannot be determined with reference to the contract, the course of dealings or the circumstances of the case, the Ontario SGA sets down a number of rules for ascertaining intention. In order to discover the intention of the parties with respect to transfer of ownership, it is necessary to look to the terms of the contract, the conduct of the parties and the circumstances of the case. This general language allows considerable latitude in application and interpretation by the parties and the courts.[7] Commercial shipping terms are relevant *indicia*. However, the generally accepted meaning of such a term may be refuted by an agreement, either express or implied from the circumstances, and thus the transfer of property and risk may be postponed beyond the time of shipment.[8]

§11.61 Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.[9] Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not

pass until that thing is done and the buyer has notice of it.[10] Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done and the buyer has notice of it.[11] When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer:

(i) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if the buyer does not signify approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.[12]

§11.62 Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.[13]

§11.63 Where the subject matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall possess certain qualities when it is brought into existence or is ascertained, is not a mere warranty, but a condition precedent to any obligation upon the buyer under the contract. Since the existence of those qualities is part of the description of the thing sold, they become essential to its identity. The buyer cannot be obliged to receive and pay for a thing different from that for which he contracted.[14] Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.[15]

Footnote(s)

1 Ontario SGA, s. 17.

2 Ontario SGA, s. 18(1).

3 *[2007] B.C.J. No. 605* (B.C.C.A.).

4 *[2007] B.C.J. No. 605* at para. 27 (B.C.C.A.).

5 *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd.*, *[1999] A.J. No. 869*, *73 Alta. L.R. (3d) 30*, *249 A.R. 53*, *48 B.L.R. (2d) 222* at para. 20 (Alta. Q.B.), *per* Binder J.

6 *Jerome v. Clements Motor Sales Ltd.*, *[1958] O.J. No. 631*, *[1958] O.R. 738* at 743-44 (Ont. C.A.).

7 *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd.*, *[1999] A.J. No. 869*, *73 Alta. L.R. (3d) 30*, *249 A.R. 53*, *48 B.L.R. (2d) 222* at para. 20 (Alta. Q.B.), *per* Binder J.

8 *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd.*, *[1999] A.J. No. 869*, *73 Alta. L.R. (3d) 30*, *249 A.R. 53*, *48 B.L.R. (2d) 222* at para. 20 (Alta. Q.B.), *per* Binder J.

9 Ontario SGA, s. 19, Rule 1.

10 Ontario SGA, s. 19, Rule 2.

11 Ontario SGA, s. 19, Rule 3.

12 Ontario SGA, s. 19, Rule 4.

13 Ontario SGA, s. 19, Rule 5(i).

14 *Alabastine Co. of Paris Ltd. v. Canada Producer & Gas Engine Co.*, *[1914] O.J. No. 74*, *17 D.L.R. 813* at 817, 30 O.L.R. 394 (Ont. C.A.), *per* Meredith C.J.O.

15 Ontario SGA, s. 19, Rule 5(ii).

End of Document

TAB 13

2012 ABCA 36
Alberta Court of Appeal

Cold Lake First Nations v. Alberta (Minister of Tourism, Parks & Recreation)

2012 CarswellAlta 179, 2012 ABCA 36, [2012] A.W.L.D. 1811, [2012] A.W.L.D. 1812, [2012] A.W.L.D. 1813, [2012] A.W.L.D. 1815, [2012] A.W.L.D. 1816, [2012] A.W.L.D. 1817, [2012] A.W.L.D. 1818, [2012] A.W.L.D. 1826, [2012] A.W.L.D. 1875, [2012] A.W.L.D. 1876, [2012] A.W.L.D. 1877, [2012] A.J. No. 96, 216 A.C.W.S. (3d) 884, 522 A.R. 159, 544 W.A.C. 159, 64 Alta. L.R. (5th) 201

Cold Lake First Nations (Respondent / Applicant) and The Queen In Right of Alberta as represented by The Minister of Tourism, Parks and Recreation (Appellant / Respondent) and Brian Grandbois, Jean Grandbois, Harvey Scanie, Nancy Scanie, Allen Scanie, Carrie Lawrence, Kelsey Jacko and Margaret Piche (Respondents / Individual Respondents)

Jean Côté, Constance Hunt, Myra Bielby JJ.A.

Heard: December 28, 2011
Judgment: February 2, 2012
Docket: Edmonton Appeal 1103-0218-AC

Proceedings: reversing in part *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks & Recreation)* (2011), 2011 CarswellAlta 2456 (Alta. Q.B.)

Counsel: E.C. Lew, K.L. Lambert for Respondent / Applicant
S.C. Latimer, A.L. Edgington for Appellant / Respondent
Brian Grandbois, Jean Grandbois, Harvey Scanie, Nancy Scanie, Allen Scanie, Carrie Lawrence, Kelsey Jackso, Margaret Piche, Respondents / Individual Respondents for themselves

Subject: Public; Property; Civil Practice and Procedure; Criminal

Headnote

Aboriginal law --- Reserves and real property — Rights and title — Miscellaneous
Contempt order — Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Failure to do so resulted in members being deprived of effective opportunity to be heard — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Judges and courts --- Contempt of court — Practice and procedure — Principles of natural justice
Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since

time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Failure to do so resulted in members being deprived of effective opportunity to be heard — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Aboriginal law --- Practice and procedure — Parties — Representation by solicitor
Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Failure to do so resulted in members being deprived of effective opportunity to be heard — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Legal representation
Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Failure to do so resulted in members being deprived of effective opportunity to be heard — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Injunctions — Protesters
Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Failure to do so resulted in members

being deprived of effective opportunity to be heard — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Miscellaneous procedural requirements
Interpreter — Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge should have expressly advised members of their right to be represented by lawyer and explained that assistance of lawyer might be important to ensure their position was fully advanced — Error of law was compounded by failure to investigate need for interpreter where some members may have required this aid.

Civil practice and procedure --- Judgments and orders — Amending or varying — Consent orders
Respondent First Nations group erected unauthorized blockage in protest of decision of appellant Minister of Tourism, Parks and Recreation (Minister) to expand campground into adjacent parcel, BP — First Nations claimed to have used BP since time immemorial — Parties entered into consent order, which provided for removal of blockage (consent order) — On Minister's application, judge found that First Nations was not in contempt, but that some members were in breach of consent order (second order) — Some members of First Nation then entered park — Minister brought application to have First Nations and those members held in contempt of both orders — Chambers judge dismissed contempt application, and varied both orders — Chambers judge did not discuss issues relating to members' lack of notice of orders, legal representation and interpreters — Minister appealed — Appeal allowed in part; application remitted — Appeal was dismissed against one respondent who was not served with order or notice of appeal — Appeal was allowed as to other individual respondents — Chambers judge had no jurisdiction to amend second order because neither party brought application to vary consent order or second order — Chambers judge could not impose order on parties when he was unsuccessful in obtaining consensus on order — Chambers judge erred in law in granting order varying provisions of second order.

Aboriginal law --- Quasi-criminal offences — Miscellaneous
Contempt order — Fair hearing.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions
Contempt order.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Sufficiency of notice
Contempt order.

Judges and courts --- Contempt of court — Practice and procedure — Summary process — Service of notice
Contempt order.

APPEAL by Minister of Tourism, Parks and Recreation from judgment reported at *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks & Recreation)* (2011), 2011 CarswellAlta 2456 (Alta. Q.B.), dismissing application for contempt order and varying earlier orders.

***Per curiam*:**

Overview of Appeal

33 For that reason, we set aside the order granted on July 26, 2011, and remit the contempt application to be reheard by another judge of the Court of Queen's Bench. However, we do not suggest that the appellant must pursue this rehearing. It may be that the passage of time and intervening events have resolved the issue in another fashion.

Did the chambers judge have jurisdiction to vary the consent order and the Goss order in the absence of an application to vary being made by the parties?

34 Given the above conclusion, it is not necessary to address this issue. However, in light of the possibility that the contempt application may be reheard, and to assist the judge in that circumstance, we conclude the chambers judge had no jurisdiction to amend the Goss order as he did.

35 A judge should not take jurisdiction to grant an order that has not been sought by either party with a properly filed application and supported by evidence: *Hicks v. Kennedy* (1957), 6 D.L.R. (2d) 567 (Alta. C.A.), at 569, (1957), 20 W.W.R. 517 (Alta. C.A.). The only application before the chambers judge was the appellant's contempt application. No party advanced an application to vary the consent order or Goss order at that time.

36 The *Alberta Rules of Court*, Alta. Reg. 124/2010 ("the Rules"), set out the requirements for applications and supporting evidence: rr. 6.3, 6.11. These Rules reflect a fundamental principle of our adversarial system - a party is entitled to know the case that must be met. In the absence of an application, a party responding is unable to make full answer.

37 During argument, no doubt operating from the best of motives and fully aware of the sensitivity of the situation, the chambers judge queried the appellant's counsel as to whether he had the discretion and authority to amend the Goss order. Counsel answered that he would prefer it if it were brought on notice as a motion to vary the Goss order, but that the court had inherent jurisdiction to deal with it. This statement does not preclude the appellant from now raising jurisdiction as a ground of appeal, because it did not contain a concession that the court should exercise its inherent jurisdiction when no notice or opportunity to prepare had been given to the parties.

38 Applications also need to be supported by properly filed evidence in order to be considered by the court on an application: *Deiure v. Deiure*, 2000 ABCA 328, 281 A.R. 146 (Alta. C.A.) at para. 3. The court should not grant relief without evidence to support the order. The Rules set out the types of evidence that the court may consider when making a decision: r. 6.11. They do not include unsworn statements made during a court application.

39 In arriving at this conclusion, we observe that the chambers judge correctly identified this as a culturally and politically sensitive matter, and he tried to resolve it without resorting to the galvanizing effect of a contempt order. The appellant itself appears to have nodded to this sensitivity and the practicalities of the situation through its choice of not seeking to enforce the provisions of the Goss order by removing the offending structures and property itself, after the respondents failed to do so.

40 In the face of a dynamic, evolving situation, such as, for example, those encountered in family law from time to time, a judge properly may seek to obtain admissions, concessions, agreement, or consent, all of which are factors that supplant the need for evidence. He or she will then gain jurisdiction by agreement pursuant to which relief may be granted that differs from what was expressly sought.

41 However, if that agreement is not forthcoming, a judge has no jurisdiction to impose relief which no party sought, and of which no notice was given. Here, when the chambers judge was unsuccessful in obtaining consensus on the order he wished to make on July 26, 2011, he nonetheless imposed that order. In so doing, he did not advise the parties of the steps he was considering taking, nor did he inform them of the exact nature of the amendments he intended to make or give them the opportunity to address him on either jurisdiction or content.

42 The circumstances in which an injunction may be varied, and by whom, are wider than for other types of orders or judgments, given the discretionary nature of this relief and the emergent situation which so often provides the basis for granting this extraordinary remedy. If there was an application seeking the remedy the chambers judge ended up granting, which was supported by evidence not offered at the time the Goss order was granted, it may be that the chambers judge could have granted the order he did. However, in the circumstances of this matter, he erred in law in granting an order varying the

provisions of the Goss order. In those circumstances he was limited to granting the contempt order, refusing that order or granting an adjournment to allow the individual respondents to obtain counsel or for other reasons.

Did the chambers judge exercise his discretion unreasonably in dismissing the appellant's contempt application?

43 In light of our decision to remit the contempt application to the Court of Queen's Bench for rehearing, it is unnecessary to address this issue.

Conclusion

44 The appeal is dismissed as against the respondent, Carrie Lawrence, on the basis that she was not served with either the order under appeal or the notice of this appeal.

45 The appeal is allowed as to the other individual respondents. The July 26, 2011, order is stuck in its entirety as it relates to them. The contempt application is remitted to the Court of Queen's Bench to be reheard by another judge of that court, should the appellant choose to apply for that rehearing.

Appeal allowed in part.

TAB 14

Most Negative Treatment: Check subsequent history and related treatments.

2015 ABCA 249
Alberta Court of Appeal

Kon Construction Ltd. v. Terranova Developments Ltd.

2015 CarswellAlta 1331, 2015 ABCA 249, [2015] 10 W.W.R. 441, [2015] A.W.L.D. 2810, [2015] A.W.L.D. 2811, [2015] A.W.L.D. 2812, [2015] A.W.L.D. 2813, [2015] A.W.L.D. 2818, [2015] A.W.L.D. 2819, [2015] A.W.L.D. 2820, [2015] A.W.L.D. 2853, [2015] A.W.L.D. 2898, [2015] A.W.L.D. 2899, [2015] A.W.L.D. 2946, [2015] A.W.L.D. 2949, [2015] A.W.L.D. 2950, [2015] A.W.L.D. 2951, 20 Alta. L.R. (6th) 85, 256 A.C.W.S. (3d) 344, 387 D.L.R. (4th) 623, 43 C.L.R. (4th) 17, 602 A.R. 327, 647 W.A.C. 327, 76 C.P.C. (7th) 305

Kon Construction Ltd., Respondent (Plaintiff and Defendant by Counterclaim) and Terranova Developments Ltd., Appellant (Defendant and Plaintiff by Counterclaim) and Scheffer Andrew Ltd., Respondent (Defendant by Counterclaim)

Jean Côté, Frans Slatter, Thomas W. Wakeling JJ.A.

Heard: June 3, 2015
Judgment: July 22, 2015
Docket: Edmonton Appeal 1403-0203-AC

Proceedings: affirming *Kon Construction Ltd. v. Terranova Developments Ltd.* (2014), 35 C.L.R. (4th) 61, 2014 CarswellAlta 708, 2014 ABQB 256, B.A. Browne J. (Alta. Q.B.); additional reasons at *Kon Construction Ltd. v. Terranova Developments Ltd.* (2014), 35 C.L.R. (4th) 99, 2014 CarswellAlta 1853, 2014 ABQB 625, J.D. Rooke A.C.J.Q.B. (Alta. Q.B.); additional reasons at *Kon Construction Ltd. v. Terranova Developments Ltd.* (2014), 35 C.L.R. (4th) 102, 2014 ABQB 665, 2014 CarswellAlta 2018, J.D. Rooke A.C.J.Q.B. (Alta. Q.B.)

Counsel: M.A. Pruski, for Respondent, Kon Construction Ltd.
C.L. Plante, for Appellant, Terranova Developments Ltd.
S. Delblanc, G.S. Ranu, for Respondent, Scheffer Andrew Ltd.

Subject: Civil Practice and Procedure; Contracts; Evidence; Property; Public; Torts

Headnote

Evidence --- Real evidence — Electronic
Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor K Ltd. for grading of land development project — Project took longer than expected, in part due to very wet weather, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — T Ltd. appealed on ground, inter alia, that trial judge erred in relying on two exhibits based on reports generated by computer program from raw survey data — Appeal dismissed — Evidence was admissible — Raw survey data in question were collected by automated equipment, stored in electronic format, and transferred automatically from original collecting equipment to storage device — Reliability of collection and storage techniques depended on underlying reliability of electronic equipment — Equipment was routinely used and relied on by surveying profession, and there was no indication in this case of inherent inaccuracy — S Ltd. and K Ltd. were not required to prove how technology worked — It was not error of law for trial judge to rely on data that resulted.

Evidence --- Opinion — Experts — Miscellaneous
Electronic records — Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor

K Ltd. for grading of land development project — Project took longer than expected, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — T Ltd. appealed on ground, inter alia, that trial judge erred in relying on two exhibits based on reports generated by raw data processed by computer program, as it was inadmissible expert opinion — Appeal dismissed — Entry of two exhibits could have been handled in more structured way, but were admissible — Trial judge did not make palpable and overriding error in how she relied upon evidence — Relying on output from equipment which had computer programs embedded in it did not invariably rise to level of expert opinion evidence — There was no universal rule that computer-generated reports were inadmissible hearsay, or only admissible through expert evidence — Computer-generated reports in this case were straightforward and trial judge found that method and evidence were reliable — Although certain portion of process required specialized knowledge, merely relying on and reporting on volume calculations in computer reports did not require such knowledge.

Evidence --- Opinion — Lay witnesses
Witnesses with expertise — Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor K Ltd. for grading of land development project — Project took longer than expected, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — T Ltd. appealed on ground, inter alia, that trial judge erred in relying on evidence given by two witnesses from S Ltd. who were not qualified as experts — Appeal dismissed — Evidence was admissible — Witnesses were involved in events that gave rise to litigation, so they were entitled to testify — Witnesses had expertise as they were professional engineer and surveyor, but they were not qualified as expert witnesses and did not give advance notice of their opinions, which was not fatal — There was no miscarriage of justice in admitting witnesses' opinion — K testified that he confirmed amounts certified in invoices by analyzing raw data compiled in two exhibits — Nature of K's opinion about invoices was well-known, raw data had been disclosed, and witnesses could be cross-examined — Witnesses were entitled to defend themselves and their use of their expertise.

Evidence --- Hearsay — Miscellaneous
Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor K Ltd. for grading of land development project — Project took longer than expected, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — T Ltd. appealed on ground, inter alia, that trial judge erred in relying on two exhibits based on computer-generated reports, as raw data was collected by individual surveyors who did not testify, so exhibits were hearsay — Appeal dismissed — Witnesses who testified relied on work of other individual surveyors and date processors, as professionals often do in day-to-day work — Compilations of raw data were not inadmissible merely because they were prepared by teams of people — Raw survey measurements recorded electronically would not have been of much assistance to trial judge — Witnesses were cross-examined on methodology behind exhibits, and expert witnesses testified on subject — Disputed exhibits also were admissible under business records exception to hearsay — Trial judge recognized shortcomings of evidence and found that witness K from S Ltd. was best person to interpret document created by computer, which was admissible as corporate document — Trial judge's ruling on this issue was not founded on any error of law, nor was it unreasonable.

Construction law --- Contracts — Breach of terms of contract — Miscellaneous
Evidence — Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor K Ltd. for grading of land development project — Project took longer than expected, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — Trial judge found that calculations from S Ltd.'s witness represented most reliable evidence of how much material was actually moved — Trial judge held that it was not unreasonable for S Ltd. to rely on dirt hauler's assurances that all clay had been delivered — T Ltd. appealed on ground, inter alia, that trial judge overlooked issue as to whether all clay acquired was delivered to site and that it was charged for clay that was never delivered — Appeal dismissed — While reasons could have been more comprehensive, it was not reviewable error for trial judge to fail to mention every piece of evidence presented and every argument made, and trial judge did not make palpable and overriding error — Trial judge relied on many pieces of evidence in coming to her conclusion about accuracy of invoices, and as issue was extensively

covered, it was unlikely it was overlooked.

Construction law --- Contracts — Breach of terms of contract — Breach by contractor — Defective workmanship — Miscellaneous
Defendant developer T Ltd. hired defendant engineering consulting firm S Ltd. and plaintiff contractor K Ltd. for grading of land development project — Project took longer than expected, and T Ltd. eventually fired K Ltd. and hired new company to do grading work — K Ltd. brought action for payment of invoices by T Ltd. — T Ltd. brought counterclaim for damages arising from breach of contract by K Ltd. and negligence by S Ltd. — Trial judge partially allowed action and dismissed counterclaim — Trial judge held that K Ltd.'s workmanship was not defective — Trial judge found that it was not proven that K Ltd. was responsible for failure of some lots to meet engineered fill requirements and that there was no evidence that K Ltd. improperly excavated borrow pits or used improper equipment — Trial judge held that failure could have been result of new company — T Ltd. appealed — Appeal dismissed — Trial judge's findings of fact were available on record and did not disclose palpable and overriding error — S Ltd.'s duty to monitor and supervise K Ltd.'s work did not mean that it became guarantor of performance of that work — T Ltd.'s argument that trial judge failed to note that K Ltd. kept spreading clay after testing stopped was not supported by findings — Trial judge's conclusion that K Ltd. had done compacting work in colder months did not reflect error, despite problematic record — T Ltd. did not show any reviewable error in trial judge's findings respecting testing costs.

APPEAL by developer from judgment reported at *Kon Construction Ltd. v. Terranova Developments Ltd.* (2014), 2014 ABQB 256, 2014 CarswellAlta 708, 35 C.L.R. (4th) 61 (Alta. Q.B.), partially granting contractor's action for payment of invoices and dismissing developer's counterclaim for damages from contractor and engineer.

***Per curiam*:**

1 This appeal arises from a dispute over the performance of an earth moving contract. The appellant developer, Terranova Developments Ltd., retained the respondent engineers, Scheffer Andrew Ltd., to design a residential subdivision in north Edmonton. Terranova later retained the respondent Kon Construction Ltd. to do the earth moving work required to grade the subdivision.

Facts

2 Preparing lands for subdivision generally includes stripping off the topsoil and marginal materials, and stockpiling them. The site is then filled with clay and leveled, and the topsoil and marginal materials are placed in appropriate locations. Clay can sometimes be obtained from borrow pits on one part of the land, to be placed in other areas that require filling. During its initial design work, Scheffer Andrew determined that achieving the required grades on the site in question would require significant quantities of clay (beyond what was available from borrow pits) from other off-site locations.

3 Kon Construction agreed to do the necessary work on a unit price basis. It was contemplated that the work would be done during the 2005 construction season, but a number of delays were experienced. Terranova had difficulty locating sufficient quantities of clay, wet weather interrupted the work, and a delay in subdivision approval prevented a timely completion of the project.

4 In June 2006, Terranova terminated Kon Construction's contract, and Terranova later hired another contractor to complete the work. The trial judge found that Terranova did not have grounds to terminate the contract as: (i) the delays in completion were not Kon Construction's fault, (ii) Scheffer Andrew never certified that Kon was in default as required by the contract, and (iii) Terranova failed to follow the termination procedures in the contract: *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2014 ABQB 256 (Alta. Q.B.) at paras. 70, 72, 79, 83, (2014), 35 C.L.R. (4th) 61 (Alta. Q.B.).

5 Kon Construction sued for its unpaid invoices. Terranova counterclaimed, alleging that Kon had abandoned the contract, it had not performed the contract in accordance with its terms, and it had not performed the work properly. Terranova also sued Scheffer Andrew, alleging that it negligently supervised the work. The trial judge gave extensive written

> them into a format that someone could understand. I did a calculation of the cut on the site — no, I didn't actually do the calculation because I'm a computer moron. But I directed someone to do the calculation based on reviewing the shots that were done on the site and we came up with a quantity based on that. As a check on the quantities that had been paid.
>
> Q Did you check them as against the PPCs [Progress Payment Certificates]?
>
> A Yes.
>
> Q And what were your findings?
>
> A The findings were that basically they balanced. Depending on how you take that information and how you use it, what kind of boundaries you put around it, the results can vary a little bit. (transcript, p. 2381, l. 13-26)

The trial judge found that this method and this evidence were reliable.

29 Klaver confirmed that a decision had to be made about which survey points to use. He extrapolated between known points to account for missing data, and adjusted the calculations 20% to factor in compaction of the soil. Those portions of the process are the only parts that seem to call for the application of "specialized knowledge", and are the only aspects of Exhibits 105 and 106 that arguably required expert evidence. Merely relying on and reporting on the volume calculations in the computer reports did not require any specialized knowledge.

Evidence from Witnesses with Expertise

30 When expert evidence is to be used, the Rules of Court require that the parties give notice to their opponents. When the witness is called, the trial judge will hear submissions and apply the test in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) to determine if the witness is qualified to give expert opinion evidence. The proposed evidence must be necessary to assist the trier of fact. The trial judge must also decide if the witness qualifies as having the necessary special knowledge. Once qualified, the expert witness will be permitted to give opinion evidence.

31 The Alberta *Rules of Court* define an "expert" widely as "a person who is proposed to give expert opinion evidence". Other provinces use a narrower definition; for example the Ontario *Rules* only apply to expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding": *Westerhof v. Gee Estate*, 2015 ONCA 206 (Ont. C.A.) at paras. 60, 80-1, (2015), 124 O.R. (3d) 721 (Ont. C.A.). The Ontario *Rules* have been interpreted as being directed mainly at controlling "hired gun" experts. The Alberta *Rules* on expert witnesses are, however, found in Part 5 of the *Rules* relating to "Disclosure of Information", and are directed as much at avoiding surprise at trial, which can lengthen trials or prompt adjournments. On their face, the Alberta *Rules* apply to any witness who proposes to give expert opinion evidence.

32 In this case, the witnesses Marinus Scheffer and Hans Klaver testified about Exhibits 105 and 106, and the other issues raised in the trial. Notices of expert evidence were not given as contemplated by the Rules, and neither of them was qualified by the trial judge as an expert witness.

33 Notwithstanding their wide wording, the *Rules* and the common law on expert witnesses largely contemplate the "external" expert witness who is retained to provide an opinion to assist the court. For example, in *White Burgess Langille Inman* at para. 32 the Court wrote:

> Underlying the various formulations of the duty [of the expert witness to the court] are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

This formulation of the duty of expert witnesses assumes that the expert has no interest or involvement in the case other than to provide his or her expert opinion on the issues.

34 The witnesses Marinus Scheffer and Hans Klaver fall in a gray area. They are "expert witnesses" in the sense that they have expertise: Scheffer is a professional engineer and Klaver is a surveyor. They were only involved in original work and this litigation because of their expertise. The respondent Scheffer Andrew was sued on the basis that it failed to properly apply Marinus Scheffer's and Klaver's expertise in administering the earthworks contract. They were not however "expert witnesses", in the sense that they were neither qualified by the trial judge as being capable of providing opinion evidence, nor did they provide advance notice of any expert opinions they were going to give. They were witnesses because they were involved in the very events that gave rise to the litigation, not because they had been hired as "expert witnesses" to provide objective, external evidence to assist the Court.

35 Thus, there would appear to be at least three categories of "witnesses with expertise", who in some respects are witnesses of fact, and in other respects opinion witnesses:

> (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by *White Burgess Langille Inman* and *Mohan*.
>
> (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
>
> (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. Marinus Scheffer and Klaver fall into this category.

The rules of evidence and civil procedure relating to expert witnesses are primarily designed to deal with the first category of expert witness.

36 The first category of "independent experts" must always be qualified by the trial judge under the *Mohan* procedure, and advance notice of their opinions must be given under the *Rules of Court*. External witnesses who are not so qualified are not permitted to give opinion evidence requiring specialized expertise. External expert witnesses are expected to display a basic level of independence and objectivity.

37 It is sometimes argued that the evidence of witnesses in the second category is not "opinion" evidence: *Westerhof* at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. Further, the overall objective of comprehensive disclosure found in R. 5.1(1)(c & d) supports the pre-trial disclosure of the opinions of participating experts.

38 The final category of litigant-witnesses with expertise does not fall neatly into the *White Burgess* and *Mohan* analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in *White Burgess Langille Inman*. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.

39 Under the common law, no witness with an interest in the outcome of the case was allowed to testify, on the assumption that their evidence was somehow "tainted": J.H. Baker, *An Introduction to English Legal History*, (4th ed.) (London: Butterworths, 2002) at p. 91. Thus, the parties to the litigation (who usually knew the most about the case) could not testify, and even the accused in a criminal case could not testify in his own defence. These rules were gradually stripped away by statute, and those provisions still exist in the *Alberta Evidence Act*, RSA 2000, c. A-18:

> 3(1) No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest.

> (2) A person offered as a witness shall be admitted to give evidence notwithstanding that the person has an interest in the matter in question or in the event of the action or that the person has been previously convicted of a crime or offence.
>
> 4(1) The parties to an action and the persons on whose behalf the action is brought, instituted, opposed or defended are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of themselves or of any of the parties.
>
> (2) The spouses and adult interdependent partners of the parties and persons mentioned in subsection (1) are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of any of the parties.
>
> (3) Nothing in this section makes the defendant in a prosecution under an Act of the Legislature compellable to give evidence for or against himself or herself.

The rule in *White Burgess Langille Inman* requiring external expert witnesses to have some level of independence and objectivity before they will be permitted to express opinions on matters requiring specialized knowledge is properly regarded as a narrow exception to these provisions, arising as a precondition to them giving opinion evidence.

40 Secondly, it is generally not necessary to qualify the last class of witnesses with expertise as "experts" under the *Mohan* procedure. As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues. The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did. Since these witnesses are available for pre-trial questioning, formal advance notice of their opinions or their evidence is not needed.

41 The issues are neatly illustrated by *Diotte c. R.*, 2008 TCC 244, 2008 D.T.C. 4558 (Fr.) (T.C.C. [General Procedure]), where the valuation of certain shares was in issue. Diotte was both the taxpayer involved in the litigation, one of the persons who had initially set the valuation of the shares, and a long-time employee of the securities industry. The attempt to have him qualified as an expert witness was summarily dismissed at para. 28, because "... it is unreasonable to believe that the Appellant Mr. Diotte could have offered an entirely objective opinion uninfluenced by his personal interest". Nevertheless, he was allowed to give evidence on how he set the value of the shares, and why that valuation was appropriate. His interest in the outcome of the case was not a barrier to his testimony. This evidence was, presumably, given by him as a lay witness, even though it clearly engaged his opinions about the value of the shares. Diotte was a witness with expertise, who was involved in the underlying events, and so was permitted to give evidence arising from his expertise even though he was not qualified as an "expert" under the *Mohan* test.

42 In this case, Klaver testified that he confirmed the amounts certified in the invoices by analyzing the raw data compiled in Exhibits 105 and 106. It would have been possible for the respondents to have attempted to qualify him as an expert to that extent, but the failure to do so is not fatal. The nature of his opinion about the invoices was well known, and lay at the heart of the litigation. The raw data he relied on had been disclosed, and was available for analysis by the appellant's external expert witness. Terranova was able to cross-examine Klaver fully to the extent that he justified his methodology using his expertise and experience. It is not apparent that the *Mohan* process has to be applied to a witness like Klaver, but in any event there was no miscarriage of justice.

43 To the extent that professional judgments had to be made about which surveys to select, and which computer programs to use, Marinus Scheffer and Klaver could also be cross-examined to test the evidence. They may have justified some of their choices because of their expert opinions about the proper procedures to use, but that does not render their evidence inadmissible as "expert evidence". The litigation alleged that they had not properly exercised their expertise, and they were entitled to defend themselves by explaining why they did what they did. Terranova retained Scheffer Andrew as an expert engineering firm to supervise the project, and to certify the invoices. When Scheffer Andrew was sued, it was entitled to explain how and why it did its work; the firm was hired because of its expertise, and it is inconsistent to now argue that it cannot demonstrate that it had any expertise. It cannot fairly be denied the opportunity to justify its work product on the basis that its officers and employees, who were hired (and later sued) because of their expertise, are now expressing "opinions". The independent experts retained by the parties could then express external expert opinions against this background about

whether the standard of care had been met.

Hearsay Underlying Electronic Records and Expert Evidence

44 Terranova has overlapping arguments about the source of the data in Exhibits 105 and 106. It argues that the raw data were collected in part by individual surveyors, none of whom testified. The computer programs were operated by unknown persons. The computer manipulated the data in ways and for reasons that are not entirely transparent. None of the witnesses who testified had any personal knowledge of any of this, which the appellant argues makes the evidence hearsay and inadmissible.

45 Terranova objects that it is not able to cross-examine the persons who actually gathered and entered the raw data. This argument is somewhat artificial, because it appears that much of the evidence was gathered electronically, and then transferred automatically to the computer that prepared the reports. As previously noted, the equipment in question has inherent reliability because of its acceptance by the professionals who use it, and its repeated use in the field, a process once described as "forms of enquiry and practice that are accepted means of decision within that expertise": *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.) at p. 899. It is not necessary for a litigant relying on this type of equipment to reprove the technology in every trial.

46 The rules of evidence permit the introduction of summaries of voluminous source documents, where it would be impractical and wasteful to expect the court or the jury to go through all of the source documents and extract the necessary inferences: *J.H. Ashdown Hardware Co. v. Singer* (1951), [1952] 1 D.L.R. 33, 3 W.W.R. (N.S.) 145 (Alta. C.A.) at pp. 148-9 affm'd [1953] 1 S.C.R. 252, [1953] 2 D.L.R. 625 (S.C.C.); *R. v. Scheel* (1978), 42 C.C.C. (2d) 31 (Ont. C.A.) at p. 34. It is generally a requirement that the source documents be disclosed to the opposing side, and introduced as part of the trial record. In this case there was considerable confusion surrounding the trial record: it appears that the disc holding the raw survey data may not have been included in the exhibit that referred to it. The raw survey measurements recorded electronically in the Total Station surveying equipment would not in any event have been of much assistance to the trial judge. Further, Terranova's expert witness could have had access to the source documents, but he was instructed not to go behind the data provided. Any deficiencies in the formal trial record do not result in reviewable errors.

47 Furthermore, it is unrealistic to think that experts work alone. Most professionals work in teams, and depend on input from a number of different sources within their organization: *White Burgess Langille Inman* at para. 61; *R. v. Prosser*, 2015 NBCA 7 (N.B. C.A.) at para. 39, (2015), 430 N.B.R. (2d) 154 (N.B. C.A.). Generally, only the head of a professional team is qualified as an expert, and testifies. The head of the team is entitled to testify about the work of the team, even if he or she does not have personal knowledge about every aspect of the work: *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875 (Alta. C.A.) at p. 880. It is unrealistic to think that each of the other team members should be called merely to testify that they followed their normal procedures in entering raw data. Absent some indication that there were flaws in the data entry or computer programming, judicial economy requires that the evidence all be entered through one witness.

48 In doing their day-to-day work, professionals routinely rely on the accuracy of the work done by others in the organization. Here the witnesses who testified relied on the work of other individual surveyors and data processors. The compilations of the raw data behind Exhibits 105 and 106 are not inadmissible just because they were prepared by teams of people not produced for cross-examination.

49 The two disputed exhibits also have many of the characteristics of business records, and so are admissible as an exception to the hearsay rule: *J.H. Ashdown Hardware Co.* at pp. 148-9. The raw data were collected by the automated equipment or the surveyors, and automatically transferred over or entered by data processors, in the ordinary discharge of their duties. At the time that the information was gathered and entered, these people had no motivation to fabricate or distort the information. Indeed, they were under a duty to record the information accurately, because the owner and the contractor depended on them to certify payments under the contract. There is at least a presumption that the work was reliably done, and that even if there were some errors on individual items the overall averaging and cross-referencing of data would render most errors non-material. The resulting computer compilations are admissible. The two witnesses who testified as to the implications of the compilations of data were available for cross-examination, which is all that can realistically be expected in the context of this trial.

TAB 15

2002 ABCA 79
Alberta Court of Appeal

Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.

2002 CarswellAlta 397, 2002 ABCA 79, [2002] 6 W.W.R. 444, [2002] A.W.L.D. 198, [2002] A.J. No. 372, 112 A.C.W.S. (3d) 776, 1 Alta. L.R. (4th) 14, 266 W.A.C. 250, 299 A.R. 250, 3 P.P.S.A.C. (3d) 101

Northwest Equipment Inc., Appellant and Daewoo Heavy Industries America Corporation, Respondent

Fruman, Wittmann JJ.A., Brooker J. (ad hoc)

Heard: April 20, 2001
Judgment: March 19, 2002
Docket: Calgary Appeal 0019094

Counsel: *A.G. Bell*, for Appellant
K.T. Lenz, for Respondent

Subject: Corporate and Commercial; Insolvency; Contracts

Headnote

Personal property security --- Disposition of collateral by debtor — Sale in ordinary course of business
Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement without notice to creditor — Dealer represented that excavator was unencumbered — Excavator was type of property used in more than one jurisdiction and creditor should have registered security interest in Washington to maintain perfection under s. 7 of Personal Property Security Act (PPSA) — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator, as required under s. 28(1)(a) of PPSA — U.S. company appealed — Appeal dismissed — Section 30(2) of PPSA did not apply as sale of excavator was not in ordinary course of dealer's business — U.S. company should have consulted B.C. personal property registry before buying equipment — Loss of perfection of creditor's security interest by failing to meet requirements of s. 7(3) of PPSA did not extinguish creditor's security interest — Purpose of perfection is to provide notice to third parties — U.S. company's interest in excavator remained subject to creditor's security interest while excavator was in U.S. — Personal Property Security Act, R.S.B.C. 1996, c. 359, ss. 7, 7(3), 28(1)(a), 30(2).

Personal property security --- Priority of security interest — Perfected versus unperfected interest
Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement without notice to creditor — Dealer represented that excavator was unencumbered — U.S. company leased excavator to third party and registered financing statement in Alberta — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator, as required under s. 28(1)(a) of PPSA — U.S. company appealed — Appeal dismissed — U.S. company did not perfect security interest in excavator by registering financing statement because agreement with third party was not security interest — U.S. company's interest in excavator remained subject to creditor's security interest — U.S. company did not have competing priority with creditor since it did not have security interest — U.S. company could have learned of creditor's secured interest by searching personal property registry in B.C. when it purchased excavator — No public policy or disclosure reason justified overriding s. 28(1)(a) by applying s. 35(1)(b) of PPSA to give

U.S. company priority — Personal Property Security Act, R.S.B.C. 1996, c. 359, ss. 28(1)(a), 35(1)(b).

Personal property security --- Conflict of laws — Determining jurisdiction
Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement, without notice to creditor — Dealer represented that excavator was unencumbered — U.S. company leased excavator to third party and registered financing statement in Alberta — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator — U.S. company appealed — Appeal dismissed — B.C. law applied because personal property security laws of B.C. and Alberta provided that perfection in this type of equipment was governed by law of jurisdiction where debtor was located when security interest attached — Debtor was located in B.C. when creditor acquired security interest — Section 7(2)(a) of Personal Property Security Act applied — Personal Property Security Act, R.S.B.C. 1996, c. 359, s. 7(2)(a).

APPEAL by U.S. owner of excavator from judgment which determined that equipment was purchased subject to security interest of creditor.

***Fruman J.A.*:**

1 Both Daewoo Heavy Industries America Corporation, the secured party, and Northwest Equipment Inc., the owner, claim priority over an excavator. The equipment was originally purchased by a British Columbia company, and a security interest was granted to Daewoo in that province. But the excavator had a taste for travel. It was sold to Northwest, and without Daewoo's knowledge, moved from British Columbia to Washington State. Later, again without Daewoo's knowledge, it was relocated to Alberta. There it was leased to a third party, and was ultimately seized by Daewoo. Northwest contests the seizure and Daewoo's claim to the excavator.

2 This judgment attempts to unearth the rudiments of priorities, unperfected security interests and interjurisdictional rules. As the excavator's sojourn in each location gives rise to different legal issues and analyses, each jurisdiction will be examined separately. The unifying factor is the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359.

3 British Columbia law applies because the personal property security laws of both British Columbia and Alberta provide that "the validity, perfection and effect of perfection or non-perfection of a security interest" in this type of equipment is governed by the law of the jurisdiction where the debtor was located when the security interest attached: (British Columbia *Personal Property Security Act*, *supra*, s. 7(2)(a); Alberta *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 7(2)(a)). The debtor was located in British Columbia when Daewoo acquired its security interest. Washington law has a similar, though not identical provision (*Uniform Commercial Code — Secured Transactions*, RCW 62A.9A-301(1)), but in any event, counsel did not provide expert evidence of Washington law, and relied on British Columbia law in respect of the Washington analysis. Therefore, British Columbia law generally applies to all three jurisdictions. Except as otherwise noted, references in this judgment are to the British Columbia statute, which is referred to as the *PPSA*.

British Columbia

4 Daewoo supplies heavy equipment, including excavators. Trainer Bros., a British Columbia corporation, sold and leased Daewoo's equipment, as well as heavy equipment manufactured by other companies.

5 In 1996, Daewoo began supplying equipment to Trainer Bros. in British Columbia. Trainer Bros. signed a security agreement, granting Daewoo a security interest in the inventory Daewoo had already supplied, as well as inventory to be supplied in the future. Among other clauses, the security agreement provided that Trainer Bros. would not sell any of the inventory supplied by Daewoo without Daewoo's written consent, unless the sale was in the ordinary course of Trainer Bros.' business. Trainer Bros. also undertook to notify Daewoo about any change in the location of the equipment (AB IV at 363).

On September 25, 1996, Daewoo registered a financing statement at the British Columbia Personal Property Registry.

6 In 1997, Daewoo sold Trainer Bros. the excavator that is the subject of this dispute. The purchase price of approximately US$150,000 was due on November 30, 1997, but was never paid. This was one of many defaults under the security agreement. The total outstanding debt owed to Daewoo is approximately US$1.5 million. Trainer Bros. has since declared bankruptcy.

7 Northwest is a Washington-based corporation that sells and leases construction equipment. In May 1998, prior to Trainer Bros.' bankruptcy, Northwest purchased the excavator from it as part of a larger asset purchase. According to Northwest, Trainer Bros.' negotiator, William Trainer, represented that the excavator was unencumbered (AB III at 149). The misrepresentation was repeated in writing in the Bill of Sale (AB V at 402). Although it was Northwest's usual practice to conduct encumbrance searches when it purchased earthmoving equipment, it did not search the British Columbia Personal Property Registry to determine if any security interests were registered against the excavator (AB III at 149-50).

8 Under the terms of the sale, Northwest was to receive seven pieces of equipment and a $300,000 loan from Trainer Bros., and Trainer Bros. was to receive 49% of the shares of Northwest. The loan was never made and the shares were never issued. Trainer Bros.' receiver eventually assigned all claims against Northwest to William Trainer's sister-in-law.

9 Northwest contends that the sale of the excavator was in the ordinary course of Trainer Bros.' business, and therefore, it took the excavator free from Daewoo's security interest. A master in chambers agreed. But on appeal *de novo* to the Court of Queen's Bench, a chambers judge decided that the sale of the excavator and other machinery for a minority interest in a U.S. corporation was not in the ordinary course of Trainer Bros.' business (AB I at 34). The chambers judge also decided that Daewoo had not expressly or impliedly consented to the sale of the excavator (AB I at 39). Accordingly, Northwest took the excavator subject to Daewoo's security interest.

10 Northwest appeals both findings.

Ordinary Course of Business

11 Section 28(1)(a)[1] of the *PPSA* states the general rule that a security interest continues if the collateral is dealt with. It is "not affected by a sale and can be enforced against the buyer": R. C. C. Cuming and R. J. Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at 182. The section is a statutory formulation of the *nemo dat* rule, a common law and common sense principle that one cannot give away more than one possesses. See D. A. Dukelow & B. Nuse, eds., *Dictionary of Canadian Law*, 2nd ed. (Scarborough: Carswell, 1995), *s.v. "nemo dat quod non habet"*.

12 Daewoo's security interest in the excavator attached when Trainer Bros. took possession of it in 1997.[2] Because a financing statement had already been registered, Daewoo then had a perfected security interest in the excavator.[3] The security interest was still perfected when Northwest purchased the excavator in 1998. Applying s. 28(1)(a), Trainer Bros. could not convey a greater interest in the excavator to Northwest than Trainer Bros. actually had. Because Trainer Bros.' interest was subject to Daewoo's perfected security interest, Northwest's interest would be similarly encumbered.

13 But s. 28(1)(a) does not always apply. In certain circumstances the *PPSA* has specifically replaced the *nemo dat* rule, permitting a transferee to receive greater rights in property than the transferor possessed. See *Giffen (Re)*, [1998] 1 S.C.R. 91 (S.C.C.) and *Donaghy v. CSN Vehicle Leasing* (1992), 132 A.R. 155 (Alta. Q.B.) (trustee in bankruptcy obtained better title to a leased good than the bankrupt possessed by virtue of s. 20((b)). Sales in the ordinary course of business under s. 30(2)[4] and transfers with consent under s. 28(1)(a) are exceptions to the *nemo dat* rule.

14 Under s. 30(2), a buyer of goods sold in the ordinary course of the seller's business takes the goods free from any perfected or unperfected security interest given by the seller. Its purpose "is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers which would otherwise result if such buyers were required in every case to conduct a search of the Personal Property Registry before buying goods": Cuming and Wood, *supra*, at 213. The focus is on commercial practicality: *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.), at 220-21. The ordinary course exception applies whether or not the buyer knew of the security interest, and even though the security agreement limited the

seller's rights to dispose of the goods. The exception does not apply if the buyer was aware that the transaction was in breach of the security agreement.

15 Accordingly, if Trainer Bros. sold the excavator in the ordinary course of its business, Northwest would acquire it free from Daewoo's security interest. Sales in the ordinary course of business are usually "carried out under normal terms and consistent with general commercial practices": Cuming and Wood, *supra*, at 215. The chambers judge decided the sale of equipment to Northwest was sufficiently unusual that it was outside the ordinary course of Trainer Bros.' business. He considered several factors, including:

- the transaction was a component of a share purchase arrangement, not a cash sale; Trainer Bros. ordinarily sold and leased inventory for cash;
- the form of transaction — shares and a loan back to the purchaser — was unusual; there had been no prior transactions by Trainer Bros. of a similar type;
- the purchaser was a dealer, not a construction company; Trainer Bros. ordinarily sold products to end users;
- the sale, which involved one-quarter of Trainer Bros.' inventory, constituted a comparatively large portion of overall sales;
- the transaction was not advertised;
- the transaction was concluded on the eve of insolvency; and
- the consideration was never tendered.

16 Because the chambers judge heard the appeal from the master's order *de novo*, this court reviews the chambers judge's decision as a judgment of a court of first instance. Provided a first instance judge considers the appropriate factors in deciding whether a transaction is in the ordinary course of business, a reviewing court will defer to the judge's findings: *369413 Alberta Ltd. v. Pocklington* (2000), 271 A.R. 280 (Alta. C.A.), at 289. The factors considered by the chambers judge were appropriate and provide ample evidence upon which he could conclude that the sale of the equipment by Trainer Bros. to Northwest was outside Trainer Bros.' ordinary course of business. This transaction was sufficiently unusual that Northwest should have consulted the British Columbia Personal Property Registry before buying the equipment.

Consent

17 The *PPSA* contains a second exception that permits a purchaser to acquire goods free from a secured charge. Under s. 28(1)(a), a security interest in collateral does not continue if the secured party expressly or impliedly authorized the transfer.

18 Northwest alleges that Daewoo consented to the sale of the excavator because Trainer Bros. discussed the restructuring of its business operations with Daewoo. The chambers judge decided that the discussions did not provide adequate or accurate disclosure of the arrangement between Trainer Bros. and Northwest (AB I at 37). Consequently, Daewoo neither expressly nor impliedly authorized the transaction. In reaching this conclusion, he considered the following factors:

- the corporate restructuring proposal contemplated revenue from sales, but the consideration for the actual transaction was a share deal, with no cash compensation;
- the proposal contemplated a location in Abbotsford, British Columbia, and did not mention transferring the equipment to Washington; and
- the proposal contemplated a rental arrangement, not an outright sale.

19 Additional evidence before the trial judge included:

[TAB 16]

Most Negative Treatment: Check subsequent history and related treatments.

2018 SCC 52, 2018 CSC 52
Supreme Court of Canada

Moore v. Sweet

2018 CarswellOnt 19478, 2018 CarswellOnt 19479, 2018 SCC 52, 2018 CSC 52, [2018] 3 S.C.R. 303, [2019] I.L.R. I-6120, 298 A.C.W.S. (3d) 401, 430 D.L.R. (4th) 315, 43 C.C.P.B. (2nd) 161, 84 C.C.L.I. (5th) 1

Michelle Constance Moore (Appellant) v. Risa Lorraine Sweet (Respondent)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: February 8, 2018
Judgment: November 23, 2018
Docket: 37546

Proceedings: reversing *Moore v. Sweet* (2017), 134 O.R. (3d) 721, 409 D.L.R. (4th) 312, 32 C.C.P.B. (2nd) 254, 65 C.C.L.I. (5th) 175, 2017 CarswellOnt 2958, 2017 ONCA 182, G.R. Strathy C.J.O., P. Lauwers J.A., R.A. Blair J.A. (Ont. C.A.); reversing in part *Moore v. Sweet* (2015), 2015 ONSC 3914, 2015 CarswellOnt 20995, H.J. Wilton-Siegel J. (Ont. S.C.J.)

Counsel: Ian M. Hull, Suzana Popovic-Montag, David M. Smith, for Appellant
Jeremy Opolsky, Jonathan Silver, for Respondent

Subject: Civil Practice and Procedure; Contracts; Insurance

Headnote

Insurance --- Contracts of insurance — Assignment of contract — Restrictions on assignment of life insurance
Applicant and deceased were married for more than 20 years — Applicant was named beneficiary of deceased's life insurance policy and from its inception until breakup of their marriage, deceased and applicant paid insurance premiums on policy from their joint account — Under oral agreement, applicant continued to pay premiums and policy remained in effect until her husband's death — Following divorce, deceased established relationship with respondent and contrary to oral agreement, deceased revoked applicant's designation and designated respondent as irrevocable beneficiary — Trial judge found that there was oral agreement between former spouses, which took form of equitable assignment, and that applicant should receive life insurance proceeds — Respondent appealed — Appeal was allowed — Court of Appeal ruled that trial judge erred in relying on doctrine of equitable assignment, which was not pleaded or argued, and that because record was not created on ground of equitable assignment, trial judge's findings with respect to it were unreliable — Applicant appealed — Appeal allowed — Designation of respondent as irrevocable beneficiary under ss. 190(1) and 191(1) of Insurance Act did not supersede applicant's contractual interest in receiving proceeds of policy — Constructive trust was appropriate remedy.

Equity --- Relief from unconscionable transactions — Unconscionable or improvident transactions — Unjust enrichment
After their divorce, applicant and deceased agreed that she would maintain his life insurance policy and then receive proceeds on his death — Following divorce, deceased established relationship with respondent and contrary to oral agreement, deceased revoked applicant's designation and designated respondent as irrevocable beneficiary — Trial judge ruled that there was oral agreement between former spouses, which took form of equitable assignment, and that applicant should receive life insurance proceeds — Respondent appealed — Appeal was allowed — Court of Appeal ruled that trial judge erred in failing to hold that there was valid juristic reason for respondent's receipt of policy proceeds and therefore in holding that proceeds were impressed with trust in applicant's favour based on unjust enrichment — Absent equitable assignment, provisions of Insurance Act, pursuant to which respondent was designated irrevocable beneficiary, operated to provide valid juristic reason for her receipt of insurance proceeds, making finding of unjust enrichment unavailable — Applicant appealed — Appeal allowed — Remedial constructive trust should be imposed for applicant's benefit — Applicant could establish that respondent was enriched and she herself was correspondingly deprived — Deprivation element did not require that disputed

benefit be conferred directly by applicant on respondent — Using straightforward economic approach focusing on what applicant actually lost, it could be seen that she was deprived of right to receive entirety of policy — Applicant upheld her end of bargain but did not get what she contracted for and from that perspective it was clear that respondent's enrichment came at applicant's expense — Because respondent received benefit that otherwise would have accrued to applicant, requisite correspondence existed — There was no justification in law or equity for fact that respondent was enriched at applicant's expense — Beneficiary designation made pursuant to ss. 190(1) and 191(1) of Act did not provide any reason in law or justice for respondent to retain disputed benefit notwithstanding applicant's prior contractual right to remain named as beneficiary and receive proceeds — Nothing in Act could be read as ousting common law or equitable rights that persons other than designated beneficiary may have in policy proceeds — Constructive trust was appropriate as personal remedy would be inadequate.

Assurance --- Contrats d'assurance — Cession du contrat — Restrictions concernant la cession d'une assurance-vie

Requérante et le défunt ont été mariés pendant plus de vingt ans — Requérante était la bénéficiaire désignée dans la police d'assurance-vie du défunt et dès le début de leur mariage et jusqu'à leur séparation, le défunt et la requérante ont payé les primes d'assurance des polices à partir de leur compte conjoint — À la suite d'une entente verbale, la requérante a continué de payer les primes et la police est demeurée en vigueur jusqu'à la mort du défunt — Après le prononcé du divorce, le défunt a commencé une relation avec l'intimée et, reniant l'entente verbale, le défunt a révoqué la désignation de la requérante et a désigné l'intimée comme bénéficiaire irrévocable de la police — Juge de première instance a conclu qu'il y avait une entente verbale entre les ex-conjoints sous la forme d'une cession en equity et que la requérante devrait recevoir le produit de l'assurance-vie — Intimée a interjeté appel — Appel a été accueilli — Cour d'appel a conclu que le juge de première instance avait commis une erreur en se fondant sur la doctrine de la cession en equity, laquelle n'avait été ni plaidée ni argumentée, et comme le dossier n'avait pas été créé sur la base d'une cession en equity, la conclusion du juge de première instance à son égard ne pouvait pas être retenue — Requérante a formé un pourvoi — Pourvoi accueilli — Désignation de l'intimée en tant que bénéficiaire irrévocable en vertu des art. 190(1) et 191(1) de la Loi sur les assurances l'emportait pas sur le droit contractuel de la requérante de recevoir le produit de la police — Réparation appropriée était une fiducie par interprétation.

Equity --- Redressement à l'égard d'une transaction inique — Transaction inique ou inconsidérée — Enrichissement sans cause

Après leur divorce, la requérante et le défunt se sont entendus pour qu'elle perpétue la police d'assurance-vie puis qu'elle reçoive le produit après la mort du défunt — Après le prononcé du divorce, le défunt a commencé une relation avec l'intimée et, reniant l'entente verbale, le défunt a révoqué la désignation de la requérante et a désigné l'intimée comme bénéficiaire irrévocable de la police — Juge de première instance a conclu qu'il y avait une entente verbale entre les ex-conjoints sous la forme d'une cession en equity et que la requérante devrait recevoir le produit de l'assurance-vie — Intimée a interjeté appel — Appel a été accueilli — Cour d'appel a conclu que le juge de première instance avait commis une erreur en ne concluant pas qu'il y avait un motif juridique valide pour que l'intimée reçoive le produit de la police et, par conséquent, en concluant qu'une fiducie avait été imposée sur le produit de la police en faveur de la requérante sur la base d'un enrichissement injustifié — En l'absence d'une cession en equity, les dispositions de la Loi sur les assurances, en vertu desquelles l'intimée était désignée comme bénéficiaire irrévocable, présentaient une base juridique valide lui permettant de recevoir le produit de l'assurance, de sorte qu'il n'était pas possible de conclure à l'enrichissement injustifié — Requérante a formé un pourvoi — Pourvoi accueilli — Il convenait d'imposer une fiducie par interprétation en faveur de la requérante à titre de réparation — Il était loisible à la requérante de démontrer que l'intimée s'était enrichie et qu'elle avait elle-même subi un appauvrissement correspondant — Élément d'appauvrissement ne requérait pas l'octroi direct, par la requérante à l'intimée, de l'avantage en litige — À la suite d'une analyse économique simple se concentrant sur ce que la requérante a effectivement perdu, il était possible de constater que la requérante a été privée du droit de recevoir l'intégralité du produit de la police — Requérante a respecté sa part du marché, mais n'a pas reçu ce qui était prévu en fait dans le contrat et, vu sous cet angle, il était manifeste que l'intimée s'était enrichie au détriment de la requérante — Comme l'intimée a reçu le bénéfice qui aurait autrement été conféré à la requérante, la correspondance requise existait — Enrichissement de l'intimée au détriment de la requérante n'était pas justifié par un motif en droit ou en equity — Désignation de bénéficiaire effectuée en vertu des art. 190(1) et 191(1) de la Loi ne fournissait pas de motif en droit ou en justice permettant à l'intimée de conserver la prestation en litige malgré le droit contractuel antérieur de la requérante de demeurer la bénéficiaire désignée et de recevoir le produit de la police d'assurance — Rien dans la Loi ne pouvait être considéré comme excluant les droits que peuvent avoir, en common law ou en equity, d'autres personnes que le bénéficiaire désigné sur le produit de la police d'assurance — Réparation qu'il convenait d'accorder était l'imposition d'une fiducie par interprétation puisque toute réparation personnelle s'avérerait inappropriée.

The applicant and the deceased were married for more than 20 years. The applicant was the named beneficiary of the deceased's life insurance policy. From its inception until the breakup of their marriage in 2000, the deceased and the applicant paid insurance premiums on the policy from their joint account. Under an oral agreement, the applicant continued to pay the premiums and the policy remained in effect until her ex-husband's death. Following the divorce, the deceased established a relationship with the respondent. Contrary to the oral agreement, the deceased revoked the applicant's designation and designated the respondent as the irrevocable beneficiary of the policy. The trial judge ruled that there was an oral agreement between the former spouses, which took the form of an equitable assignment and that the applicant should receive the life insurance proceeds. The respondent successfully appealed.

The Court of Appeal ruled that the trial judge erred in relying on the doctrine of equitable assignment, which was neither pleaded nor argued. Because the record was not created on the ground of equitable assignment, the application judge's findings with respect to it were unreliable. The trial judge leaped directly from an oral agreement to a conclusion that the deceased intended to make an absolute assignment of the property. The trial judge also erred in failing to hold that there was a valid juristic reason for the respondent's receipt of the policy proceeds and therefore in holding that the proceeds were impressed with a trust in the applicant's favour based on unjust enrichment. Absent equitable assignment, the provisions of the Insurance Act, pursuant to which the respondent was designated the irrevocable beneficiary, operated to provide a valid juristic reason for her receipt of the insurance proceeds, making a finding of unjust enrichment unavailable. The applicant appealed.

Held: The appeal was allowed.

Per Côté J. (Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Martin JJ. concurring): In these circumstances, a remedial constructive trust should be imposed for the applicant's benefit. The applicant could establish that the respondent was enriched and she herself was correspondingly deprived. The parties agreed that the respondent was enriched to the full extent of the insurance policy through her right to receive the insurance proceeds as the designated irrevocable beneficiary. The issue remained whether the applicant could prove that she suffered a corresponding deprivation.

The measure of the applicant's deprivation was not limited to her out-of-pocket expenditures or to the benefit taken directly from her, but her loss also included the benefit that was never in her possession but would have accrued for her benefit had it not been received by the respondent instead. The deprivation element did not require that the disputed benefit be conferred directly by the applicant on the respondent. Using a straightforward economic approach focusing on what the applicant actually lost, it could be seen that the applicant was deprived of the right to receive the entirety of the policy. Given that the applicant held up her end of the bargain and kept the policy alive by paying the premiums, did not predecease the insured, and still did not get what she contracted for, it would be artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds. From this perspective it was clear that the respondent's enrichment came at the applicant's expense. Because the respondent received the benefit that otherwise would have accrued to the applicant, the requisite correspondence existed.

There was no justification in law or equity for the fact that the respondent was enriched at the applicant's expense in order for the claim to succeed. The beneficiary designation made pursuant to ss. 190(1) and 191(1) of the Insurance Act made it clear that the respondent was the person to whom the insurance proceeds were payable. This was a juristic reason for the respondent to retain the proceeds. The corresponding deprivation also needed a juristic reason but there was not one present. The designation did not provide any reason in law or justice for the respondent to retain the disputed benefit notwithstanding the applicant's prior contractual right to remain named as beneficiary and therefore to receive the proceeds. Nothing in the Insurance Act could be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. The applicant made out a prima facie case. As well, policy reasons favoured the applicant.

The appropriate remedy was the imposition of a constructive trust. The applicant was able to establish that a personal remedy would be inadequate and that the applicant's contribution that founded the action was linked or causally connected to the property over which the trust was claimed. The trial judge concluded that the applicant had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment and ordered that the respondent hold the proceeds in a constructive trust for the applicant. The trial judge's analysis of the right to recover for unjust enrichment was different, but his conclusion regarding the propriety of a remedial constructive trust should be left alone. The money had been paid into court and was ready to be impressed with a constructive trust. Ordering that the money be paid to the respondent and then requiring the applicant to enforce the judgment would unnecessarily complicate the process and create a risk of loss.

The proceeds of the policy, with accrued interest, were ordered to be impressed with a constructive trust in favour of the applicant and be paid out of court for her benefit.

Per Gascon, Rowe JJ. (dissenting): The appeal should be dismissed. There was no basis on which to impose a constructive trust in the circumstances. The majority at the Court of Appeal were correct in their reasons on the issue. The applicant also failed to establish a claim based on unjust enrichment as it could not be made out on the facts. The applicant only asserted that she had contractual rights to the proceeds and did not establish a proprietary or equitable interest in the proceeds themselves. The applicant's contract with the insured was for her to be maintained as the beneficiary of the policy while she paid the premiums and the contract did not create a proprietary or equitable interest in the policy's proceeds. Simply being named as a beneficiary did not give the applicant a right in the proceeds before the death of the insured. The right to the proceeds only crystallized upon the insured's death. At the time of the insured's death, the only rights that the applicant possessed in relation to the life insurance contract were her contractual rights. The insured's estate had no assets, so any claim for breach of contract would have been pointless.

There was no correlative deprivation between the applicant's failed contractual expectations and the respondent's enrichment. The applicant's deprivation did not correspond with the respondent's enrichment. The applicant's inability to enforce her contractual rights was not the same as the respondent's statutory entitlement to proceeds. The Insurance Act provided a clear juristic reason for any enrichment the respondent could have received through the applicant's loss as a creditor of the deceased's insolvent estate. Opening up irrevocable beneficiary designations to challenges by an insured's creditors would risk creating enormous amounts of litigation, which was the situation the government was clearly trying to avoid.

La requérante et le défunt ont été mariés pendant plus de vingt ans. La requérante était la bénéficiaire désignée dans la police d'assurance-vie du défunt. Dès le début de leur mariage et jusqu'à leur séparation en 2000, le défunt et la requérante ont payé les primes d'assurance des polices à partir de leur compte conjoint. À la suite d'une entente verbale, la requérante a continué de payer les primes et la police est demeurée en vigueur jusqu'à la mort du défunt. Une fois le divorce prononcé, le défunt a commencé une relation avec l'intimée. Reniant l'entente verbale, le défunt a révoqué la désignation de la requérante et a désigné l'intimée comme bénéficiaire irrévocable de la police. Le juge de première instance a conclu qu'il y avait une entente verbale entre les ex-conjoints sous la forme d'une cession en equity et que la requérante devrait recevoir le produit de l'assurance-vie. L'intimée a interjeté appel avec succès.

La Cour d'appel a conclu que le juge de première instance avait commis une erreur en se fondant sur la doctrine de la cession en equity, laquelle n'avait été ni plaidée ni argumentée. Comme le dossier n'a pas été créé sur la base d'une cession en equity, la conclusion du juge de première instance à son égard ne pouvait pas être retenue. Le juge de première instance s'est fondé sur l'entente verbale pour directement sauter à la conclusion que le défunt avait eu l'intention de faire une cession absolue des biens. Le juge de première instance a également commis une erreur en ne concluant pas qu'il y avait un motif juridique valide pour que l'intimée reçoive le produit de la police et, par conséquent, en concluant qu'une fiducie avait été imposée sur le produit de la police en faveur de la requérante sur la base d'un enrichissement injustifié. En l'absence d'une cession en equity, les dispositions de la Loi sur les assurances, en vertu desquelles l'intimée était désignée comme bénéficiaire irrévocable, présentaient une base juridique valide lui permettant de recevoir le produit de l'assurance, de sorte qu'il n'était pas possible de conclure à l'enrichissement injustifié. La requérante a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Côté, J. (Wagner, J.C.C., Abella, Moldaver, Karakatsanis, Brown, Martin, JJ., souscrivant à son opinion) : Compte tenu des circonstances du présent dossier, il convenait d'imposer une fiducie par interprétation en faveur de la requérante à titre de réparation. Il était loisible à la requérante de démontrer que l'intimée s'était enrichie et qu'elle avait elle-même subi un appauvrissement correspondant. Les parties s'entendaient pour dire que l'intimée s'était enrichie du plein montant de la police d'assurance grâce à son droit de recevoir le produit de l'assurance à titre de bénéficiaire irrévocable. La question qui restait à trancher était celle de savoir si la requérante pouvait démontrer qu'elle avait subi un appauvrissement correspondant.

La mesure de l'appauvrissement de la requérante ne se limitait pas à ses dépenses ni à l'avantage qui lui a été pris directement, mais sa perte englobait également l'avantage qui n'a jamais été en la possession de la requérante, mais qui lui serait revenu s'il n'avait pas plutôt été remis à l'intimée. L'élément d'appauvrissement ne requérait pas l'octroi direct, par la requérante à l'intimée, de l'avantage en litige. À la suite d'une analyse économique simple se concentrant sur ce que la requérante a effectivement perdu, il était possible de constater que la requérante a été privée du droit de recevoir l'intégralité

du produit de la police. Puisque la requérante a respecté sa part du marché, qu'elle a maintenu la police en vigueur en payant les primes, qu'elle n'est pas décédée avant le défunt et, malgré tout, qu'elle n'a pas reçu ce qui était prévu en fait dans le contrat, il paraîtrait artificiel de prétendre que sa perte était autre que le droit de recevoir la totalité du produit de l'assurance. Vu sous cet angle, il était tout aussi manifeste que l'intimée s'était enrichie au détriment de la requérante. Comme l'intimée a reçu le bénéfice qui aurait autrement été conféré à la requérante, la correspondance requise existait.

Pour avoir gain de cause, la requérante devait tout de même démontrer que l'enrichissement de l'intimée à son détriment n'était pas justifié par un motif en droit ou en equity. Il était manifeste, compte tenu de la désignation de bénéficiaire effectuée en vertu des art. 190(1) et 191(1) de la Loi sur les assurances, que l'intimée était la personne à qui l'on devait remettre le produit de l'assurance. Il s'agissait-là d'un motif juridique permettant à l'intimée de conserver le produit. Bien que l'appauvrissement correspondant devait également être fondé sur un motif juridique, il n'y en avait aucun en l'espèce. La désignation ne fournissait pas de motif en droit ou en justice permettant à l'intimée de conserver la prestation en litige malgré le droit contractuel antérieur de la requérante de demeurer la bénéficiaire désignée et, par conséquent, de recevoir le produit de la police d'assurance. Rien dans la Loi sur les assurances ne pouvait être considéré comme excluant les droits que peuvent avoir, en common law ou en equity, d'autres personnes que le bénéficiaire désigné sur le produit de la police d'assurance. La requérante a établi une preuve prima facie. Aussi, des motifs fondés sur la police penchaient en faveur de la requérante.

La réparation qu'il convenait d'accorder était l'imposition d'une fiducie par interprétation. La requérante a été en mesure de démontrer qu'une réparation personnelle serait insuffisante et que sa contribution à la base de l'action avait un lien ou un rapport de causalité avec le bien à l'égard duquel l'existence d'une fiducie était soulevée. Le juge de première instance a conclu que la requérante avait établi avoir droit à l'intégralité du produit de la police d'assurance-vie sur le fondement de l'enrichissement sans cause, et a ordonné à l'intimée de détenir ce produit en fiducie par interprétation pour le compte de la requérante. L'analyse faite par le juge de première instance du droit de la requérante au recouvrement pour remédier à l'enrichissement était différente, mais il n'y avait aucune raison de modifier sa conclusion concernant l'à-propos d'imposer une fiducie par interprétation. L'argent a été déposé au greffe du tribunal et il était facile de lui imposer une fiducie par interprétation. Si l'on ordonnait que l'argent consigné au tribunal soit versé à l'intimée, et ensuite que la requérante fasse exécuter le jugement, cela compliquerait inutilement le processus et ferait naître aussi le risque de perte. L'imposition d'une fiducie par interprétation a été ordonnée en faveur de la requérante sur le produit de la police d'assurance, ainsi que les intérêts accumulés, de même que le retrait de ces sommes du greffe du tribunal et leur versement au bénéfice de la requérante.

Gascon, Rowe, JJ. (dissidents) : Le pourvoi devrait être rejeté. Il n'y avait aucun fondement permettant d'imposer une fiducie par interprétation dans les circonstances. Les motifs des juges majoritaires de la Cour d'appel sur la question étaient justes. La requérante n'a pas réussi à établir un droit fondé sur un enrichissement injustifié puisque les faits ne le permettaient pas. La requérante a seulement fait valoir qu'elle avait des droits contractuels à l'égard du produit, mais n'a pas établi un droit de propriété ou en equity dans le produit lui-même. En vertu du contrat liant la requérante au défunt assuré, la requérante devait être maintenue comme bénéficiaire de la police tant et aussi longtemps qu'elle payait les primes, mais le contrat ne créait pas un droit de propriété ou en equity dans le produit de la police. Le fait d'être simplement désignée comme bénéficiaire ne conférait pas à la requérante un droit dans le produit avant le décès du défunt assuré. Le droit dans le produit ne se cristallisait qu'au moment du décès. Lorsque le décès du défunt assuré est survenu, les seuls droits que la requérante avait par rapport au contrat d'assurance-vie étaient ses droits contractuels. La succession du défunt n'avait aucun actif et toute réclamation pour rupture de contrat aurait été inutile.

Il n'y avait aucun appauvrissement corrélatif entre les attentes contractuelles déçues de la requérante et l'enrichissement de l'intimée. Il n'y avait pas de lien entre l'appauvrissement de la requérante et l'enrichissement de l'intimée. L'impossibilité de la requérante de faire valoir ses droits contractuels ne correspondait pas au droit statutaire de l'intimée au produit. La Loi sur les assurances fournissait un motif juridique clair à l'appui de tout enrichissement dont aurait bénéficié l'intimée par le biais de la perte subie par la requérante en tant que créancière de la succession insolvable du défunt. Exposer les désignations irrévocables de bénéficiaires aux contestations des créanciers de l'assuré risquerait de constituer une recette parfaite pour entraîner des litiges, une situation que le législateur souhaitait manifestement éviter.

APPEAL of judgment reported at *Moore v. Sweet* (2017), 2017 ONCA 182, 2017 CarswellOnt 2958, 65 C.C.L.I. (5th) 175, 32 C.C.P.B. (2nd) 254, 134 O.R. (3d) 721, 409 D.L.R. (4th) 312 (Ont. C.A.).

POURVOI formé à l'encontre d'un jugement publié à *Moore v. Sweet* (2017), 2017 ONCA 182, 2017 CarswellOnt 2958, 65 C.C.L.I. (5th) 175, 32 C.C.P.B. (2nd) 254, 134 O.R. (3d) 721, 409 D.L.R. (4th) 312 (Ont. C.A.).

***Côté J.* (*Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Martin JJ.* concurring):**

I. Overview

1 This appeal involves a contest between two innocent parties, both of whom claim an entitlement to the proceeds of a life insurance policy.

2 The appellant, Michelle Constance Moore ("Michelle"), and the owner of the policy, Lawrence Anthony Moore ("Lawrence"), were former spouses. They entered into a contractual agreement pursuant to which Michelle would pay all of the policy's premiums and, in exchange, Lawrence would maintain Michelle as the sole beneficiary thereunder — and she would therefore be entitled to receive the proceeds of the policy upon Lawrence's death. While Michelle held up her end of the bargain, Lawrence did not. Shortly after assuming his contractual obligation, and unbeknownst to Michelle, Lawrence designated his new common law spouse — the respondent, Risa Lorraine Sweet ("Risa") — as the *irrevocable* beneficiary of the policy. When Lawrence passed away several years later, the proceeds were payable to Risa and not to Michelle.

3 Should these proceeds be impressed with a constructive trust in Michelle's favour? A majority of the Ontario Court of Appeal found that they should not. I disagree; in my view, Risa was enriched, Michelle was correspondingly deprived, and both the enrichment and the deprivation occurred in the absence of a juristic reason. In these circumstances, a remedial constructive trust should be imposed for Michelle's benefit. I would therefore allow the appeal.

II. Context

4 Michelle and Lawrence were married in 1979. Together, they had three children. In October 1985, Lawrence purchased a term life insurance policy from Canadian General Life Insurance Company, the predecessor of RBC Life Insurance Company ("Insurance Company"). He purchased this policy, with a coverage amount of $250,000, and initially designated Michelle as the beneficiary — but not as an *irrevocable* beneficiary. The annual premium of $507.50 was paid out of the couple's joint bank account until 2000.

5 In December 1999, Michelle and Lawrence separated. Shortly thereafter, they entered into an oral agreement ("Oral Agreement") whereby Michelle "would pay the premiums and be entitled to the proceeds of the Policy on [Lawrence's] death" (Superior Court decision, 2015 ONSC 3914 (Ont. S.C.J.), at para. 13 (CanLII)). The effect of this agreement was therefore to require that Michelle remain designated as the sole beneficiary of Lawrence's life insurance policy.

6 In the summer of 2000, Lawrence began cohabiting with Risa. They remained common law spouses and lived in Risa's apartment until Lawrence's death 13 years later.

7 On September 21, 2000, Lawrence executed a change of beneficiary form designating Risa as the *irrevocable* beneficiary of the policy. Risa testified that Lawrence did so because he did not want her to worry about how she would pay the rent or buy medication, and wanted to make sure that she would be able to continue living in the building where she had resided for the preceding 40 years.

8 The change in beneficiary designation was made through, and after consultation with, Lawrence's insurance broker, who also happened to be Michelle's brother-in-law. The new designation was recorded by the Insurance Company on September 25, 2000. Although Lawrence did not change the beneficiary designation surreptitiously, he did not advise Michelle that she was no longer named as beneficiary.[1]

9 Michelle and Lawrence entered into a formal separation agreement in May 2002. This agreement dealt with a number of issues as between them, but was silent as to the policy and anything related to it. They finalized their divorce on October 3,

2003.

10 Pursuant to her obligation under the Oral Agreement, and without knowing that Lawrence had named Risa as the irrevocable beneficiary, Michelle continued to pay all of the premiums on the policy until Lawrence's death. By then, a total of $30,535.64 had been paid on account of premiums; about $7,000 had been paid since 2000.

11 Lawrence died on June 20, 2013. His estate had no significant assets.

12 Michelle was advised by the Insurance Company that she was not the designated beneficiary of the policy on July 5, 2013, around two weeks after Lawrence's death. On February 12, 2014, Michelle commenced an application seeking the opinion, advice and direction of the Ontario Superior Court of Justice as to her entitlement to the proceeds of the policy. Pursuant to a court order dated December 19, 2013, the Insurance Company paid the proceeds of the policy into court pending the resolution of the dispute.

13 Part V of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out a comprehensive scheme that governs the rights and obligations of parties to a life insurance policy. It applies to all life insurance contracts "[d]espite any agreement, condition or stipulation to the contrary" (s. 172(1)), which means that the parties cannot contract out of its provisions.

14 Of particular relevance for the purposes of this appeal are the provisions of the *Insurance Act* that deal with the designation of beneficiaries. A "beneficiary" of a life insurance policy is defined as "a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration" (s. 171(1)). A beneficiary designation therefore identifies the intended recipient of the proceeds under the life insurance policy upon the death of the insured person, in accordance with the terms of the policy.

15 Part V of the *Insurance Act* recognizes two types of beneficiary designations: those that are *revocable* and those that are *irrevocable*. A revocable beneficiary designation is one that can be altered or revoked by the insured without the beneficiary's knowledge or consent (s. 190(1) and (2)). An irrevocable beneficiary designation, by contrast, can be altered or revoked only if the designated beneficiary consents (s. 191(1)). When a valid irrevocable beneficiary designation is made, s. 191 of the *Insurance Act* makes clear that the insurance money ceases to be subject to the control of the insured, is not subject to the claims of the insured's creditors and does not form part of the insured's estate.

16 It is clear that the interest of an irrevocable beneficiary is afforded much more protection than that of a revocable beneficiary; the former has a "statutory right to remain as the named beneficiary entitled to receive the insurance moneys unless he or she consents to being removed" (Court of Appeal decision, 2017 ONCA 182, 134 O.R. (3d) 721 (Ont. C.A.), at para. 82). The legislation contemplates only one situation where insurance money can be clawed back from a beneficiary, regardless of whether his or her designation is irrevocable: to satisfy a support claim brought by a dependant against the estate of the now-deceased insured person (*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 58 and 72(1)(f)). No such claim has been brought in this case.

17 Part V of the *Insurance Act* also deals with the assignment of a life insurance policy. A life insurance contract entails a promise by the insurer "to pay the contractual benefit when the insured event occurs" (*Norwood on Life Insurance Law in Canada* (3rd ed. 2002), by D. Norwood and J. P. Weir, at p. 359). It can therefore be understood as creating a chose in action against the insurer, which is transferrable from one person to another through the mechanism of an assignment. The statute provides that where the assignee gives written notice of the assignment to the insurer, he or she assumes all of the assignor's rights and interests in the policy. Pursuant to s. 200(1)(b) of the *Insurance Act*, however, an assignee's interest in the policy will not have priority over that of an irrevocable beneficiary who was designated prior to the time the assignee gave notice to the insurer — unless the irrevocable beneficiary consents to the assignment and surrenders his or her interest in the policy.

18 The relevant provisions of the *Insurance Act* read as follows:

> **190** (1) Subject to subsection (4),[2] an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.
>
> (2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.

. . . . .

> **191** (1) An insured may in a contract, or by a declaration other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate.
>
> (2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.
>
> **200** (1) Where an assignee of a contract gives notice in writing of the assignment to the insurer at its head or principal office in Canada, the assignee has priority of interest as against,
>
> (a) any assignee other than one who gave notice earlier in like manner; and
>
> (b) a beneficiary other than one designated irrevocably as provided in section 191 prior to the time the assignee gave notice to the insurer of the assignment in the manner prescribed in this subsection.
>
> (2) Where a contract is assigned as security, the rights of a beneficiary under the contract are affected only to the extent necessary to give effect to the rights and interests of the assignee.
>
> (3) Where a contract is assigned unconditionally and otherwise than as security, the assignee has all the rights and interests given to the insured by the contract and by this Part and shall be deemed to be the insured.

. . . . .

III. Decisions Below

A. Ontario Superior Court of Justice (Wilton-Siegel J.) — 2015 ONSC 3914 (Ont. S.C.J.)

19 The application judge, Wilton-Siegel J., held that Risa had been unjustly enriched at Michelle's expense, and therefore impressed the proceeds of the policy with a constructive trust in Michelle's favour. He began his reasons by addressing a preliminary matter: the Oral Agreement that Lawrence and Michelle had entered into during their separation. He held that Michelle and Lawrence "each had an equitable interest in the proceeds of the Policy from the time that it was taken out" and that the Oral Agreement had effectively resulted in the "equitable assignment to [Michelle] of [Lawrence's] equitable interest in the proceeds in return for [Michelle's] agreement to pay the premiums on the Policy" (para. 17) (CanLII). According to the application judge, this equitable interest "took the form of a right to determine the beneficiary of the Policy" (para. 18).

20 The application judge then turned to Michelle's unjust enrichment claim. He found that the first two elements of the cause of action in unjust enrichment — an enrichment of the defendant and a corresponding deprivation suffered by the plaintiff — were easily met in this case: Risa had been enriched by virtue of her valid designation as irrevocable beneficiary, and Michelle had suffered a corresponding deprivation to the extent that she paid the premiums and to the extent that the proceeds had been payable to Risa "notwithstanding the prior equitable assignment of such proceeds to her" (para. 27). With respect to the third and final element — the absence of a juristic reason for the enrichment — the application judge held that Risa's designation as beneficiary under the policy did not constitute a juristic reason that entitled her to retain the proceeds in the particular circumstances of this case (para. 46). This was because Risa's entitlement to the proceeds would not have been possible if Michelle had not performed her obligations under the Oral Agreement, and because the Oral Agreement itself amounted to an equitable assignment of the proceeds to Michelle (para. 48).

B. Ontario Court of Appeal (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting) — 2017 ONCA 182, 134 O.R. (3d) 721 (Ont. C.A.)

21 The Ontario Court of Appeal allowed Risa's appeal and set aside the judgment of the application judge. It ordered that the $7,000 Michelle had paid in premiums between 2000 and 2013 be paid out of court to her and that the balance of the

insurance proceeds be paid to Risa.

(1) Majority Reasons

22 Writing for himself and for Strathy C.J.O., Blair J.A. held that it was not open to the application judge to find that the Oral Agreement amounted to an equitable assignment, since the doctrine of equitable assignment had not been placed in issue by the parties before him.

23 Turning to Michelle's unjust enrichment claim, Blair J.A. accepted the application judge's finding that Risa was enriched. He found it unnecessary to resolve the issue of whether the corresponding deprivation element had been made out as he found there was a juristic reason justifying the receipt by Risa of the proceeds. Specifically, Blair J.A. held that the application judge had erred in his approach to the juristic reason element of the unjust enrichment framework — first, by failing to recognize the significance of Risa's designation as an *irrevocable* beneficiary, and second, by failing to apply the two-stage analysis mandated by this Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.). In Blair J.A.'s view, "the existence of the statutory regime relating to revocable and irrevocable beneficiaries ... falls into an existing recognized category of juristic reason", constituting "both a disposition of law and a statutory obligation" (para. 99).

24 Blair J.A. declined to decide whether a constructive trust can be imposed only to remedy unjust enrichment and wrongful acts or can also be based on the more elastic concept of "good conscience". He took the position that there was nothing in the circumstances of this case that put it in some "good conscience" category beyond what was captured by unjust enrichment and wrongful act.

(2) Dissenting Reasons

25 In dissent, Lauwers J.A. agreed with the majority that the application judge had erred in relying on the equitable assignment doctrine. However, he disagreed with the majority as to the disposition of Michelle's unjust enrichment claim and the propriety of imposing a constructive trust over the proceeds in these circumstances. He would therefore have dismissed the appeal.

26 Lauwers J.A. began by considering this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), and held that it leaves open four routes by which a constructive trust may be imposed: (1) as a remedy for unjust enrichment; (2) for wrongful acts; (3) in circumstances where its availability has long been recognized; and (4) otherwise where good conscience requires it. According to Lauwers J.A., in relation to the fourth route, the *Soulos* court anticipated that the law of remedial trusts would continue to develop in a way that accommodates the changing needs and mores of society.

27 On the issue of unjust enrichment, Lauwers J.A. concluded that Michelle had made out each of the requisite elements and that a constructive trust ought therefore to be imposed over the proceeds in her favour. With respect to the corresponding deprivation element, he rejected the submission that Michelle's financial contribution was the correct measure of her deprivation, and instead found that the asset for which she had paid and of which she stood deprived was the full payout of the life insurance proceeds — not just the amount she had paid in premiums.

28 Lauwers J.A. also rejected the proposition that the applicable *Insurance Act* provisions provided a juristic reason for Risa's retention of the proceeds. In his view, Michelle's entitlement to the insurance proceeds as against Risa was neither precluded nor affected by the operation of the *Insurance Act*. He also held that a juristic reason could not be found based on the parties' reasonable expectations or public policy considerations.

29 Finally, regarding to the imposition of a constructive trust, Lauwers J.A. considered a number of other cases that involved disappointed beneficiaries. Noting that these cases fit awkwardly under the unjust enrichment rubric, he observed that:

> ... the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* — circumstances where the availability of a trust has previously been recognized — and the fourth route — where good conscience otherwise demands it, quite independent of unjust

enrichment. [para. 276]

IV. Issues

30 The issues in this case are as follows:

A. Has Michelle made out a claim in unjust enrichment by establishing:

(1) Risa's enrichment and her own corresponding deprivation; and

(2) the absence of any juristic reason for Risa's enrichment at her expense?

B. If so, is a constructive trust the appropriate remedy?

V. Analysis

31 In the present case, Michelle requests that the insurance proceeds be impressed with a constructive trust in her favour. The primary basis on which she seeks this remedy is unjust enrichment. In the alternative, she submits that the circumstances of her case provide a separate good conscience basis upon which a court may impose a constructive trust.

32 A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (*Waters' Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 478). In Canada, it is understood primarily as a *remedy*, which may be imposed at a court's discretion where good conscience so requires. As McLachlin J. (as she then was) noted in *Soulos*:

> ... under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. ... Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate. [Emphasis added; para. 43.]

33 What is therefore crucial to recognize is that a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust. The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), at paras. 50-51). Absent this, a plaintiff seeking the imposition of a remedial constructive trust must point to some other basis on which this remedy can be imposed, like breach of fiduciary duty.[3]

34 I now turn to consider Michelle's claim in unjust enrichment.

A. Unjust Enrichment

35 Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788, "At the heart of the doctrine of unjust enrichment ... lies the notion of restoration of a benefit which justice does not permit one to retain."

36 Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a

failed or ineffective transaction, or at the defendant's request (*Peel (Regional Municipality)*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.

37 In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 *Can. Bus. L.J.* 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), and *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.), per Laskin J., dissenting). Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.

38 This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*, at para. 32). As observed by McLachlin J. in *Peel (Regional Municipality)* (at p. 788):

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

39 Justice and fairness are at the core of the dispute between Michelle and Risa, both of whom are innocent parties. Moreover, and to complicate matters, resolution of this dispute requires this Court to consider the elements of an unjust enrichment claim as they apply in a context that involves several parties. Pursuant to her Oral Agreement with Lawrence, Michelle paid around $7,000 in premiums to the Insurance Company between 2000 and 2013 in exchange for the right to remain named as beneficiary of the policy. When Lawrence passed away, however, the insurance proceeds (which totalled $250,000) were payable by the Insurance Company not to Michelle, but to Risa — the person whom Lawrence had subsequently named the irrevocable beneficiary, contrary to the contractual obligation he owed to Michelle. The result of this arrangement was that Risa's enrichment was significantly greater than Michelle's out-of-pocket loss. Moreover, Risa was entitled to receive the proceeds from the Insurance Company by virtue of her designation as irrevocable beneficiary, pursuant to ss. 190 and 191 of the *Insurance Act*.

40 These unusual circumstances raise two distinct questions respecting the law of unjust enrichment. First, what is the proper measure of Michelle's deprivation, and in what sense does it "correspond" to Risa's gain? Second, does the legislative framework at issue provide a juristic reason for Risa's enrichment and Michelle's corresponding deprivation — and if not, can such a juristic reason be found on some other basis? I will deal with each of these questions in turn.

(1) Risa's Enrichment and Michelle's Corresponding Deprivation

41 The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (*Kerr*, at para. 37; *Garland*, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr*, at para. 38; *Garland*, at para. 31; *Peel (Regional Municipality)*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.), at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (S.C.C.) ("*PIPSC*"), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

42 The parties in the present case do not dispute the fact that Risa was enriched to the full extent of the $250,000 by virtue of her right to receive the insurance proceeds as the designated irrevocable beneficiary. The application judge found as much (at para. 27), and this finding is not contested on appeal.

43 In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also *Peel (Regional Municipality)*, at pp. 789-90, and *Kleinwort Benson v. Birmingham Council* (1996), [1997] Q.B. 380 (Eng. C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched *at the plaintiff's expense* (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (*The Canadian Law of Unjust Enrichment and Restitution*, at p. 149).

44 The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer. As was succinctly articulated by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at pp. 669-70:

> When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, [the respondent] never in fact owned the [disputed] property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by [the appellant], [the respondent] would have acquired the property. In *Air Canada*..., at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." (Emphasis added.) In my view the fact that [the respondent in this case] never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. [The appellant] has therefore been enriched at the expense of [the respondent]. [Emphasis in original.]

While *Lac Minerals Ltd.* turned largely on the defendant's breach of confidence and breach of fiduciary duty, the above comments were made in the context of La Forest J.'s analysis of the tripartite unjust enrichment framework as it was applied in that case. My view is thus that these comments are applicable to the analysis in the present case.

45 The foregoing also indicates that the corresponding deprivation element does not require that the disputed benefit be conferred *directly* by the plaintiff on the defendant (see McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 155, but also see pp. 156-83; Maddaugh and McCamus, *The Law of Restitution*, at p. 35-1). This understanding of the correspondence between loss and gain has also been accepted under Quebec's civilian approach to the law of unjust enrichment:

> The theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party. ... The impoverished party looks to the one who profited from its impoverishment. It is then for the enriched party to find a legal justification for its enrichment.

(*Cie immobilière Viger v. Lauréat Giguère Inc.* (1976), [1977] 2 S.C.R. 67 (S.C.C.), at p. 79; see also *Lacroix c. Valois*,

> [1990] 2 S.C.R. 1259 (S.C.C.), at pp. 1278-79.)

46 Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.

47 To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504 (Sask. C.A.), at para. 42).

48 My colleagues, Gascon and Rowe JJ., approach Michelle's loss differently. They take the position that unjust enrichment cannot be invoked by a claimant to protect his or her "contractual expectations against innocent third parties" (para. 104). While they agree that the Canadian principle against unjust enrichment operates where a plaintiff has lost wealth that was either in his or her possession or that would have accrued for his or her benefit, they take the position that "awards for expected property have generally been where there was a breach of an equitable duty", and they distinguish that situation from cases where the plaintiff held "a valid contractual expectation" of receiving certain property (para. 104).

49 My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense* of the former. As was observed by Professors Maddaugh and McCamus in *The Law of Restitution*, one source of difficulty in these kinds of disappointed beneficiary cases is

> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff.... [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

50 From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle

would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

51 My colleagues also dispute this proposition. They say that any deprivation suffered by Michelle is attributable to the fact that she lacks the practical ability to recover anything against Lawrence's insolvent estate. The result, in their view, is that what Risa received — a statutory entitlement to the proceeds — is different than what Michelle lost — which they characterize as the ability to enforce her contractual rights against Lawrence's estate (para. 111). Again, I disagree; since Risa was given the very thing that Michelle had contracted to receive *and was otherwise entitled to receive* (given that she held up her end of the bargain), it seems evident to me that Risa was enriched at Michelle's expense. To be clear, it is not simply that Risa gained a benefit with a value equal to the amount of Michelle's deprivation. Rather, what Risa gained is the precise benefit that Michelle lost: the right to receive the proceeds of Lawrence's life insurance policy. I would also add that the insolvency of Lawrence's estate simply means that Michelle would be unable to recover the value of her loss by bringing an action against Lawrence's estate in breach of contract; it does not affect her ability to bring an unjust enrichment claim against Risa. The fact that a plaintiff has a contractual claim against one defendant does not preclude the plaintiff from advancing his or her case by asserting a separate cause of action against another defendant if it appears most advantageous (*Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 206).

52 I would therefore conclude that the requisite enrichment and corresponding deprivation are both present in this case. The payability of the insurance proceeds by the Insurance Company for Risa's benefit did in fact impoverish Michelle "to the full extent of the insurance payout in [Risa's] favour" (Court of Appeal decision, at para. 208 (Lauwers J.A., dissenting)).

53 In light of this, the Court of Appeal's order — which was made on the consent of the parties, and which requires that $7,000 of the proceeds be paid to Michelle and that the balance be paid to Risa — cannot be upheld on a principled basis. If there is a juristic reason for Risa's retention of the insurance money, then Michelle's claim will necessarily fail and Risa will be entitled to the full $250,000. If there is no such juristic reason, however, then Michelle's unjust enrichment claim will succeed and she will be entitled to a restitutionary remedy totalling that amount.

(2) Absence of Any Juristic Reason

54 Having established an enrichment and a corresponding deprivation, Michelle must still show that there is no justification in law or equity for the fact that Risa was enriched at her expense in order to succeed in her claim. As observed by Cromwell J. in *Kerr* (at para. 40):

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case .... [Emphasis added.]

55 This understanding of juristic reason is crucial for the purposes of the present appeal. The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated in *Peter* (at p. 990), "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'."

56 In *Garland*, this Court shed light on exactly what must be shown under the juristic reason element of the unjust enrichment analysis — and in particular, on whether this third element requires that cases be decided by "finding a 'juristic reason' for a defendant's enrichment" or instead by "asking whether the plaintiff has a positive reason for demanding restitution" (para. 41, citing *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (Ont. C.A.), at para. 105). In an effort to eliminate the uncertainty between these competing approaches, Iacobucci J. formulated a juristic reason analysis that

proceeds in two stages.

57 The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).

58 If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

59 This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.

(a) First Stage — None of the Established Categories Applies in These Circumstances

60 The first stage of the *Garland* framework asks whether a juristic reason from an established category operates to deny recovery. Michelle submits that none of these categories applies in the circumstances of this case. Risa takes the position that the *Insurance Act* required the proceeds of the policy to be paid exclusively to her as the validly designated beneficiary, such that the applicable legislation constitutes a juristic reason to deny the recovery sought by Michelle.

61 The main issue at this stage of the analysis is therefore whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* — which, when coupled with Lawrence's insurance policy, makes it clear that Risa is the one to whom the insurance proceeds are payable — provides a juristic reason for Risa to retain those proceeds in light of Michelle's claim to the money. Put differently, the question can be framed as follows: is there any aspect of this statutory framework that justifies the fact that Risa was enriched *at Michelle's expense*? If so, Michelle's claim will necessarily fail.

62 My colleagues dispute this proposition. In their view, it is sufficient to show that there is some juristic reason for the fact that the defendant was enriched, and there is thus no need to demonstrate that the enrichment *and the corresponding deprivation* occurred without a juristic reason. With respect, this proposition is at odds with the clear guidance provided by this Court in *Kerr* (para. 40, reproduced at para. 54 of these reasons) and disregards the work already done by the recognized categories of juristic reasons identified in *Garland*. Each of these categories points to a *relationship* between the plaintiff and the defendant that justifies the fact that a benefit passed from the former to the latter. To focus exclusively on the reason why the defendant was enriched is to ignore this key aspect of the law of unjust enrichment.

63 Two categories of juristic reasons might be said to apply in the circumstances of this case: disposition of law and statutory obligations. Disposition of law is a broad category that applies in various circumstances, including "where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery" (*Kerr*, at para. 41 (emphasis added)). The statutory obligations category operates in a substantially similar manner, precluding recovery where a legislative enactment expressly or implicitly mandates a transfer of wealth from the plaintiff to the defendant. Although there is undoubtedly a degree of overlap between these two distinct categories, what matters for the purposes of this appeal is that a plaintiff's claim will necessarily fail if a legislative enactment provides a reason for the enrichment and corresponding deprivation, so as to preclude recovery in unjust enrichment. As Professors Maddaugh and McCamus note in *The Law of Restitution*:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law. The payment of validly imposed taxes may be considered unjust by some but their payment gives rise to no restitutionary right of recovery. [Emphasis added; footnotes omitted; p. 3-28.]

64 The jurisprudence provides ample support for this proposition. Among the issues in *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.) ("*GST Reference*"), was whether suppliers registered under the *Excise Tax Act*, R.S.C. 1985, c. E-15, that incurred costs in collecting the Goods and Services Tax on behalf of the federal government could recover those costs from the government on the basis of restitution. For a majority of this Court, Lamer C.J. answered this question in the negative:

> Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is *ultra vires*. [Emphasis added; p. 477.]

65 A similar issue arose in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (S.C.C.). In that case, the respondents were charged under the *Fisheries Act*, R.S.C. 1970, c. F-14, for harvesting and attempting to sell large quantities of herring spawn. The Department of Fisheries and Oceans seized and sold the herring spawn, and the appellant Crown in Right of Canada held the proceeds pending the outcome of the proceedings. The proceedings were eventually stayed and the net proceeds paid to the respondents. Because the Crown refused to pay interest or any other additional amount, however, the respondents sought restitution in the amount of $132,000, on the ground that the Crown had been unjustly enriched by its retention of the proceeds during the time of seizure. Writing for a unanimous Court, Major J. denied that claim on the following basis:

> Here, Parliament has enacted a statutory regime to regulate the commercial fishery. It has provided an extensive framework dealing with the seizure and return of things seized. This regime specifically provides for the return of any fish, thing, or proceeds realized. This was followed. Interest or some other additional amount might have been gratuitously included, but it was not. The validity of the *Fisheries Act* was not, nor could have been, successfully challenged. Therefore, the Act provides a juristic reason for any incidental enrichment which may have occurred in its operation. As a result, the unjust enrichment claim fails. [para. 22]

In short, it was Major J.'s position that the statutory regime, by specifying what had to be returned, made it clear that anything falling outside of the specified categories was to be retained by the Crown. In other words, the *Fisheries Act* stipulated that, in certain circumstances, a benefit would be retained by the Crown.

66 These cases are examples of situations where a statute precluded recovery on the basis of unjust enrichment. It is to be noted that in each case, recovery was denied because the legislation in question expressly or implicitly required the transfer of wealth between the plaintiff and the defendant and therefore justified the defendant's retention of the benefit received at the plaintiff's expense. It is in this way that the applicable legislation can be understood as "denying" or "barring" recovery in restitution and therefore as supplying a juristic reason for the defendant's retention of the benefit.

67 What, then, should we make of ss. 190(1) and 191(1) of the *Insurance Act*? The former permits the insured to identify the person to whom or for whose benefit the insurance money is payable when the insured passes away. Coupled with the insurance contract, it directs the insurer to pay the proceeds to the person so designated. The latter provides that such a designation may be made irrevocably.

68 Given the fact that a statute will preclude recovery for unjust enrichment where it requires (either explicitly or by necessary implication) that the defendant be enriched to the detriment of the plaintiff, the provisions of the *Insurance Act* may therefore provide a juristic reason for the beneficiary's enrichment vis-à-vis any corresponding deprivation that may have been suffered *by the insurer* at the time the insurance money is eventually paid out. For this reason, an unjust enrichment claim brought by the insurer against the designated beneficiary (revocable or irrevocable) would necessarily fail at this stage; the rights and obligations that exist in that context — both statutory and contractual — justify the beneficiary's

enrichment at the insurer's expense (*Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206 (Sask. C.A.), at paras. 47-54).

69 A valid beneficiary designation under the *Insurance Act* has also been found to constitute a juristic reason that defeats a third party's claim for the entirety of the death benefit in circumstances where that party paid some of the premiums under the erroneous belief that he or she was the named beneficiary. In *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.), the deceased had maintained his first wife as the designated beneficiary under a life insurance policy. His second wife, who did not have a contractual right to be named as beneficiary, wrongly believed that he had executed a change of beneficiary designation in her favour, and paid some of the policy premiums — initially from a joint bank account she shared with the deceased and later from her own bank account. She sought the imposition of a constructive trust in her favour over the policy proceeds, arguing that there was no juristic reason for the first wife's enrichment. Even accepting that the second wife could be said to have suffered a corresponding deprivation, the Ontario Court of Appeal upheld the motion judge's finding that a valid beneficiary designation under the *Insurance Act* amounted to a juristic reason that defeated the second wife's claim for the insurance money that was payable to the first wife. I would observe that the claimant in that case sought a constructive trust over the entire death benefit, and not merely the return of any payments made on the basis of her erroneous belief; the Court of Appeal did not decide whether she would be entitled to the return of those payments, and that question is not before us today.

70 At issue in this case, however, is whether a designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides any reason in law or justice for Risa to retain the disputed benefit notwithstanding Michelle's prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like Michelle, who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at p. 90, the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'" (see also *Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.)). In *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273 (B.C. C.A.), for example, the British Columbia Court of Appeal found that the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, provided a "complete set of priority rules" that was "designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty" (paras. 27 and 21, citing *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.)). In those circumstances, there was no "room for priorities to be determined on the basis of common law or equitable principles" (para. 22). By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.

71 The reasoning put forward by McKinlay J. (as she then was) of the Ontario High Court of Justice in *Shannon v. Shannon* (1985), 50 O.R. (2d) 456 (Ont. H.C.), is particularly instructive in this regard. Like Michelle, the plaintiff in *Shannon* was the former spouse of an insured person who had contractually agreed to maintain the plaintiff as the sole beneficiary of the life insurance policy in his name and "not to revoke such beneficiary designation at any time in the future" (p. 458). Shortly thereafter, and in breach of his contractual obligation, the insured person surreptitiously changed the beneficiary designation in favour of his niece and nephew. He passed away several years later, and when the plaintiff discovered the change in beneficiary designation, she commenced an action asserting her entitlement to the proceeds of her former spouse's insurance policy. McKinlay J. found in her favour and made the following observations (at p. 461):

> It would appear from s. 167(2) [i.e. the predecessor of s. 190(2) of the *Insurance Act*] that the insured may at any time before the filing of an irrevocable declaration alter or revoke an existing designation by way of a declaration.
>
> The position of the defendant is that this is precisely what the insured did, and that any finding of the court of a trust in favour of the plaintiff would have the effect of the court's attempting to overrule a clear statutory provision.
>
> But the *Insurance Act* provides a statutory framework for the protection of the insured, the insurer and beneficiaries; equity imposes duties of conscience on parties based on their relationship and dealings one with another outside the purview of the statute. When he concluded the separation agreement with his wife, the deceased bound himself to maintain the policy in good standing, which he did; he also bound himself to maintain it for the benefit of his wife,

> which he did not. [Emphasis added.]

72 *Shannon* therefore supports the proposition that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it "does not specifically preclude the existence of rights outside its provisions" (p. 461). Similarly, in *Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244 (Man. C.A.), the Manitoba Court of Appeal recognized that courts have readily accepted that contractual rights to policy proceeds may operate to the detriment of named beneficiaries:

> Generally, the courts have imposed remedial constructive trusts in factual circumstances where the deceased has breached an agreement regarding life insurance benefits. These have arisen most commonly in cases where the husband executed a separation agreement promising to retain his former wife as the beneficiary of his life insurance policy and, in contravention of that promise, before his death, the deceased changed the designation of his beneficiary to that of his present wife or another family member. [para. 39]

73 Accepting that contractual rights to claim policy proceeds can exist outside of the *Insurance Act*, can an irrevocable designation under the *Insurance Act* nonetheless constitute a juristic reason for Michelle's deprivation? In my view, it cannot. This is because the applicable statutory provisions do not require, either expressly or implicitly, that a beneficiary keep the proceeds *as against a plaintiff, in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death*. By not ousting prior contractual or equitable rights that third parties may have in such proceeds, the *Insurance Act* allows an irrevocable beneficiary to take insurance money that may be subject to prior rights and therefore does not give such a beneficiary any absolute entitlement to that money (*Shannon*, at p. 461). Put simply, the statute required that the Insurance Company pay Risa, but it did not give Risa a right to keep the proceeds as against Michelle, whose contract with Lawrence specifically provided that she would pay all of the premiums exclusively for her own benefit. Neither by direct reference nor by necessary implication does the statute either (a) foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — whether revocable or irrevocable — or (b) preclude the imposition of a constructive trust in circumstances such as these (see *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (Ont. C.A.); see also *KBA Canada Inc.*).

74 On this basis, the applicable *Insurance Act* provisions are distinguishable from other legislative enactments that have been found to preclude recovery, such as valid statutory provisions requiring the payment of taxes to the government (see *GST Reference*, at pp. 476-77; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65 (Ont. C.A.), at p. 69, aff'd [1991] 3 S.C.R. 593 (S.C.C.)). In that context, the plaintiff's unjust enrichment claim must fail because the legislation permits the defendant to be enriched even when the plaintiff suffers a corresponding deprivation. The same cannot be said about the statutory framework at issue in this case, however; there is nothing in the *Insurance Act* that justifies the fact that Michelle, who is contractually entitled to claim the policy proceeds, is nevertheless deprived of this entitlement for Risa's benefit.

75 Moreover, in my view, the fact that *Shannon* was decided prior to *Soulos* and *Garland* is of no moment (Court of Appeal decision, at paras. 84 and 89). While those cases add to our understanding of the law on constructive trusts and unjust enrichment, they do not in any way undermine the holding in *Shannon* with respect to the effect of the *Insurance Act* in circumstances such as these.

76 The majority below came to the opposite conclusion on this issue. Having considered the legislative regime governing beneficiary designations in Ontario, Blair J.A. held that the *Insurance Act* framework "lean[s] heavily in favour of payment of the proceeds of life insurance policies to those named as irrevocable beneficiaries, whereas it continues to recognize the right of an insured, at any time prior to such a designation, to alter or revoke a beneficiary who does not fall into that category" (para. 83). On this basis, he concluded that the legislative regime under which Risa had been designated as the irrevocable beneficiary of Lawrence's life insurance policy supplied a juristic reason for her receipt of the proceeds, since it constituted both a disposition of law and a statutory obligation (para. 99).

77 With respect, I disagree with two aspects of Blair J.A.'s reasons. First, he framed the issue as being whether the applicable *Insurance Act* provisions, pursuant to which Risa had been designated as irrevocable beneficiary, provided a juristic reason for her receipt of the insurance proceeds (paras. 26(iii) and 83). This, in my view, is the wrong perspective

from which to approach this third stage of the unjust enrichment analysis. As stated above, the authorities indicate that the court's inquiry should focus not only on why the defendant received the benefit, but also on whether the statute gives the defendant the right to retain the benefit against a correspondingly deprived plaintiff — in this case, whether the *Insurance Act* extinguishes an unjust enrichment claim brought by a plaintiff at whose expense the named beneficiary was enriched (*GST Reference*, at p. 477; *Kerr*, at para. 31). And given the view expressed earlier in these reasons, it seems to me that the *Insurance Act* does not.

78 Second, Blair J.A. placed a significant degree of emphasis on the distinction between revocable and irrevocable beneficiaries, and on the certainty and predictability associated with the statutory regime governing irrevocable designations. While it is clear that an irrevocably designated beneficiary has a "statutory right to remain as the named beneficiary" and is therefore "entitled to receive the insurance moneys unless he or she consents to being removed" (para. 82), I am still not persuaded that s. 191 of the *Insurance Act* can be interpreted as barring the possibility of restitution to a third party who establishes that this irrevocable beneficiary cannot, in good conscience, retain those monies in the face of that third party's unjust enrichment claim. To borrow the words of Professors Maddaugh and McCamus, "the fact that the insurer is directed by statute, implicitly if not directly, to pay the insurance monies to the irrevocable beneficiary, does not preclude recovery by the other intended beneficiary where retention of the monies by the irrevocable beneficiary would constitute an unjust enrichment" (*The Law of Restitution*, at p. 35-16). Therefore, the fact that Risa was designated pursuant to s. 191(1) of the *Insurance Act*, as opposed to s. 190(1), does not assist her against Michelle in the circumstances of this case.

79 I would also observe that the majority below declined to "go so far as to say that the designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* invariably trumps a prior claimant" (para. 91), but nevertheless found that it did in this case. It is with this latter statement that I would disagree; as outlined above, my view is that the statutory scheme does not prevent a claimant with a prior contractual entitlement from succeeding in unjust enrichment against the designated beneficiary.

80 My colleagues take the position that the *Insurance Act* provides a juristic reason for Risa's enrichment because it specifically provides that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by the insured's creditors. They say that because "Michelle's rights are contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds" (para. 122). While there is no dispute that Michelle may have a claim against Lawrence's estate, my view is that she is *also* a person at whose expense Risa has been enriched — and therefore a plaintiff with standing to claim against Risa in unjust enrichment. And while the *Insurance Act* specifically precludes claims by creditors suing on the basis of some obligation owed by the insured's estate, it does not state "with irresistible clearness" that a claim *in unjust enrichment* — i.e. a claim based on a different cause of action — brought by a plaintiff who also has a contractual entitlement to claim the insurance proceeds must necessarily fail as against the named beneficiary.

81 For all of the foregoing reasons, I would echo the conclusion arrived at by Lauwers J.A., dissenting in the court below, that "[Michelle's] entitlement to the insurance proceeds as against [Risa] is neither precluded nor affected by the operation of the *Insurance Act*", with the result that this case "falls outside the category of disposition of law as a juristic reason to permit [Risa] to retain the life insurance proceeds" (para. 229).

82 Since there is no suggestion that any other established category of juristic reason would apply in these circumstances, my conclusion at this first stage is that Michelle has made out a *prima facie* case.

(b) Second Stage — Policy Reasons Militate in Favour of Michelle

83 The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments — including considerations relating to the way in which the parties organized their relationship (*Garland*, at paras. 45-46; *Pacific National Investments Ltd.*, at para. 25; *Kerr*, at paras. 44-45).

84 It is clear that both parties expected to receive the proceeds of the life insurance policy. Pursuant to the Oral Agreement, Michelle had a contractual right to remain designated as beneficiary so long as she continued to pay the

premiums and kept the policy alive for the duration of Lawrence's life. Although she could have better safeguarded her interests by requiring Lawrence to designate her irrevocably, her expectation with respect to the insurance money — rooted in the Oral Agreement — is clearly reasonable and legitimate.

85 Risa, by contrast, expected to receive the insurance money upon Lawrence's death by virtue of the fact that she had been validly designated as irrevocable beneficiary. Because Risa was designated after Lawrence and Michelle entered into the Oral Agreement, however, I am of the view that her expectation cannot take precedence over Michelle's *prior contractual right* to remain named as beneficiary, regardless of whether Risa knew that this was actually the case. To echo the findings of the application judge:

> While there is no evidence that [Risa] knew that [Michelle] was paying the premiums on the Policy, she was aware that [Lawrence] was not in a position to do so. She says that she believed that [Lawrence's] brother was paying the premiums, but there is nothing in the record regarding the brother's motivation or intentions that would make [Risa's] belief in such action reasonable. [para. 49]

86 Moreover, I am not persuaded that the oral nature of the agreement between Michelle and Lawrence undermines Michelle's expectation or serves as a public policy reason that favours Risa's retention of the proceeds. The legal force of unwritten agreements has long been recognized by common law courts. And while "kitchen table agreements" may in some cases result in situations where parties neither understand nor intend the legal significance of their agreement, this is not such a case; the parties do not dispute the finding that Michelle and Lawrence did in fact have an Oral Agreement that the former would pay the premiums on the policy and, in exchange, would be entitled to the proceeds of the policy upon the latter's death (Superior Court decision, at para. 17; Court of Appeal decision, at para. 22). Indeed, the existence of the Oral Agreement is quite clearly corroborated by Michelle's payment of the premiums following her separation from Lawrence.

87 As a final point, it appears to me that the residual considerations that arise at this stage of the *Garland* analysis favour Michelle, given that her contribution towards the payment of the premiums actually kept the insurance policy alive and made Risa's entitlement to receive the proceeds upon Lawrence's death possible. Furthermore, it would be bad policy to ignore the fact that Michelle was effectively tricked by Lawrence into paying the premiums of a policy for the benefit of some other person of his choosing.

88 For the foregoing reasons, I would conclude that Risa has not met the burden of rebutting Michelle's *prima facie* case. It follows, therefore, that Michelle has made out each of the requisite elements of the cause of action in unjust enrichment.

B. Appropriate Remedy: Imposition of a Constructive Trust

89 The remedy for unjust enrichment is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation — i.e. an order to pay damages — that may be enforced by the plaintiff against the defendant (*Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), at p. 47). In most cases, this remedy will be sufficient to achieve restitution, and it can therefore be viewed as the "default" remedy for unjust enrichment (*Lac Minerals Ltd.*, at p. 678; *Kerr*, at para. 46).

90 In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature — that is, an entitlement "to enforce rights against a particular piece of property" (McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 1295). The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust — a remedy which, according to Dickson J. (as he then was),

> is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.
>
> (*Pettkus*, at pp. 843-44)

91 While the constructive trust is a powerful remedial tool, it is not available in *all* circumstances where a plaintiff establishes his or her claim in unjust enrichment. Rather, courts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed (*PIPSC*, at para. 149; *Kerr*, at paras. 50-51; *Peter*, at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

92 The application judge concluded that Michelle had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment, and he accordingly ordered that Risa held those proceeds on constructive trust for Michelle (para. 52). He specifically found that Michelle had demonstrated a "clear 'link or causal connection' between her contributions and the proceeds of the Policy that continued for the entire duration of the Policy" (para. 50).

93 While my analysis of Michelle's right to recover for unjust enrichment differs from that of the application judge, I see no reason to disturb his conclusion regarding the propriety of a remedial constructive trust in these circumstances. Ordinarily, a monetary award would be adequate in cases where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Furthermore, ordering that the money be paid out of court to Risa, and then requiring Michelle to enforce the judgment against Risa personally, would unnecessarily complicate the process through which Michelle can obtain the relief to which she is entitled. It would also create a risk that the money might be spent or accessed by other creditors in the interim.

94 Moreover, the application judge found that Michelle's payment of the premiums was causally connected to the maintenance of the policy under which Risa was enriched. Because each of Michelle's payments kept the policy alive, and given that Risa's right as designated beneficiary necessarily deprived Michelle of her contractual entitlement to receive the entirety of the insurance proceeds, I would impose a constructive trust to the full extent of those proceeds in Michelle's favour.

95 This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.

VI. Conclusion

96 I would therefore allow the appeal without costs and order that the proceeds of the policy, with accrued interest, be impressed with a constructive trust in favour of Michelle and accordingly be paid out of court for her benefit.

***Gascon, Rowe JJ.* (dissenting):**

I. Introduction

97 This appeal is, without question, a difficult one. Michelle and Risa are both innocent victims of Lawrence's breach of contract and they equally invite substantial sympathy. Michelle paid approximately $7,000 to keep alive an insurance policy on the promise she would receive the proceeds if Lawrence died within its term. Risa cared for and supported Lawrence for 13 years and expected, as irrevocable beneficiary, that she would receive support should he die. With Lawrence's broken promise now discovered, Michelle claims a constructive trust over the proceeds on the basis of unjust enrichment or "good conscience", while Risa insists her irrevocable beneficiary designation is unassailable.

98 It is an unfortunate reality that a person's death is sometimes accompanied by uncertainty and conflict over the wealth that has been left behind. The resulting litigation can tie up funds that the deceased intended to support loved ones for a significant period of time, adding financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered life insurance policy holders to designate an "irrevocable

