Court File No. M44123
M44124

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Applicants

BRIEF OF AUTHORITIES OF THE DIP LENDERS AND THE AD HOC COMMITTEE

October 1, 2014

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Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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[1] Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;
Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
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[DIVISIONAL COURT]

HENRY v. HAMMOND.

1913 March 3, 4.

CHANNELL, and BRAY JJ.

Limitations, Statute of - Trust - Express Trust - Shipping Agent - Sale of Cargo and Payment of Claims - Balance in Hands of Agent.

In 1883 a vessel called the International was wrecked off the coast of Kent. The vessel and cargo were subsequently salved, and the plaintiff, who was an average adjuster carrying on business in Paris and who was acting on behalf of foreign insurers of the cargo, instructed the defendant, who was a shipping agent at Ramsgate, to sell the cargo and out of the proceeds of the sale to pay all claims and expenses in connection with the cargo. The defendant accordingly sold the cargo, and after paying all claims and expenses there remained in his hands a sum of 96*l.* This sum was not paid over to the plaintiff, nor did the plaintiff know that there was any money in the defendant's hands representing the balance of the proceeds of the sale. In the defendant's balance-sheets for the years 1884 to 1888 inclusive this sum appeared as a debt due from him, the entry being "*International*, 96*l.*," but the name of the creditor was not stated. In 1889 this sum was carried to profit and loss account, and it did not appear again in the balance-sheets. In 1912 the plaintiff, having discovered the fact that the defendant had received this sum, brought an action to recover it, to which the defendant pleaded that the claim was barred by the Statute of Limitations. The plaintiff, in answer to the plea of the statute, contended that the defendant had made himself an express trustee of this sum, and that therefore the statute did not apply:-

Held, that the transaction which the defendant was employed by the plaintiff to carry out was an ordinary commercial transaction in the way of the defendant's business as a shipping agent, that the defendant was not bound to keep the moneys coming to his hands in the course of carrying out that transaction separate from his other moneys, and that therefore he was not in the position of an

express trustee of the sum of 96*l.* for the plaintiff, and the Statute of Limitations was a good defence to the claim.

APPEAL from the Ramsgate County Court.

The action was brought to recover 96*l.* 11*s.* 4*d.* as money received by the defendant on behalf of the plaintiff. The defence was that the claim was barred by the Statute of Limitations.

The plaintiff was the surviving partner in the French firm of Dupuis, Jaillon & Henry, who carried on business in Paris as average adjusters. In 1883 a vessel called the *International* with a cargo of coal was wrecked off the coast of Kent. The vessel and her cargo were subsequently salved

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and brought into Ramsgate harbour. The plaintiff's firm, who were acting for the foreign insurers of the cargo (1), sent the bill of lading to the defendant, who was then carrying on business at Ramsgate as a shipping agent, with instructions to sell the cargo on their behalf and to pay all claims and expenses in connection therewith. The cargo was accordingly sold by the defendant, and after payment of salvage and other claims and expenses, including the commission due to the defendant, there remained in his hands a sum of 96*l.* 11*s.* 4*d.* due to the plaintiff's firm. This sum was not paid over to the plaintiff's firm, nor did the plaintiff's firm or the plaintiff know until 1906 or 1907 that there was any money in the defendant's hands representing the balance of the proceeds of the sale of the cargo. The sum appeared, among a large number of other items in connection with transactions with various persons, in the balance-sheets of the defendant's business for the years ending June 30, 1884 to 1888, both inclusive, as a sum owing by the defendant, the entry being "*International*, 96*l.* 11*s.* 4*d.*," but the name of the creditor was not stated. The defendant's ledger for 1889 shewed that this sum of 96*l.* 11*s.* 4*d.* was in that year carried to profit and loss account, and this particular item did not appear again in the balance-sheets. The defendant retired from business in 1899. In February, 1912, the plaintiff demanded payment of the 96*l.* 11*s.* 4*d.* from the defendant, and on June 22 of that year this action was brought.

The plaintiff, in reply to the defence of the Statute of Limitations, contended that the defendant was in the position of an express trustee of this sum for him, and that therefore the statute did not bar the claim. The county court judge held that the defendant was not an express trustee of this sum for the plaintiff, and that the claim was barred by the statute. He accordingly gave judgment for the defendant. The plaintiff appealed.

Hilbery, for the plaintiff. The defendant was entrusted by the plaintiff's firm with property for the purpose of selling it and

(1) The plaintiff's firm were treated as being themselves the insurers of the cargo.

creating a fund out of which to pay certain claims and expenses and to hold the balance for the plaintiff's firm. The defendant sold the property and there remained a balance of 96*l.* 11*s.* 4*d.* due to the plaintiff's firm, and the defendant by his entries in his balance-sheets and books treated himself as a trustee of that sum for the persons entitled to it, namely, the plaintiff's firm and now the plaintiff. He was therefore an express trustee of that money, and it is well settled that in such a case he cannot set up the defence of the Statute of Limitations. His position was not that of an ordinary agent to collect and pay over money. "Where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it": per Giffard L.J. in *Burdick v. Garrick.* (1) That passage was cited with approval by Lord Macnaghten in *Lyell v. Kennedy* (2), and by Bowen L.J. in *Soar v. Ashwell.* (3) In *In re Hindmarsh* (4) the solicitors who received certain money for their client did so as ordinary agents, and it was held that the relation of trustee and cestui que trust did not exist between them so as to exclude the application of the statute. That case depended upon its special facts: per Lord Hatherley in *Burdick v. Garrick.* (5) In the present case the defendant was a trustee of the property, namely, the coals, and he became a trustee of the sum arising from the sale of that property. He was therefore a trustee of the balance of the proceeds of the sale of that property, after paying the claims and expenses, namely, 96*l.* 11*s.* 4*d.*, for the plaintiff's firm; and further, by his entries in his balance-sheets earmarking that sum, he recognized his position as a trustee of that sum for the person entitled to it. He was in the position of a trustee holding under an express trust.

In *Lyell v. Kennedy* (6) Lord Selborne said: "As to the rents and profits received by the respondent, and the accumulated fund

(1) (1870) L. R. 5 Ch. 233, at p. 243.

(2) (1889) 14 App. Cas. 437, at p. 463.

(3) [1893] 2 Q. B. 390, at p. 397.

(4) (1860) 1 Dr. & Sm. 129.

(5) L. R. 5 Ch. at p. 240.

(6) 14 App. Cas. at p. 457.

which arose from them in the banker's hands, there was a series of declarations, oral and in writing, by the respondent, sufficient, in my judgment, to establish against him, by his own admission, a fiduciary character. A man who receives the money of another on his behalf, and places it specifically to an account with a banker ear-marked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough." The defendant here received the money in a fiduciary character to be dealt with by him as directed by the person entitled to it, and he was therefore an express trustee of it. *Soar v. Ashwell* (1), *North American Land and Timber Co. v. Watkins* (2), and *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.* (3) are in point. The defendant received the cargo and its proceeds in a fiduciary capacity to deal with them in a particular way, and he can only discharge himself by shewing that he handed over the money to the person entitled to it. He was not entrusted with the property or the proceeds to deal with them as his own. As in *Lyell v. Kennedy* (4) be held the balance of the proceeds of the sale of the cargo for all whom it might concern. The position of the defendant was not that of an ordinary agent to receive and pay over money. He was placed in a position of confidence to negotiate with the claimants upon the cargo and to pay their just claims and also the expenses. He was paid a

commission for his work, and though he was not bound to place the proceeds of the sale to a separate account he could not make a profit out of the transaction in addition to his commission. His position was different from that of a banker and customer where the banker is a mere creditor in respect of the moneys of the customers: *Foley v. Hill.* (5) The judgment of the county court judge was therefore wrong.

E. M. Pollock, K.C., and ***Thorn Drury***, for the defendant. *Soar v. Ashwell* (1) shews clearly that in the case of a constructive

(1) [1893] 2 Q. B. 390.

(2) [1904] 1 Ch. 242.

(3) [1912] A. C. 555.

(4) 14 App. Cas. 437.

(5) (1848) 2 H. L. C. 28.

trust the Statute of Limitations can be used as a bar to a claim. But if the fiduciary relationship under which the trustee holds the money is such that he is in the position of an express trustee the statute cannot be pleaded in answer to a claim to recover the money. Where a Court of Equity has a concurrent jurisdiction with a Court of law, the Court of Equity in affording the remedy will act by analogy to the Statute of Limitations and allow the statute to be pleaded as a bar: *Knox v. Gye* (1); *Friend v. Young*. (2) This is a common law action to recover money had and received. The fiduciary relationship which was held to exist in *Burdick v. Garrick* (3) depended upon the special nature of

the deed under which the moneys were to be received and invested: per Hall V.-C. in *Watson v. Woodman* (4), cited by Stirling J. in *Friend v. Young*. (5) The transaction in the present case was an ordinary commercial transaction, and the Courts ought not to introduce into such transactions the equitable doctrines of trusts: per Bramwell L.J. in *New Zealand and Australian Land Co. v. Watson*. (6) The defendant did not stand in a fiduciary relation to the plaintiff's firm either in respect of the cargo or of the proceeds of the sale thereof. He was not bound to keep the moneys arising from the sale separate from his own moneys. It would be impossible for him to keep the moneys in each of his business transactions separate. In *Lyell v. Kennedy* (7) the defendant collected the rents of the property for the heir, whoever he might be, and placed the moneys so received to a separate account, and he was therefore an express trustee of those moneys. North American Land and *Timber Co. v. Watkins* (8) was a simple case of an express trust; and *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.* (9) comes within the same category as *Lyell v. Kennedy*. (7) There is no authority to shew that a shipping agent who is employed in the ordinary course of his business to sell a cargo and to divide the proceeds in a particular way stands in

(1) (1872) L. R. 5 H. L. 656, at p. 674.

(2) [1897] 2 Ch. 421, at pp. 431, 432.

(3) L. R. 5 Ch. 233.

(4) (1875) L. R. 20 Eq. 721, at p. 731.

(5) [1897] 2 Ch. at p. 432.

(6) (1881) 7 Q. B. D. 374, at p. 382.

(7) 14 App. Cas. 437.

(8) [1904] 1 Ch. 242.

(9) [1912] A. C. 555.

a fiduciary relation to his employer so as to be in the position of an express trustee. The judgment was therefore right.

Hilbery in reply.

CHANNELL J. This case raises an interesting point. The question is whether or not the defendant ought to be treated as being in the position of an express trustee in respect of the sum of 96*l.* 11*s.* 4*d.* claimed in this action. This sum is the ultimate balance in his hands upon an account in connection with transactions which he was employed by the plaintiff's firm to carry out in the ordinary course of his business as a shipping agent. The transactions which the defendant was employed to carry out occurred nearly thirty years ago. He is unable to shew that he has ever paid this sum over to the plaintiff's firm or to the plaintiff. But for the lapse of time the plaintiff is the proper person to recover it, and he would recover it as a debt due to him in respect of those transactions. Inasmuch, however, as the Statute of Limitations has been pleaded as a defence, he can only recover it by establishing that the defendant is in the position of an express trustee of that sum for him. It is clearly settled that a constructive trust is not sufficient, though I do not think that any question of a constructive trust arises in this case.

A considerable number of authorities have been cited, and the one which has been most often referred to in recent cases is *Burdick v. Garrick.* (1) In that case there is a passage in the judgment of Giffard L.J. which has been referred to with approval by many judges. Lord Macnaghten in *Lyell v. Kennedy* (2) said this: "The principle which governs the case may be stated concisely in the words of the late Lord Justice Giffard. In *Burdick v. Garrick* (3) that learned judge expressed himself as follows: 'I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that

trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.'" The passage there cited from the

(1) L. R. 5 Ch. 233.

(2) 14 App. Cas. 437, at p. 463.

(3) L. R. 5 Ch. at p. 243.

judgment of Giffard L.J. has also been approved by, among other judges, Bowen L.J. in *Soar v. Ashwell* (1), and I think that we may take it as, in the language of Lord Macnaghten, concisely stating the principle which governs this case. We must apply that principle to a case where the property is a sum of money. It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell L.J. in *New Zealand and Australian Land Co. v. Watson* (2) when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions. A shipping agent carries on a well understood business, and it cannot possibly be said that he is bound to keep the money of each of the persons by whom he is employed in the course of that business separate. There is not in this case the element that there was in *Lyell v. Kennedy* (3) of the moneys being in fact kept separate. I am aware that, if the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognized his obligation, the obligation itself being the essential thing. This principle seems to me to reconcile all the cases.

With reference to the case of *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.* (4), upon which the plaintiff strongly relies, the circumstances there seem to me to be entirely different from those in the present case. In that case the money sought

(1) [1893] 2 Q. B. 390, at p. 397.

(2) 7 Q. B. D. 374, at p. 382.

(3) 14 App. Cas. 437.

(4) [1912] A. C. 555.

to be recovered came into the possession of the defendants among to an unauthorized and improper use of the plaintiffs' property. Where in such a case a person makes a profit out of the improper use of another person's property, he becomes a trustee of that profit for the owner of the property. That case therefore does not assist us in the present one, where there is a mere debt arising out of transactions in respect of property, namely, coals, as to which property no doubt it might possibly be said that the defendant was in a sense a trustee. For instance, he could not have bought the coals himself. He was employed to sell the coals, and to receive the money for them; he was under no obligation to keep the money so received as a separate fund, but he was entitled to mix it with his own moneys, and he was merely a debtor for the amount of the ultimate balance due from him.

I do not think that it is necessary to go through all the cases, but I desire to refer to an observation of Stirling J. in the case of *Friend v. Young* (1), where that learned judge, after referring to the authorities, said: "In my judgment, therefore, the existence of a fiduciary relation does not prevent the defence of the statute being set up in the present case." So in the present case the mere fact that there had been at some time the existence of a fiduciary relation does not necessarily prevent the statute being set up as a defence. In my opinion the principle applicable to the case of a banker and

customer applies. The defendant in the ordinary course of his business as a shipping agent has incurred a debt, and with reference to that debt the Statute of Limitations applies. The judgment of the county court judge was right, and the appeal must be dismissed.

BRAY J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Church, Adams & Prior, for Emery & Emery, Ramsgate.*

Solicitors for defendant: *Kingsford, Dorman & Co., for J. Thorn Drury, Ramsgate.*

(1) [1897] 2 Ch. 421, at p. 432.

W. F. B.

TAB 2

Case Name:

General Publishing Co. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.-43, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of General Publishing Co. Limited, General Distribution Services Limited, Stoddart Publishing Co. Limited, The Boston Mills Press Ltd. and House of Anansi Press Limited

[2002] O.J. No. 2270

161 O.A.C. 202

34 C.B.R. (4th) 186

4 P.P.S.A.C. (3d) 141

114 A.C.W.S. (3d) 598

Docket Nos. C38304, C38306 and C38307

Ontario Court of Appeal
Toronto, Ontario

Austin, Rosenberg and Laskin JJ.A.

Heard: June 5, 2002.
Judgment: June 12, 2002.

(8 paras.)

Bankruptcy -- Creditors -- Priorities.

Appeal by a group of publishers from a decision that they did not have priority in the estate of the bankrupt company as against the Bank of Nova Scotia. The publishers claimed that they had an agency relationship with the bankrupt, so as to make them more than mere creditors. They based this argument on the fact that they retained title to the books until monies were remitted to them by

the bankrupt. However, the bankrupt did put sale proceeds into its own account, and did not pay immediately.

HELD: Appeal dismissed. The relationship was one of creditor and debtor. There was no express or implied agency or trust relationship, in light of the fact that the bankrupt did not have to segregate the funds, but could put the funds into its own account.

Appeal from:

On appeal from the decision of Justice John D. Ground dated May 22, 2002.

Counsel:

Justin R. Fogarty and D. Fraser Hughes, for the appellant, The Publishers - C38307.
Laurel C. Broten, for the appellant, Philip Wood Inc., operating as Ten Speed Press - C38304.
Christopher W. Besant, for the appellant, Hushion House Publishing Limited - C38306.
Joseph Pasquariello, for the Monitor, Deloitte & Touche.
John L. Finnigan, Robert I. Thorton and Kyla E.M. Mahar, for the respondent, General Distribution Services Limited et al.
John D. Marshall, for the respondent, Bank of Nova Scotia.

The following judgment was delivered by

1 THE COURT:-- These brief reasons dispose of the appeals of Hushion House (C38306), Ten Speed (C38304) and "the publishers" (C38307) from the decision of Ground J. dated May 22, 2002 in these matters. The issue is whether the publishers have priority over the Bank of Nova Scotia (the "Bank") with respect to accounts receivable billed and to be collected by the distributor General Distribution Services Inc. ("GDS"). The publishers claim that because they retained title to the books, and in one case express ownership of the accounts receivable, they have priority over the Bank. We disagree.

2 The basic principle that governs the resolution of the case is found in Halsbury's Laws of England (4th ed., Vol. 1(2), Agency, para. 98):

> Where money is entrusted to an agent by his principal or received by him on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. In the former case the agent will be a trustee, in the latter a debtor.

3 Halsbury cities as authority Henry v. Hammond, [1913] 2 K.B. 515, in which Channel J. said at

p. 521:

> It is clear that if the terms on which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon hand over an equivalent sum of money, then, in my opinion he is not trustee of the money, but a merely a debtor. All the authorities seem to be consistent with that statement of the law.

This statement is approved by the Supreme Court of Canada in Hanna v. Provincial Bank of Canada, [1935] S.C.R. 144.

4 In our view, in these circumstances accounts receivable stand on no different footing than money. In the instant case there is neither in the agreement nor in the conduct of the parties any suggestion that when GDS received the proceeds of the sales of the books of the publishers, it was to segregate those funds. It was free to deposit the funds and to mingle them with its own money. It follows that the relationship between GDS and a publisher was not that of trustee and beneficiary but of debtor and creditor.

5 Ground J. found that there were two simultaneous sales, one from the publisher to the GDS and another from GDS to the purchaser. We need not decide whether that is a correct characterization of the transaction as it makes no difference to the outcome of the appeal. What governs is the arrangement between the publisher and GDS with respect to the holding of the funds paid by the purchaser to GDS. Henry v. Hammond applies.

6 Whether or not GDS "owned the receivables" as found by Ground J., or the publishers "owned the receivables", as they allege, the fact is that the arrangement required and permitted GDS to collect the money and to put it into its own account. From that account GDS was bound to pay a publisher within 93 days for any books sold to purchasers, whether or not the purchaser had paid for the books. This requirement, it seems to us, negates any suggestion of a trust relationship and leaves the relationship between publisher and distributor as one of creditor and debtor.

7 Ground J. relied on the express provision in the agreement to the effect that the relationship between publisher and distributor was not one of agency. Again, we need not decide whether the characterization of the relationship is correct as it makes no difference to the outcome of the appeal. There was no term, either express or implied, that required the funds owing to the publisher to be segregated. In these circumstances, the relationship, insofar as the funds were concerned, was one of creditor and debtor.

8 We agree with Ground J.'s disposition of Hushion House's claim to a security interest. In

addition Hushion House subordinated its interest to that of the Bank. Accordingly, we would not vary the conclusion reached below. The appeals are therefore dismissed.

AUSTIN J.A.
LASKIN J.A.
ROSENBERG J.A.

cp/ln/e/nc/qlhcc

TAB 3

Case Name:

Water Street Pictures Ltd. v. Forefront Releasing Inc.

Between
Water Street Pictures Ltd., Respondent (Plaintiff),
and
Forefront Releasing Inc., VanCity Capital Corporation and Business Development Bank of Canada, Appellants (Defendants)
(Registry No. CA032858)
And between
Water Street Pictures Ltd., Appellant (Plaintiff),
and
Forefront Releasing Inc., VanCity Capital Corporation and Business Development Bank of Canada, Respondents (Defendants)
(Registry No. CA033419)

[2006] B.C.J. No. 2652

2006 BCCA 459

[2006] 11 W.W.R. 381

231 B.C.A.C. 189

57 B.C.L.R. (4th) 212

26 E.T.R. (3d) 197

152 A.C.W.S. (3d) 610

2006 CarswellBC 2476

Vancouver Registry Nos. CA032858 and CA033419

British Columbia Court of Appeal
Vancouver, British Columbia

Hall, Saunders and Lowry JJ.A.

Heard: June 7 and 8, 2006.
Judgment: October 13, 2006.

(44 paras.)

Commercial law -- Banking -- Accounts -- Trust accounts -- Appeal by the Banks from a decision awarding $278,814 to the respondent, Water Street Pictures -- Bankrupt television producer, with which the respondent had distribution agreements, forwarded money to appellants from two bank accounts -- Trial judge found that pursuant to distribution agreements, money had been held in trust by the bankrupt for the respondent -- Appeal allowed -- No suggestion that the accounts were opened or operated as trust accounts -- Distribution agreements did not create any trust obligations.

Wills, estates and trusts law -- Trusts -- Constructive trusts -- Express trusts -- Requirements -- Certainty of intention -- Appeal by the Banks from a decision awarding $278,814 to the respondent, Water Street Pictures -- Bankrupt television producer, with which the respondent had distribution agreements, forwarded money to appellants from two bank accounts -- Trial judge found that pursuant to distribution agreements, money had been held in trust by the bankrupt for the respondent -- Appeal allowed -- On consideration of the distribution agreements as drawn, no trust obligations had been imposed on the bankrupt.

Appeal by VanCity Capital and the Business Development Bank of Canada from a decision awarding $278,814 to the respondent, Water Street Pictures. The respondent produced a series of television shows in two cycles, the first in 1999, the second in 2000. It entered into two distribution agreements with Forefront Releasing, one for each cycle, whereby the respondent was to receive from the distributor, in six month intervals, all of the revenue of the distribution to broadcasters after the deduction of the distributors' fees and expenses. Forefront was financed by VanCity Capital for $500,000, and by Business Development Bank of Canada for $750,000, on terms which gave them priority over Forefront's unsecured creditors. Forefront became insolvent in 2001. The respondent purported to terminate the distribution agreements shortly before it would have been entitled to receive in excess of $300,000 from Forefront. The appellant Banks then made demands for repayment of their loans. They received $278,814 from Forefront which they knew to be money from two accounts maintained by Forefront at the TD Bank and CIBC for the deposit of revenues received from various productions, including "Edgemont Road". The respondent commenced its action for damages contending that, under the terms of the distribution agreements, all of the money the Banks received was, as known to the Banks, money that was held in trust for it by Forefront. The trial judge found in favour of the respondent and awarded it damages in the amount of $278,814. On appeal, the Banks submitted that the judge erred in concluding that any of the revenue received by Forefront from the distribution of "Edgemont Road" was trust money held by Forefront for the respondent. The respondent cross-appealed and sought to amend its pleadings to allege

against the Banks additional loss it contended was compensable.

HELD: Appeal allowed and action dismissed. Cross-appeal dismissed. On consideration of the distribution agreements as drawn, no trust obligations had been imposed on Forefront. There was no suggestion that the account at TD Bank, or the second account at CIBC, were opened or operated as trust accounts. The accounts were not used only for the deposit of distribution revenue, and the deposits of such revenue were not limited to revenue from the distribution of "Edgemont Road". Forefront took its fees and expenses from the accounts and periodically drew from the accounts to pay down its loans. The trial judge was fundamentally mistaken in relying on there being a provision in the second agreement that required Forefront to keep "Edgemont Road" revenue in a separate account. Neither agreement contained any such provision.

Counsel:

B. Martz: Counsel for Water Street Pictures Ltd.

H.W. Wiebach: Counsel for VanCity Capital Corporation and Business Development Bank of Canada

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[Editor's Note: A Corrigendum was released by the Court October 18, 2006. The correction has been made to the text and the Corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 LOWRY J.A.:-- Water Street Pictures Ltd. ("Water Street") produced a series of television shows entitled "Edgemont Road" in two cycles, the first in 1999, the second in 2000. It entered into two distribution agreements with Forefront Releasing Inc. ("Forefront"), one for each cycle, whereby the producer was to receive from the distributor, in six-month intervals, all of the revenues of the distribution to broadcasters after the deduction of the distributor's fees and expenses. Forefront was financed by VanCity Capital Corporation ("VanCity") for $500,000.00, and by Business Development Bank of Canada ("BDC") for $750,000.00, on terms which gave them (the "Banks") priority over Forefront's unsecured creditors. Forefront became insolvent in 2001. Water Street purported to terminate the distribution agreements shortly before it would have been entitled to receive in excess of $300,000.00 from Forefront. Acting on legal advice, the Banks then made demand for repayment of their loans. They received $278,814.75 from Forefront which they knew to be money from two accounts maintained by Forefront at the TD Bank and CIBC for the deposit of revenues received from various productions, one of which was "Edgemont Road". The amount on deposit at the time considered to be revenue attributable to the distribution of that series was CDN $93,089.57 in one account and US $81,408.22 in another.

2 Water Street commenced this action for damages against Forefront, VanCity, and BDC,

contending that, under the terms of the distribution agreements, all of the money the Banks received was, as known to the Banks, money that was held in trust for it by Forefront. Water Street maintained that the money belonged to it, and therefore not to Forefront. The action was tried before Madam Justice Morrison. She found for the producer and awarded damages of $278,814.75.

3 The Banks appeal. (Forefront is named as an appellant but takes no position on the appeal.) The Banks contend that the judge erred in concluding any of the revenue received by Forefront from the distribution of "Edgemont Road" was trust money held by Forefront for Water Street. Further, they maintain there is no sound evidentiary basis for concluding that the officers of both Banks knew that the money on deposit in the two accounts was trust money or that they were put on inquiry in that regard. Finally, they say that, as a matter of law, no more than the amounts of CDN $93,089.57 and US $81,408.22 could have been held in trust for Water Street in any event because the remaining balance in the accounts was not "Edgemont Road" revenue.

4 Water Street cross appeals. It seeks to amend its pleadings to allege against the Banks additional loss it contends is compensable, and it maintains that the judge erred in declining to award compound interest payable on the judgment, as well as special costs.

5 The determinative issue then is whether, under the provisions of the distribution agreements, the revenue from "Edgemont Road" was held by Forefront in trust for Water Street. The agreements were drawn by solicitors. Forefront does not contend that any terms are to be implied. On my consideration of the provisions of the agreements as drawn, I have concluded that no trust obligations were imposed on Forefront, and, for the reasons that follow, I would allow the Banks' appeal and dismiss the action against them.

The trial judgment

6 After discussing the evidence and stating the position of the parties, the judge concluded in her reasons for judgment, [2005] B.C.J. No. 559, 2005 BCSC 368 as follows:

> [100] In my view, the evidence does establish a creation of a fiduciary obligation or trust between Water Street and [Forefront]; that the nature of that obligation was known to the [Banks], who appeared to be reckless of that obligation in their rush to seize whatever funds they could at the end of June 2001.

7 The judge's analysis which follows that conclusion appears to be predicated on her view that the distribution agreements are not free from ambiguity, which she saw in the use of the words "remit" and "payable" in relation to Forefront's obligation to account to Water Street every six months. The ambiguity she identified led her to interpret the agreements based in large measure on extrinsic evidence concerning the conduct of the parties and the Banks in relation to the revenue received from the distribution of "Edgemont Road" that Forefront held on deposit.

8 When the account at the TD Bank was opened, Forefront's accountant noted in its deposit book that it would be an interest bearing account to be used for third party distributions related to

"Edgemont Road". But there is no suggestion that the account at the TD Bank, or the second account at CIBC, were opened or operated as trust accounts. The accounts were not used only for the deposit of distribution revenue, and the deposits of such revenue were not limited to revenue from the distribution of "Edgemont Road". The revenue deposited in those accounts from the distribution of "Edgemont Road" was intermingled with revenue received from the distribution of other productions. Forefront took its fees and expenses from the accounts and periodically drew from the accounts to pay down its loans.

9 It is common ground that the production of "Edgemont Road" was publicly funded through what is referred to as Telefilm. Forefront's participation as a distributor required Telefilm's approval and that meant there could be no question about Forefront's financial viability. Thus, when Forefront began to fail in the latter part of 2000, its principals were in a difficult position. They had personally guaranteed much of the bank debt and they were obviously anxious to minimize their exposure. They were told their guarantees would be surrendered (as they eventually were) if the Banks recovered $250,000.00 of the loans. But their continued participation in the distribution of publicly funded productions was largely dependent on there being no default in Forefront's obligations to Water Street.

10 The position taken by the principal of Forefront (Mickey Rogers), who was dealing with Water Street (Michael Chechik and Andrea Droege) and the Banks (Diane Friedman at VanCity and Leonard McCabe at BDC), was that the money in the accounts received from the distribution of "Edgemont Road" belonged to Water Street and was not available to the Banks. Prior to BDC taking legal advice when demand on Forefront was made, Mr. McCabe wrote a credit report acknowledging that he considered monies "earmarked" for Water Street in Forefront's accounts was not Forefront's money. Ms. Friedman at VanCity held a contrary view.

11 Against this background, the judge's analysis advanced in support of her conclusion is as follows:

> [101] On the issue of ambiguity, the terms of the two distribution agreements cannot be said to be free from ambiguity. There is a certain amount of confusion arising from the words used, "remit" and "payable". The plaintiff says that there should be a trust concluded not only from the agreement but also from the surrounding circumstances; the defendants say that there should be an implied right to commingle funds. As the defence has concluded, the court is permitted to take into account "relevant surrounding circumstances" when interpreting contracts, so long as the consideration of the surrounding circumstances does not overwhelm the wording in the actual contracts.
>
> [102] To describe the relationship between Water Street and Forefront Releasing Inc. as that of creditor and debtor is to overlook the reality of the situation, both

> of the contracts, and of the industry in which both Water Street and Forefront were experienced players.
>
> [103] Unlike consignment or agency cases, copyright and beneficial ownership to the *Edgemont* series has always remained with Water Street. The only rights given to Forefront were to distribute Series I and II to broadcasters throughout the world, in return for repayment to Forefront of expenses and payment of certain commissions. Monies received from the international broadcasters were to be kept in a separate account, according to the second Distribution Agreement; there was no stipulation that this be a separate trust account, but that does not relieve Forefront of its fiduciary obligation.
>
> [104] In my view, the conduct of the principals throughout confirmed that both Water Street and Forefront recognized the fiduciary obligations. McCabe, the experienced banker with BDC, knew at all times that those funds belonged to Water Street, and not to Forefront. It was his writing on the March 16, 2001 cash flow statement that indicated "earmarked for Water Street". In August 2000, the then accountant for Forefront, Maggie Neilson opened the TD account for Forefront and wrote on the July 31, 2000 account statement "FYI - this account is interest bearing and is to be used for 3rd party distribution monies - i.e. *Edgemont* I and II". For the defence to now say that that was written by Neilson on her own volition and not under the direction of Ms. Rogers is questionable.
>
> [105] In November 2000, Mr. Chechik asked Mickey Rogers if Water Street's money was safe, and he was told not to worry. Later, the accountant for Water Street was told that indeed their money was safe and in a separate account. The fact that the funds may have been commingled in the CIBC bank account of Forefront does not preclude finding those funds were subject to the trust obligation.

12 The judge then continued, appearing to say that the agreements provide that Forefront held the money in trust quite apart from the conduct of the parties which she said confirmed Water Street's case:

> [107] I agree with counsel for the plaintiff that both on a plain reading of the contractual language and considering the commercial circumstances of this industry and the surrounding circumstances of these contracts, and the market in which the parties were operating, a trust has been established. The relationship between Water Street and Forefront is not that of debtor and creditor.

> [108] Further, the conduct of the parties confirms the plaintiff's case, and is consistent with the plaintiff's claim and the words of the Agreements.

13 The judge discussed the credibility of the principal witnesses and then continued:

> [118] To describe the plaintiff as "an unsecured creditor" is to misrepresent the nature of the business, the nature of the contractual relationship between the parties, and to misrepresent the terms of the contract between the plaintiff and Forefront. It is to ignore the true nature of the relationship between Water Street and Forefront, and to ignore the fiduciary obligation that existed between those two parties.
>
> [119] There is sufficient language in the Agreements and sufficient conduct to show intention to create a trust, and the Distribution Agreements amounted to that.
>
> [120] It is important to note that there was to be no interest paid to Water Street on funds retained by Forefront on behalf of Water Street in between the six month reporting and payment periods. When interest is to be paid, the relationship is nearly always the relationship of debtor and creditor. That is not the case here. Any interest earned in the interest-bearing Toronto Dominion account would be for the benefit of Forefront, not Water Street.
>
> [121] There was never any agreement between Water Street and Forefront that the funds would be commingled. The fact that they were intermingled by Forefront does not preclude a finding of a trust. I find that both Forefront and Water Street acted throughout pursuant to a fiduciary relationship existing.

14 The analysis consists of a number of conclusory statements that regretfully I find to be of little assistance now in understanding the reasoning the judge employed. She made reference to the reality of the situation (both of the agreements and the industry), the commercial circumstances of the industry, the surrounding circumstances of the agreements, the markets in which the parties were operating, the nature of the business and of the contractual relationship, as well as the true nature of the relationship between Water Street and Forefront, without saying what it was about any of these considerations that is significant, or saying what it was about any of them that supports her conclusion that the distribution agreements were to be interpreted as providing for the creation of a trust in respect of "Edgemont Road" distribution revenue. I have difficulty seeing on what evidentiary basis it can be said there was anything remarkable about the industry or the relationship

between the producer and the distributor that bears on the way the agreements are to be interpreted.

15 I have difficulty seeing on what basis it can be said, on the one hand, that, on a plain reading of the contractual language, the agreement provides for the establishment of a trust (para. 107), and, on the other hand, that the agreement contains an ambiguity that bears on that very issue (para. 101). More importantly and in any event, the judge did not explain what it was about the ambiguity she identified that she found confusing and how that confusion bore upon the issue of whether the agreements provide for a trust.

16 The judge appears to have been fundamentally mistaken in relying on there being a provision in the second agreement that required Forefront to keep "Edgemont Road" revenue in a separate account (para. 103). Neither agreement contains any provision to that effect. To the contrary, it is evident that in making the second agreement the parties turned their minds to a change from the first agreement to provide for Forefront's maintaining separate *books* of account for the "Edgemont Road" series, and that is the extent of what they agreed. The relevant clause provides:

> 16.2 The Distributor shall create and maintain separate books of account for the Series, and the Producer may have access during business hours to such and to make copies of such accounts ....

More than at any other time, that was the time when, if they had in mind burdening Forefront with trust obligations, it might have been expected that they would incorporate a term requiring the distributor to maintain a separate bank account for that revenue, as they could easily have done. I consider it significant that they did not do so.

17 It may well have been convenient for Forefront to open the account at the TD Bank for the purpose of depositing revenue received from the distribution of "Edgemont Road", but the fact that it opened an account does not mean it had any obligation to do so. It never agreed to open an account much less keep revenue separate.

18 The judge attached significance to the absence of any provision in the agreements permitting the commingling of funds in the accounts. But what appears to me to be significant is that Forefront was in no way precluded from operating the accounts as it did. The absence of any restriction on what Forefront did with revenue received from the distribution of "Edgemont Road" appears to me to be indicative of there being no intention that Forefront be burdened with trust obligations which may well have been thought to be unnecessary. The significance of not requiring that funds be kept separate was stated by the English Court of Appeal in ***Henry v. Hammond***, [1913] 2 K.B. 515 at 521:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If

> on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell L.J. in *New Zealand and Australian Land Co. v. Watson* [7 Q.B.D. 374, at p. 382] when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions.

19 The principle was recently applied by the Ontario Court of Appeal in ***General Publishing Co. (Re)*** (2002), 34 C.B.R. (4th) 186.

20 Finally, the judge said she considered it important that interest earned on the revenue received from the distribution of "Edgemont Road" during a period of up to six months was not payable to Water Street. She said that when interest is paid, the relationship is nearly always one of debtor and creditor. But I have difficulty seeing why, if the revenue belonged to Water Street in the sense that it was being held in trust for Water Street, Forefront would be entitled to use the money for its own benefit. The holder of trust money is not normally entitled to earn interest for his own account.

21 The first agreement is silent with respect to the payment of interest, but the second agreement specifically provides that Forefront was to pay interest at a prescribed rate on amounts due to Water Street after the date on which it was entitled to receive the money, if its entitlement exceeded what it had received by three per cent or more. It would seem to follow that no interest was otherwise payable by Forefront to Water Street, certainly under the second agreement if not under the first. In my view, if any significance is to be attached to Forefront being permitted to use the revenue to earn interest, or for some other purpose, during the six-month period between the dates on which it had to account to Water Street, it is an aspect of the contractual relationship that is completely at odds with Forefront having been burdened with the obligations of a trustee owing a fiduciary duty to Water Street in respect of what it was permitted to do with distribution revenue it held.

22 The question now on which the appeal is argued is whether there was any basis for the reliance the judge placed on the conduct of the parties as "confirming" an intention to provide that the revenue received by Forefront for the distribution of the "Edgemont Road" series, after deducting its fees and expenses, was to be held in trust for up to six months at a time for Water Street. I consider that, even if the conduct the judge relied upon can, when viewed in the context of Forefront's insolvency, be said to support the conclusion she reached, which I doubt, it was not evidence that was admissible for the purpose of interpreting the agreements because there was nothing ambiguous about their wording that bore on the issue of whether the revenue was held in trust.

Discussion

23 Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last

resort. It is only when the intentions of the parties cannot be objectively determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined. The two-step approach to be taken has been succinctly stated by the Manitoba Court of Appeal in ***Geoffrey L. Moore Realty Inc. v. Manitoba Motor League***, [2003] 9 W.W.R. 385, 2003 MBCA 71 at para. 26:

> [26] In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

24 Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made. Such evidence is generally restricted to circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed: ***Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.*** (1997), 49 B.C.L.R. (3d) 317 (C.A.) at paras. 18 to 20. See also Lord Hoffman's discussion of the principles of interpretation in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** (1997), [1998] 1 W.L.R. 896 (H.L.). The wording of the agreement must not, however, be overwhelmed by a contextual analysis: ***Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.*** (1996), 25 B.C.L.R. (3d) 285 (C.A.) at para. 19.

25 If, after undertaking the first step of the analysis, the text is ambiguous, extrinsic evidence becomes admissible for the purpose of resolving the ambiguity and determining what was actually agreed. But there must be a true ambiguity before recourse can be had to evidence of the way in which the parties conducted themselves. It is well recognized that a court is not to search for ambiguity. In ***Melanesian Mission Trust Board v. Australian Mutual Provident Society***, 1996 UKPC 53, [1996] J.C.J. No. 63 at para. 9, Lord Hope of Craighead expressed the caution a court must exercise in this regard, as follows:

> [9] The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must

> be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.

26 An ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made: ***Gilchrist v. Western Star Trucks Inc.*** (2000), 73 B.C.L.R. (3d) 102, 2000 BCCA 70 at paras. 17-18; and ***Re Canadian National Railways and Canadian Pacific Ltd.*** (1978), 95 D.L.R. (3d) 242 at 262, [1979] 1 W.W.R. 358 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668. Where extrinsic evidence has been admitted, it has been to resolve an ambiguity in what the parties in fact agreed as opposed to overcoming an uncertainty about the legal consequences of the agreement they made.

27 Where an ambiguity exists, a court in this province (unlike an English court) may consider not only evidence of the parties' conduct in making their agreement, such as the course of their negotiations, but also the conduct of the parties in performing their agreement. It is, however, clear that evidence of that kind must be approached with caution. In ***Re C.N.R. and C.P. Ltd.***, this Court discussed the use that can be made of evidence of this kind, where, at p. 262, it was said:

> However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight. In the case of evidence of subsequent conduct the evidence is likely to be most cogent where the parties to the agreement are individuals, the acts considered are the acts of both parties, the acts can relate only to the agreement, the acts are intentional and the acts are consistent only with one of the alternative interpretations. Where the parties to the agreement are corporations and the acts are the acts of employees of the corporations, then evidence of subsequent conduct is much less likely to carry weight. In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so and it is to this danger that allusions are made throughout the recent English cases, particularly *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235, [1973] 2 All E.R. 39, and *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583, [1970] 1 All E.R. 796. In England the risks have been considered

> sufficiently grave that the possibility of illumination from the use of subsequent conduct has been ruled out. In Canada, they have not, but those risks must be carefully assessed in each individual case before determining to give weight to subsequent conduct.

28 Thus, it does appear clear that, if extrinsic evidence of conduct post-dating the making of an agreement is adduced to resolve an ambiguity in the interpretation to be given to an agreement, its value may be limited and it must in any event be confined to the conduct of the parties or their employees where the parties are corporations.

29 The only ambiguity the judge identified, and the only ambiguity addressed in argument by Water Street and the Banks on this appeal and at trial, is what is said to be the confusion associated with the use of the words "remit" and "payable" as employed in the text of the agreement.

30 The agreement is not complicated. Its object was to facilitate the distribution of the television series to broadcasters. Virtually all of Water Street's interest in the series was transferred to Forefront save only for the copyright which Water Street retained enabling it to contract with a different distributor in the event that the agreement was terminated. Having acquired the right to do so, Forefront, not Water Street, was free to "exploit" the series in virtually any way it saw fit. Forefront was free to contract with such broadcasters on such terms as it wished, and it was to Forefront that distribution revenues were paid. Forefront was certainly not acting as Water Street's agent. It would have been Forefront, not Water Street, which could have sought relief in the event of a broadcaster's default. It was Forefront which was entitled to be paid for the distribution of the series.

31 Forefront was required to pay $250,000.00 on the first agreement, and $150,000.00 on the second agreement, to Water Street as an advance that was repayable from distribution revenues as part of financing the production of each cycle of the series, and Forefront's approval was required with respect to the production budgets, as well as the cast, the directors, and the writers.

32 Water Street and Forefront effectively agreed to share the profit generated by Forefront. They agreed that the amount of distribution revenue actually received by Forefront would be shared on the basis that Forefront would receive an agreed fee (which varied with the nature of each distribution) together with its expenses, and Water Street would receive the balance. The wording the judge said was confusing is found in the clauses of the agreement pertaining to Water Street's receipt of its share of distribution proceeds.

33 Under both agreements, Forefront agreed to "remit" to Water Street 100% of what was defined as the Net Revenue (the balance of the gross distribution revenue subject to deductions). Under the heading of "Reports and Remittances" in the first agreement, Forefront was obligated to report to Water Street twice yearly with each report being accompanied by a "remittance" to the producer of the amount due and "payable" to the producer. Under the same heading in the second agreement, Forefront was obligated to report to and "pay" the producer semi-annually.

34 As I understand it, reduced to simplest terms, Water Street contends that the word "remit" means to send something back, the suggestion being that Forefront was obligated to return to Water Street money that belonged to Water Street, even though Water Street had never had the money. Water Street cites various dictionary definitions in support, some of which attribute to the word the meaning Forefront maintains it is to be given. On that basis, it is contended that the use of the word is indicative of an intention to provide for a trust. Forefront says that there is at very least an ambiguity as to what meaning is to be given to "remit" as it is used in the agreement.

35 In my view, the contention is without substance. It is perfectly clear that the words "remit" and "pay" are used interchangeably in relation to Forefront's obligation to send money to Water Street. That meaning for the word "remit" can also be found in the dictionaries. To read more into the choice of those words is to search for or create an ambiguity that does not exist, something the court must not do. As was said in ***Gilchrist*** at para. 18, the words of the agreement "must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning". The meaning Forefront would attribute to the word "remit" cannot be said to be its natural meaning in the context of the agreements. The interpretation of the agreements for which Forefront contends is simply not a reasonable interpretation.

36 I do not consider that on any reasonable interpretation it can be said that the words "remit" or "remittance" can be said to carry more in their meaning than an obligation to pay Water Street. Indeed, that is what the second agreement specifically provides with respect to Forefront's obligation to report and remit. As I have said, the judge did not explain what it was that she found confusing about the words "remit" and "payable". On a plain reading of the agreement I see nothing confusing about them and no reason they should not have the obvious meaning they can reasonably be said to have been intended to convey. It was only that every six months Forefront was required to send what it owed to Water Street. Whether to send the money was to remit or to pay it is of no consequence and there is no distinction that can be drawn on which it can be argued that it was the parties' intention to burden Forefront with the obligations of a trustee in respect of the money it held for up to six months at a time.

37 In ***M.A. Hanna Co. v. Provincial Bank of Canada***, [1935] S.C.R. 144, the Supreme Court of Canada considered essentially the same case as Water Street's dispute with the Banks presents here. The plaintiff was engaged in the business of selling coal on a wholesale basis. It entered into an agreement with a factor to sell its coal. The factor's compensation was the amount it recovered in sales that exceeded the plaintiff's regular circular prices. The sale proceeds were deposited in the factor's bank, there being no obligation on it to keep them separate. The agreement between the plaintiff and the factor required the factor to "remit" a "remittance" when accounting to the plaintiff every four weeks. The factor became insolvent and the bank by which it was financed seized the account. The plaintiff sued, contending the sale proceeds were trust monies.

38 The majority found it unnecessary to decide whether the money was held in trust, rejecting the claim on the basis that the bank had not been put on inquiry. But the two minority judgments,

concurring with the majority in the result, are instructive. They came down against the plaintiff on the basis that no trust had been created on the provisions of the agreement between the plaintiff and the factor.

39 Rinfret J. expressed his conclusion at p. 156, as follows:

> I, therefore, come to the conclusion that the agreement of November 11th allowed the Docks Company to deposit the proceeds of the sale of the appellant's coal in the Docks Company's general account and to use the proceeds thereof between the settlement dates, subject only to the obligation of remitting to the appellant a sum of money equivalent to the collections at the end of the remittance period agreed upon between the parties.

40 Cannon J. took essentially the same view, relying in particular on ***Henry v. Hammond***.

Conclusion

41 On a plain reading of the distribution agreements, drawn as they were by solicitors, I find no ambiguity as to what can objectively be said to have been the parties' intentions in material respects that would have permitted the judge to have recourse to extrinsic evidence concerning the parties' post-agreement conduct.

42 It would have been a simple matter for the parties to have made provision for distribution revenue to be held in trust, but they did not see fit to do so, nor did they even provide for the revenue being kept in a separate account when it is evident they turned their mind to Forefront being required to maintain separate books of account for the "Edgemont Road" series as distinct from its other distribution business.

43 The time during which substantial distribution revenue remained in Forefront's bank accounts was as long as half a year, yet no restrictions were imposed on what Forefront could do with the money in all that time. In my view, as in the minority's view in ***M.A. Hanna Co.***, it was open to Forefront to use the money as it did, subject only to remitting to Water Street a sum of money equivalent to distribution revenue to which it was entitled every six months, consistent with the principle stated in ***Henry v. Hammond***, where there is no obligation to keep money separate. The provisions of the distribution agreements created no trust that deprived the Banks of the priority to Forefront's bank accounts that they otherwise had.

Disposition

44 I would allow the Banks' appeal and dismiss the action against them. It would then follow that Water Street's appeal would be dismissed.

LOWRY J.A.

HALL J.A.:-- I agree.
SAUNDERS J.A.:-- I agree.

* * * * *

CORRIGENDUM

Released: October 18, 2006.

On the title page of the reasons for judgment, 2006 BCCA 459, released October 13, 2006, the names of the counsel appearing are in the incorrect order and are to be switched.

TAB 4

Case Name:

Giles v. Westminster Savings Credit Union

Between
Laurie Giles and others, plaintiffs, and Westminster Savings Credit Union, Gary J. Thomas, Taylor Ventures Ltd., Ralph Dennis Taylor, Joanne Taylor, Floyd Taylor, Vince Taylor; Michael G. Oliver, Raymond E. Drabik, Ewen C. Carruthers, and William R. Chalcraft, carrying on business under the firm name and style of Oliver, Drabik, Carruthers & Chalcraft, a Partnership; Kenneth Rogers Appraisals Ltd. and Kenneth N. Rogers, defendants

[2006] B.C.J. No. 159

2006 BCSC 141

146 A.C.W.S. (3d) 121

Vancouver Registry No. S004562

British Columbia Supreme Court
Vancouver, British Columbia

Sigurdson J.

Heard: November 17 - 19 and 22 - 26, and
November 29 - December 3, and December 6 - 10, 2004;
and March 21 - 24 and 29 - 31, and April 7 - 8, 11 -
14 and 18 - 19, 2005.
Judgment: January 27, 2006.

(547 paras.)

Tort law -- Negligence -- Contributory negligence -- Apportionment of liability -- Fiduciary duty -- Action by investors in Taylor Ventures for damages against the Credit Union that authorized mortgages without their knowledge dismissed -- The Credit Union was not reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with Taylor Ventures were in

breach of trust or in breach of a fiduciary duty owed to the investors -- Based on the foregoing, the Credit Union established a juristic reason for any enrichment it received by way of the mortgages.

Action by investors in Taylor Ventures (TV) for damages against the Credit Union that authorized mortgages without their knowledge -- TV was a real estate development company that operated in the late 1980's and 1990's and was involved in projects with various investors -- Ultimately the company went into receivership and then bankruptcy -- When the company went bankrupt, the plaintiff investors lost their investments -- The investments involved minimal documentation; each investor received only a single document that recorded the amount of money provided and the number of shares in a project received in return -- The basic terms of the transactions were straightforward and were the same in each case -- The case concerned the liability of the Credit Union, and one of its managers, for any actionable conduct of TV in its relationship with its investors -- The investors alleged that the Credit Union and its officer were liable for damages in connection with the mortgaging of ten properties because they either knowingly received trust property or knowingly assisted in a breach of trust or a breach of fiduciary duty by TV -- HELD: Action dismissed -- Upon a consideration of all of the evidence, it was determined that the Credit Union and its officer were not liable for knowing assistance or for knowing receipt in connection with the breach of fiduciary duty by TV -- There was an obligation of the developer to act honestly and in the best interests of the investors in exercising its discretion when it might affect the interests of the investors, therefore, there was a fiduciary relationship between TV and the investors -- The Credit Union and its officer did not have actual knowledge of a trust or a fiduciary duty, nor did they have actual knowledge of a breach of trust or fiduciary duty -- The Credit Union was not reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with TV were in breach of trust or in breach of a fiduciary duty owed to the investors -- Based on the foregoing, the Credit Union established a juristic reason for any enrichment it received by way of the mortgages.

Statutes, Regulations and Rules Cited:

Land Title Act, R.S.B.C. 1996, c. 250, s. 29

Counsel:

Counsel for the Plaintiffs: J. Laxton, Q.C. J. Shields C. Weiler

Counsel for the Defendant Credit Union: J. Milton D.A. Goult
R. Dalziel

Counsel for the Defendant Gary Thomas: R. McGowan L.J. O'Sullivan

Counsel for the Defendant Lawyers: J. Webster

TABLE OF CONTENTS

1 SIGURDSON J.:-- This action concerns claims by a number of individual investors in Taylor Ventures Ltd. ("TVL").

2 TVL was a real estate development company owned by Ralph Taylor and his wife Joanne and operated in the late 1980's and 1990's with the help of his brother Floyd Taylor. The company was involved in projects with investors and projects of its own, including the development of an ice rink. Ultimately, the company went into receivership and then bankruptcy.

3 The plaintiffs invested, in varying amounts and circumstances, in projects undertaken by TVL. When the company went bankrupt, the plaintiffs lost their investments.

4 During this time, TVL did most of its banking at Westminster Savings Credit Union (the "Credit Union"). This case concerns the liability of the Credit Union and one of its managers, Gary Thomas, for any actionable conduct of TVL in its relationship with its investors.

5 The plaintiffs' investments involved minimal documentation; each investor received only a single document known as a "speedy memo" that recorded the amount of money provided and the number of shares in a project received in return. The basic terms of the transactions were straightforward and were the same in each case: TVL promised the investor twenty percent interest on his or her investment, which was redeemable at any time, and a further share of profits if the investor stayed in until the completion of the project.

6 There is controversy over whether there were other terms of the contract. This arises from the absence of any written agreement beyond the speedy memo, and the informality of the dealings between TVL and the investors. These dealings consisted largely of verbal representations made in various circumstances, including meetings with the investors that took place at Helen's Deli, a restaurant in the Sapperton district of New Westminster, as well as newsletters that TVL sent to investors.

7 Although the investors did not have substantial documentation, they say they relied on their trust in Ralph Taylor.

8 As I will explain below, it appears from the weight of the evidence to have been agreed by the investors and TVL that the company had the discretion as to how and when to develop the projects and whether to sell the project or the lots created in the development. I will also find that the parties understood that TVL would have sole discretion as to both the calculation of profits and their division and distribution.

9 The investors say that TVL breached the terms of the contract or the trust or fiduciary obligations the company and its principals owed to the investors in a number of ways: by not segregating the money they paid to TVL, but rather commingling it with other company funds; by not using that money to retire initial financing on the properties in which they invested but rather using it for unauthorized purposes, including an ice rink project and a project of the principal's son; by failing to report to investors or account for their investments; and by failing to have development plans or do more than minimal work on the projects.

10 The central allegation in this case surrounds TVL selling and mortgaging ten properties (which the plaintiffs say were investors' projects in which they had an interest) without the investors' knowledge or consent and without accounting to them for any of the proceeds. The plaintiffs say that these transactions were in breach of trust and in breach of a fiduciary duty they allege was owed to them by TVL.

11 The plaintiffs' counsel describes these transactions as part of a bizarre scheme in which, in the words of the plaintiffs' counsel, "the investors' own lands were mortgaged to provide funds to buy lands the investors believed that they had already bought with their own money and which they believed they owned or would own free and clear of all encumbrances".

12 The plaintiffs say that the Westminster Savings Credit Union, where Ralph Taylor and TVL banked for many years, and its officer, Gary Thomas, are liable for damages in connection with the mortgaging of the ten properties because they either knowingly received trust property or knowingly assisted in a breach of trust or a breach of fiduciary duty by TVL.

13 The plaintiffs' overall theory was expressed in different ways in argument, but it was put this way, at least initially, by their counsel. The Credit Union knew of the return promised to the investors and knew that the real estate market had to be strong to sustain that yield. The plaintiffs suggest that TVL was insolvent and deeply indebted to the Credit Union and that the Credit Union, knowing the condition of the real estate market, was concerned about a "run on the bank". They say that the Credit Union's attention was diverted because their employee, Mr. Thomas, was in a conflict of interest as he and some of his family members had made substantial investments in TVL. They say that the Credit Union took part in the scheme or, at the very least, ignored signs that should have put it on inquiry into a possible breach of trust or fiduciary obligation.

14 The Credit Union and Mr. Thomas, on the other hand, say that the legal arrangement between TVL and the investors was a debtor/creditor relationship -either a loan or a participating loan - and was not a trust or a fiduciary relationship. Alternatively, they say that if it was either a trust or a fiduciary relationship, there was no breach of trust or of fiduciary duty. If there was such a breach, the Credit Union and Mr. Thomas say they had neither actual nor constructive knowledge of the breach and are not liable as third party accessories.

15 The Credit Union submits that on the proper construction of the essentially oral contract between the investors and TVL, TVL was authorized to do the following: if it had title to properties,

it could sell them; if it did not yet own properties, it could assign its rights under options; as part of its general discretion it could mortgage properties if it saw fit to do so to advance the development of the investor projects; and it could repay the investors' loans on demand. In addition, the Credit Union says that there was no agreed prohibition on the commingling of funds by TVL.

16 This background shows that the starting point in this case is to determine the nature and terms of the contractual relationship between the investors and TVL. The next step will be to characterize the relationship between TVL and the investors to determine if it was a trust or fiduciary relationship and, if so, if there was a breach of the resulting obligations. If there was such a breach, I must determine if the Credit Union and Mr. Thomas are liable for damages.

17 The plaintiffs in this proceeding were ten individual investors: Robert Dunlop, Sandra Miller, Vern Keller, John Berger, James Ogren, John Mountain, Heather Roberton, Tom Koretchuk, Gary Burgess, and Phyllis Atchison. I will set out the circumstances and details of their investments later in these reasons.

18 The trial proceeded only against the Credit Union and its manager, Gary Thomas. It was adjourned against the lawyers, Oliver, Drabik, Carruthers & Chalcraft, although their counsel made submissions.

19 Ralph Taylor, the principal of TVL and his brother, Floyd Taylor, are both named parties, both are bankrupt, and both testified at trial.

20 There are many plaintiffs in this action but only ten went to trial. It is the plaintiffs' counsel's expectation that this decision may lead to a resolution of all of the many claims in this proceeding. (For a description of the circumstances leading to this multi-plaintiff trial, see Giles v. Westminster Savings Credit Union, [2002] B.C.J. No. 2567, 2002 BCSC 1583.)

21 The issues in this case are as follows:

1. What were the terms of the contract between TVL and the investors? Specifically, what are the answers to the three following questions, which lie at the heart of the dispute concerning the terms:

    a) was TVL prohibited from using the monies that the investors gave to TVL other than for the purchase and development of the property or properties underlying the project referred to in the speedy memo - in other words, was TVL prohibited from commingling the funds?
    b) did TVL had the right to mortgage the property or did its discretion include the right to mortgage the property or, as the plaintiffs' counsel suggest, did that right only exist in connection with the initial acquisition of the property?

c) were the investors owners of the individual projects or were they lenders with a right to participate in profits?

2. In the legal relationship between the investors and TVL was there:

(a) a trust;
(b) a Quistclose trust; or
(c) a fiduciary relationship?

3. Was TVL acting in breach of trust, or in breach of a fiduciary duty owed to the investors when it entered into any of the ten property transactions, or otherwise?
4. If it was, are the defendants Westminster Savings Credit Union or Gary Thomas liable for knowing assistance or knowing receipt in connection with the breach of trust or breach of fiduciary duty?
5. If so, what damages are the plaintiffs entitled to?

22 Ralph Taylor incorporated TVL in 1979 and was its operating mind. At all material times, he was an undischarged bankrupt. This status prevented him from serving as a director of TVL when the company was incorporated, although he says he later became a director for "convenience sake". He also regularly told potential investors that, because of difficulties with banks, it was better (for developers) to deal with investors.

23 Although TVL dealt with a number of financial institutions, Westminster Savings Credit Union was the company's main banker from about 1988 to 1998. Ralph Taylor dealt primarily with the Credit Union's employee, Gary Thomas. Mr. Taylor did not disclose to the Credit Union that, throughout this period, he was an undischarged bankrupt.

24 During the relevant time, Mr. Thomas was the Manager of Commercial Loans and had some independent lending authority. The Credit Union also had a Management Credit Committee that reviewed and approved loans. In the 1990s, Barry Forbes was the Chair of the Management Credit Committee. He is also the President and CEO of Westminster Savings Credit Union and has been so for 26 years.

25 By 1988, at the latest, Ralph Taylor was purchasing and developing real property. Floyd Taylor, Ralph Taylor's brother, acted as the accountant for TVL. He prepared financial statements for the Credit Union and other financial institutions. The two of them operated TVL.

26 The company seems to have had success in the late 1980s and for a few years thereafter, a time when the real estate market appears to have been strong.

27 Even early on, Ralph Taylor raised money from investors. Initially the group of investors involved with TVL was small but, over time, it grew to upwards of 500 people.

28 TVL's activities were largely unregulated. The company did not issue prospectuses to potential investors in its projects. The speedy memo, which I referred to earlier and which provided a bare record of money received and shares issued in a particular project, was the only written document that accompanied an investment. However, many investors would, from time to time, attend monthly meetings with Ralph Taylor at Helen's Deli and there were written agendas for these meetings. The evidence was that Mr. Taylor generally followed these agendas and discussed the topics set out in them.

29 In the 1990s, TVL apparently sold nine properties to some companies of its larger individual investors and another property to a related company. As part of these transactions, the purchasers of these properties - or the nominee purchasers as they were referred to by plaintiffs' counsel at trial - granted mortgages to the Credit Union. The first of these transactions took place in 1992, another took place in 1994, four more took place in 1995 and another four in 1996.

30 The plaintiff investors - none of whom were among the nominee purchasers mentioned above - claim to have had an interest in these properties as investor projects. TVL purportedly continued, after the sales, to participate in the development of these investor projects, although it is unclear on the evidence the extent of development work that was actually done on the properties.

31 The transactions concerning these properties will be discussed in detail in that part of the judgment dealing with the evidence of the Credit Union and its manager. However, for ease of reference in the discussion of the evidence that will follow, I will identify the projects as follows:

* 180 Acres South Nanaimo
* Laguna View
* Chilliwack Mountain
* 43 Acres Langley, a single project comprising four separate properties:

    * 20100 96th Avenue
    * 20230 96th Avenue
    * 20168 96th Avenue
    * 20200 96th Avenue

* Delta Industrial Park
* 3.5 Acres Langley
* Special Investment Club

2. WHAT WERE THE TERMS OF THE AGREEMENTS BETWEEN TAYLOR VENTURES LTD. AND THE INVESTORS?

32 The plaintiffs' position on how the arrangement with TVL operated and the terms of the agreement with TVL was put this way. (I paraphrase their argument.)

(a) The plaintiffs were offered a choice of properties in which to invest.
(b) The plaintiffs gave money to TVL to buy shares in the specific piece of property chosen by the investor.
(c) TVL was to buy the property and develop it. The plaintiffs provided the capital, TVL the expertise.
(d) TVL had complete discretion over how and when to develop the properties it bought.
(e) The plaintiffs placed their full trust and confidence in TVL that TVL would honour the deal honestly and faithfully and Ralph Taylor accepted the investors' trust.
(f) TVL promised a twenty percent annual guaranteed return and to buy back shares at any time when asked by the plaintiffs.
(g) TVL could "flip" the land, partially develop and sell it, or fully develop and sell it.
(h) Whoever was an investor in a specific piece of property at the time of its sale would get a share of any profit above his twenty percent return.
(i) While TVL could finance the initial land purchase through financial institutions, thereafter all the money used would come from TVL and the plaintiff investors.
(j) As shares were purchased, the initial financing would be retired so that the property would be held by TVL free and clear of all encumbrances for the benefit of the investors.
(k) Title was to be held by TVL because providing titles to the hundreds of investors was too cumbersome and expensive, particularly since the investors were allowed to trade' their shares to TVL and to each other. (At some point the practice appeared to change so that TVL was the only party who bought shares.)
(l) The calculation of the profit was left entirely to the discretion of TVL. TVL may have been entitled to "sweat" equity of ten percent or twenty percent and to whatever share of profit in any project was represented by the number of shares TVL had purchased.
(m) TVL gave the plaintiffs monthly reports showing the value of their shares in each project and noting the increase in value each month over a three month period.
(n) TVL told the plaintiffs their money was safely invested in the land in which they had purchased shares.

(o) TVL told the plaintiffs it had money enough to buy back any shares and to pay the guaranteed twenty percent return.
(p) TVL kept records of every investors' purchase and sale.
(q) The only record of the purchase of a share given to the plaintiffs was a speedy memo which identified the name of the project by the land involved, and the number of shares purchased.
(r) Many investors wrote on their cheques used to pay for the shares the name of the project and the amount of shares purchased.

33 The defendants say that the agreement between the investors and TVL was, in essence, a loan and that the investors had a right to participate in the profits of the project if they had not had their investment repaid.

34 The defendants' position, in summary, is that:

(a) It was not a term that the investors acquired an ownership interest in property.
(b) There was no term restricting TVL from selling or mortgaging the properties.
(c) There was no term stipulating that the funds provided by the investors would be used by TVL solely for the purchase and development of specific properties referred in the investors' respective speedy memos. In other words, there was no prohibition against the commingling of monies by TVL.

35 Therefore, the main areas of difference lie in the following areas. First, what is the proper characterization of the relationship between the investors and TVL; that is, were the plaintiffs in fact the beneficial owners of the land or was there was some other legal relationship between the investors and TVL such as that of a debtor and creditor? Second, what were the limits, if any, that the contract imposed on TVL's use of the funds; that is, was there a prohibition against commingling funds or were the funds to be held and used only for the purchase or the purchase and development of the particular pieces of property? Finally, what was the scope of the discretion the investors gave TVL to deal with the land that was the subject of the investment; that is, could the land be mortgaged or sold by TVL without their consent?

36 Since the speedy memo is the only written record of the agreement, I must look to the discussions that took place between Ralph Taylor and the investors on an individual basis and at the regular meetings at Helen's Deli. Evidence of these discussions was given by each of the individual plaintiffs as well as by Ralph Taylor and Floyd Taylor.

37 I will start with a review of the evidence regarding the terms of the contract and will then make my findings on what was agreed to between these plaintiffs and TVL.

38 In this section, I will first identify the plaintiff investors and their relationship with TVL. I will then summarize their evidence on the communications between the investors and Ralph Taylor as to the details of their relationship.

39 Robert Dunlop, a retired high school teacher, met Ralph Taylor in mid -1994 through his son and friends, who were investors. He made an early investment in TVL in a project called Parkway Industrial, which was not at issue in this trial. Mr. Dunlop invested in two projects that are at issue in this lawsuit. He paid $12,000 for three shares of the Delta Industrial Park project and $10,000 for ten shares in the 3.5 Acres Langley project.

40 Sandra Miller is a single mother with four children. She is the daughter of Robert Dunlop. Ms. Miller made two separate investments in the 3.5 Acres Langley project, paying $7,000 for seven shares in total.

41 Vern Keller is semi-retired, having worked for nearly fifty years in the construction of large warehouses. He made the following investments in TVL: he purchased five shares in the Special Investment Club, paying the company $2,470 for four of these and buying the fifth from another investor, with Ralph Taylor's knowledge, for $1,400; he received six shares in 180 acres South Nanaimo in lieu of a $20,000 payout due to him from another TVL project in which he had invested; and he paid $81,200 for twelve shares in 43 Acres Langley, $9,150 for three shares in Delta and $3,090 for three shares in 3.5 Acres Langley. His total loss through TVL was about $150,000. Ultimately, through his accountant, Mr. Keller applied for an Allowable Business Investment Loss ("ABIL") and wrote off losses of $92,000.

42 John Berger is a retired carpenter. In August 1994, he made his first investment with TVL. He made three separate investments, all in the Delta project, for a total of $304,550. His total loss, including other TVL investments, was $428,200.

43 James Ogren is a purchasing agent for Burrard Ironworks. He met Ralph Taylor in the late 1980s. Like many of the investors, he got to know Ralph Taylor through hockey; they played in the same league and later on the same team. Mr. Ogren made the following investments in TVL, all of which were ultimately lost. He paid $6,700 for ten shares in the Special Investment Club. He bought a share in a Kelowna project which is not at issue here, and that share was worth $7,200 when he swapped it for a share in 180 Acres South Nanaimo worth $6,500. He later bought another share in the same development for $6,500. Finally, he paid $19,800 for three shares in the 43 Acres Langley project. Other lost investments with TVL, he said, brought his total loss to nearly $49,000. He applied for an ABIL but his claim was disallowed.

44 John Mountain retired from teaching in 1998, and then worked as a substitute teacher for about five years. He knew Ralph Taylor's wife for many years and was introduced to Mr. Taylor in 1989. He made the following investments in TVL which are raised in this action: $6,100 for one share in the 180 Acres South Nanaimo project; $3,150 for one share in Laguna View; $18,250 for five shares in Delta Industrial Park and $3000 for three shares in 3.5 Acres Langley. His loss in

these investments was $30,500. His total loss, including TVL projects not at issue here, is in excess of $50,000.

45 Heather Roberton's husband played hockey with Ralph Taylor. She invested in three projects that are the subject of this action. Her investments are as follows: $60,000 for six shares in Chilliwack Mountain, one of which she redeemed for $37,000; $3,200 for five shares in the Special Investment Club; and $9,450 for three shares in Delta Industrial Park.

46 Tom Koretchuck knew Ralph Taylor from playing hockey. He is a former teacher who first invested in TVL in 1992. He paid $18,900 for three shares in the 180 Acres South Nanaimo project. He later sold one of these shares for $12,900. He lost the balance. He and his wife also invested Parkway Industrial, a project that is not at issue here. Mr. Koretchuck's wife claimed an ABIL.

47 Gary Burgess met Mr. Taylor in 1990 through refereeing hockey games. He did not attend the Helen's Deli meetings. His investment that is the subject of this action was $56,000 for eight shares in the 43 Acres Langley project. His total loss was about $73,600. Mr. Burgess claimed an ABIL.

48 Phyllis Atchison is a retired legal secretary. In two separate transactions, she paid TVL $26,600 for four shares in the 180 Acres South Nanaimo project. Ms. Atchison applied for an ABIL in 2002.

49 The investors all appeared to have the same understanding of the basic deal offered by TVL. They all understood, and I conclude they were told by TVL, that they would receive, on redemption, twenty percent per annum return on their investment, plus a share of the profit of the project if they stayed in until the end. Most of the investors testified that their understanding was that the twenty percent was guaranteed and payable on demand. Mr. Burgess, however, said he did not think the rate of return was guaranteed. He also believed that Ralph Taylor would only redeem the investment if he could find another buyer.

50 None of the investors said they gave money to Ralph Taylor in trust, nor did any of them testify that TVL accepted the money in trust. It appears, from their testimony, that there was no discussion between TVL and the investors of whether the money should be held in separate bank accounts or subject to separate accounting. However, some investors, such as Mr. Mountain, testified that they assumed that this was the arrangement.

51 None of the investors recalls Ralph Taylor using the word "loan" in any of their discussions and most said that if the investment had been characterized as a loan, they would not have given Mr. Taylor their money. On cross-examination, however, Mr. Keller agreed that Mr. Taylor could have said many times that the investment was like a term deposit and Mr. Berger agreed with his discovery evidence that his investment could be equated with a term deposit and that a term deposit is a loan. However, Mr. Berger also said that if he wanted a term deposit, he would have gone to a bank.

52 All but two of the investors referred to themselves as shareholders, although Ms. Roberton said that Mr. Taylor also used the terms "club members" and "investors" to describe the investors. They appear to have generally understood that as shareholders, their shares were connected to a particular project and that their money was to be used to buy and develop the land.

53 While the investors may have believed they were shareholders, it is not clear how many shares were available. Shares were usually sold at the Helen's Deli meetings. Some investors, such as Mr. Keller, testified that Mr. Taylor told them there were a limited number of shares. Others, such as Ms. Miller, testified that there was both a limited number of shares and a time limit on share purchases. Others, such as Mr. Ogren, testified that Mr. Taylor never said anything about a limit on the number of shares available, but did say the shares were available for a limited time. As far as Mr. Dunlop was aware, when the share offering was finished, it was finished. A couple of plaintiffs appeared to believe that TVL could issue more shares after the sale closed but that appears only to be an assumption on their part. Ralph Taylor said that he could issue more shares but that does not appear to have been the subject of discussion with the investors. TVL kept a record of the number of shares sold on each project and the shares that had been redeemed by TVL.

54 There was evidence of the communications between TVL and the investors as to whether the investor's share was an interest in the land. Most investors appeared to have believed that TVL was on title. They all had communications with TVL before they bought. The transactions were all very similar. Some of the investors testified they were told that the property was registered in the name of TVL because there were so many shareholders it would be impossible to put them all on title. While some investors only assumed that they owned the land attached to the various projects, a number testified that Ralph Taylor led them to believe they were owners of the land. This being an important issue, I will review briefly the evidence of each of the investors as to what Ralph Taylor told them.

55 Mr. Dunlop said that, when he visited the 3.5 acres in Langley, Ralph Taylor indicated that "this is your land." He said that, when he bought his share, Mr. Taylor told the meeting that, in Mr. Dunlop's words, "We were collectively buying a share in a particular project, which in this case would be land ...". He said he understood Mr. Taylor owned shares as well and then when shareholders redeemed, Mr. Taylor would say that he became "that much bigger of an owner of that project". Mr. Dunlop understood he would be getting a share of the profits of a project if he stayed in.

56 Ms. Miller said she was told by Ralph Taylor that the money would be invested in a given project and would be used to buy and develop the land in the project. She testified that Mr. Taylor told her that by owning the land, the money would be secure.

57 Mr. Keller said that Ralph Taylor told him that when he purchased shares he owned a portion of the property that he bought shares in, that there was no mortgage and that the shareholders owned the land outright. Mr. Keller also said he was buying shares of the profits of an entire project.

58 Mr. Berger testified that Ralph Taylor told him he was buying an ownership interest which represented an interest in land and that the investment club was pooling money in order to purchase and develop land. But he also testified, "By buying a share I'm automatically a part owner. It doesn't have to be said". Mr. Berger also said that Mr. Taylor said and he understood the deal to be that if he left his money in he was entitled to share in the profits of the projects in the speedy memo.

59 Mr. Ogren said that Ralph Taylor told them that they could wait it out because they owned the land. He said that Mr. Taylor also told him that if he left his money in, he would be entitled to share in the profits of the project and it was up to Mr. Taylor to determine what the profits of the particular project were.

60 Mr. Mountain said that Ralph Taylor told him about TVL, how they could invest together and that they would buy shares in land in individual projects. He said that Mr. Taylor said that the money would be used for the project. He said that Mr. Taylor told him he would get a share of whatever profit the project generated but that he had no idea of the expenses that were incurred on the project.

61 Ms. Roberton said Ralph Taylor indicated to her that she would have an ownership interest in the land. When it was suggested to her that the proof of claim she and her husband filed in the bankruptcy did not assert any ownership interest in land, she replied that the document was prepared by the original trustee and she had not seen a form like this before and that she signed it because she was told the document was required by the trustee. She said that Mr. Taylor said that if you wanted to cash your share in before completion that you would get your twenty percent but you would not get your share in the profit of the project if it sold.

62 Mr. Koretchuk said that he assumed that TVL had title. If there was a mortgage on title, he said he assumed that TVL would pay off the mortgage with the money from the shares. He said that they were guaranteed twenty percent and a share of the profits at the end. He said he was not sure how that worked but that they were still guaranteed twenty percent.

63 Mr. Burgess said Ralph Taylor told him the property was owned by the group. He said that he was purchasing shares in a specific project and there was no financing from outside the group of people who were investing in that project. He said as well that he was going to get a share of the profit that was obtained from the sale of the project.

64 Ms. Atchison said Ralph Taylor told her she was purchasing a share in the land. She was also told that if they stayed in, they were entitled to a share of the profits of the project, in addition to interest.

65 A number of investors were asked on cross-examination if they understood or were told that they were responsible for any costs or taxes that might arise in the development or for any losses that might result. All said no. While Ralph Taylor later testified that some investors asked him about their liability for mortgage payments and other possible costs and that he told them they

would not be responsible, the issue does not appear to have been a subject of general discussions between Mr. Taylor and the investors.

66 The investors all said that Ralph Taylor had broad discretion to manage and develop the projects and a number of them testified that it was up to him to calculate the profit on a project. The investors all said they trusted him and expected him to make them money.

67 On the question of whether that discretion included the right to sell or mortgage the property in a project without the investors' knowledge or consent, most of the investors said that Ralph Taylor did not specifically raise that with them. Mr. Dunlop assumed that as a shareholder no one else outside the club was investing and there would be no mortgage. Mr. Keller, when asked about mortgages, said that Mr. Taylor said that the land was clear title. He testified that he attended most of the meetings at Helen's Deli. He was asked in cross-examination about the agenda for the club meeting in September 1994, which contained an item dealing with mortgages. He said he did not recall the discussion. Mr. Ogren, who testified that Mr. Taylor said there would never be mortgages on the properties, was also asked about this meeting and said that he did not recall the meeting when the agenda item was discussed. Mr. Burgess testified that Mr. Taylor told him, on a number of occasions, that he would not mortgage the property to a financial institution.

68 The other investors did not raise the issue of TVL's ability to mortgage with Ralph Taylor on their own initiative. They all testified that they never gave him permission to mortgage the properties, nor, on the other hand, did they expressly prohibit it. Yet while many of the investors did not recall any specific discussion of mortgages on the project properties, they say that Mr. Taylor spoke frequently of his aversion to banks. Mr. Mountain said Mr. Taylor said the whole idea of the investment club was that there were no mortgages, so if the market went bad they could wait it out. Mr. Mountain testified he did not recall being at a meeting where a mortgage on another investor project was on the agenda. Mr. Keller said much the same thing. Other investors, including Ms. Miller and Ms. Atchison, testified that Mr. Taylor said frequently that he did not need banks or mortgages because he was raising money from investors. Mr. Berger said that Mr. Taylor kept preaching they were strong enough and did not need outside money. Mr. Taylor's comments left Mr. Koretchuk with much the same feeling as these witnesses.

69 A number of the investors testified that Mr. Taylor spoke about what was required for investors to obtain security. Mr. Keller said that Ralph Taylor mentioned that collateral was available for investments of more than $50,000 at almost every meeting and that investments smaller than that did not have security. Mr. Taylor gave Mr. Berger a duplicate certificate of title to secure one of his investments, but later asked him to return it, which Mr. Berger did. On cross-examination, Mr. Berger denied he required the duplicate certificate to have security, but when it was put to him that he had said otherwise at his examination for discovery, he agreed his earlier statement was correct. Mr. Koretchuk was aware that TVL offered security to investors with over $50,000 but it is not clear where he got that information.

70 The investors were also asked about their knowledge of Ralph Taylor's ice rink project. While all appear to have heard of the project, their testimony was generally to the effect that Mr. Taylor had said that it was, in the words of one witness, "his baby" and that they could not invest in it.

71 Ralph Taylor testified as an adverse witness called by the Westminster Savings Credit Union. He was also cross-examined by Mr. Shields, counsel for the plaintiffs. He later testified again on his own behalf, near the end of the trial.

72 I found Ralph Taylor to be somewhat charismatic, but argumentative, defensive and, at times, long-winded. He appeared to have a good memory, but was quick to blame other people and external events for the failure of his development ventures.

73 Mr. Taylor was 70 years old at the time of trial. At all material times, he was an undischarged bankrupt.

74 Mr. Taylor was a teacher before he was a developer. After forming TVL in 1979, he had some success buying, renovating, and selling houses.

75 In 1988, he began bringing in investors to help finance TVL's projects. In the 1990s, it appears that TVL was quite successful. Some investors received substantial payouts. Over time, however, that changed. Mr. Taylor could not recall any project between 1994 and 1998 that made any money.

76 From the time he began bringing in investors, his arrangement with them seems to have been the same: he offered them twenty percent per annum return on their investment plus a share of the profits in a particular project, if they remained involved to the end of the project. Although he indicated in his testimony that he could have insisted on redeeming shares of investors by paying them the principal amount plus twenty percent interest and could have done so even if they wanted to stay in, this was never discussed with the investors and appears to be entirely hypothetical. It provides a telling example, however, of both Ralph Taylor's stubbornness and of how one party can form a subjective intent about an agreement, even though that aspect was never the subject of discussion between the parties.

77 The Credit Union argues that this transaction between Taylor and the investors is properly characterized as a loan or a participating loan. But Mr. Taylor testified on cross-examination that he never used that term when dealing with the investors, nor did he advise them that the money they received as a return on their investment was interest that had to be declared to Revenue Canada. Likewise he never referred to the investors as "lenders"; he originally called them "shareholders", and later, "investors".

78 Mr. Taylor, contrary to the evidence of a number of the investors, testified that he never told the investors that they were part-owners of the property, and he said that, before the litigation, no investor had ever said that they owned the land or that they should be on title. Mr. Taylor's evidence was that TVL was the owner of the land and that the investors' money was pooled with TVL's

money. He testified that the investors' money was never segregated nor had the parties agreed it should be segregated.

79 He also testified he never told investors that TVL was holding their money in trust. He never told the investors he was holding the properties in trust. He also testified that no investor told him the money was to be held in trust.

80 TVL had only one account at the Westminster Savings Credit Union. Mr. Taylor deposited the investors' money into that account and used it to pay all and any expenses, including all redemptions, all personal and family expenses, and all corporate expenses for any and all projects.

81 While Mr. Taylor used the account for all his expenses, he appears not to have actually drawn a salary during the time he was banking at the Credit Union. In his tax filings in the early 1990s, he did not declare any of the many payments made to him or on his behalf as income or taxable benefits. He stated he was a bankrupt dependent upon his wife. His income tax returns contain misstatements in that regard.

82 Mr. Taylor said that TVL having only one account was consistent with the obligation that he had undertaken to the investors to pay them back on demand without segregating the funds.

83 TVL became a substantial enterprise. Ralph Taylor said that by 1998, when the company went into receivership, about one-third of the projects had investor participation and there were approximately 500 project investors. The balance of the projects were undertaken by TVL alone or with other partners. One of these projects was the development of the ice rink, which TVL undertook with a partner and which proved to be a significant financial burden for the company.

84 Ralph Taylor was cross-examined extensively over what he said to the investors. He testified that he would often say that the money is invested in land, that land is safe and that the plan was to buy land, develop land, sell land, and split the profits. He understood that the investors trusted him and relied on him and his advice. Mr. Taylor said that the investors also understood that the money went for more than just the land; they knew they were participating in the project and that their money also went towards development expenses.

85 He was not willing to say that TVL and the investors pooled their money to buy properties. The distinction he tried to make in his evidence was that it was shares in a project, not shares in the land. He emphasized that, rather than saying "this is your land", he would have said to the investors, "this is our land" or "our project".

86 He agreed that in the 1990s the investors had a choice of properties they could invest in. At the same time, he only had one account the money could go into. While he said that they all would have known this, because all his cheques, including redemption cheques, were written on the account, he admitted that he never told the investors that their money was going into a single account. He agreed that he told the investors over the years that the money was in land, and land

was secure. When he told the investors, "we own part of the land", he said he meant that TVL owned the land. He testified that he did not tell Ms. Miller that "they owned the land" but he did tell them that they owned the property outright and had the advantage that they did not have to deal with the banks. He said he told Ms. Miller "the money was going to go into a project to buy land and do a development and after the lots are sold the profits would be divided", or something like that.

87 Mr. Taylor testified that the minutes of the meetings at Helen's Deli showed that he offered security, in the form of clear titles to land, for large investments. He said he spoke to the investors about this as early as April 1990 and at the meetings in November 1991, April 1992 and May 1992.

88 There seems to be little dispute that, as Mr. Taylor stated, he had sole discretion to make development decisions and decisions how to pay for the project. One issue in dispute, however, is whether he could mortgage the properties.

89 He testified that he never said he would consult the investors before mortgaging and that no one ever said he could not mortgage. He denied there was anything wrong with mortgaging the properties associated with the investors. He agreed, however, that he never told investors that TVL had the right to sell a property to a company which could then mortgage the property.

90 He says he raised the issue of mortgages at the meetings at Helen's Deli and said mortgages were discussed regularly, for example in January 1992 and in 1994. From my review of the documents, however, the issue of mortgages does not appear frequently on the agendas and possible discussion of the issue appears to have been a rare occurrence.

91 Mr. Taylor said that investors must have known the banks were lending to TVL on the projects. However there appears to be little doubt that he indicated, on numerous times in numerous meetings, that banks were to be avoided because they create problems. At the very least, he implied that borrowing money from banks to finance developments was to be avoided.

92 I will discuss later Mr. Taylor's perspective on TVL's involvement in the ten impugned transactions between 1992 and 1996 where lands were sold and mortgaged. I note here, however, that Mr. Taylor's basic explanation of these transactions reflects his stubborn approach. It was suggested to him that the underlying purpose of the sale of the ten properties to large investors, who then obtained mortgage funds to pay out options or prior encumbrances or to provide funds to Taylor Ventures, was to avoid the $3 million lending cap that TVL and related entities were subject to with the Credit Union. He replied, "You cannot avoid the loan cap." He then as much as acknowledged that the purpose of the transactions was to do indirectly what TVL could not do directly: borrow more money from the Credit Union than it would otherwise be prepared to lend.

93 Floyd Taylor, the brother of Ralph Taylor, was called as the plaintiffs' first witness. Although he describes himself as a bookkeeper, he has a Bachelor of Commerce degree from the University of Saskatchewan.

94 In 1989, Floyd Taylor became involved in TVL. He set up the files, was responsible for the accounting and bank reconciliations and he prepared the company's financial statements. He understood that TVL had accounts at financial institutions other than Westminster Savings Credit Union, including the Canadian Western Bank, Laurentian Bank, CIBC, and the Gulf & Fraser Fisherman's Credit Union. He said he provided the financial statements to some of those institutions.

95 He also prepared some of the speedy memos given to the investors. He typed the agendas for the meetings at Helen's Deli and the newsletters that were distributed to investors, but always under the direction of Ralph Taylor.

96 Because of TVL's failure, Floyd Taylor lost his home, which had been pledged as collateral for loans on a project. He said he wanted to clear his name and was clearly troubled that he had been made to look like a thief and a fraudster.

97 In giving his evidence, he often described his own understanding of the agreement with the investors rather than simply recounting the communications between TVL, through Ralph Taylor, and the investors. In that respect, some of his evidence was not relevant to the determination of the terms of the agreement.

98 Floyd Taylor recalls the investment club starting in 1988. The idea of pooling investors' money, he said, started with a project Ralph Taylor did in Maple Ridge. In the first few years, he said, TVL did well, and his brother distributed money to the investors.

99 He agreed that were two basic types of development projects: projects with speedy memo investors involved and TVL's own projects, which were financed by some other form of financing. He said the development projects in British Columbia included subdivisions, rezonings, and that some required hard development costs such as roads and sewers. In one project, TVL went into the house-building business. It was not unusual, he said, for TVL to tie up property by purchasing an option.

100 He confirmed that the basic deal with the investors was a guaranteed minimum twenty percent return per annum, payable on demand, and that investors would share in the profits, resulting in an even higher return, if they stayed in until the project was sold. He said Ralph Taylor would determine the profits, but that he did not tell him or the investors how those profits were to be determined. The expenses, he said, were really done in Ralph Taylor's head. He does not recall Ralph Taylor preparing an information sheet summarizing the selling price or expenses of any project. People, he said, took Ralph Taylor at his word.

101 As he understood it, the whole concept of TVL was that Ralph Taylor would make all the decisions, exercising his business judgment to make the highest possible profits on the project. He said TVL did not put any money itself into the investor projects, but instead provided the expertise in return for a share of the profits. He was not sure what share of the profits from each project the

company would take - he thought fifteen to twenty percent - but he understood that its share would increase when it redeemed a speedy memo investment.

102 He agreed that a development project is more than just the land, but includes the permits, subdivision costs, roads, sewers, servicing, etc. He also agreed the investors who stayed in were entitled to a share of the profits of the entire project rather than to a share of what the land was worth.

103 Floyd Taylor attended nearly every meeting at Helen's Deli, as least for the first few years. In the course of his testimony, he was taken through the newsletters and agendas distributed to the investors. He agreed that Ralph Taylor would discuss everything on the agenda at these meetings.

104 He was asked about the February 27, 1992 agenda, which contained the following item: "How does our club work? A, buy land; B develop land; C sell land; D split profits." He said that Ralph Taylor told investors this meant they would, as a group, buy a piece of land, develop it and sell it and that there were different groups of people into different projects, but that each piece of land was owned jointly by the people in each group.

105 At the outset of his evidence, he said that Ralph Taylor told the people who attended the Helen's Deli meetings that he would hold the property in the name of TVL, that TVL would be on title, but he would hold it in trust for that group of people, and that they could trust him to develop and sell it and share the profits. In his words, "it's a trust, trust thing".

106 Floyd Taylor was the only witness who testified that Ralph Taylor specifically told the investors that the property was held in trust. I find that he has to some degree allowed his remorse over investors' losses, as well as what he feels is misdirected blame, to affect his objectivity in recalling what occurred at the material time in the company's dealing with the investors.

107 On cross-examination, he agreed that the December 31, 1993 financial statements that he prepared showed a number of investor projects, including 180 Acres South Nanaimo, Chilliwack Mountain and Laguna View, listed under the assets of TVL and that all these were shown as being owned or optioned by TVL and that there was no indication of those properties being held in trust. He also agreed that none of the investors ever asked for a copy of the legal title or whether they were going to be on title, nor did he tell them, when he delivered a speedy memo, that he or TVL was a trustee. He did not recall any speedy memo investor asking what security was being offered, whether TVL kept segregated bank accounts or why all the redemptions were made from one account, nor did he volunteer this information to investors.

108 He agreed that, in 1994, Ralph Taylor was referring to the share purchases as "term deposits at 20% with possible bonus", but did not agree that this was an accurate way of describing the arrangement. While he said he never told the investors they were loaning money, he never asked his brother why he described the investments as term deposits, nor did he tell him he should not do so.

109 He said that the only time Ralph Taylor used the term "loan" was in relation to money invested in the company at twelve percent interest. These loans, he said, did not entitle the lender to a share in the project, but only monthly interest payments. He said he prepared T-5 slips for those lenders, so they could declare the interest received as income.

110 He did not recall anyone objecting when the investments were described as "term deposits" or anyone saying, "they're not term deposits, I own the land." Nor can he recall any discussions with investors regarding whether they would be liable for any additional development costs or builders' liens and the like.

111 On the issue of security, he said TVL began providing clear title properties as security to people with more than $50,000 invested in their project, including the speedy memo projects. He understood that no collateral would be available for investments of less than $50,000. He said that this policy was reiterated at many meetings, and he made reference to the November 26, 1992 agenda, which indicated that security was provided for investments of $50,000 or more.

112 When he was asked by the plaintiffs' counsel, Mr. Weiler, whether mortgaging lands was consistent with the purpose and intent of the investment club, Floyd Taylor said it might be necessary to take out a mortgage if the investors didn't want to put up cash necessary to buy and develop the land. On cross-examination he said, as an investor himself, he was not concerned that there was a mortgage on title, or that a numbered company was used. In fact, he said, it never crossed his mind. He did not, however, recall Ralph Taylor telling investors that he was going to put a mortgage on the lands they were investing in or that they were short of money.

113 He said Ralph Taylor told the investors that the "money is in the land", "the land stays put, it's not going to go anywhere, it's there for anybody to see" and "land over time appreciates in value". He said that Ralph Taylor told the investors that TVL and the investment club could survive hard times, while businesses that relied on the banks would fail, because they were a large group of people pooling their resources and, since they didn't have to worry about interest charges, they could hold the land until the economy improved. He said the message from Ralph Taylor was that the banks are not helping developers so the investment club would go it alone and banks should not be needed.

114 He acknowledged, however, that he received money from speedy memo investors in the 180 Acres South Nanaimo project even after there was a mortgage on title. He also acknowledged that he assumed that, since the investors trusted Ralph Taylor to run the business to the best of his ability, he could place mortgages on the property.

115 He admitted he never heard Ralph Taylor tell the investors that he would ask for their consent before putting on a mortgage, nor did he hear any investor tell Ralph Taylor they expected him to call a meeting and get their consent before mortgaging the properties. He said that his view was that Ralph Taylor should have had a meeting if he needed more money and, if the investors were not willing to come up with it, then perhaps he could mortgage properties.

116 He understood that Ralph Taylor took out mortgages on various projects and sold shares in projects even when they didn't have title to the land yet, but he admitted he never raised a concern with any of the investors about these practices. This was because either he was not concerned himself or he was too busy doing his job. He said he considered Ralph Taylor had good judgment and he trusted him as everyone else did. He never heard Ralph Taylor say, "I'll need your permission before I'll get a mortgage".

117 Ms. Milton, for the Credit Union, questioned him about the first impugned transaction, which took place in July 1992 when Ralph Taylor used a numbered company, 402847 B.C. Ltd., and borrowed $700,000 from the Credit Union to complete the purchase of the property associated with the 180 Acres South Nanaimo project. He said that he did not have concerns at the time, nor did he raise the issue with his brother or with the investors. He explained that he was too busy at the time and may not have known this was an investor project. He said Ralph Taylor was running this business the best way he saw fit.

118 He blamed Ralph Taylor's downfall on owning and purchasing too much land in the Linley Valley in Nanaimo.

119 Floyd Taylor was questioned about the financial statements he had prepared and signed. In those statements, he said, he referred to shareholders who bought shares under the heading, "due to shareholders". He said that showed the principal amount owing to shareholders.

120 He testified that, as of December 31, 1992, the amount due to shareholders was $15,031,000; at the end of 1993, it was $16,492,000; by the end of 1994, $18,688,000; by December 31, 1995, $19,411,000; by December 31, 1996 $15,470,400.

121 He was referred to a comment made in the August 16, 1993 agenda under the heading "Item 8: security." The comment says, "our club members have over $13,000,000 invested at this time" and "we have over $20,000,000 worth of clear title land, so your money is very safe". He was asked if he knew those statements to be true. He said he was not an appraiser and could not say whether that was true, but he had no reason to believe it was blatantly wrong.

122 On cross-examination, he agreed that there was nothing on the financial statements that showed any portion of a property being held in trust for investors. He said he never showed the Credit Union records which would reveal which of the TVL projects had speedy memo investors and which did not. He also said he never told Gary Thomas that Ralph Taylor was a bankrupt.

123 He testified that none of the speedy memo investors ever asked to see any of the financial statements he prepared for TVL.

124 Ms. Milton suggested to Floyd Taylor that the reason the 1992 financial statements show that TVL owns the land and there is a debt to the investors is because that is what the deal with investors was at the time and what he honestly believed at the time. He resisted these suggestions. He said

Ralph Taylor needed the financial statements in a rush and the statements were Ralph Taylor's picture of the assets and liabilities at the time. He said he turned kind of a blind eye to the whole thing.

125 I find that the financial statements, indicating TVL as the owner of the investor projects, at least from an accounting perspective, probably reflects what Floyd Taylor thought was an accurate picture at the time.

126 What were the terms of the contract or the contracts between the plaintiff investors and TVL?

127 After I have determined the terms of the contract, I will discuss whether the investors' interest in the agreement or arrangement was also a trust or whether the monies were paid to TVL on some trust or trust-like arrangement or whether there was a fiduciary relationship between TVL and the investors. If I find that there has been a breach of trust or a breach of fiduciary duty, then the question is whether the Credit Union or Mr. Thomas participated in that breach in an actionable way.

128 I have set out earlier what the parties assert were the terms of the acknowledged contractual relationship between TVL and the investors.

129 There was no written agreement signed by the parties. There are only the so-called speedy memos and the cheques written by the investors. Beyond the newsletters and agendas of the monthly meetings, there was limited documentation exchanged. At least some of documents post-dated the making of the contracts.

130 The basic agreements between the parties, which were both oral and written (the twenty percent return, the discretion given Ralph Taylor to develop the properties, the possibility of a share of the profits if the investor stayed in until the end), were clear and are not really in dispute. However, determining the terms of the contract beyond these fundamental aspects is not simple. To the extent that there were other terms, are these to be implied in the circumstances, or are they to be found in the communications between the parties or in their conduct? If the written terms are ambiguous, can evidence of the parties' conduct or of surrounding circumstances resolve those ambiguities?

131 Accordingly, it is important first to set out some of the relevant principles to be applied when attempting to determine the terms of a contract which may be partly written, partly oral and, perhaps, partly implied. Having found those terms, I will set out principles used to interpret those terms.

132 The determination of the terms of a contract is an objective exercise. What did the parties agree to? What did they put in writing or say to each other that was intended to be of contractual effect?

133 While the word "intent" may suggest that the subjective understanding of the parties is relevant, the law is clear that the intention of the parties must be approached objectively. When the contract is alleged to be partly oral and partly in writing or based on a course of conduct, as here, that determination can be difficult. Nonetheless, evidence of one party's understanding of what a term means or whether a term exists is generally not admissible, because it is irrelevant to the objective determination of the intention of the parties.

134 During the course of trial, evidence was led that touched upon parties' assumptions and what various parties believed were the obligations of TVL in particular circumstances. However, as I commented during the trial, this evidence is not admissible for the purposes of determining the terms of the contract between an investor and TVL.

135 The authors of Halsbury's Laws of England, 4th ed. Reissue, vol. 9(1), at 515, para. 768, say, "the problem is one of determining the intention of the parties as evidenced by their words and conduct, so that no general principle of interpretation can be universally true." With that proviso, Halsbury's describes six factors taken into account by the courts in determining whether a communication between parties is intended to be of contractual effect. Three of them are relevant here:

> if only a brief period of time elapses between the making of the statement and the formation of the contract, the court may be disposed to hold that the statement is a term of the contract;
>
> where the party to whom the statement is made makes clear that he regards the matter as so important that he would not contract without the assurance being given, that is evidence of an intention of the parties that the statement is to be a term of the contract;
>
> where the party making the statement is stating a fact which is or should be within his own knowledge and of which the other party is ignorant, that is evidence that the statement is intended to be a term of the contract;

136 The court must interpret and consider the formation of a contract on its factual matrix. In Chitty on Contracts, 29th ed. (London: Sweet & Maxwell, 2004) at p. 764-765, the learned authors suggest the modern law allows the court a broad scope of inquiry:

> Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable man against the background of the transaction in question, the court is free (subject to certain exceptions) to look to all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words that are ambiguous but even to conclude that the

> parties must, for whatever reason, have used the wrong words or syntax ... The court must place itself in the same "factual matrix" as that in which the parties were.

The authors then quote Lord Wilberforce's decision in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 W.L.R. 989 (H.L.) at 995-996:

> No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the "surrounding circumstances" but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract is it certainly right that the court should know the commercial purpose of the contract and this in turn presupposed knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

137 In Delisle v. Bulman Group Ltd. [1991] 4 W.W.R. 637 (B.C.S.C.), Ryan J. (as she then was) said the following, which is relevant not only to the question of the factual matrix and the limitations and the admissibility of the subjective intention of the parties, but as well to the admissibility of evidence where there is ambiguity as to the meaning of contractual terms. She said, at 639:

1. Evidence of facts mutually known to the parties prior to the execution of a contract are admissible to identify the meaning of a descriptive term if they are relevant and not excluded by other evidentiary tests. Ambiguity is not a precondition to a consideration of the factual matrix. (Prenn v. Simmonds, [1971] 1 W.L.R. 1381, [1971] 3 All E.R. 237 (H.L.); ACLI Ltd. v. Cominco Ltd. (1985) 61 B.C.L.R. 177 (C.A.)).
2. In examining the factual matrix the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract. Viva voce evidence as to what the parties intended is inadmissible in interpreting a written contract. "Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction." (Prenn, supra [p. 241]; Elkiw v. Harris, 39 C.P.C. (2d) 121).
3. If, after examining the agreement itself in its factual matrix, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then additional evidence may be admitted. This evidence includes evidence of the facts that led up to the making of the agreement, evidence of the circumstances as they existed at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement. The two existing reasonable interpretations may be the result of ambiguity arising from doubt,

> uncertainty or difficulty of construction. (Canadian National Railway v. Canadian Pacific Ltd., [1979] 1 W.W.R. 358, 95 D.L.R. (3d) 242 (B.C.C.A.))

138 This passage has been has been cited with approval frequently, most recently in Group Eight Investments Ltd. v. Taddei (2005), 143 A.C.W.S. (3d) 532, 2005 BCCA 489.

139 Evidence of unilateral intention is inadmissible. Lord Wilberforce put it this way in Prenn v. Simmonds, supra at 241.

> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of Dr. Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

140 The factual matrix in which these contracts were made was that TVL was a real estate development company that established a club so that it could raise money to develop real estate, and it raised that money from unsophisticated individuals who sought a guaranteed return and the chance to participate in profit in real estate development.

141 Although there were a number of investors, and each of their dealings with TVL was a little different and occurred at different times, I find on the evidence that the essential terms of the agreements were the same for all investors in this trial. Although there were, of course, individual contracts between TVL and each investor, it was not suggested by any counsel that the investors actually made contracts that were different in substance. That is consistent with the patterned nature of TVL's dealings with its investors.

142 TVL, a real estate development company, had from time to time, a number of projects. Investors could select one particular project of TVL in which to invest by acquiring what were called shares. TVL was acquiring the land, often by option.

143 The only written document exchanged by the parties was the speedy memo that was a document signed on behalf of TVL that acknowledged receipt of the investor's money for a particular number of "shares" in a particular project. The term "shares" is an ambiguous term in the circumstances, and in this section I will consider what it meant and later whether it connotes a trust.

144 As to the meaning of a share, I find that the basic terms were agreed and well understood by all parties. (The proper legal characterization of the arrangement, whether it was a trust, a debtor/creditor arrangement or perhaps something else, is another question.) The terms were simply that the monies paid by the investor to TVL were repayable to the investor on demand at any time with interest at twenty percent per annum. If the investor chose to remain an investor until completion or sale, the investor was entitled to twenty percent interest on his investment plus a share of the profits from that real estate project. That was what a share amounted to. There was no

agreed basis on which the profit would be determined other than it was to be left to the discretion of the principal of TVL.

145 Although there was nothing in writing on this point, I find that, through a course of conduct, it was accepted by the investors that the decisions as to the development of the property, the expenditures incurred in that development, and the timing of sale of the property or lots in the project were matters left entirely at the discretion of TVL.

146 There was no agreement that the investors would become registered owners of the property. There was no further document as to what their share represented. Although there were a number of ambiguous aspects of what a share represented, I will introduce one here: did the parties agree, as a matter of contract, that the purchase of a share would amount to a beneficial ownership interest in the land or, rather, did it result in TVL, having owned or acquired the land, retaining beneficial ownership and having certain contractual obligations to the investor?

147 I find that there was some but not extensive discussion over the legal characterization of the relationship between the parties. That was probably because the basic terms were quite simple. The investors left most matters in Mr. Taylor's hands.

148 After the demise of TVL, many of the witnesses attempted to reconstruct matters and characterize the legal relationship as either an ownership interest or a loan with a right to participate in the profits or something else, when they had not done that earlier.

149 At the relevant time, the investors tended to focus on what they saw as the central element of the investment; that is, they could get a significant return on their money, with the possibility of an even greater profit if they stayed in until the conclusion of the project.

150 The question of whether the investors and TVL had a trust relationship is a question that includes a consideration of all of the circumstances demonstrating the parties' intention. I will return to that question.

151 Apart from the allegation of trust, the plaintiffs allege two other terms of the agreement: first, that Taylor Ventures would not commingle the funds from the investors in a project with its own funds and the funds from investors for other projects; second, that TVL would not mortgage the properties other than to obtain the initial financing to acquire the property.

152 As to the first allegation, I find, on a consideration of all of the evidence, that although the investors invested in particular projects, there was no express agreement on the part of TVL with the investors not to commingle the funds or to hold them separate and use them only to acquire the land or for the specified project. There was discussion with three investors that their funds would be used for the acquisition of specific projects but I do not find, even on that evidence, an agreement by TVL not to commingle those funds with others it received.

153 If there was no express term barring the company from commingling funds, is that term to be implied in the circumstances?

154 Prof. Fridman, in The Law of Contract in Canada, 3rd Ed. (Toronto: Carswell, 1998) notes at p. 475 that implying or importing a term into the contract:

> "... is not something which the courts will do easily or cavalierly. There has to be strong evidence to support the conclusion that the implication of a term by implication is permissible in the circumstances. It would seem that there are three main instances when this may be done: (i) when it is reasonably necessary, having regard to the surrounding circumstances, and in particular the previous course of dealing with between the parties, if any; (ii) when there is an operative trade or business usage or custom that may be said to govern the relationship of the parties; and (iii) when some statute of its own motion implies a term into the kind of contract that is in question."

155 More recently, Lord Simon of Glaisdale articulated, in B.P. Refinery (Westernport) Pty. Ltd. v. Shire of Hastings (1977), 16 A.L.R. 363 (P.C.) a five-part test that was adopted by Lambert J.A. in London Drugs Ltd. v. Kuehne & Nagel International Ltd., (1990), 45 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 51 (C.A.), aff'd [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1. In B.P. Refinery, at p. 376 Lord Simon said:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

156 What were the circumstances? TVL operated one account into which it made all of the deposits and from which it paid all expenses. All share redemption and profit-sharing cheques were drawn on that account. The investors may not have known that but they knew the investment club had many other investors and projects and that Taylor had an obligation to repay those investors, plus twenty percent interest, on demand.

157 Applying the principles that I have set out, I find that there was not an implied obligation on the part of TVL not to commingle the funds that it received from the investors. I think that the imposition of such a term would be clearly inconsistent with the at least two of the five requirements, namely that (1) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; and (2) it must be so obvious that "it goes without saying".

158 The plaintiffs argue that the defendants have not established that TVL had the right to

commingle investor monies with its own. In my view, that is not the proper approach. The conclusion that I reach is that it has not been proven that there was an agreement, express or implied, that the monies would be kept in a separate account designated for the particular project or group of investors or that it was a breach of the agreement to deposit all the investors' monies in a single bank account as TVL did.

159 Second, it is alleged TVL agreed not to mortgage the property in which an investor acquired shares. There was no express written term to this effect in the agreement.

160 The plaintiffs say that such an agreement was implied from the nature of the arrangement as it was explained to the investors from time to time or made by the ongoing representations of TVL that were intended to be of contractual effect when inducing investment and continued investment. They were told that the investment club could succeed because it did not require bank financing and that, because there was no financing, the company and the investors could withstand some difficult times. It appears to have been a strong and repeated theme by Ralph Taylor that the strength of the club of investors was in pooling their funds and not requiring banks. I prefer the evidence of the investors and Floyd Taylor on this point, although Ralph Taylor's version is not strongly to the contrary.

161 The defendants say that not only was there no express term to that effect, but that the acquisition and development of the property were matters entirely within TVL's discretion, and financing was at times needed. That it was obvious that bank financing was not in breach of the arrangement, the defendants say, is shown by the fact that no one objected when mortgages were placed on properties by TVL at various points. The defendants say that nearly all of the investor projects were mortgaged or encumbered at material times and that it is unlikely that Ralph Taylor would say that they were free and clear when a search could have easily revealed the opposite. I do not accept that submission.

162 While it may have been somewhat unrealistic that the various real estate projects could successfully proceed without financing from a bank or other financial institution and while it appears that some financing at the outset to acquire some properties was inevitable, it was a constant theme of Ralph Taylor's discussion with investors that the club would be strong and succeed because it did not need or use banks and could wait out a downturn in the real estate market. The fact that there were, on occasion, references on the agendas to bank mortgages could have alerted the very careful eye of an investor, but the overwhelming verbal message from Ralph Taylor for TVL was that the club could make it on its own.

163 While there is some evidence to the contrary, I find that, on a consideration of the whole of the evidence, there was an obligation that was undertaken by TVL not to mortgage the properties in which the investors were investing, unless a mortgage was needed to acquire a property or the investors consented. That term is formed by the ongoing representations that I find were made to the investors by TVL in connection with their investments. It was made frequently and had been made

to the investors in connection with their earlier investments with TVL.

164 I conclude it was, as well, an implied term. If an officious bystander, having come across the parties and having heard what Mr. Taylor said repeatedly before he entered into agreements with investors, had asked the parties if it was a term of the contract that Mr. Taylor would obtain investors' consent if TVL needed bank financing for investor projects, both parties would agree without hesitation that this was a term of their agreement. I would expect, given the amount of discretion and trust placed in Ralph Taylor by the investors, that they probably would have given consent readily in most circumstances if asked. Mr. Taylor, however, never sought that consent.

3. WHAT WAS THE LEGAL RELATIONSHIP BETWEEN TAYLOR VENTURES LTD. AND THE INVESTORS?

165 The plaintiff investors make three essential submissions.

166 First, the investors' counsel argue that this is a classic or "true" trust case, in which the investors gave money to TVL to buy an interest in a specific piece of real estate and TVL became the agent of the investor and held the purchased property in trust for the investor.

167 Second, the plaintiffs say that even if the money was a loan, it was a loan for a specific purpose - that is to say, it became what is referred to as a Quistclose trust. They say that if the monies they gave TVL were loans, those loans were tied to specific projects and to the profits that those specific projects might generate, and as such, a trust arose with respect to the particular funds.

168 The third position of the plaintiffs is that TVL was a fiduciary because it acted as a professional adviser and manager with absolute discretionary power over the investors' funds or over their interest in or connection to the properties.

169 The defendants' general position is that there was no trust because the land was not held in trust for the investors, nor was money accepted for a specific purpose in a manner that would give rise to a purpose or Quistclose trust. The defendant Credit Union says that for a trust to exist there must be three certainties - certainty of intention, certainty of subject matter, and certainty of object - and that, in this case, at least the first two certainties are not present. They say that, in substance, the relationship between TVL and the investors was one of debtor and creditor.

170 The defendants also argue that, in the circumstances, there was no fiduciary relationship. The defendants say that this was a commercial arms-length relationship upon which courts are reluctant to impose fiduciary obligations. The defendants say that Ralph Taylor and TVL were entitled to act in their own self-interest, not in the best interests of the plaintiffs. They say the only obligation was a contractual one to provide a specific percentage return on the investment, with a possible share at the end.

171 The first question that I must answer is whether the land was held in trust for the investors

associated with the particular project.

172 This is a foundational question because the plaintiffs argue that there was a breach of trust for which the Credit Union may be held liable, either because it participated in or assisted in the breach or because, as a result of the breach, it received trust property in some form. On this second point, the plaintiffs argue that the trust property may have been received by way of mortgages over the investors' land, by receipt of the proceeds of mortgages which may have been paid towards TVL's line of credit, by the receipt of interest reserve funds secured by those mortgages, or by the receipt of proceeds after foreclosures.

173 The plaintiffs rely on Mr. Justice Tysoe's comments in Eron Mortgage Corp. v. Eron Mortgage Corp. (Trustee of) (1999), 70 B.C.L.R. (3d) 381, 10 C.B.R. (4th) 257 at paragraph 34:

> "... A gives money to B for the purpose of acquiring an asset which B is to hold for A and that B does acquire that asset and holds it for A (whether using A's funds or otherwise). A is entitled to the asset because it is held in trust by B for A ..."

and at paragraph 38:

> "I agree with the submission of Mr. Fredricksen that when a trustee has been given monies to acquire an asset and the trustee appropriates or earmarks such an asset for the beneficiary, the beneficiary will have a trust interest in the asset without the necessity of tracing his or her money in the asset."

174 The plaintiffs acknowledge that the three certainties - of intention, of subject matter and of object - must be present for a trust to exist but say that, in this case, they are.

175 The plaintiffs say that the certainty of the investors' intention that these monies and the particular properties were to be held in trust is revealed in the simplicity of the deal. The plaintiffs put it this way in their argument:

> Essentially Taylor said to the investors and the agreement was:
>
> 1. With your money and my expertise we will go into the land development business together and make a profit.
> 2. We will own the land jointly but for convenience TVL will hold the title.
> 3. I will issue shares and give you a speedy memo that will identify how many shares you buy, the price, and the name of the project you choose to invest in.
> 4. We should make at least 20% profit but it likely will be more, perhaps 40% or more.

5. I will have sole discretion over how the profit is calculated but I will guarantee you a return of at least 20% on your money per annum.
6. I will also give you the option of selling your shares back to me anytime you ask and if you exercise this option I will give you your money back along with an annual return of 20%
7. I will have sole discretion over what properties to buy and what to pay for them but you can choose which property to invest in.
8. I will have sole discretion over when and how to do the development, and when and at what price to sell, but I agree never to encumber the title so we will always have the security of the land.

176 The plaintiffs argue that although TVL had discretion, that discretion was clearly defined and delineated and all the terms were settled.

177 As to the subject matter of the trust, the plaintiffs say this was also certain and put it this way:

(a) Each investor was offered a choice of properties. Those properties were identified by location and description - e.g. 180 acres Nanaimo.
(b) Each investor chose a specific property - again, e.g. 180 acres Nanaimo.
(c) Each investor chose the number of shares he wished to buy and received a speedy memo identifying his purchase and number of shares.
(d) Ralph Taylor testified he took investors to see the specific properties in question.
(e) Ralph Taylor kept his copy of the Speedy Memo in a file kept for each property.
(f) Each property was identified in agendas and newsletters.

It is clear that the subject matter was certain. The property was identified. The investors associated with each property were known. The number of shares held by investors in each property was known to Taylor Ventures and recorded in the records kept by Taylor Ventures. The area of discretion was clearly delineated. (Taylor's breach of his discretionary power does not mean his discretionary power was uncertain.)

178 The key issue here is the parties' intention when the investors placed funds with TVL under their agreement. This must be determined by considering the whole of the evidence surrounding the transaction and, from that evidence, the proper characterization of the transaction.

179 The plaintiffs say that the existence of a trust is a question of fact. An agreement to pay interest (which the plaintiffs' counsel later argued was properly characterized as a minimum percentage of profit) and the possibility that TVL may have, with or without authorization,

commingled the investors' money with its own are simply factors to consider and are not determinative. The plaintiffs argue that the clear implication of the speedy memos, in light of all of the evidence, is that the money would be invested only in the project the plaintiffs chose and that any commingling was a breach of the agreement and cannot be used to prevent the establishment of a trust. The plaintiffs say that commingling, if not a breach of contract, is not a particularly relevant factor as the plaintiffs do not have to trace funds to establish that a share in a project was intended to represent an interest in the land.

180 Mr. Laxton, for the plaintiffs, argues that the evidence against these transactions being intended to be loans is overwhelming. He says the only evidence in support of that position related to discussions between Ralph Taylor and Barry Forbes, the president of the Credit Union, rather than to communications with the investors. Mr. Laxton submits the term "loan" was never used by TVL in dealing with the investors and no T-5s were ever issued to reflect that the amount paid was interest.

181 The intention of the parties, Mr. Laxton says, was clear and certain: TVL was to hold the land in trust for the investors.

182 The plaintiffs say that the defendants' arguments that there was no intention to form a trust are not made out in the evidence. The fact that share values were not tied to the value of the land but increased in accordance with accrued interest was, according to Mr. Laxton, simply a significant part of the "con", since if Ralph Taylor dealt with actual land values, he would have had to make full disclosure or risk doing so, which would have led to questions about how the development was being financed. The offers of security to investors investing $50,000, Mr. Laxton argues, do not indicate that they did not intend to have an interest in the land but were made to help TVL sell shares, to disarm investors who were expressing concerns about security, and to create the impression of wealth and liquidity. The contention that the shares were like term deposits, Mr. Laxton said, was something made late in the day - in 1994 and not earlier.

183 Mr. Laxton submits that it is not relevant that some of the plaintiffs called their investments unsecured debt when filing proofs of claim in the bankruptcy proceedings and that others identified their losses as business debts when claiming ABILs on their tax returns. These claims and filings, he says, did not occur until after 1997 and were attempts by people who had lost substantial monies to recoup their losses. Those claiming in the bankruptcy simply completed forms supplied by the trustee. Those seeking to claim losses for income tax purposes did so on the advice of accountants. Subsequent conduct late in the day in attempts to recoup their losses, is not, in Mr. Laxton's submission, relevant to the issue of the true intention of the investors.

184 The plaintiffs' counsel says that they did not merely assume that the land would be held in trust; rather, they were told they were buying an ownership interest in land associated with the project and were led to believe that Ralph Taylor would be using the money for the purchase of the land, and the land would be free and clear.

185 Counsel argues that the large discretionary power given to TVL did not make the deal or the subject matter uncertain, but rather, because the parties agreed on the ambit of the discretion, the deal was both complete and certain. The interest of the investors, he says, was determinable as a percentage of the total shares issued by TVL for the particular project.

186 The defendants argue that the three certainties required to establish a trust are not satisfied in this case.

187 First, the Credit Union's counsel says that, objectively and on a consideration of all the evidence, although there were general discussions, there was no intention that the property or the money would be held in trust for the investors. The defendants' general position is that the properties were not held in trust but rather that there was a contractual agreement to pay interest on the principal amount on demand plus a share of the profits determined at TVL's discretion. All the defendants take that position. The defendants say that receiving compensation for the use of their money speaks loudly against and is inconsistent with the investors retaining a beneficial interest in the funds or the property. They say the transaction, in substance, was a loan, regardless of what it was called. More precisely, they say it was a participating loan, in the sense that the investors were able to receive their money back with interest, and also participate in possible profits.

188 The defendants say that the payment of interest has long been considered an indication of an intended debtor/creditor relationship. They say the absence of an obligation not to commingle the funds with others, or the funds of TVL generally, also points away from an intention that there was to be a trust.

189 Second, the defendants say there was no certainty of subject matter. The investors were only entitled to an unascertained share of the profits, not an identifiable interest in land. In any event, the portion of the property they arguably were entitled to was, at best, uncertain. This subject matter was made more uncertain, they say, because there was no restriction on TVL's ability to raise money by selling further shares and thereby diluting any interest the investors might have had in the land. In that respect, they say, the alleged trust property failed to be clearly defined.

190 Mr. Webster, for the defendant lawyers, argues that there is no certainty of object. He says that the plaintiffs did not expect to get back the property. He also argues that the plaintiffs only had a contract for a guaranteed return, regardless of what became of the alleged trust property.

191 Overall, the defendants say, that to find a trust on the evidence, or based on the subjective intentions of the plaintiffs, strains the doctrine of trusts beyond its due and proper limits.

192 Was there a trust established when the investors gave money to TVL for shares in a project which TVL acquired or could acquire?

193 The plaintiffs must establish three certainties to create a trust: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object.

194 In Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787, the Supreme Court of Canada found that the required these certainties could be found in the agreement between the airline and the defendant travel agent. At p. 803-04, the court said:

> In concluding that the relationship between M & L and the airline was one of trust, the Court of Appeal relied on Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce (1987), 61 O.R. (2d) 233. Although the Court of Appeal's decision in that case (1990), 71 O.R. (2d) 63 (note), was brief, the reasons of the trial judge, at p. 237, went into greater depth:
>
> > In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object. The agreement ... is certain in its intent to create a trust. The subject-matter is to be the funds collected for ticket sales. The object, or beneficiary, of the trust is also clear; it is to be the airline. The necessary elements for the creation of a trust relationship are all present. I find that such a relationship did exist between CP and the two travel agencies.
>
> This analysis is clearly applicable to the facts of the present case. That the intent of the agreement is to create a trust is evident from the following wording: "All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline." The object of the trust is the respondent airline, and its subject-matter is the funds collected for ticket sales.

195 How is it to be determined whether the parties here intended to create a trust or a debtor/creditor relationship? In Air Canada, supra the intention was clear from the instrument. Formality, however, is not necessary.

196 Halsbury's Laws of England, 4th ed. reissue, vol. 34 describes the law as follows at para. 548: "A trust can be created by any language which is clear enough to show an intention to create it." The words usually used in the payment or the acquisition of property to show that intention are "in trust", but any expression in the circumstances that shows that intention will suffice.

197 In this case, the monies were not paid over specifically to TVL in trust. The documentation for the transaction, as I have noted, was sparse: a speedy memo, which set out the same thing in all cases. It read:

[name, address and phone number of investor] [date]

Rec'd [dollar amount] for [number] share(s) in [property].

Taylor Ventures Ltd.
[signature of R. Taylor or Floyd Taylor]
526-4905

198 The document did not expressly say that the land was held in trust for the investor. There is a reference to shares but there were no share certificates or title certificates. Although there was no specific trust document or specific agreement that it was held in trust, there was obviously a connection between the investor and the particular property or project chosen.

199 The plaintiffs rely on the statement by Mr. Justice Tysoe in Eron Mortgage, supra that I have quoted above. It seems to me however, that this statement, with its focus on money given by one party to another "for the purpose of acquiring an asset", takes us back to the original question: did the investors give TVL money with the intention that TVL would buy (or pay for) and hold land in trust for them?

200 The plaintiffs say that the factual matrix reveals that the investors wanted to participate as owners in real estate development. Since TVL was to have title, they say, the intention must be that the land would be held in trust.

201 The defendants disagree. They ask me to cut through the extensive oral evidence, which they say represents either subjective belief or an attempt to reconstruct past events, and determine what was at the heart of the transaction. They argue that intention can be found, objectively, by considering the essential nature of the transaction, which they say was a loan or a participating loan. They point out that an investor was entitled to demand the return of his or her money, plus twenty percent interest, at any time and only those who stayed on until completion were entitled to a share of the profits.

202 Both types of legal relationships - trust and loan - are, of course, quite common. In the dealings between Ralph Taylor and the investors, however, no party used either term, at least in connection with this type of investment.

203 In the absence of express terms indicating a trust, I must look to other factors to determine if a trust was intended. In this case, several factors seem of particular relevance: (1) the payment of interest, (2) the ability of TVL to commingle investors' funds with its own and those of investors in other projects, (3) the circumstances surrounding the investment, including the communications

between Ralph Taylor and the investors and, (4) to a lesser degree, the parties' conduct.

204 The Credit Union says I should look to the first two factors and find that, in substance, the intention was that this was to be a debtor/creditor relationship, not a trust. The evidence on these two points is relatively clear. First, all the parties agree that the investors were to receive a twenty percent per annum return on their money, although the plaintiffs say it is wrong to characterize this as interest. Second, as I have found above, there was no agreement, express or implied, obliging TVL to keep funds separate. While neither of these factors is, in itself, determinative, they are relevant to the determination of the parties' intention.

205 In Waters' Law of Trusts in Canada, 3rd ed., (Toronto: Carswell, 2005) the author discusses, at pp. 86-87, the role the payment of interest and the commingling of funds play in distinguishing trust beneficiaries from creditors:

> This preference of trust beneficiaries over creditors makes it important to distinguish the trustee-beneficiary relationship from the creditor-debtor relationship. The distinction is clear enough when the trust arises from the intention, express or implied, of the settlor, but when does the law deem a person a constructive trustee of the funds or assets which he holds for another? The answer, as Ontario Hydro-Electric Power Commission v. Brown and Maralta Oil Co. v. Industrial Incomes Ltd., [1968] S.C.R. 822, show, is when the duty of the holder of the funds or assets is to keep that property distinct from his own personal property. For this reason the banker is a debtor vis-a vis its customer; it mixes the customer's money with its own, and is under an obligation only to pay out an equivalent sum on demand. The depositor, even if he be an express trustee depositing trust moneys, has only a personal action against the bank; that is the essence of a claim against a debtor. A trustee on the other hand must keep the assets subject of the trust separate, and be ready to hand over those assets when the time comes.
>
> The question which provides the most difficulty is whether the particular holder of title to assets who acknowledges another's interest is trustee or debtor. A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing specific is said about this. <u>The duty to keep the assets distinct, if it exists, must be spelled out of the nature of the transaction, the environment in which the parties agree, the type of persons who are the holders of title and the transferor, and whether or not interest payments are to be made by the holder of the assets. If interest is to be paid, the relationship is nearly always that of creditor and debtor.</u> [emphasis added]

206 The plaintiffs say that this was hardly a normal commercial transaction. The plaintiffs say the

payment of interest, rather than indicating a debtor/creditor relationship, was, in the case at bar, a guaranteed portion of profit. They rely on McEachern v. Royal Bank of Canada, [1991] 2 W.W.R. 702, 111 A.R. 188 (Q.B.) for the proposition that that the payment of interest is by no means determinative. In that case, which involved a breach of trust by a mortgage broker, Justice Andrekson referred, at p. 726, to the passage from Prof. Waters I have set out above and to this passage from the Restatement of the Law, Trusts 2d, vol.1 (St. Paul: American Law Institute, 1959), paragraph 12 at pp. 37-38:

> If there is an understanding between the parties that the person to whom money is paid shall pay "interest" thereon (at a fixed or at the current rate, and not merely such interest as the money, being invested, may earn) the relationship is practically always a debt and not a trust. Interest is paid for the use of the money, and if the payee pays interest he is, in the absence of a definite understanding to the contrary, entitled to use the money for his own purposes. It is theoretically possible, of course, for a trustee to pay "interest" from his own funds, but in the absence of a clear agreement to that effect such an intention would not be found.

207 Despite these authorities, Andrekson J. concluded that neither the commingling of funds nor the payment of interest for the use of the funds was determinative of the true nature of the agreement and that, notwithstanding the commingling, there was nevertheless a restriction on the use of the funds. As a result he found there could be a trust. In reaching this conclusion, he looked to the surrounding circumstances and found that, although the agreement was silent as to whether the broker could treat the funds as its own, both the plaintiff and the sales manager for the broker believed the broker could not. He found that the funds were deposited with the broker for the specific purpose of buying insured mortgages for the plaintiff and that the payment of interest was simply a way to lure the plaintiff's funds from another bank. He held that the funds were impressed with a trust.

208 In Citadel General Assurance Co. v. Lloyd's Bank Canada, [1997] 3 S.C.R. 805, the Supreme Court said this about the commingling of funds at paragraph 16:

> The fact that the trust funds in Drive On's account were commingled with other funds does not undermine the relationship of trust between the parties. As Iacobucci J. wrote for the majority of this Court in Air Canada v. M & L Travel Ltd., supra, at p. 804, "[w]hile the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative"; see also R. v. Lowden (1981), 27 A.R. 91 (C.A.), at pp. 101-2; Bank of N.S. v. Soc. Gen. (Can.), [1988] 4 W.W.R. 232 (Alta. C.A.), at p. 238.

209 In Bank of Montreal v. British Columbia Milk Marketing Board (1994), 94 B.C.L.R. (2d) 281 (S.C.), Newbury J. (as she then was), considered a pooling scheme in which the defendant

board acted as a clearing house for money owed under the scheme by vendors to producers. When one vendor, McKinnon Holdings, ran into financial difficulty and failed to pay its producers, the board withheld money it owed McKinnon. Following the bankruptcy of McKinnon, the Board claimed this money on the basis that it was the producers' property as beneficiaries of a trust. The plaintiff bank, meanwhile, claimed the money as a secured creditor. The question was whether the amount that the Board withheld was the Board's as beneficiaries of a trust.

210 As Newbury J. noted at paragraph 9, the Board argued that funds paid by vendors to the Board

> "cannot be considered as moneys belonging to McKinnon" and, since McKinnon had no property interest in respect of the milk not used by it, it must have held the producers' milk either as their trustee or as a bailee in possession. More importantly, they say, an implied trust meeting the common law requirements of certainty of intent, subject-matter and object, existed in respect of any money received or receivable by McKinnon from the Board for the producers' benefit.

211 Newbury J. said at paragraph 10-11:

> ... The law is clear that for a trust to be created, there must be sufficient evidence of an intention on the payor's part that the funds or property received by the trustee are not to become part of his own property but are to be or remain the property of the beneficiary. For this purpose, there must be an obligation whether imposed by express terms or implied from other circumstances, on the part of the trustee to keep the property separate. This was the point made by Channell J. in the well-known case of Henry v. Hammond [1913] 2 K.B. 515 as follows:
>
> > It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law .... I am aware that, if the defendant is bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognized his obligation, the obligation itself being

> the essential thing. This principle seems to me to reconcile all the cases." [at 521 ...].

These comments still appear to represent the law today in Canada. In The Law of Trusts in Canada (2nd ed., 1984), Professor Waters notes the following in comparing trust and agency:

> ... it is essential if the agent is to be an express trustee, or to be made by law a constructive trustee, that there be property which the agent was required to keep separate from his own assets. If the agent, who is collecting moneys from third parties for the principal, or is required to pay over the principal's money to a third party, is to be a trustee of any kind, it is vital that it be shown the agent was required, contractually or otherwise, to keep those moneys identifiable from other assets. Otherwise, the agent is a debtor only. [at 46 ...].

On this point Waters cites Thomson v. Merchant's Bank (1919) 58 S.C.R. 287; H.E.P.C. Ont. v. Brown (1960), 21 D.L.R. (2d) 551 (Ont. C.A.) and Re H.B. Haina & Associates, Inc. (1978) 86 D.L.R. (3d) 262 (B.C.S.C.). I note as well that Henry v. Hammond was expressly approved and applied by our Court of Appeal in Salo et al. v. Royal Bank of Canada and Patrick & Miles Logs Ltd., [1988] B.C.J. No. 999 (Vancouver Registry No. CA005921, dated May 5, 1988) in characterizing the relationship between a logging firm and its logging broker as one of debtor and creditor rather than trustee and beneficiary. In this regard, the Court noted that apart from a direction by the logging firm that its logs were to be kept separate from other logs acquired by the broker, the principal exercised no control over the manner in which the broker performed its function of broker, no direction or control over the manner in which it dealt with the proceeds received from the sale of the logs, and never instructed the broker to keep the proceeds from such sales separate from its own general funds.

212 In the above passage, Newbury J. notes that there must be "sufficient evidence" of the payor's intention that the fund be kept separate for a trust to be created. That comment, of course, relates to the funds that were the subject of the alleged trust.

213 The payment of interest is an important factor in this case in indicating the true intention of the parties. While it is not determinative, in the circumstances of this case, it is an objective fact that normally indicates that a debtor/creditor relationship was intended, at least with respect to the funds. It is argued by the defendant that the fact that the investors generally described the main terms of

their deal with Taylor Ventures as the return of their investment plus interest and a share of profits if they stayed in, rather than as a particular interest in land, also indicates that the investors did not intend that the land was to be held in trust for them.

214 On the other hand, the investors only received interest if they redeemed their share and TVL did not issue T-5's to investors as they did in the case of specific twelve percent loans from investors. TVL appears to have suggested or encouraged investors to treat money on redemptions as capital gains.

215 The fact that Ralph Taylor suggested and some investors accepted that the investments were like term deposits may suggest a debtor/creditor relationship. But this suggestion was made late in the day and was hardly a consistent theme of the communications between the parties. I do not think it is of much significance.

216 What of the absence of an obligation to keep the monies that were advanced separate from the other assets of Taylor Ventures? In this case, I think the fact of commingling is a less significant factor than it might be if the issue was whether there was a trust intended for the particular funds rather than the property. As the plaintiffs argue, the fact that the monies were commingled by TVL, even if not prohibited, does not speak to the parties' intention as to whether the real property was to be held in trust. In other words, even though the investor may not have limited TVL in its ability to use the particular funds, the proper question to ask in determining whether this is, in substance, a trust is whether the parties intended that TVL would hold for the investor a beneficial share in land in a particular project.

217 On the question of the surrounding circumstances, while the evidence of the conduct of the parties, both at the time of investment and thereafter is relevant to some degree, the evidence that speaks most loudly in determining intention is evidence dealing with the discussions between the parties before the investments was made. How did Ralph Taylor explain to the investors what a share represented or what their interest was?

218 My review of that evidence indicates that, while there were only a few occasions when the parties spoke of the investors' money buying the land, there were more frequent references to individual plaintiffs acquiring an ownership interest. While Ralph Taylor denied making some of the comments attributed to him by the plaintiff investors, I prefer the evidence of the investors who testified over his evidence. None of the plaintiffs was shown to lack credibility or to be inconsistent on this point. They appeared to try to recount the origins of the transactions as best they could. On the other hand, I had serious reservations about the credibility of Ralph Taylor, who I found would often rationalize or be selective in his recollection of what he said to possible investors. I do not think that it is a correct characterization of the plaintiffs' evidence to say that, in discussing ownership of land through the investments, they were just stating their assumptions. The thrust of their evidence was that Ralph Taylor said that they were acquiring ownership in land and that that is what their share in a designated project amounts to.

219 Towards the end of the trial, Ralph Taylor was asked about this evidence, which was given by Ms. Miller:

> Q. Well, I guess I should ask you why is it you believe that you had an ownership interest in the land?
> A. I was told by Mr. Taylor that that's what the money was used for and that by owning the land the money would be secure.

220 Mr. Taylor was asked if he told her that. He replied: "I would tell that to the group." He was then asked:

> Q. If you go - sorry, and the group, you would tell that to all the investors?
> A. Yes

221 What was the share referred to on the speedy memos intended to represent? It is clear that it did not represent a share in Taylor Ventures. But did it represent an interest in a property or a share in a project or the profits from a project?

222 Mr. Shields asked Ralph Taylor this on cross-examination.

> Q. You certainly would have said this is our land and that's TVL and the investment club comprised of the investors?

A Yeah, it was our project.

> Q. And --
> A. And the land is part of the project.
> Q. I understand, but you would have said, you do not deny, that this is our land, referring to the land people had invested in jointly, the investors [sic - and] TVL?
> A. Yes.

223 The oft-repeated speech of Ralph Taylor was that banks were to be avoided and that in bad times the club could wait it out. He tried to suggest that he said things like property was hard to finance, banks were hard to get mortgages from and second mortgages were costly but I think that he was more direct than that. I think he said banks were to be avoided and the club could avoid them because of how they raised the money. The phrase "we can wait it out", may be taken to suggest that Taylor Ventures and the investors could sit on their interest in land until bad times passed. Again, this is just a factor that suggests, to some degree at least, an intention that the legal title holder, TVL, holds the interest in trust for the group of interested investors.

224 The investors' evidence regarding what Ralph Taylor told them about what they were buying is important. It must be carefully considered in determining the intention of the parties to these transactions. But I must be alive to the many possible meanings of his statements; a phrase such as

"the land does not go away" may simply indicate the nature of the business in which the investor and TVL are involved or it might suggest that the investors had something tangible of value.

225 The defendants say that TVL's occasional use of terms such as "'we' will develop the land" and "'we' (or you) own the land" could be taken to mean either that TVL owned the property, with the investors participating in some fashion, or that the investors beneficially owned the property.

226 The defendants point to evidence that suggests that the investors never expected that they would actually receive the land and the deal was always only for a percentage return on their investment and a possible share of the profits, that share to be determined by TVL.

227 The defendants suggest that the surrounding facts, taken as a whole, point away from a finding that the parties' intention was that the plaintiffs' shares would represents an ownership interest in the particular land. Mr. Webster argues that the fact that the investor could be paid back plus twenty percent is inconsistent with a trust. He asks this question: if the investors expected that the properties in which they invested were held safely for them, how did they expect to get twenty percent and their principal when the subdivision development properties did not generate any income prior to sale? His answer is that the investors relied on TVL's other projects to generate revenue, which is inconsistent with an intention that the property be held in trust for them but rather consistent with a commercial debtor/creditor relationship that they had with Taylor Ventures.

228 The defendants also point to other surrounding circumstances. They point out that, according to Ralph Taylor, some investors asked about liabilities before they invested and were told that there were none. If they were to be owners, the defendants say, even unsophisticated investors would expect to be liable for costs related to the property, such as taxes or insurance.

229 On a similar note, the defendants point to the fact that share values were calculated from time to time, not with reference to the market value of the property, but simply by taking the amount of the investment and adding accrued interest. This, they say, suggests a debtor/creditor relationship, not a trust.

230 Those facts, I agree, are all consistent with a relationship in which the investors sought a good interest return on their investment plus a share of the profits if they stayed in and are inconsistent with a relationship in which the investors intended to receive an interest in land. The authority that TVL exercised in connection with all of the projects is also more consistent with the land belonging beneficially to TVL with an obligation to account for profits than it is with belonging to the investors.

231 Although I do not place great weight on subsequent conduct of the parties, such as investors claiming a loss with Revenue Canada or filing proofs of loss in the bankruptcy, should weight be given to the fact that no investor complained that they already owned the land when Taylor said, frequently and clearly, that security was available for those with over $50,000 invested? I think that at best the weight attributed to that factor should be modest because the fact of an interest in land

and an offer of security are not necessarily mutually exclusive.

232 In another case involving TVL, a similar issue was addressed. In Taylor Ventures Ltd. (Trustee of) v. 554925 B.C. Ltd., (2004) 7 C.B.R. (5th) 8, 2004 BCSC 1612, (TVL (Trustee) v. 554925), Burnyeat J. considered an application by a Trustee in bankruptcy of TVL that a transfer of a certain lot to the defendant numbered company, which was owned by a Mr. van Gaalen, was a fraudulent conveyance.

233 The numbered company claimed that the transfer was pursuant to an agreement, made in 1993, that TVL would hold the property in trust.

234 In that case, Ralph Taylor had testified: "Well, I would find a piece of land that looked right for a development and then offer shares for sale to people that wanted to participate in the project". Mr. van Gaalen provided $200,000 to TVL in 1993 with the cover letter noting, "[e]nclosed $200,000 is for a 1/3 interest in the development of 10 acres ... as per plan shown to me." In return he received a letter from TVL saying "[r]eceived $200,000 for 1/3 interest in 44 Lot Sub-division at 1825 Extension Road, Nanaimo".

235 In January 1998, an arrangement was agreed upon between TVL and Mr. van Gaalen whereby title to the property would be transferred to 554925 B.C. Ltd., the nominee of Mr. van Gaalen and Mr. Stinson, who was the other participant in this project and who had assigned his interest to Mr. van Gaalen.

236 The question was whether 554925 B.C. Ltd. had established that a valid trust had been created by the original agreement between TVL and the two investors. Burnyeat J. said that there was nothing in the two July 8, 1993 letters, (the letters I have quoted above), the subdivision plan, and the Statement of Adjustments from the original purchase to allow him to conclude that it was the intent of TVL to create a trust. He said that he could not be satisfied that the language used by TVL was "in any way 'imperative' or that the intention of TVL in July through September, 1993 was to establish a trust".

237 If the only evidence in the case at bar was the speedy memo, then Justice Burnyeat's decision would properly support the argument that there was insufficient evidence of intention to form a trust; clearly, that decision provides persuasive support to the defendant's argument that a document as basic as a speedy memo is, by itself, insufficient evidence to make out the intention to establish a trust. In the case at bar, however, there was other evidence, such as the evidence of the investors as to what was said to them, that was put forward in support of the argument that this arrangement was a trust.

238 In this case, the investors were told by Ralph Taylor that the share they had purchased in a property or a project would represent an ownership interest. They were told that they would be part owners or owners with TVL. And while the investor could demand payment at any time, the evidence suggests that TVL or another investor would acquire that interest. To that extent, the

ability to redeem shares is not inconsistent with a trust.

239 There are factors, such as the payment of interest and the ability of TVL to commingle funds, that might, on reflection and in hindsight, point to a conclusion that some other relationship was intended. Considering the evidence that I have set out in this part of the judgment, I think that there is a reasonably good argument that the parties had the intention to create a trust.

240 That conclusion, however, can only be a provisional one, and requires a consideration of the next certainty. Certainty of intention and certainty of subject matter are obviously related. In his text, Professor Waters considers the case of Perry v. Perry, [1918] 2 W.W.R. 485, in which a testator, having divided his property between his widow and sons, expressed a desire that his daughter "shall inherit from her mother a share" with "the balance to be divided in equal shares...". While the phrase dealt with the subject matter, the court found that the imprecise language also rendered uncertain the intent of the testator. As he observes at p. 150-51:

> [Did] this mean a share of the mother's own property or a share of the property devised to her by the testator? And, if that was uncertain, what "balance" was to be divided? Language and property description interacted, therefore, in determining the intent of the testator.

241 With that in mind, I must turn my attention to the question of the second certainty, certainty of subject matter.

242 The parties disagree as to whether there was certainty of subject matter. I have set out their arguments above.

243 Under the terms of their agreement with TVL, were the plaintiffs entitled to a specified or a determinable interest in land? Or were they entitled to an unascertained future share of profits in a particular project, payable only if they stayed in until the project was completed and did not, in the interim, demand that TVL return their investment with the promised twenty percent per annum interest?

244 In TVL (Trustee) v. 554925, Burnyeat J. also addressed the issue of the required certainty of subject matter and found that there was no certainty of subject matter because the documents said by the defendants to have established the trust referred to a "1/3 interest in the development of 10 acres ... into 44 lots". In this regard, he said, at paragraph 38, "there is no certainty about whether the subject matter of the alleged trust is an interest in the development including the profits coming from the development or whether it is an interest in the Property itself". At paragraph 45, he added:

> I am satisfied that this transaction was no different than the other transactions between TVL and Mr. van Gaalen whereby he paid money in order to receive a "share". None of the usual indicia of the development of a property by partners or by a trustee on behalf of beneficiaries is present. Mr. van Gaalen never saw the

> Property, he had no idea about the taxes, he had no knowledge about the third "partner", and there appears to have been no dealings between Mr. van Gaalen and TVL relating to the Property for the four years between 1993 and 1997.

245 Even if the particular land in which the investor bought shares is identified and there were expressions of intention that the investor have a beneficial ownership interest in the land, that is not the end of the matter. As noted by Waters, above (at p. 117):

> [E]ven if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to take must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

246 As Waters also notes (at p. 119):

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it". This latter form of certainty more often occurs with fixing the quantum of beneficiaries' interests, but it can occur with the whole trust property.

247 This raises the question: even if it was the intention of the parties that the investors were to have a beneficial interest in the land to be acquired, how is that particular interest of the investor to be determined? The defendants say that if the subject matter is based on a formula, it must be determinable at the time of the sale to the investor, since if there is a trust, that must be the time that it was created. In order to achieve this certainty, they say, the investor must have purchased a specific percentage of an interest in land rather than something that might be large or small depending on the number of shares sold. The plaintiffs say that the subject matter is determined by calculating the percentage interest of the investor based upon the records of TVL. They say that the evidence shows that there was more than enough money raised by share sales for each of the investor projects in question and the record of the total shares sold operates as the denominator to determine the interest of the investor in the underlying land to be purchased.

248 I find that the understanding was that the legal title to the property would be held by TVL. There was, of course, no written formula determining how each particular investor's interest in the property would be determined. When shares in a project were sold, it is unclear how many would be sold, but the plaintiffs say that the interest of the investor can easily be determined as a percentage of the shares sold when the time for selling ended.

249 However, there are a number of aspects of the evidence that raise uncertainty as to the determination of an investor's possible interest.

250 First, it seems probable that if the investor's interest was properly characterized as an interest in land, as opposed to that of a creditor who might share in the profits of a project, it is probable that

TVL also had a share in the project or the lands. However, whatever interest TVL had in a particular project or land was not precisely determined between the parties.

251 Let me refer to the plaintiffs' evidence in this respect. Mr. Dunlop understood that TVL was to get a share of the project. Ms. Miller understood her share of the profits depended on whatever cut TVL was going to get from the project, and she knew that TVL was going to get some sort of share in the project but did not know what that share was going to be. Mr. Keller understood that his share of the project would depend on whatever TVL was going to take from the completed project. Mr. Berger had no idea what share of the profits were to flow to TVL but he understood TVL was to get part of the profits. Mr. Ogren said he did not have any understanding as to how Ralph Taylor was going to calculate the profits. Mr. Mountain said he was aware that TVL was going to get a share of the project but had no idea of what that share was going to be, and he left it entirely up to Ralph Taylor to do what he had to do to complete the project. Ms. Roberton agreed that Ralph Taylor expected to make a profit on behalf of Taylor Ventures on each project, that it was up to him to calculate the profit and that his calculations would determine how much each investor received. Mr. Koretchuk knew that TVL was going to get a share of the profits of the project, but had no idea of what that share was going to be. Mr. Burgess said that he assumed that TVL had shares in the projects and he knew he was going to get something out of it, but had no idea how that was to be calculated. Ms. Atchison did not have any understanding as to how Ralph Taylor was going to calculate the profits and she left that up to him.

252 It might be argued that TVL only had a share of the profits and not a share of the beneficial interest in land, if that is what the investors had. I find that the reason there was no formula or specific determination agreed to by the parties on the formula to determine the precise interest each investor had in the land was because the focus of the discussions between TVL and the investors was on the guaranteed return and the percentage of profits from the sale or development of the project, not what each party would own if the issue became who owns what share of the land.

253 If TVL did not own the land in a project entirely, I find that it is by no means certain that TVL did not have an interest in the land, and that it is uncertain what percentage each of the parties owned in that land.

254 Even if there were a limited number of shares sold, I find, on all of the evidence, that the interest of the particular investor is not sufficiently determinable by an agreed formula. I do not find that the broad discretion that the investors gave TVL was sufficiently certain to provide an agreed basis for determining any interest an individual investor might have in the lands.

255 Another aspect of uncertainty of subject matter is the fact that if the shares were to represent an interest in land, there was no certain agreement that there would be no further shares sold. Ralph Taylor said he could sell more shares but the topic was not really discussed. There was no clear agreement proven that he would not sell more shares; some investors thought that he could, while others thought when the deadline for sales passed, he could not sell more shares. It was certainly not

an implied term that he would not sell more shares. The investors' concern was not the dilution of their shares in terms of an interest in land, but the recovery of interest and a greater amount for profits if they stayed in until the project was sold.

256 There was no certainty of subject matter and that conclusion also leads me to conclude that there was insufficient certainty of intention that there was to be a trust.

257 I conclude that the required certainties of intention and subject matter are not met here. The arrangement between TVL and the investors was a commercial debtor/creditor relationship and did not satisfy the requirements to be a trust.

258 The next issue is whether there was a Quistclose or purpose trust.

259 The plaintiffs argue that the advance by the investors to TVL was for a specific purpose and that, even if it was a loan, it was a loan for a specific purpose and, as such, TVL was not free to use the money for any other purpose. The plaintiffs say that the purpose trust gives rise to fiduciary obligations and creates a resulting trust in their favour, which was breached to the extent that TVL failed to use funds for the designated purpose. The essence of this argument, therefore, is that there is a trust in connection with the purchase or investment monies as opposed to the properties.

260 The plaintiffs say that the Quistclose trust exists, whether the monies from the investor is a loan or not, because the funds provided by the investors were restricted to being used to purchase a specific property, because TVL accepted that the plaintiffs' money would be put to that use exclusively and because it was not the intention of the parties that the money would become the property of TVL.

261 The defendants say that this concept of a Quistclose trust only applies to the funds, not to the lands. It is not enough that the investor has some motive in advancing the money; a trust will not be imposed on TVL unless the investor intended to restrict TVL's freedom to dispose of money by requiring that it should not be applied for any purpose other than that stipulated. They submit that there was no specific declared use of the funds, and that a reference to a project in the speedy memo was not enough to mean that the funds would be used solely for the purchase or development of that project. The defendants say that there was no requirement that the funds be kept in a separate account, nor was there evidence that the funds could only be used to buy the land but not be used for other relevant purposes of TVL, such as taxes, option payments, insurance or the redemption of other investors' interests.

262 The defendants say that, when a loan or advance is made, the mere declaration of a specified purpose is not enough to create a purpose trust, but that there must be something in addition that indicates that the recipient is not to have the full beneficial interest in the fund.

263 The origins of the Quistclose trust were described in Re Westar Mining Ltd. (2003), 9 B.C.L.R. (4th) 61, 2003 BCCA 11 at paragraph 11-12, where Mackenzie J.A. said:

> A purpose trust is often referred to as a Quistclose trust in recognition of the influential judgment in Barclay's Bank, Ltd. v. Quistclose Investments Ltd., [1968] 3 All E.R. 651 (H.L.). Quistclose also involved a special banking arrangement. The respondent Quistclose had advanced funds to Rolls Razor Ltd. to allow it to pay a declared dividend. Quistclose accompanied its cheque to Rolls Razor with a letter to the appellant bank confirming that the cheque would be deposited to a separate account and that the funds "will only be used to meet the dividend due ....". Rolls Razor went into voluntary liquidation before the dividend was paid and the bank claimed the monies on behalf of Rolls Razor's creditors. The House of Lords, in a unanimous judgment delivered by Lord Wilberforce, held that the monies had to be returned to Quistclose because they were advanced exclusively for the payment of a dividend which could not be paid after the voluntary liquidation. Lord Wilberforce concluded that the advance of the funds for a specific purpose created an equitable right in Quistclose to see that the fund be applied for that purpose, and created a secondary trust in favour of Quistclose when that specific purpose could not be carried out.
>
> Quistclose does not modify the certainty of intention, subject matter, and object required of trusts generally.

264 Newbury J. (as she then was) also considered the issue of a Quistclose trust in Bank of Montreal v. British Columbia Milk Marketing Board, supra. She said at paragraph 12:

> Mr. Stark on behalf of the Board cited the decision of the House of Lords in Barclay's Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567, and the judgment of Southin J. (as she then was) in Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd. (1986) 11 B.C.L.R. (2d) 308 (B.C.S.C.). These stand for the proposition that where A gives money to B for the specific purpose of paying C, that money is impressed with a trust and may not be appropriated by him. I certainly do not doubt this principle, which in the words of Lord Wilberforce is supported by "longevity, authority, consistency and ... good sense". In both Barclay's Bank and Lowndes, however, it would appear that the recipient of the funds was required, either by express terms or the past course of dealings between the parties, to keep the money separate from its own funds. Certainly in Barclay's Bank, the funds had been advanced by a lender into a separate account opened specially to enable the borrower to pay a dividend to its shareholders. The Court in Lowndes did not refer specifically to the question of segregation of funds in its description of the facts, but the correspondence quoted at p. 310 of the judgment refers to "trust accounts designated by the Superintendent of Insurance." Both cases, moreover, were concerned with funds paid on express conditions of trust which the payees thereof later tried to

> repudiate. The case at bar is concerned with whether a trust may be implied from the course of dealings imposed by G.O. 131 and the language thereof.

265 In Twinsectra Ltd. v. Yardley, [2002] 2 All E.R. 377, a firm of solicitors received money on the undertaking that the monies would be retained until such time as they were applied in the acquisition of property on behalf of the client, that the loan monies would be used solely for the acquisition of property on behalf of the client and no other purpose, and that they would repay the sum within four calendar months after receipt of the loan monies by them. The solicitor did not retain the monies until it was applied in the acquisition of property by Mr. Yardley, the client. Instead, on being given an assurance by Mr. Yardley that it would be so applied, they paid the money to a Mr. Leach and he, as solicitor, simply paid it out upon Mr. Yardley's instructions and did not take steps to ensure that it was utilized solely for the acquisition of property by Mr. Yardley.

266 The House of Lords was divided as to whether evidence of dishonesty was required in order to impose liability on an accessory to a breach of trust, but were unanimous as to what was required to make out a **Quistclose** trust. These requirements were set out in the dissenting reasons of Lord Millet at paragraph 68-72:

> Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.
>
> Such arrangements are commonly described as creating "a Quistclose trust", after the well-known decision of the House in Quistclose Investments Ltd. v. Rolls Razor Ltd [1970] AC 567 in which Lord Wilberforce confirmed the validity of such arrangements and explained their legal consequences. When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee-in-bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties

collected from the terms of the arrangement and the circumstances of the case.

[emphasis added]

267 Ms. Milton, for the Credit Union, argues there must be, in addition to a declaration of specific purpose, some indication that the borrower is not to have the full beneficial interest in the funds. This, she says, has usually been shown by the borrower having a requirement to keep the loan monies separate from other assets and return them if the purpose is not made out.

268 In Re Westar Mining Ltd. Mackenzie J.A. referred to Milk Marketing Board and said that because the vendor was not required under the terms of its dealings with the Board to separate funds received from the Board for producer payments from the other property of the vendor, or to use the funds received exclusively to pay producers, "... the essential elements of mutual intention to create a trust and certainty of subject matter were not satisfied". He went on to say at paragraph 16, that:

> Conversely, in the present case, the payments by Poscan were required to be paid into a separate joint venture account to be used exclusively to pay the operating expenses of Greenhills. The Bank recognized the separate status of the account. The payments by Poscan under the Joint Venture Agreement were separated from Westar's other assets, in contrast to the payments to the vendor by the Milk Marketing Board that, with the agreement of the Board, were mingled with the vendor's other property.

269 The argument that there was a Quistclose trust fails for three reasons. First, there was no obligation on the part of TVL to segregate the funds, a factor that Westar indicates is important. Second, the evidence, as a whole, does not establish a mutual intention that the monies could not be applied for other purposes of TVL. Third, the agreement to pay interest for the use of the money points to a debtor/creditor relationship with some flexibility to TVL rather than a restriction on the use of the particular funds.

270 The three certainties for the establishment of a purpose trust are equally applicable here, but I find that they were not satisfied. In particular, I find that the requirement for certainty as to intention that the beneficial interest in the fund would remain in the investor is not met in this case. Although two or three of the investors said that the monies were to be used to acquire the properties, I do not find, on the whole of the evidence, the required certainty of intention that the beneficial interest in the monies remain with the investors. Moreover, to the extent that some plaintiffs assumed their funds would only be used for particular projects, I think it is clear from Westar that this subjective intention is not sufficient to establish a purpose trust.

271 Therefore, my conclusion is that the evidence in this case does not establish that there was a Quistclose or purpose trust, with respect to the monies paid to TVL by the investors.

272 The plaintiffs argue that, even if there was not a trust or a Quistclose trust, there was nevertheless a trust-like or fiduciary relationship and TVL was a fiduciary. They say this because TVL acted much like a professional advisor to the investors, with absolute discretion over the investors' funds and the development of the projects in which they had an interest.

273 The defendants deny that there was a fiduciary relationship.

274 The plaintiffs say that, even if a trust were not found and the relationship was a contractual and a commercial one, if the ingredients that give rise to a fiduciary duty are present and there is the vulnerability of the plaintiff investors, the traditional fiduciary principles are invoked. The argument, as I understand it, is that even if there was not a trust or purpose trust, the broad discretion given TVL in the management of projects and the lack of knowledge and sophistication and the vulnerability of the investors to that discretion resulted in a fiduciary relationship which TVL breached by entering into the impugned transactions.

275 The plaintiffs say that TVL would only be in breach of fiduciary duty if it placed its interests ahead of those of the investors. They blame TVL, not for the failure of their investments, but for acting disloyally by secretly selling investor projects to major investors, who then mortgaged them with the connivance of Ralph Taylor, even as Mr. Taylor was purportedly still developing them as investors' projects.

276 The defendants say that the parties were not fiduciaries because the concept of a fiduciary relationship has no place in an arms-length commercial relationship.

277 The defendants say that TVL was acting, as it was entitled to, in its own self-interest and its obligation was not to act in the best interests of the plaintiffs but to provide a specific percentage return on the investors' money with a share of the profits. TVL, they say, never relinquished its own self-interest; rather, the interests of the investors and TVL were simply aligned in the goal of making a profit. They say that the investors were not vulnerable but could have negotiated security rights if they wished to do so.

278 In Frame v. Smith, [1987] 2 S.C.R. 99, Madam Justice Wilson, then in dissent, said at paragraph 59-60, in a passage about fiduciary relationships that has since been frequently cited with approval:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts (3rd ed. 1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 L.Q.R. 472; George W. Keeton and L. A. Sheridan, Equity (1969), at pp. 336-52; Shepherd, supra, at p. 94. Yet there are common

features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.
(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

279 In Gladstone v. Attorney General of Canada, [2005] 1 S.C.R. 325, 2005 SCC 21, the Court made clear, at paragraph 24, that the determination of whether there was a fiduciary relationship was a principled analysis:

> The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. At its core is the obligation of one party to act for the benefit of another. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In Guerin v. The Queen, [1984] 2 S.C.R. 335, Dickson J. (as he then was) stated at p. 384:
>
> > I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

280 In Hodgkinson v. Simms, [1994] 3 S.C.R. 377, the Supreme Court of Canada found a fiduciary relationship existed between the plaintiff and the defendant accountant even though there was a contractual relationship. La Forest J., for the majority, said as follows at paragraph 28-29:

> Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see Johnson v. Birkett (1910), 21 O.L.R. 319 (H.C.);

> McLeod v. Sweezey, [1944] S.C.R. 111; P.D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see Standard Investments Ltd. v. Canadian Imperial Bank of Commerce (1985), 52 O.R. (2d) 473 (Ont. C.A.), leave to appeal refused, [1986] S.C.C.A. No. 29. However, as Prof. Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see supra, at p. 88.
>
> ... As I stated in M. (K.) v. M.(H.), [1992] 3 S.C.R. 6, at p. 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in Guerin v. The Queen, [1984] 2 S.C.R. 335, at p. 384:
>
> > . . . where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary . . . .
> >
> > It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[emphasis added]

281 There is some reluctance on the court's part to find a fiduciary relationship in the context of an arms-length commercial relationship. Mr. Justice Sopinka for the majority on this issue in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, said at paragraph 27:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application

of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in Equity and Commercial Relationships, ed., P.D. Finn, The Law Book Company, 1987, explains why:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

282 After endorsing the view that it would undermine the sound doctrine of equity to make unreasonable and inequitable applications of it, Sopinka J. said at paragraph 29:

> ... equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

283 In Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, Binnie J. noted that, even where there is discretion, business people are capable of agreeing to the scope of the power to be exercised. He said at paragraph 30:

> Even prior to Lac Minerals the Court expressed the view that the policy objectives underlying fiduciary relationships did not generally apply to business entities dealing at arm's length. In Frame v. Smith, [1987] 2 S.C.R. 99, Wilson J. stated, at pp. 137-38:
>
> > Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, Jirna Ltd. v. Mister Donut of Canada Ltd. (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their

> bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.
>
> To the same effect, see Lac Minerals per Sopinka J. at p. 595, Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 414, per La Forest J., and the comment of Professor Davies that "[s]trong evidence should be required before a breach of confidential information situation is metamorphosed into one of fiduciary relationship" (Davies, supra, at p. 7). Despite these warnings, a majority of this Court in Hodgkinson v. Simms, supra, held that where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context. The vulnerability of clients to their professional advisors invoked traditional fiduciary principles. In this case there is nothing in the relationship between a juice manufacturer and its licensee to suggest that the former surrendered its self-interest or rendered itself "vulnerable" to a discretion conferred on the latter. The overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power (M.(K.) v. M.(H.), supra, per McLachlin J. at p. 86) does not operate here. If different policy objectives apply, one would not expect the remedy necessarily to be the same.

284 Was this contractual and commercial relationship, if not a trust, also a fiduciary relationship?

285 Beyond the rather sparse terms of the contractual arrangement, TVL had significant discretion in terms of what to do with the investor projects.

286 TVL had wide discretion from the investors as to how it handled each development. The decision of when or whether to develop or sell the property, the determination and appropriate split of profits, indeed, the entire management of the projects in all critical respects was left to the discretion of TVL. Obviously, numerous kinds of dealings with a property could affect the practical interests of the investors. Although I have found an obligation not to mortgage the projects to financial institutions, beyond a mortgage to acquire the property initially, I find that the manner in which possible profits might be realized was something the investors left to TVL. They trusted Ralph Taylor and granted him discretion to act as he saw fit.

287 The defendants argue that this is one of those commercial relationships where the parties' rights and obligations were circumscribed by contract and there is no room for a possible fiduciary obligation. The parties, it is true, were dealing at arm's length, and the plaintiffs received a promise of significant interest and additional profit if they remained until the completion of the project. This was not a relationship, they say, where Ralph Taylor gave up his self-interest for that of the investors. Even if there is vulnerability, the defendants argue, the discretion that the plaintiffs granted TVL was simply part of the bargain under which they received the promise of a substantial

return on their monies. Having granted that discretion as part of the bargain, the defendants say, the plaintiffs cannot now rely on it as the basis for a claim that TVL had a fiduciary duty to them. In other words, they say, insofar as the investor-related projects were concerned, TVL was given free rein to conduct its business in any fashion it saw fit in order to realize the profit required to pay the investors the agreed return and perhaps something more.

288 If there is not a trust, the relationship between the plaintiffs and TVL clearly does not fall into one of the standard categories that attract fiduciary responsibilities, such as trustee-beneficiary, solicitor-client or doctor-patient.

289 I recognize that it may be rare for there to be fiduciary relationships between two independent contracting commercial parties, but I think that the situation here is unusual. As stated in Hodgkinson v Simms: "the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests".

290 This was a commercial relationship, but fiduciary duties have been imposed on developers in commercial arrangements: Hardman Group Ltd. v. Alexander (2003), 212 N.S.R. (2d) 304, 15 C.C.L.T. (3d) 52 (S.C.). It is also significant that this was not a normal commercial relationship. It was a bargain between an experienced real estate developer and unsophisticated investors.

291 The information concerning all aspects of the developments was entirely in Ralph Taylor's hands. The investors placed substantial trust in TVL and gave it enormous discretion as to the development of the projects in which their club invested, not only in the manner in which the land was acquired and developed but in the type and amount of costs that were incurred and in the calculation and division of profits.

292 Influenced, perhaps, by his early track record or by his personality, the investors placed a great deal of trust in the man behind TVL, who presented himself as having the expertise, know-how and drive to make it where others failed in the real estate development business. Ralph Taylor told the investors that they could go it alone without bank financing, but the investors really left it to Ralph Taylor to decide how to develop or sell the properties and maximize the profits that they hoped to share in. Aside from the understanding that TVL would not increase their risk by granting mortgages to banks, there were no agreed controls over this discretion, only that TVL would exercise it honestly in their joint benefit to try to maximize profit for them.

293 Given the absence of any restrictions by the investors on the actual use of the funds given to TVL, given the wide discretion as to the development and possible sale of the properties, and given the lack of any outside regulatory control or other form of active supervision, I find that there was significant vulnerability on the part of the investors to the exercise of this discretion by TVL.

294 My conclusion is that the level of discretion granted TVL and the degree to which the investors were vulnerable was sufficient to give rise to fiduciary obligations on the part of TVL.

While the parties' interests may have generally coincided, there was, I find, an obligation of the developer to act honestly and in the best interests of the investors, or their joint interests, in exercising its discretion when it might affect the interests of the investors. Therefore, I find that there was a fiduciary relationship between TVL and the investors.

4. DID THE IMPUGNED TRANSACTIONS BREACH ANY OBLIGATION TAYLOR VENTURES LTD. OWED THE INVESTORS?

295 Having found there was a fiduciary duty owed by TVL, I will consider whether TVL acted in breach of that fiduciary duty. Although I found that there was no trust, I will nevertheless consider whether, if I had found a trust, TVL's actions would have been a breach of trust. Thereafter, I will consider the question of the liability of Westminster Savings Credit Union and Mr. Thomas on the accessory principles.

296 While the investors have a number of complaints about the conduct of TVL, the central allegation, and the one that is relevant insofar as the claim against the Credit Union defendants is concerned, relates to the nine transactions where TVL sold lands it had or was acquiring to so-called nominee purchasers and one to a related company. The allegation is that TVL secretly sold and mortgaged the designated investor properties without advising the plaintiffs or accounting to them for any of the proceeds, in order to hide the real nature of the scheme.

297 The plaintiffs' allege that TVL, having exhausted its borrowing power with the Credit Union, devised this scheme to raise money by selling the investors' lands without appearing to do so. They allege TVL carried it out with Mr. Thomas' knowledge and assistance. Investors' lands worth $25 million, they say, were sold to nominee purchasers - all numbered companies - and the Credit Union then gave those purchasers mortgages over development land, even though they were not developers. While it would appear, from an examination of the Credit Union documents, that the buyers had generally, to the Credit Union's knowledge, paid fair market value, Mr. Laxton argued that, in fact, the nominee purchasers did not put up any money, did not pay any interest or taxes and did not do any of the development work. Ralph Taylor, he says, hoped to persuade the nominee purchasers to sell the properties back to him when TVL's financial position improved and, in the meantime, carried out whatever development work the company could afford, in order to create the impression that nothing had changed. The impression of normalcy, he says, was key to the whole plan.

298 In the end, TVL did not repurchase the properties. Mr. Laxton makes this argument: as a result, the investors got nothing and ultimately lost some $16.7 million plus accumulated interest, while the nominee purchasers collectively received a gift of the equity of $11,995,000 in return for the $2,149,935 they had invested in TVL. While this gift was not part of TVL's plan, the Credit Union was caught in the middle and had to try to justify what it had done as legitimate corporate lending. But, he argues, the Credit Union also benefited from the scheme. It received $11.15 million in new mortgages, with the attendant fees, as well $4 million in payments against TVL's overdraft.

Meanwhile, he alleges, TVL diverted upwards of $9 million to the rink project and about $3 million or more to a project of Ralph Taylor's son.

299 The issue is whether the conduct of TVL in connection with the sale and mortgaging of the ten designated investor properties is a breach of trust or fiduciary duty.

300 It is useful to me set out a portion of a chart prepared by the plaintiffs' counsel that describes the sale of properties underlying investors' projects to third party numbered companies (the so-called nominee purchasers) and the mortgages that were taken out on those properties.

Summary of Projects and Mortgage Particulars

[Editor's note: Table 1, Summary, could not be reproduced online.]

301 The various projects listed above - 180 Acres, Laguna View, Chilliwack Mountain, 43 acres, 3.5 acres, Delta Industrial Park and the Special Investment Club - were all projects in which the plaintiffs had shares.

302 Why is it asserted that these transactions were in breach of the fiduciary duty owed to the plaintiffs? The argument is that, although the investors gave wide discretion to TVL, that discretion had to be exercised honestly, in good faith and in the interests of the investors (or in the joint interests of TVL and the investors) in the development of the projects in which they had shares. It is asserted that the TVL's discretion was exercised dishonestly and disloyally in each of these transactions.

303 What were the impugned transactions all about?

304 Ralph Taylor introduced each of the so-called nominee purchasers to the Credit Union. Ralph Taylor's evidence was that TVL was trying to raise money and he could only raise money by selling or mortgaging properties, or selling more shares. He said he did not want to sell the land without control, as the profit was in the development, but to raise larger sums, he said, one must provide collateral. He testified that he suggested to some of his larger investors that he would sell them a piece of property, which they would mortgage, that TVL would get the mortgage money and would oversee the development, and the so-called nominee purchaser would have his investment secured by the equity in the property. Since TVL maintained control, he described this as a "win-win" situation: the nominee purchaser received security, while TVL received funding in the form of the mortgage funds as well as any equity in excess of that required to satisfy the claims of the nominee/purchaser investors.

305 TVL took projects that were investors' projects - or at least part of investor projects - and used them to raise monies which were then used for TVL's general expenses, including development costs, share redemptions, and costs associated with the ice rink.

306 Ralph Taylor, I find, never mentioned to these plaintiffs that these projects were being sold to nominee companies and were being mortgaged by those companies to the Credit Union, and, of

course, he did not explain why this was being done.

307 Ralph Taylor may have done this to raise money to complete his ice rink and for the general expenses of TVL. If there was a trust, I find that these transactions were without the consent of the beneficiaries, and the sale and mortgaging of the properties was beyond any discretion that was granted by the investors. If there was a trust, these transactions would be in breach of trust.

308 In terms of the fiduciary duty, the issue is whether TVL was acting honestly in the best interests of the investors in the project.

309 The defendants argue that no matter how bad Ralph Taylor may have been as a businessman, or how ill-conceived his plan was, the interests of the plaintiffs were foremost in his mind and that he never kept the mortgaging of the properties a secret. However, these particular transactions, including the resulting mortgages, were unique, and I find Ralph Taylor did keep them secret from the investors.

310 Ralph Taylor may have believed that completing the ice rink, which he hoped would generate income of $2 million per year, was the solution to any problems of TVL and would ultimately benefit the investors, in that they would be paid their agreed principal and interest. Yet even if he believed this, the question remains: was he required to obtain the consent of the investors - or at least make full disclosure - with regard to these transactions, which involved the sale and mortgage of property underlying projects that they had invested in?

311 Were these transactions and the attendant increased risk beyond the reasonable discretion that was given to TVL? I think that they were. But I find that even if there was not a trust, this was more than just a breach of the agreement between TVL and the investors. I conclude that there was a mutual understanding that, although TVL had a wide discretion, when the exercise of that discretion affected the investors' interest and the property and projects which they hoped would generate profits, TVL would exercise it honestly in their mutual interests.

312 Instead, what happened was that, without any notice or information to the investors, or their consent, the properties, which were either owned, being purchased, or under option to TVL and which the investors believed were being developed for the purpose of generating a profit in which they would share, were transferred to third parties as a security interest for monies that had been earlier advanced to TVL by the principals of the nominee purchasers. TVL did not carry out these transactions in the normal course of the business that the investors anticipated. Ralph Taylor did these transactions because TVL required funds and some large investors wanted some security.

313 I find that TVL retained a beneficial interest in the properties, and could redeem the properties upon paying what was owed to the party purchasing the land. However, these transactions removed TVL from title and, to a large extent, affected its control of these properties. The transactions placed those properties at risk, given the ability of the third parties - the so-called nominee purchasers - to deal with them, sell them, further mortgage them or at least have a prior interest that had to be satisfied, even if the property could, in fact, ultimately be developed or sold by TVL.

314 I find that TVL's sale of the investor properties to third parties as part of a scheme to provide some larger investors with security, and mortgaging the properties to raise funds for general purposes, including the ice rink, was, if there was a trust, in breach of trust and as well was in breach of a fiduciary obligation owed to the investors.

315 As a result of that breach, TVL would be liable for damages. Given the receivership and bankruptcy of TVL, however, that liability is academic and is not the real issue in this trial.

316 The question, then, is whether the defendants would be liable as accessories to the breach of trust and the breach of fiduciary duty committed by TVL.

5. IS THE CREDIT UNION LIABLE, ON PRINCIPLES OF KNOWING ASSISTANCE AND KNOWING RECEIPT, FOR A BREACH OF FIDUCIARY DUTY?

317 The plaintiffs allege that the Credit Union and Mr. Thomas are liable as accessories under the principles of knowing assistance or knowing receipt in connection with a breach of trust or breach of fiduciary duty.

318 Before I describe the legal principles and the arguments, I will discuss some of the evidence surrounding the Credit Union's knowledge of TVL's dealings with the investors, and in particular the transactions that are impugned in this litigation.

319 I will begin with a review of the evidence of Barry Forbes.

320 Mr. Forbes has held the position of president and chief executive officer of Westminster Savings Credit Union for 26 years. He is the chair of the credit committee.

321 Mr. Forbes said he did not have any direct business dealings with Ralph Taylor. He had lunch with him on several occasions and saw the financial statements of TVL from time to time. Mr. Forbes said that, in his experience, there were occasional excesses in the line of credit, but Ralph Taylor, he said, was good on his word to satisfy them. He indicated that he did not monitor the TVL account as it was operating properly. Although it was normal to do a credit bureau search on a guarantor, and Ralph Taylor was the guarantor of TVL's indebtedness, he did not know if that was done on Ralph Taylor in the 1990s.

322 He said his general knowledge of TVL's business was that Ralph Taylor said investors had lent him money, that he paid them a high rate of return and they could get it back at any time. His understanding, he said, was that the investors were participants in specific projects and participated in the profits of the project in which they invested.

323 Mr. Forbes was challenged on his characterization of the arrangement between TVL and investors as being loans. He admitted that none of the contemporaneous documents created by the Credit Union referred to the transactions as loans. He also admitted that, while he had said on discovery that Mr. Thomas and others at the Credit Union had referred to them as loans, he had not

mentioned on discovery that Mr. Taylor referred to them as loans.

324 Mr. Forbes said that he reviewed the financial statements of TVL from time to time to get a general sense of their status but did not do a line-by-line analysis or a comparison of the property statements with the loan files, as that was not something that the Credit Union would do.

325 He is familiar with the mortgages on the ten properties in the so-called nominee purchaser transactions. According to him, nine of the loans were approved by the management credit committee and one was within Mr. Thomas' credit granting approval limit. He said most of the loans were asset purchase loans - loans to buy land - and one was a working capital loan. He said that once a commercial loan is approved, the information goes to legal counsel to ensure the security is in place. Thereafter, the funds are advanced. He expected a reporting letter from the Credit Union solicitors when each mortgage was registered and the money advanced. In a transaction where Ralph Taylor signed as a director, he said that the absence of a reporting letter was not troubling.

326 Generally, he said the asset purchase loans were straightforward. He said that the Credit Union was principally an asset lender and looked primarily to the asset for repayment. In the 1990s, the bank could lend up to seventy-five percent of the market value of a property. He agreed that the Credit Union obtained a professional appraisal from Kenny Rogers Appraisals in each of the ten cases and he was satisfied with the market value of the property in each case.

327 He was asked whether, in each of these ten cases, he would have to inquire of Mr. Thomas to determine if the borrowers had the requisite experience to develop the properties, but he pointed out that these were not development loans. Mr. Forbes denied that the Credit Union would want to know that the development was ongoing or would happen quickly in order to satisfy itself that the loan was sound.

328 Mr. Forbes was asked whether the Credit Union verified the net worth reported by the nominee purchasers in their applications. He said that while it was normal to do a credit bureau search, that was not the case on every guarantee that the Credit Union took.

329 He did not know whether the Credit Union made such inquires of the financial wherewithal of Ralph Taylor or TVL. He agreed that getting tax returns is a way of testing some information, but that there were no tax returns from Mr. Taylor or TVL provided to the Credit Union. Mr. Forbes was asked on cross-examination to compare the figures and the financial statements for TVL with the tax returns and he ultimately agreed there were differences and these differences were substantial.

330 Mr. Forbes also described the various loan files of the Credit Union in connection with the ten transactions. He described the process by which loan applications are put together and approved. In the interest of consistency and clarity I will identify the properties first in relation to the investor project of which they were part and then by the general property description. I have set out the

transactions in chronological order.

331 The first of the impugned transactions took place in 1992. The evidence in the Credit Union files showed that on July 3, 1992, a numbered company, 402847 B.C. Ltd., applied to the Credit Union for a loan of $700,000. The principal and sole shareholder of 402847 B.C. Ltd. was Ralph Taylor. The documents in the file showed that the purpose of the loan was to purchase 180 acres - 1099 Bruce Avenue, Nanaimo.

332 The application for credit prepared by the Credit Union indicated that there would be a first mortgage over the property and a guarantee of Ralph Taylor, who, according to the application, reported a net worth of $2 million.

333 The loan was approved by the management credit committee and the transaction completed in July 1992.

334 The property was ultimately sold pursuant to a court order in December 1999. According to Mr. Forbes, the Credit Union received the net proceeds and wrote off $37,000.

335 The next transaction took place in 1994, when, according to the Credit Union's files, 442391 B.C. Ltd. applied for a loan for $1.5 million.

336 The file contained a contract of purchase and sale dated July 11, 1994, transferring the property from TVL to 442391 B.C. Ltd. for $3 million. The Credit Union's file indicates that the transaction was half in cash and trades and the balance of the sale price was by the mortgage from the Credit Union.

337 The principal of the borrower 442391 B.C. Ltd. was Darrel Howlett, who is described in the Credit Union's files as a successful realtor/entrepreneur. He was required to provide a guarantee for $1.5 million. Credit bureau searches reveal a Beacon Score, which is a measure of a person's credit rating. Mr. Howlett's creditworthiness, as measured by his Beacon Score, was 637, which Mr. Forbes said was satisfactory. The internal Credit Union document indicated that Mr. Howlett reported a net worth in the $2 million range.

338 When the transaction completed in July 1994, there was an appraisal that assessed the property as being worth $3.3 million.

339 Mr. Forbes said that, ultimately, the property was listed for sale and sold for about $900,000 and that the Credit Union suffered a loss of about $600,000. It took steps against Mr. Howlett on his guarantee and that claim was settled.

340 This property appears to be part of the property known as 43 Acres Langley.

341 On this application, the borrower was 491503 B.C. Ltd., the principal of which was Allan McLean. Mr. McLean was known to the Credit Union, which had a credit bureau report dated

November 1993. He reported a personal net worth of $1.25 million.

342 In the Credit Union documents, the transaction was described as the purchase of a commercial holding property in Langley. The price, according to the contract in the Credit Union file, was $1 million. The borrower sought a first mortgage of $465,000.

343 The Credit Union documents indicated that the principal of the borrower anticipated that the property would be upzoned over the next three years. The equity for the purchase, according to the Credit Union file, came from the sale of another property that the Credit Union financed.

344 The transaction completed in March 1995 when TVL transferred the property to 491503 B.C. Ltd. The Credit Union received an appraisal for $935,000.

345 The loan payments came from Mr. McLean's account until shortly before TVL's receivership, when they were paid by TVL.

346 The Credit Union file indicates that 485383 B.C. Ltd. applied in July 1995 for a loan allegedly to replenish working capital, employ an architect and commence preliminary work. The loan sought was $780,000.

347 The Credit Union documents indicated that the applicant acquired the property in 1990 by way of option and the principal of the numbered company was Vincent Taylor, Ralph Taylor's son. Then in his early 30s, Vince Taylor reported a net worth of nearly $1.9 million.

348 When the loan transaction completed in June 1995, the Credit Union received a first mortgage on the property, which was appraised at $1.246 million, and a guarantee from Vince Taylor.

349 Ultimately, this property was sold following the receivership. The Credit Union suffered a loss of about $145,000 and then, according to Mr. Forbes, received a settlement of Vince Taylor's guarantee.

350 According to the Credit Union files, the applicant in this 1995 transaction was 498951 B.C. Ltd, the principal of which was Cesare Maniago. The stated purpose of the loan was to exercise an option to purchase, at a cost of $640,000, and to cover pre-development costs and working capital of $860,000.

351 The Credit Union's security for the loan was a first mortgage and a guarantee from Mr. Maniago, who had a good credit rating with a Beacon Score of 721. Mr. Maniago's statement of net worth, according to the Credit Union files, was $1.9 million.

352 The loan transaction completed in July 1995 and the documents indicate that 498951 B.C. Ltd, as nominee of TVL, completed the option to acquire the property under the 1992 option agreement. A condition of the loan was an appraisal of a minimum value of $3.5 million.

353 This property was sold in the fall of 1997, prior to the receivership, and the Credit Union was paid in full.

354 According to the Credit Union files, the borrower was 509695 B.C. Ltd., the principal of which was Ewald Irion. The borrower was seeking a loan of $1.5 million for the purchase of land priced at $3.5 million. The source of funds was said to be cash and equivalents of $3.5 million.

355 The purchase was apparently of a development site in Walnut Grove. The Credit Union was to hold first mortgage security over that property. An appraisal in December 1995 showed the value of the property was $3.11 million. One of the lending requirements of the Credit Union was that the value be at least $3 million.

356 Mr. Irion provided a guarantee of up to $500,000. His Beacon Score was 673. According to Mr. Forbes that was satisfactory.

357 The loan transaction completed in December 1995. All interest payments came from TVL.

358 The property was sold by the receiver of TVL and the mortgage was repaid.

359 The next property was also referred to as Walnut Grove or 96th Avenue Langley. This was also part of what was a project called the 43 Acres Langley.

360 According to the Credit Union documents the borrower was 510705 B.C. Ltd., which was purchasing the subject property for $3 million from TVL, part for cash and equivalents and the balance by a mortgage from the Credit Union.

361 The Credit Union was asked to provide a $1.5 million mortgage. The report to the management credit committee indicated the security was a first mortgage over ten acres for proposed multi-family and commercial property in Walnut Grove with a guarantee of Mr. Norbert Laakmann of $500,000, who was introduced to the Credit Union by TVL. Mr. Laakmann's Beacon Score was according to Mr. Forbes, a very high one - 804.

362 The transaction completed in January 1996. The property was appraised at $3.8 million.

363 The documents indicated that although the required appraisal was for over $3 million the transaction for tax purposes would be written up at $1.5 million. Mr. Forbes said that at the time he would have expected to see information, or at least been satisfied that information had been supplied that provided the rationale for the transaction, but he did not see that in the material. Mr. Shields argued that this was an example of Mr. Forbes avoiding a question and argued that Mr. Forbes said it would be of concern at discovery, but said that it would be cause for an inquiry or could be of concern at trial.

364 The next property was also sometimes referred to as the Montana Property.

365 The loan applicant was 512047 B.C. Ltd., of which Daryl Myers was the principal.

366 The purpose of the loan, according to the Credit Union documents, was to purchase eleven lots, the price being $605,000, part of which would be paid in cash. The loan sought was for $330,000.

367 The Credit Union wanted a first mortgage over eleven single residential lots and the guarantee of Mr. Myers who, according to the Credit Union file, had a net worth in the $1.1 million range.

368 The transaction completed in March 1996. The transferor on the lot sales was TVL.

369 This loan, like many of the others, was for a one-year term and was renewed. Mr. Forbes said payments were made from the TVL account.

370 Following receivership the property was put up for sale. The Credit Union received $270,000 plus $50,000 from another property, and suffered a small shortfall.

371 Mr. Forbes described this as a loan to retire an option. In March 1995, TVL entered into an option to purchase. The loan application documents say that the property was acquired in March 1995 at a cost of $2.3 million with option payments over the ensuing months and a present balance owing of $1.65 million.

372 According to the Credit Union file, the amount to retire the option was $1.65 million and the loan applied for by 512146 B.C. Ltd was $1.38 million.

373 According to the loan documents, there was to be a first mortgage over twenty acres at 7664 80th Street, Delta and a guarantee by Jacob Stobbe, the principal of 512146 B.C. Ltd. The Credit Union file indicated that he was the owner of Norlan Parts in Langley. Mr. Stobbe had a Beacon Score of 772, which Mr. Forbes said was a high score. The file indicates that Mr. Stobbe reported a net worth in the $1.65 million range.

374 On cross-examination, Mr. Forbes agreed that TVL had paid $700,000 towards the property between March 1995 and March 1996 and that the numbered company had applied for a $1.38 million loan to retire the option. He was asked what had become of TVL's equity and what value there was to TVL in selling the property to a numbered company. He said he had no idea.

375 The transaction completed and the Credit Union advanced the money in April 1996, after the Credit Union received an appraisal that the property was worth $2.355 million. $100,000 was forwarded to the numbered company's account and used as an interest reserve.

376 Mr. Forbes said that, prior to the commencement of this action, neither the investors nor TVL's receiver or trustee advised the Credit Union that the investors owned the lots, nor did they try to attach the proceeds paid to the Credit Union under the mortgage.

377 Mr. Forbes said that after the receivership of TVL, the property was sold and the proceeds in excess of the Credit Union mortgage debt were paid to the receiver.

378 The Credit Union's documents show an application by 512048 B.C. Ltd. for a loan of $1.5 million, including $900,000 to retire an option, $192,000 for development cost charges as well as funds for working capital and an interest reserve.

379 According to the Credit Union file, the security included a limited guarantee up to $500,000 from Carl Godecke, the principal of 512048 B.C. Ltd., who reported a net worth of $1.6 million. According to the Credit Union file, Mr. Godecke had been the owner of G & S Masonry for the last fourteen years.

380 Mr. Forbes described Mr. Godecke's Beacon Score for credit rating purposes as 731, which he said was a high score.

381 The transaction completed in April 1996 and Mr. Forbes said that the Credit Union received a first mortgage of $1.3 million, which was advanced, but the money for the development cost charges was not advanced. The Credit Union risk rating worksheet indicates the loan was 65.5% of equity, based on appraised value. Following the receivership, a second mortgagee on title paid out the Credit Union.

382 Generally, Mr. Forbes' evidence was that the mortgage loans had one-year terms which were routinely renewed if they were not in arrears. He said no suggestion was made to the Credit Union by investors or by the receiver that the investors had an interest in the lands.

383 Mr. Forbes acknowledged that the Financial Institutions Commission of B.C. ("FICOM"), the regulatory body for credit unions in British Columbia, found a number of irregularities in the lending practices of the Credit Union after the receivership. In 1998, FICOM said the Credit Union had exceeded its single-member loan cap in its dealings with TVL. FICOM found the total loan amount was $19 million, an amount which included eight of the ten loans to nominee purchasers which are the subject of this proceeding and which FICOM counted as connected loans.

384 Mr. Forbes agreed that the total connected loans of $19.5 million exceeded the loan cap, but he seemed to disagree that all the loans should be counted as connected. Mr. Forbes, however, never disagreed with FICOM as to its finding that there were connected loans well over the lending cap. Interest was being paid by TVL on loans approaching $13 million.

385 Mr. Forbes said that FICOM had raised concerns in 1997 about the Credit Union's loans to TVL, but that these dealt not with connected loans, but with whether there was experienced management involved in the Laguna View and Delta Industrial Park properties. He said the Credit Union advised FICOM that experienced management, in the person of Ralph Taylor, would be involved in the projects.

386 He said that the Credit Union responded to FICOM's 1998 report by stating that a review had revealed that the non-compliance with the cap was the result of placing too much reliance on the former manager of commercial loans, i.e. Mr. Thomas, and that none of the normal review processes had identified the problem.

387 On cross-examination, Mr. Forbes agreed several of the principals of the borrowers, which I have referred to as the nominee purchasers, were new to the Credit Union and the applications for credit indicated that they did not have any development experience.

388 I found Mr. Forbes to be a credible but cautious witness. Although there were some inconsistencies in his evidence, I found that he attempted and did give his evidence in a truthful manner.

389 Mr. Thomas is now 66 years of age. He is married and has a 42-year-old daughter, Allana.

390 He retired in 1997 after a career in banking spanning 30 years, the last 15 1/2 of these at the Credit Union. During his time at the Credit Union, he reported, although not directly, to Mr. Forbes.

391 Mr. Thomas' title at the Credit Union was Manager of Commercial Loans. He worked in the commercial branch, which was at a different location from the retail branch. Customers did not make deposits at the commercial branch. Mr. Thomas had the ability to track customer deposits, but said that he did not do so.

392 Each year, he wrote up between 150 and 200 loan applications. Most of these loans were, in his words, asset-based rather than income-based and most were secured by a first mortgage and, often, by a personal guarantee. Mr. Thomas had authority to make loans up to $350,000. Loans for amounts greater than that required approval of the Credit Union's management credit committee.

393 Mr. Thomas said that he had between 300 and 400 accounts in his branch. This high volume of files, he explained, was why he didn't do a line-by-line analysis of TVL's financial statements.

394 Mr. Thomas was the person at the Credit Union who most frequently dealt with TVL. He had done so since the late 1980s.

395 Mr. Thomas understood the shareholders of TVL to be Joan Taylor and Ralph Taylor and he knew that, initially, there were a small number of investors. He described his relationship with Ralph Taylor as a business relationship. While they met occasionally for coffee, he said that he did not socialize with Mr. Taylor, nor did he attend the meetings at Helen's Deli or the TVL Christmas parties. Occasionally he went to Ralph Taylor's home, but only because that is where Mr. Taylor kept his office.

396 Although the Credit Union had a personal guarantee from Ralph Taylor, it apparently never obtained a report from the credit bureau. If a report had been sought, the Credit Union would have

discovered that Ralph Taylor was an undischarged bankrupt.

397 Mr. Thomas said that he was not aware of TVL operating a trust account, nor did he personally receive cheques for deposit into the TVL account. No one to his knowledge, he said, gave TVL money in trust.

398 He said that he was not aware of any problems with payments to creditors until the eve of TVL's receivership. He denied hearing of any problems or criticism of either TVL or Ralph Taylor with respect to creditors. The company had a line of credit of $500,000, which, at least in the later years, was secured, and while it sometimes exceeded that limit, Mr. Thomas said the account operated satisfactorily. The excesses did not concern him, he said, because such short term excesses were common in the development industry, and usually arose because of deferred real estate closings, and Ralph Taylor usually advised him in advance that they would arise.

399 Mr. Thomas annually received unaudited financial statements from TVL. In these statements was an item headed "due to shareholders", which he said he understood to be to a reference to a combination of the monies owed to the investment club members and to the principals, Ralph Taylor and his wife. He said his understanding, derived from discussions he had with Ralph Taylor, was that the land shown on the financial statements was owned by TVL. Mr. Thomas testified that Ralph Taylor told him numerous times that he had hundreds of clear title lots.

400 Mr. Thomas made the following notation on an application for a $900,000 working capital loan in 1993: "due to shareholders is $10 million owing to approximately 280 silent investors. The investors are participants in specific projects and participate on a profit sharing basis." He said he got that information from Ralph Taylor. He said that Ralph Taylor told him that they were club members. The application in 1993 indicates that the "trust and confidence expressed by this large group (of silent investors) supports our assessment that Taylor is an experienced, capable and knowledgeable builder/developer".

401 Mr. Thomas said that he had never heard anyone describe Ralph Taylor as a trustee. He said he was somewhat familiar with the term "fiduciary", but had never heard Mr. Taylor or TVL described as a fiduciary.

402 Although Mr. Thomas was subject to a lengthy and aggressive cross-examination and was often confronted with his evidence on discovery, I found him overall to be a truthful witness. I have reviewed his evidence a number of times but I did not see serious inconsistencies in his evidence. Although the plaintiffs' counsel asserted in argument that there were inconsistencies in Mr. Thomas's evidence about topics including the financial pressure from the rink project, whether funds were invested in specific projects or tied to particular property, or whether a lender would want to know the liabilities of a borrower, I did not find his testimony to contain significant inconsistencies so as to undermine the overall reliability of his evidence. One significant question I put to him was whether his evidence was that the ten properties in question are properties that the speedy memo investors were not participating in. He said that he agreed with that but on

cross-examination he indicated that he didn't know or have knowledge what properties they were associated with and did not see the distinction between knowing they were not involved and not knowing if they were involved. Nevertheless, I found that he attempted to give his evidence honestly.

403 Mr. Thomas was occasionally long-winded in his answers and often would have to rely on reconstruction, as he did not have a full recollection of the events in this case, some of which took place 15 years ago. I think that Mr. Thomas, like other parties, was reasonably trying to characterize transactions that were not given definite labels at the relevant time.

404 Mr. Thomas was occasionally stubborn on cross-examination and did not always directly answer the question that was put to him. Occasionally, he was not forthcoming and became defensive when he thought a logical conclusion to a question on cross-examination might be harmful, such as when he was asked whether a lender would want to know all he could about an unsecured borrower. Generally, however, I found him to be a responsive witness.

405 Some of the questions asked of Mr. Thomas dealt with matters that, I think, did not cross his mind at the material time. For example, he was asked to consider the effect on TVL of an ongoing obligation to pay investors twenty percent per annum on debt of $20 million. I think that the scope of TVL's business was beyond Mr. Thomas' experience and depth as a banker, which generally involved straightforward loans with asset-based security. He appears to have had a great deal of confidence in the ability of Ralph Taylor. He took him at his word and was not suspicious of Mr. Taylor's possible activities.

406 On the whole, I conclude Mr. Thomas was a credible witness.

407 Mr. Thomas had a personal involvement as a lender or an investor in TVL. He knew that the Credit Union did not permit him to lend his own money but he chose to do so anyway. When the Credit Union learned of his loan, after the TVL receivership, Mr. Thomas was required to resign.

408 In August 1993, he loaned TVL $150,000. He did not inform his employer of this loan at any time prior to January 1998. He advanced the money through his daughter, Allana Thomas, because he knew if he did it directly it would contravene the conflict of interest rules of the Credit Union. As he said, "My desire to assist Ralph superseded my good judgment."

409 Mr. Thomas had a speedy memo that Ralph Taylor had given his daughter but he was not interested in being associated in any way with a piece of property. He did not see copies of the speedy memos given to other investors, although he regularly saw Ralph Taylor carrying around a clip board with speedy memos.

410 There was reference in the documents to a payout of $210,000, but Mr. Thomas said he never got that amount. He said he received $165,000, which was deposited into his daughter's account at another bank. He and his wife each declared $5,000 on their tax returns, presumably as

interest income.

411 Ultimately, Mr. Thomas did not get the balance of the interest he said he was entitled to. In the fall of 1997 or thereabouts, he received, through his daughter, a building lot from Mr. Taylor. The receiver of TVL challenged that transaction as a fraudulent preference and, ultimately, it was set aside.

412 Mr. Thomas was asked why Mr. Taylor's need for $150,000 could not be met by the Credit Union. Mr. Thomas said that he recalled telling Mr. Taylor that the Credit Union wouldn't be able to respond in time, nor would any other financial institution. Yet the documents tracking the deposit and payment of these funds appear inconsistent with TVL requiring the money forthwith. Mr. Thomas said he did not know why, in August of 1993, TVL did not have $150,000 to complete a transaction. All he recalled is that Ralph Taylor said that he needed it badly. He said the forty percent return was at Ralph Taylor's insistence and that he had no expectation of receiving it.

413 This was not the only loan made by Mr. Thomas or members of his family. In September 1994, with the knowledge of his employer, Mr. Thomas purchased a fractional interest in a mortgage through his RRSP. His wife contributed $70,000 from her RRSP, which allowed them to buy $175,000 of the mortgage. None of that principal or interest was ever repaid.

414 Around 1994, and on another occasion shortly after, Mr. Thomas's sister-in-law and mother-in-law loaned Mr. Taylor $200,000. On both occasions, they were repaid with interest.

415 In the summer of 1995, Mr. Thomas' brother-in-law, Mr. Brocker, expressed an interest in investing $360,000 in real estate in British Columbia. By drawing on his own and family members' RRSPs, Mr. Thomas was able to raise an additional $240,000 and he advanced $600,000 in total to Mr. Taylor in September 1995.

416 The final transaction occurred in September 1997. Mr. Taylor asked Mr. Thomas if some of his relatives had an interest in putting money into a mortgage. Mr. Thomas's sister-in-law and mother-in-law once again invested $200,000. This time, said Mr. Thomas, they lost approximately $40,000.

417 Mr. Thomas agreed that, overall, his family invested more than $1 million in TVL. It appears they lost more than $200,000.

418 He was asked if he ever got an agenda or newsletter from TVL. He said he got one from his daughter after the loan and tossed it away.

419 Mr. Thomas knew that TVL had investors. He testified that he understood that they were promised a certain return and a share of the profits of a project if they stayed in for the long term. He got that information from Ralph Taylor, who described them as club members. He said on cross-examination that the investors were lenders but I think that Mr. Thomas, like other witnesses,

was reconstructing past events and was trying to characterize transactions that did not have labels during the relevant periods. He said that to the best of his knowledge the investors held no security. He said that he never had the understanding that the speedy memo investors became beneficial owners and that he had no knowledge of any trust.

420 Mr. Thomas denied knowing who the investors were, other than a few names. However, he acknowledged that he had given an inaccurate answer on discovery when he said he had no knowledge of the investors, as he acknowledged that he knew that the so-called nominee purchasers in the impugned transactions included investors in TVL. He agreed that he met nine investors whose companies were the purchasers in the impugned transactions and that he knew the names of a few others. However, he said the ten properties in issue were always proffered as TVL's clear title properties.

421 In 1994 or 1995, Mr. Taylor told Mr. Thomas that he had to visit the Securities Commission. Mr. Thomas said that Mr. Taylor later told him that everything was resolved.

422 Mr. Thomas was cross-examined on the content of agendas of investor meetings, but he denied that he was aware of the specific content at the material times. While he quarrelled with counsel on cross-examination about his understanding of TVL's operation, he ultimately agreed that the reference in the agendas to buying land, holding, selling and splitting the profits was the operation he understood TVL was involved in. He agreed that he knew that the people who had given money to TVL invested in specific projects. He said he was consistently told by Ralph Taylor that the investors were lenders investing at a specific rate of interest and that their moneys were attached to a certain piece of property, but he said he had no idea how they were attached. Mr. Thomas said that he did not think that there was any formal attachment, but that in some way they were designated to a certain project. He said that he did not know the particulars. He knew that TVL had, at various times, held anywhere from $10 million to more than $20 million from investors.

423 Mr. Thomas was asked whether, as a lender, he would want to know about the other liabilities of a borrower. He said that it was not as significant an issue when one was doing asset-based lending.

424 Mr. Thomas said that TVL furnished unaudited financial statements to the commercial branch on an annual basis and statements showed monies owing to shareholders, which he understood to be the both the shareholders of TVL and the club members, as he described the investors. Mr. Thomas denied there was anything in the financial statements that alerted the Credit Union to the fact that anybody other than TVL owned the assets.

425 Mr. Thomas says that he did not have any cause for concern over the integrity or honesty of Ralph Taylor or TVL and says that, if he had, he would not have recommended that his mother-in-law and sister-in-law re-invest money in TVL. He said he had no concerns until the fall of 1997 with respect to the solvency of TVL. Although he denied that he knew that TVL was using unconventional methods to raise cash, he agreed that his personal investment of $150,000, being

from a loans officer, was an unusual transaction.

426 He denied that he was aware that there were strong financial demands on TVL in the 1990s as a result of the rink project.

427 Although Mr. Thomas said that he didn't know that Mr. Taylor had made substantial expenditures on the ice rink, he wrote to a lawyer in October 1997 saying that TVL's working capital had been depleted due to the financial demands of the ice rink. On cross-examination, he said that he learned this information from Ralph Taylor, I take it at the time of that correspondence. He was also aware that the Credit Union was not interested in financing the ice rink, but he said he believes this decision was made by Mr. Forbes, whom Mr. Taylor first approached with the project.

428 Mr. Thomas also gave evidence about the ten transactions that are the subject of these proceedings. He said that the Credit Union viewed the loans as asset-based transactions. He testified that the loans were done in accordance with the Credit Union's standard practice.

429 In order to loan more than $350,000 he required credit committee approval. Of the loans in question, he approved one and the others were all approved by the credit committee. He participated in the document write-up for approval of nine of the loans. He testified that these loans generally required an appraisal, involved amounts less than the market value of the property, and were supported by a guarantee of the principal of the numbered company.

430 Each package was put together for presentation to the credit committee for approval.

431 He described the loans as development loans, which are for such things as development costs charges, services and the like.

432 Mr. Thomas said he had a discussion with Ralph Taylor on each of these transactions. Mr. Thomas said that although they were transferred from TVL, he knew that Mr. Taylor remained involved in these properties in some way and in some cases there was a side agreement that allowed TVL to re-acquire the property. He knew that in some cases, TVL was paying, or later agreed to pay, the interest payments. He said he understood that, as the vendor of the properties, TVL would get the proceeds.

433 Mr. Thomas said that he understood from Mr. Taylor that a few of TVL's major investors wanted or put some pressure on Mr. Taylor for collateral or security for their unsecured loans. Mr. Taylor proposed to sell the major investors a piece of land, which Mr. Taylor professed to be clear title land owned by TVL, and concurrently arrange a mortgage on the property so that the equity - the difference between the amount of the Credit Union mortgage and the actual property value - would give the major investor the comfort that they were seeking. Mr. Thomas said that he had never heard that there were restrictions on mortgaging these properties. He said he treated these loans as arms-length transactions and the money was disbursed in the normal fashion. He denied having any knowledge of an alleged trust relationship and testified that the Credit Union would not

have advanced money without the security of a first mortgage.

434 Mr. Thomas said that after three or four of these loans had been approved, Mr. Taylor phoned him and said the interest payments on these particular mortgages should be charged to the TVL account. According to Mr. Thomas, Mr. Taylor said that this was for ease of accounting and bookkeeping.

435 Mr. Thomas denied that, at any time prior to the receivership of TVL, any investor ever said they had an interest in the properties that are the subject of the ten loans. He said that he never identified any of the ten impugned properties as properties in which the speedy memo investors were somehow involved. Mr. Thomas said that he understood the properties were owned by TVL.

436 Mr. Thomas denied having the understanding that the speedy memo investors' money was advanced to TVL specifically and solely for the purchase and development of the project lands.

437 It was put to Mr. Thomas in cross-examination that these transactions were designed to get around the Credit Union lending cap. Mr. Thomas maintained that in his view they were or started out as stand-alone transactions, providing their own security and covenant and there was a source of repayment and in some cases an interest reserve.

438 Although Mr. Thomas and the Credit Union obtained credit reports on the various investors involved in the ten transactions, Mr. Thomas never requested one on Ralph Taylor. Mr. Thomas only had a cursory understanding of how Beacon Scores that measure credit ratings are determined.

439 I have described the loans in detail as part of Mr. Forbes' evidence and will discuss them further below from Mr. Thomas' perspective. In each case the monies were advanced by the solicitors for the Credit Union after the first mortgage security was registered.

440 This was a 1992 loan to 402847 B.C. Ltd., in which Mr. Thomas had no involvement. His recollection at this time was that the Taylors were long term members of the Credit Union and satisfactory customers. He said that it was not a concern to the Credit Union that the money was not repaid in a year if the payments were current.

441 Mr. Howlett was the principal of the borrower, 442391 B.C. Ltd. Mr. Thomas said that he met with Mr. Howlett, who completed a net worth statement. Mr. Thomas wrote up the loan application and it was approved by the credit committee. Mr. Thomas testified that no investor informed him that they had an interest in this property.

442 Mr. Thomas said that he knew Mr. McLean, the principal of 491503 B.C. Ltd., from two prior commercial transactions and would have spoken to him in conjunction with this transaction. Mr. Thomas said that he understood Mr. McLean was a club member of TVL. The Credit Union advanced the money with a first mortgage on title and a guarantee from Mr. McLean. Again the loan was not paid out in a year.

443 Mr. Thomas testified that he received the information for the application from Vince Taylor to purchase the property on 96th Avenue. He had dealt with Vince Taylor before. He considered this a stand-alone loan, and from his review of the file he acknowledged that the interest was paid from Vince Taylor's account or his corporate account. He said he was not told of any interest in this property by any investor.

444 This June 1995 transaction involved an application by 498951 B.C Ltd., of which Mr. Maniago was the principal, for a loan of $1.5 million to acquire land under option. Mr. Thomas said that Mr. Maniago had no development experience but that Mr. Taylor said he would continue to be involved. He says that Mr. Maniago's company was to pay the interest but subsequently there was a deal between Mr. Maniago and Mr. Taylor for TVL to pay the interest.

445 This loan application was by 509695 B.C. Ltd., the principal of which was Ewald Irion. Mr. Thomas says that he would have spoken to Mr. Irion before the application was approved.

446 Mr. Thomas spoke to Mr. Laakman, the applicant, before the loan to purchase this property was approved. He said that there was a side deal between the parties to the transaction that, while the appraisal would reflect a value of the property in excess of $3 million, value for tax purposes was $1.5 million. He said that he was not privy to that side deal. He said his focus was on the security and the guarantee that he received from Mr. Laakman.

447 This was an application by 512047 B.C. Ltd. to borrow $330,000 to purchase eleven lots. He said that the purpose of the loan to purchase the lots was because the principal of 512047 B.C. Ltd., Darrell Myers, wanted some security for loans to TVL.

448 Mr. Thomas said that he met with Mr. Myers, conducted a credit check and the funds were advanced on the strength of the first mortgage and the guarantee.

449 Mr. Thomas said that he would have had a discussion with Mr. Stobbe, the principal of 512146 B.C. Ltd. Part of the advance under the Credit Union's mortgage was an interest reserve, which paid the interest on the mortgage for a period of time.

450 Mr. Thomas did not specifically recall preparing the material for Mr. Godecke's application, but on review of the documents, he said it was prepared according to his standard practice, which would include obtaining financial statements, operating statements and reports on creditworthiness and personal net worth.

451 In certain circumstances, strangers or third parties to a breach of trust or breach of fiduciary duty may be held liable.

452 As Newbury J.A. said in 346920 Canada Inc. v. Strother (2005), 38 B.C.L.R. (4th) 159, 2005 BCCA 35 (Strother) at paragraph 75:

> The circumstances in which a "stranger" to a trust will be held responsible by Equity (often by means of a constructive trust) for a breach of trust by another, are clear enough where "knowledge" of a "fraudulent design" is shown, or where the stranger "knowingly" received or dealt with trust property.

453 In that judgment, Newbury J.A. discussed the liability of a stranger who innocently participates in a breach of trust. She said at paragraph 29:

> ... On the one hand, a "stranger" who participates innocently in a breach of trust or duty by another - i.e., without actual knowledge, recklessness or wilful blindness to the breach - and who does not receive the profits thereof will not be held liable to account. ... On the other hand, a person who agrees with the wrongdoer/fiduciary on a "common action" which includes the commission of a breach, or a person who receives the profits of such a wrongdoing as the mere cipher of or vehicle for the wrongdoer, will be liable to account in the same manner as the wrongdoer himself. A person who is not an agent or accomplice of the wrongdoer but who receives a benefit resulting from the breach of duty may or may not be found to have known of the breach ...

454 The cases disclose three types of third-party liability. The first, liability as a trustee de son tort, arises when someone who is not a trustee acts like one. The court will treat that person as if he were a trustee, and hold the person liable for a breach of trust. This form of liability is not alleged in this case. The other two traditional types of liability arise when a third party knowingly assists in a breach of trust or when a third party knowingly receives trust property following a breach of trust. The plaintiffs have argued that the Credit Union is liable under either or both of these principles.

455 Knowing assistance and knowing receipt were the subject matter of three relatively recent decisions of the Supreme Court of Canada: Air Canada v. M & L Travel Ltd., supra; Gold v. Rosenberg, [1997] 3 S.C.R. 767; and Citadel General Assurance Co. v. Lloyd's Bank Canada, supra.

456 Air Canada is the leading case on knowing assistance The test for knowing assistance is as follows:

a. that there was a breach of trust;
b. that the trustee acted "fraudulently and dishonestly";
c. that the third party had knowledge of the breach;
d. that the third party assisted the trustee in carrying out the breach;

457 Actual knowledge on the part of the third party is required, but this includes recklessness or wilful blindness. In cases of knowing assistance, constructive knowledge is said to be insufficient to "bind the stranger's conscience". Receipt of a benefit by the third party may ground an inference that the third party knew of the breach but is neither sufficient in itself nor necessary.

458 As Iacobucci J. said in Air Canada at paragraph 40:

> The reason for excluding constructive knowledge (that is, knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry) was discussed in In re Montagu's Settlement Trusts [[1987] Ch. 264], at pp. 271-73, 275-85. Megarry V.-C. held, at p. 285, that constructive notice was insufficient to bind the stranger's conscience so as to give rise to personal liability. While cases involving recklessness or wilful blindness indicate a "want of probity which justifies imposing a constructive trust", Megarry V.-C., at p. 285, held that the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience.

459 Paul Perell explained the requirement of actual knowledge in his article Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty, [1998] 21 Advocates Q, 94 at 106:

> A stranger to a trust or fiduciary relationship may be liable under the equitable doctrine of knowing assistance if he, with actual knowledge, assists the trustee or fiduciary in a dishonest and fraudulent scheme. The personal liability of the stranger is justified because he or she has acted in a way that equity considers unconscionable.

460 The leading case of the trilogy dealing with knowing receipt is Citadel General Assurance Co. In that case, the defendant bank could not be held liable for knowing assistance because it did not have actual knowledge of the breach of trust. However, because it had constructive knowledge, it could be held liable on the basis of knowing receipt.

461 In order to find a third party liable for knowing receipt, a court must find that the party received or applied trust property for its own benefit and that it did so with actual or constructive knowledge of a breach of trust.

462 La Forest J. said at paragraph 30 of Citadel:

> In my view, the receipt requirement for this type of liability is best characterized in restitutionary terms. In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 669, I stated that a restitutionary claim, or a claim for unjust enrichment, is concerned with giving back to someone something that has been taken from them (a restitutionary proprietary award) or its equivalent value (a personal restitutionary award). As well, in Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at pp. 1202-3, I stated 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.

463 The knowledge requirement for knowing receipt is lower than that for knowing assistance, the rationale being that if a stranger wishes to obtain a personal advantage in circumstances that would alert a reasonable person to the possible claims of a beneficiary, he may be liable if he does not inquire.

464 As La Forest J. explained at paragraph 49,:

> ... [R]elief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

465 He set out the reasons for requiring a lower threshold of knowledge in cases of knowing receipt at paragraph 48-49 and paragraph 53. The emphasis added in the passages below is mine:

> ... [I]n "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in Gold, supra, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".
>
> This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in Lac Minerals, supra, at p. 670, "[t]he determination that the enrichment is 'unjust' does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief". In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

...

> The respondents argued that imposing liability on a banker who merely has constructive notice of a breach of trust will place too great a burden on banks, thereby interfering with the proper functioning of the banking system. While this may be true in assistance cases where a banker merely pays out and transfers funds as the trustee's agent, the same argument does not apply to receipt cases where a banker receives the trust funds for his or her own benefit. Professor Harpum addresses this point in "The Stranger as Constructive Trustee" (1986), 102 L.Q.R. 114, at p. 138:
>
> > Although there should be a reluctance to allow the unnecessary intrusion of "the intricacies and doctrines connected with trusts" into ordinary commercial transactions, considerations of speed and the importance of possession which normally justify the exclusion of these doctrines, are less applicable to a banker who chooses to exercise his right of set-off than they are to other commercial dealings. Where a banker combines accounts, he alone stands to gain from the transaction. Because of that benefit, more should be expected of him than if he gained nothing. [Footnotes omitted.]
>
> In "knowing receipt" cases, therefore, it is justifiable to impose liability on a banker who only has constructive knowledge of a breach of trust.

466 While third party liability most commonly arises in cases of breach of trust, the principles have been extended in some cases to breaches of fiduciary duty: Waxman v. Waxman (2004), 44 B.L.R. (3d) 165 (Ont. C.A.) and Ruwenzori Enterprises Ltd. v. Walji (2004) 8 E.T.R. (3d) 209, 2004 BCSC 741.

467 In Ruwenzori, Justice Pitfield referred to Waxman as authority for the proposition that third party liability may attach when there is a breach of fiduciary duty as opposed to a breach of trust. At paragraph 199-200 he said:

> While Citadel arose in the context of a breach of trust, there is a parallel with the present case. The breach of trust in Citadel was a breach of fiduciary duty. Although neither of Zuli nor Yasmin was a trustee in fact, the nature of their liability arising from a breach of fiduciary duty is akin to that imposed on trustees. In Waxman v. Waxman, supra, the Ontario Court of Appeal discussed the applicable principle in the context of a fiduciary duty as follows at paras. 544-549:

The appellants argue that the trial judge made two errors of law in applying the doctrines of knowing receipt and knowing assistance.

First, the appellants argue that these doctrines cannot apply where there is only a breach of fiduciary duty. Rather, they can only apply where the monies wrongly paid out are trust monies and here, the 1981 and 1982 bonuses are simply corporate funds paid out pursuant to signed corporate resolutions.

We do not agree that these two doctrines have such a narrow compass. We agree with the trial judge that both are available in the context of a breach of fiduciary duty and not simply where trust monies are involved. Thus she did not err in applying these doctrines without concluding that either the 1981 and 1982 bonuses or the profit diversions constituted trust monies.

Laskin J.A. made clear that a breach of fiduciary duty may trigger the imposition of liability on third parties in Gold v. Rosenberg (1985), 129 D.L.R. (4th) 152, aff'd on other grounds [1997] 3 S.C.R. 767. Speaking for this court, he said at 154:

> Beginning with the judgment of Lord Selborne in Barnes v. Addy (1874), L.R. 9 Ch. App. 244, courts have imposed the obligations of a trustee on third parties who participate in another's breach of trust or breach of fiduciary duty. Third parties may be liable as "constructive trustees" if they knowingly receive trust property obtained in breach of trust (the "knowing receipt" cases) or if, without receiving trust property, they knowingly assist in its misapplication (the "knowing assistance" cases).

Paul Perell, in his article "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Advocates' Q. 94, makes the same point, namely that these equitable doctrines apply to both breaches of trust and breaches of fiduciary duty. An example of the latter application is found in MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255 (B.C.S.C.), cited with approval in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 at 239.

Moreover, in this context there is no reason in principle to differentiate

> between the beneficiary of a trust obligation and the beneficiary of a fiduciary obligation. Both are equally deserving of the protection of equity as against a third party who knowingly assists in the dishonest breach of that obligation or knowingly receives funds paid in breach of it.

> I adopt and apply Waxman as a proper statement of the law. Knowing assistance and knowing receipt provide the foundation for liability in the context of a breach of fiduciary duty

[emphasis added].

468 Newbury J.A. in Strother referred to the leading cases of Barnes v. Addy (1874) L.R. 9 Ch. App. 244, and Selangor United Rubber Estates, Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073 (Ch.D.). She continued at paragraph 76:

> Analogizing from cases of express trusts to fiduciary duties, there would appear to be no good reason why a stranger to the fiduciary relationship (here, between solicitor and client) could not also be held liable in Equity where he had the requisite degree of knowledge. But in the more attenuated context where the stranger has not received trust property, courts are reluctant to make wrongdoers out of persons who simply participate in what may be called the "actus reus" of the fiduciary's breach.

[emphasis added].

469 To establish that the defendants are liable for damages for knowing assistance in a breach of trust or a breach of fiduciary duty, the plaintiff must establish that the fiduciary, TVL, fraudulently or dishonestly breached its fiduciary duty and that the Credit Union (or Thomas) had actual knowledge of the breach of trust or breach of fiduciary duty. Recklessness or wilful blindness would also suffice.

470 There is a debate in the law as to whether dishonest conduct on the part of the trustee is required (see, for example, the Privy Council's decision in Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 3 All E.R. 97 (P.C.)). I conclude that TVL's breach, whether of trust or fiduciary duty, was a dishonest one.

471 TVL had wide discretion in the development of the projects for the benefit of the club members. The club members or investors interested in particular projects did not particularly

inquire as to when and how Mr. Taylor sold the properties or developed them or raised money in order to develop them. However, if there was a trust, it was in breach of trust and certainly outside the ambit of any discretion that they gave Mr. Taylor for him, without disclosure or consent, to sell projects he had designated as investor projects to other major investors in TVL in order to provide them with some form of security and to raise funds for TVL. This is true even if there was an understood right of reacquisition by TVL. Ralph Taylor carried out these transactions without informing the investors. The substance of the transactions was contrary to how he said the club would operate and could succeed.

472 A number of English cases, including Royal Brunei, supra, have defined fraud as including taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". The definition covers what Ralph Taylor and TVL did here.

473 Even if there is a dishonest breach of trust or fiduciary duty, as I have found here, the plaintiff must establish that the third party had actual knowledge of the breach or was reckless or wilfully blind if that third party is to be held liable.

474 The plaintiffs' counsel's initial argument, which is set out above at paragraph 297 is that Mr. Thomas helped devise the scheme whereby TVL would raise money by selling the investors' lands without appearing to. This is an allegation of not just actual knowledge but active participation in a breach of fiduciary duty by the Credit Union and Mr. Thomas.

475 The evidence does not support the conclusion that Mr. Thomas and the Credit Union participated or were privy to such a scheme or were reckless or wilfully blind to any scheme that Ralph Taylor might have initiated.

476 The evidence establishes that Mr. Thomas and the Credit Union believed that TVL had the right to deal with the properties as it did and did not have actual knowledge that TVL could not do so.

477 From the Credit Union's loan approval documents, the transactions looked straightforward. In each case, TVL appeared to have either title to the property or an option to purchase. In each case, TVL appeared to want to sell its interest to the so-called nominee purchasers. The Credit Union was asked to provide mortgage funding for the sale to the purchaser. The Credit Union took the steps it would usually take in the circumstances. It required an appraisal to satisfy itself that there was enough value in the property for its mortgage loan. The purchaser was subject to the usual credit bureau search and report and was required to provide a personal guarantee of the indebtedness, or at least some substantial part of it. The Credit Union took fresh mortgage security from the borrower for monies that it advanced. In all of these transactions, it appears that the Credit Union's solicitors were involved to ensure that the Credit Union received the security it wanted and new monies were advanced under that security.

478 Ralph Taylor did not specifically disclose to the Credit Union or Mr. Thomas that the

properties that were the subject of the impugned transactions were the lands designated for investor projects, nor did the Credit Union and Mr. Thomas learn that information from any other person. Although the transactions have some unusual aspects, they were straightforward in terms of the lending and loan approval practices of the Credit Union.

479 At some point, Mr. Thomas became aware that the nominee purchasers would have security for their investments in TVL through these transactions. The way that Mr. Thomas put it in his evidence, which I find was not contradicted by other evidence, was that some of TVL major investors wanted collateral or were pressuring TVL for security and, in order to provide them some comfort and some equity, TVL sold them a piece of land and arranged a mortgage with the Credit Union.

480 The purchasers behind the transactions appeared to be people of substance, generally with substantial personal worth and strong credit ratings. They spoke to Mr. Thomas and were prepared to provide the guarantees. None was called as a witness at trial.

481 At the time these transactions took place - as early as 1992, but mostly from July 1994 to April 1996 - it does not appear that the Credit Union or Mr. Thomas had actual knowledge of serious financial difficulties facing TVL. In some of the decided cases in which third parties were found liable for participating in a breach of trust, the mortgages were taken to shore up doubtful unsecured liabilities and the benefit received by the third party formed a basis on which to infer actual knowledge of the breach. In this case, the mortgages were done in a deliberate way, with the requisite loan approvals, appraisals, guarantees, and solicitors doing the normal title searches.

482 The plaintiffs argue that the defendants are imputed with the knowledge that Mr. Thomas's daughter had because she was acting as his agent with respect to his first investment. Since she was not called as a witness, plaintiffs' counsel asks me to draw an adverse inference, namely that she received all of the agendas and newsletters of TVL from August 1993 until the receivership. They argue that she received at least one newsletter or agenda and was on the mailing list and that there was no evidence from her father, Mr. Thomas, that he ever discussed the newsletter with her. This, they say, amounts to wilful blindness.

483 The plaintiffs rely on 535951 B.C. Ltd. v. Penlea Investments Ltd., [2001] B.C.J. No. 32, 2001 BCSC 49, at paragraph 11-15 and on Bowstead on Agency, 15th Edition, at page 412 et seq. in support of the proposition that knowledge of the agent gained in the scope of his agency is imputed to the principal and the fact that the principal did not have actual knowledge is irrelevant. In 535951 B.C. Ltd., however, Maczko J. said that, although the knowledge of an agent gained in the scope of his agency is imputed to the principal, whether told to the principal or not, that imputation does not satisfy a requirement of "actual" knowledge in the particular contract in that case that treats the principal and agent separately.

484 Mr. McGowan, for Mr. Thomas, suggests that the purpose of advancing this argument is to attempt to argue that Mr. Thomas had sufficient knowledge to discern a trust or fiduciary

relationship between TVL and the investors, despite his evidence that he only recalled receiving one newsletter. The defendants argue that even a review of the newsletters would not have swayed Mr. Thomas from any understanding of the underlying transaction other than that the investors were unsecured lenders with some association to the profits of a project.

485 In any event, the defendants say, the plaintiffs are not entitled to an adverse inference but have an obligation at least to establish that Allana Thomas had whatever knowledge they seek to impute to Mr. Thomas. The defendants argue, on this point, that it was not established whether Ms. Thomas continued to live at the address where she received the agenda in 1993. The defendants say that the evidence of agency is based on a thin answer to a question put to Mr. Thomas:

> Q. And you used your daughter as your agent for the investment of the $150,000, right?
> A. Yes.

They say that the plaintiffs failed to explore when the agency commenced, whether it was transactional or longer, whether it was limited to advancing and receiving the funds and whether she was formally an agent or a limited agent. Moreover, they say, the issue of agency was not pleaded, something the plaintiffs say is unnecessary as this is an evidentiary issue.

486 I do not find that it is an appropriate inference from the evidence, or from the failure to call Allana Thomas, that she received all the newsletters and agendas after the first investment. Moreover, it was not shown that the receipt of any such documents was within the scope of any agency that Mr. Thomas' daughter performed for her father.

487 In any case, even if Mr. Thomas, notionally, received the agendas and newsletters, I am not persuaded that he would have formed a different impression that he did of the relationship between TVL and the investors than he actually had. And even if the knowledge of Allana Thomas was imputed to her father, I do not think it can be imputed to the Credit Union, because the investment giving rise to the alleged agency was contrary to the rules of the Credit Union and outside the scope of Mr. Thomas' employment. See Halsbury's Laws of England, 4th ed. reissue, 2003, Vol. 2(1), at 60, paragraph 82.

488 I have concluded, on a consideration of all of the evidence, that the Credit Union and Mr. Thomas, even though they had knowledge of the existence of many investors, did not have actual knowledge of a trust or a fiduciary duty. I also find they did not have actual knowledge of a breach of trust or fiduciary duty, nor were they reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with TVL were in breach of trust or in breach of a fiduciary duty owed to the investors. I conclude that Mr. Thomas and the Credit Union were not, in fact, aware of a fiduciary relationship that may have existed or that TVL was restricted on any basis from selling or mortgaging these particular properties, nor were they wilfully blind or reckless to these circumstances. Counsel for the Credit Union argued rhetorically, "How could the Credit Union or Thomas have actual knowledge of a fiduciary relationship when it arises outside the usual

categories of fiduciary relationships?" It is, I think, a fair question.

489 Given my finding that Mr. Thomas and the Credit Union did not have actual knowledge nor were they wilfully blind as to whether there has been a breach of fiduciary duty by TVL, the claim against the defendants in knowing assistance must fail. I would make the same holding if I had found there was a trust.

490 I will address the question of the knowledge of Mr. Thomas and the Credit Union further when I consider the claim against them as third party accessories for knowing receipt.

491 Two questions arise in a claim of knowing receipt following a breach of trust or fiduciary duty. First, did the third party receive trust property or, in this case, property that was conveyed or dealt with by a party in breach of trust or a fiduciary duty? Second, did the third party have knowledge, actual or constructive, of the breach of that trust or fiduciary duty?

492 The plaintiffs say the Credit Union received trust property in the following ways: by mortgages on the investors' lands, by payments towards TVL's line of credit from both proceeds from the mortgage and share purchase funds which were deposited in TVL's business account, through "interest reserve" funds, and by funds realized through foreclosure on the mortgages.

493 The defendants say that Credit Union received nothing at all, because, in a situation like this, in which there is a fiduciary duty but not a trust, there is no trust property for the Credit Union to receive.

494 I have already found that there was no actual knowledge, recklessness or wilful blindness to the breach of fiduciary duty. The question remains whether either the Credit Union or Mr. Thomas had constructive knowledge of two things: first, that TVL owed a fiduciary duty to the subject investors; and second, that TVL breached that fiduciary duty by entering into any of the ten impugned transactions.

495 Determining whether the Credit Union or Mr. Thomas had constructive knowledge of the existence of a fiduciary duty and the breach of that duty involves a consideration of all the circumstances, including suspicious circumstances, their knowledge of the relationship between TVL and the investors and of TVL's financial circumstances, the apparent purpose of these transactions, and many other factors.

496 The plaintiffs point to a number of facts and circumstances that they say are suspicious. They say the defendants knew of these facts and circumstances and their failure to inquire more fully ought to lead to a finding that Mr. Thomas and the Credit Union had constructive knowledge of the existence of a fiduciary duty and its breach.

497 The plaintiffs say that the Credit Union had knowledge of both the fiduciary duty TVL had to its investors and the breach of that duty by virtue of its ten-year business relationship with TVL and

the personal involvement of its representative, Mr. Thomas, who had invested more than $1 million of his own and his extended family's savings in the company between 1992 and 1997.

498 They say Mr. Thomas should have been put on inquiry as early as 1992, when the first of the impugned transactions took place and that, from that point forward, he should have refused to assist or be involved with TVL.

499 The plaintiffs say his 1993 loan, which even Mr. Thomas admits took place under unusual circumstances, should have alerted him to TVL's precarious financial situation.

500 They say that the news, received in 1994, that the Securities Commission was conducting an investigation into TVL's operation should have prompted further inquiries by Mr. Thomas and the Credit Union as to how TVL was raising tens of millions of dollar and the real nature of the relationship with the investors.

501 The plaintiffs argue that the Credit Union knew that the investors' interests were substantial and were in some way connected to the land. They point to the fact that, in preparing loan documents, Mr. Thomas noted that, "$10 million dollars is owing to approximately 280 silent investors. The investors are participating in specific projects and participate on a profit-sharing basis."

502 The plaintiffs' counsel says that the financial statements did not contain a proper note explaining how and why this substantial amount was due to shareholders, a shortcoming that he says should have alerted the Credit Union.

503 They say Mr. Thomas knew that the arrangement with the investors was almost entirely oral and that through the 1990s more than $20 million had been invested by the investors in TVL. The plaintiffs suggest that Mr. Thomas did not know whether TVL could sell or mortgage the land, and he and the Credit Union did not want to know.

504 The plaintiffs argue that Mr. Thomas had in the past been offered a speedy memo for his $150,000 and refused because he knew that a speedy memo meant that the money would be, in Mr. Thomas's words, "associated in some way" with a piece of land. Mr. Thomas took a promissory note and a duplicate Certificate of Title instead. The plaintiffs say that Mr. Thomas's refusal shows that he knew that the monies of the investors were in some manner tied to a particular piece of land.

505 Mr. Thomas, the plaintiffs contend, regarded the fact that the investors had some association or connection with a particular piece of property as a positive factor. When Mr. Thomas met the nominee purchasers in the impugned transactions, the plaintiffs say that Mr. Thomas would, as a matter of standard practice, inquire into the nature of their investments in TVL.

506 The plaintiffs say that the commingled account of TVL and the fact that money from all sources was deposited by TVL into its general chequing account at the Credit Union were also

suspicious circumstances. Mr. Thomas knew, they argue, that there were only two sources of income: sales of property and payments by investors. The plaintiffs argue that at some point Mr. Thomas had to know that monies from the $500,000 line of credit went into this account, and the borrowings from the Credit Union and others were used to replenish working capital that had been depleted due to the demands of the rink project.

507 The plaintiffs say that Mr. Thomas had to know that there were significant inaccuracies in TVL's financial statements; specifically, that obligations known to the Credit Union were not reflected in the statements, including the debt owing by TVL to Mr. Thomas and the mortgage debts of $600,000 and $200,000 to Mr. Thomas and his family. They say that the Credit Union ought to have known that there were assets on the balance sheet that did not belong there. For example, the 1992 financial statements showed the Bruce Avenue property as belonging to TVL months after the property had been sold to a nominee purchaser and mortgaged by the Credit Union. The plaintiffs suggest the same thing occurred with respect to Laguna View and the Delta Industrial Park, both of which similarly appeared on financial statements after they were apparently sold by TVL to nominee purchasers.

508 The plaintiffs suggest that Mr. Thomas and the Credit Union knew that TVL was experiencing financial troubles because there were ongoing overdrafts at the Credit Union, and that TVL was being pressured by some investors for security for their investments. The plaintiffs say that the fact that TVL club members were pressuring for collateral security was not set out in the loan documents that were examined by the credit committee. The plaintiffs say the reasonable inference is that the transactions were entered into to provide a minority of TVL's investors with a fraudulent preference.

509 The plaintiffs say that the Credit Union ought to have known that the true purpose of the nominee purchaser transactions was to grossly exceed the internal lending limits policy of the Credit Union, or the lending cap on loans to connected or related parties. A connected loan, according to the Credit Union, is when the "source of repayment and security exclusive of individual guarantees or any part of the foregoing are coincident with forming part of or reliant upon the financial stability and/or performance of another borrowing account ...".

510 The plaintiffs say that it is also suspicious that the interest payments on a number of the loans were made by TVL, including the mortgages granted by the respective numbered companies of Messrs. Maniago, Irion, Stobbe, and Laakman. Moreover, the plaintiffs point to the fact that several of the nominees, namely, Messrs. Godecke, Maniago and Irion, had no development experience and that should have alerted the Credit Union to the odd nature of these transactions.

511 The plaintiffs say that the nominee purchasers gave the misleading impression that a down payment was made when, they argue, the only money paid to TVL was the loan proceeds.

512 The plaintiffs say that, on eight of the ten transactions that are impugned, at least a portion of the loan proceeds were deposited into the TVL account and used to pay overdrafts to the Credit

Union. The plaintiffs suggest that on eight of the ten transactions the property was transferred at a value significantly less than the market value.

513 Given all of this, did the Credit Union and Mr. Thomas have constructive knowledge of TVL's breach of fiduciary duty? Were there circumstances and facts known to them that should have prompted further inquiry to determine if the transactions were in breach of a fiduciary duty owed by TVL to the plaintiff investors such that the failure to do so makes them liable as accessories?

514 It is important to consider the context in which this question of the third party's knowledge of a breach of fiduciary duty is addressed. It is in the context of analyzing a claim for knowing receipt, which is essentially a principle of law designed to prevent the unjust enrichment of third parties as a result of a breach of trust or breach of fiduciary duty. This desire to prevent unjust enrichment is why the knowledge standard is less than for knowing assistance.

515 As Sopinka J. noted in Citadel, liability in knowing receipt is not strict. It depends not only on the fact of enrichment - i.e. the receipt of trust property - but also on the unjust nature of the enrichment. The obligation of the third parties is to act reasonably.

516 The first question, then, is whether it would have been reasonable for a person in the position of this account manager, and this Credit Union, knowing what they knew and making the inquiries that they ought reasonably to have made, to have concluded that there was a fiduciary relationship between TVL and the investors or that there was a breach of that fiduciary duty.

517 In the circumstances, I find that the answer to that question must be no. Unlike the trustee-beneficiary or solicitor-client relationship, the relationship of developer and investor is not a relationship that is generally known to give rise to a fiduciary duty. It is, on its face, a commercial relationship and commercial relationships generally are not fiduciary relationships. The Credit Union knew that the investors advanced monies to TVL, that those monies were connected somehow to the land and that the investors were entitled to share in profits. They knew there were many investors.

518 The TVL balance sheets indicate a legal relationship of debtor/creditor, a relationship would be familiar and within the comprehension of Mr. Thomas and the Credit Union. They do not indicate a trust relationship. Even if Mr. Thomas, or his superiors, made inquiries and was fully versed in all of the facts concerning the relationship that TVL had with the investors I do not think that he would have concluded that this was a fiduciary relationship or that TVL was in breach of it. This is not the case of a third party financial institution benefiting from the breach of what are clearly trust arrangements or would clearly be seen to be trust arrangements if reasonable inquiries had been made. Indeed, it is doubtful whether a person with some legal training, knowing all of the facts as I have found them and placed in Mr. Thomas's position, would necessarily have concluded that there was a fiduciary relationship between TVL and its investors. Mr. Thomas had no legal training and appears only to have heard of the term "fiduciary" in passing.

519 In Strother, which, like this, did not involve an express trust or trustees, the Court of Appeal considered the liability of Mr. Darc in connection with an allegation that he had known of facts sufficient to put a reasonable person on inquiry of Mr. Strother's breach, and should therefore be made a constructive trustee of the benefits he received through the Sentinel Hill Syndications.

520 Newbury J.A. said at paragraph 80-81 of Strother (January 2005):

> Mr. Darc was not asked if he knew in 1997-99 that Mr. Strother's continuing to act for Monarch constituted a conflict of interest. That question, of course, would have involved an opinion on his part on a clearly legal question, and he was not a lawyer. As noted by Professor Finn, supra, the "professional or other relationship the third party has with the fiduciary can . . . affect the appreciation that should reasonably be attributed to that person, of the character of the matter in which he or she participates. The legal advisor, more so than the layperson, should be expected both to more readily recognize fiduciary wrongdoing when it occurs and to be more sensitive to the likelihood of it when facts exist from which it could be inferred." (At 215.) In Mr. Darc's case, the converse is true.
>
> Given these types of considerations and the seriousness of a finding of "knowing assistance" in furtherance of a fraud or of "knowing receipt" of the benefits of a breach of duty, I am not prepared to find, from the evidence I have described, that Mr. Darc knew that Mr. Strother was in breach of his duty as a lawyer; that he was reckless or wilfully blind; or that he should have been put on inquiry analogously to a recipient of funds subject to a trust, when he began to earn profits and fees from Sentinel Hill. In my view, it would have been reasonable for him to think, had he considered it, that the amounts he received were attributable to his own perseverance and skill, in combination with the skill of Mr. Strother, and to his ownership of shares in the enterprise rather than to a breach of duty by Mr. Strother.

521 Similarly, I think that it was reasonable for Mr. Thomas to conclude that these were lawful loans, made on the strength of security granted by the purchasers, rather than transactions made in breach of a fiduciary duty owed by TVL to the investors. To borrow the language of Newbury J.A. in her comments above, I do not think, in light of all the circumstances, that he should have been put on inquiry analogously to a recipient of funds subject to a trust.

522 The second question I must answer is whether the transactions were of such a nature that they would put the Credit Union on inquiry. In Citadel, for example, the court said that:

> [I]n light of the Bank's knowledge of the nature of the funds, the daily emptying of the account was in the trial judge's view "very suspicious". In these circumstances, a reasonable person would have been put on inquiry as to the

> possible misapplication of the trust funds. Notwithstanding the fact that the exact terms of the trust relationship between Citadel and Drive On may have been unknown to the Bank, the Bank should have taken steps, in the form of reasonable inquiries, to determine whether the insurance premiums were being misapplied

523 It is important to note that the transactions in this case were not typical of the type of transactions that often arise in knowing receipt cases, where the recipient financial institution obtains a benefit, such as fresh security for an outstanding loan, or simply applies monies to a customer's outstanding liability. Here, in all cases, the Credit Union advanced new monies on the strength of security granted by the purported borrower, albeit while committing a portion to interest reserves. The transactions were handled by the Credit Union solicitors and, in each case, the loan transactions were supported by personal guarantees from people apparently of substantial financial means and the advance was only made after an appraisal ensured that there was sufficient security in the land. In this respect, these transactions are quite different from the typical unjust enrichment that gives rise to knowing receipt liability.

524 It is also important to note that the transactions took place over a period of years and that the relationship between TVL and the Credit Union spanned a decade. Plaintiffs' counsel argues that the duration of the relationship is a key to a finding that the Credit Union had constructive knowledge, because, they say, there was a whole series of suspicious dealings and events that should have prompted further inquiries. The duration of the relationship, however, cuts both ways. In hindsight, various circumstances and events may suggest a pattern of behaviour that might lead a reasonable person to further inquiries. It is by no means clear, however, that the same pattern would be apparent to someone who viewed those same circumstances and events over time and as a series of discrete and, for the most part, unremarkable transactions.

525 I do not find that the Credit Union had knowledge at the material times that TVL was in financial distress or that the circumstances may have suggested that. Mr. Forbes' evidence was that the accounts with the Credit Union all operated satisfactorily, there were no negative comments or negative inquiries from lenders, and loans were paid as agreed. While TVL exceeded its line of credit from time to time, the evidence is that Ralph Taylor met those excesses as he promised and the line of credit revolved satisfactorily. Overdrafts exceeding the secured amount of the line of credit, which were later covered, were not an uncommon occurrence among the Credit Union's development industry clients.

526 Upon a consideration of all of the evidence, I find that Ralph Taylor did not tell Mr. Thomas that these impugned transactions concerned lands associated with investor projects and Mr. Thomas did not know that the lands were designated as investor projects. I do not think it is a fair characterization of his evidence that he did not want to inquire as to whether TVL could mortgage or sell the properties. I find that he reasonably believed that TVL could do so.

527 Although there were some unusual aspects, the transactions were generally straightforward from the Credit Union's perspective; they were simply deals where the Credit Union lent on the security of a land mortgage. Although many of the individuals behind the nominee purchaser companies did not have development experience, which might cause some concern, Mr. Thomas was told by Mr. Taylor that Mr. Taylor would remain involved and apparently could reacquire the property. The plaintiffs suggested in argument that the "cash and equivalents" allegedly paid by the nominee purchasers as part of the purchases were not made. I do not find that assertion to be proven. More importantly, even it that was the case, I do not find it established that Mr. Thomas or the Credit Union had knowledge of that fact. I note that the apparent legitimacy of these transactions is supported by the fact that people of financial substance were willing to put up guarantees intended to be relied on by the Credit Union.

528 I turn to the interest payments on the loans. Mr. Forbes said that TVL paid the interest on the loan for the Bruce Avenue property associated with 180 Acres South Nanaimo, as it was owned by a related company and considered a connected loan. The documents show that, at all times, the interest payments were made by the borrowers on Chilliwack Mountain, 3.5 Acres and the part of 43 Acres Langley purchased by Mr. McLean, that interest was paid from interest reserves on the loans for Laguna View and Delta until six months before receivership and that on the four remaining loans TVL made most or all of the interest payments. According to Mr. Thomas, Ralph Taylor told him this was done for ease of accounting and bookkeeping and because some of the purchasers had additional offsets available.

529 As, over time, TVL told Mr. Thomas that it was committed to paying the interest for these loans, a more complete analysis by Mr. Thomas may have revealed that the Credit Union was extending too much money to borrowers connected to the company. Even if this fact were discovered, however, it would not have suggested a possible breach of fiduciary duty.

530 If Mr. Thomas had made inquiries about the ability of the borrowers to grant mortgages for the loans, as the Credit Union solicitors presumably did, he would have learned that the transactions would result in the borrower having the necessary registered interest in the land to grant the security that the Credit Union required before making loans.

531 The loan approval documents do not indicate that the transactions provided security to some of TVL's larger investors or that those investors were pushing TVL for that security. I agree that is an unusual aspect of these transactions. But the specific reason for this was not pursued in any depth in cross-examination of Mr. Thomas.

532 As I have said earlier, Ralph Taylor devised this scheme as a way to borrow more money from the Credit Union than it was willing to lend TVL, in light of the cap on related or connected borrowers. However, I find that Mr. Thomas was not aware of that scheme. He believed, incorrectly, that given the security and the guarantees, the loans were stand-alone rather than connected loans, and thus he believed that TVL had not exceeded the cap. While he was wrong on

that, I do not think that the Mr. Thomas or the Credit Union were placed on inquiry as to whether the transactions in some manner offended TVL's arrangement with its investors.

533 Moreover, I do not find that Mr. Thomas or the Credit Union had knowledge that the transactions between TVL and the nominee purchasers were generally below market value. It appears, based on the Rogers appraisals, that three may have been significantly below market value. Of those, it appears, the Credit Union did not have knowledge of the sale price on Laguna View and the 1992 transaction, to the knowledge of the Credit Union, was to a related company. The plaintiffs also argue that Mr. Thomas must have been on inquiry from the suspicious circumstances, for example that properties that had been sold still appeared on the financial statements. However, given the kind of lending transactions that Mr. Thomas was engaged in and the fact that he apparently did not need to review the financial statements on a line-by-line basis, nor did he do so, these circumstances, which, if noted, might be suspicious, did not, I find, come to his attention.

534 The third question that arises is whether the plaintiffs have established that there was a receipt and that the Credit Union has been unjustly enriched. As noted in Citadel, liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit.

535 Iacobucci J. (although dissenting in the result) described the "essence" of a knowing receipt claim in Gold v. Rosenberg this way:

> The essence of a knowing receipt claim is that, by receiving the trust property, the defendant has been enriched. Because the property was subject to a trust in favour of the plaintiff, the defendant's enrichment was at the plaintiff's expense. The claim, accordingly, falls within the law of restitution ... unjust enrichment is the essence of a claim in knowing receipt.

536 The elements of unjust enrichment were stated in Garland v. Consumers' Gas Co. (No. 2), [2004] 1 S.C.R. 629, at paragraph 30 as follows:

(1) an enrichment of the defendant;
(2) a corresponding deprivation of the plaintiff; and
(3) an absence of juristic reason for the enrichment.

537 Although the Credit Union received mortgage security, the funds it advanced were new funds and the payments from the interest reserve were received to pay the interest obligation on those new funds. And if, as the plaintiffs allege, they made their way back to TVL to reduce overdrafts, my review of the TVL bank statements indicates, and I find, that the monies generally were re-advanced over the ensuing months. The evidence does not establish there was an enrichment to the Credit Union.

538 Often, a recipient takes a benefit at a time the trustee's or fiduciary's business is failing and

the recipient fails to inquire into the true circumstances under which the transaction was conducted. Receiving money or taking security when a bank's customer's business is failing or the bank's loans are in a precarious position is a common suspicious situation in which equity will find that there is constructive knowledge of the breach of trust or, presumably, breach of fiduciary duty, where inquiries are not made. Here the transactions occurred at a time when the Credit Union believed that TVL's accounts were operating satisfactorily. The fact that Mr. Thomas continued to have his family members invest in TVL until shortly before the receivership may have been a serious conflict of interest, but it speaks to his belief in the health of TVL at the material times.

539 A particular difficulty with the plaintiffs' claim under the head of knowing receipt is the fact that, although the liability for knowing receipt has been extended to cases of breach of fiduciary duty as opposed to breach of trust, in both Waxman and Ruwenzori Enterprises the plaintiff's property was actually received by the third parties as the result of a breach of duty by the fiduciary. If, as I have found here, there was no trust - and, hence, no trust property - the third party Credit Union received nothing that belonged to the plaintiffs. There is no suggestion that Mr. Thomas personally received property of the plaintiffs.

540 A fourth question that I think arises is, if the Credit Union was under an obligation to make inquiries, what would reasonable inquiries have indicated?

541 In Gold v. Rosenberg, the court found that the bank acted reasonably in the circumstances and never received trust property in its possession, although it acquired a contingent interest in the property. Sopinka J. said this at paragraph 78 and paragraph 83:

> In certain circumstances, a third party in the position of the bank will not have discharged its duty to inquire unless the guarantor has been advised to obtain independent legal advice. ...
>
> ...
>
> A bank is only required to act reasonably in the circumstances. Corporate guarantees in situations in which the director of the corporation may be a beneficiary of a trust in relation to the shares of the corporation are common transactions. Is the bank obligated to advise each director, whose consent was necessary to obtain the guarantee, to obtain independent legal advice? I am of the opinion that, in the circumstances, advising Gold to obtain independent legal advice may be a counsel of perfection but goes beyond what is expected of an honest and reasonable banker. To quote Gibson J. in Baden, [1992] 4 All E.R. 161, at p. 268, this would impose "an impractically extensive duty of inquiry" on a bank which is otherwise acting reasonably.

542 The most likely inquiries would have been of the Taylor brothers. I find that such inquiries would not have revealed any document that would suggest that the transactions may be in breach of fiduciary duty. I expect that, consistent with his evidence at trial, Ralph Taylor would have told Mr. Thomas that TVL was entitled to sell these properties. If the Credit Union had inquired of Floyd Taylor, the accountant, I find that the information he would have provided then would have been consistent with what appeared in the financial statements of TVL.

543 Perhaps if the Credit Union had contacted some investors, it may have received a different picture, which would have prompted further inquiries. The Credit Union, however, was not required to conduct an extensive investigation of TVL's business practices and particular obligations to its investors. It was only required to act reasonably.

544 Finally, the defendants are entitled to rely on s. 29 of the Land Title Act, R.S.B.C. 1996, c. 250, as an answer to a claim of unjust enrichment. Section 29 provides that, "[e]xcept in the case of fraud in which he or she has participated", a person dealing with a registered owner of land is not affected by an unregistered interest affecting the land or charge. Some authorities have found that actual knowledge is required to establish fraud (Woodwest Developments Ltd. v. Met-Tec Installations Ltd., [1982] 6 W.W.R. 624 (B.C.S.C)) while others have found that fraud can be based on actual or constructive knowledge combined with an element of dishonesty (Nicholson v. Riach (1997), 34 B.C.L.R. (3d) 381 (S.C), Burbank v. Garbutt, [2000] B.C.J. No. 15, 2000 BCSC 14). The proposition that mere knowledge is not enough can be found in both Nicholson (at paragraph 13) and Burbank (at paragraph 46). What they have in common is reliance on the decision of Taylor J. (as he then was) in Jager the Cleaner Ltd. v. Li's Investments Co. (1979), 11 B.C.L.R. 311 (S.C.):

> The various decisions in which it is stated, even in unqualified terms, that notice of an unregistered interest before closing bars the purchaser from protection of the Act, like all other decisions of the courts, are authorities only in relation to the facts of a particular case. While the language may in some cases be broad, I do not think that they can be said to lay down a rule of universal application. The question in every case must be whether a fraud would in fact be committed if the purchaser were to claim the protection of the Act; fraud, which is never lightly to be inferred, must, I think, be established by the particular facts of the case and cannot be presumed.

545 Given my conclusion that the defendants did not have actual knowledge, were not reckless or wilfully blind and did not act dishonestly as to any possible interest of the investors, the Credit Union has established a juristic reason for any enrichment that it received by way of the mortgages.

546 In summary, upon a consideration of all of the evidence, I conclude that the defendant Credit Union and Mr. Thomas are not liable for knowing assistance or for knowing receipt in connection with the breach of fiduciary duty by TVL.

547 The plaintiffs' claims are dismissed.

SIGURDSON J.

TAB 9

Case Name:

Waxman v. Waxman

Between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Chester Waxman, Chester Waxman in trust, Chesterton Investments Limited, Robert Waxman, Gary Waxman, Warren Waxman, I. Waxman & Sons Limited, The Greycliffe Holdings Limited, Robix Financial Corporation Limited, Circuital Canada Inc., RKW Standardbred Associates Inc., RKW Standardbred Management Inc., and Glow Metal Trading Inc., defendants (appellants)
And between
I. Waxman & Sons Limited and Chester Waxman, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Shirley Waxman, Douglas Waxman, The Waxman Holding Corporation Inc., Morriston Investments Limited, Solid Waste Reclamation Limited, Solid Waste Reclamation Inc. and General Environmental Technologies Corporation, defendants to counterclaim
And between
Morris Waxman, plaintiff (respondent), and
I. Waxman & Sons Limited, defendants (appellants)
And between
Morris Waxman, Michael Waxman and Solid Waste Reclamation Limited, plaintiffs (respondents), and
Chester Waxman, Robert Waxman, Gary Waxman and I. Waxman & Sons Limited, defendants (appellants)
And between
Chester Waxman, Warren Waxman, Robert Waxman, Gary Waxman, Brenda Halberstadt and I. Waxman & Sons Limited, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Douglas Waxman, Solid Waste Reclamation Limited and The Waxman Holding Corporation Inc., defendants by counterclaim
And between
Morris Waxman and Morriston Investments Limited,

plaintiffs (respondents), and
Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (appellants)
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Paul Ennis, Q.C. and Ennis & Associates, defendants (appellants)
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (appellants), and
Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (respondents)

[2004] O.J. No. 1765

186 O.A.C. 201

44 B.L.R. (3d) 165

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132 A.C.W.S. (3d) 1046

Docket Nos. C38611, C38616 and C38624

Ontario Court of Appeal
Toronto, Ontario

Doherty, Laskin and Goudge JJ.A.

Heard: April 22-25, 28-30 and May 1-2, 5-8, 2003.
Judgment: April 30, 2004.

(752 paras.)

Civil procedure -- Appeals -- Grounds for review -- Misapprehension of or failure to consider evidence -- Standard of review -- Pleadings -- Amendment of -- Statement of claim -- Contracts -- Breach of contract -- Remedies -- Damages -- Consensus, lack of -- Undue influence -- Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Damages for breach -- Actions -- Against corporations and directors -- Shareholders -- Rights -- Sale of shares -- Liability -- To other shareholders -- Shares -- Transfer -- Damages -- For torts -- Breach of fiduciary duty -- Civil evidence -- Witnesses -- Credibility -- Legal profession -- Liability

-- Standard of care and negligence -- Professional responsibility -- Professions -- Other -- Auditors -- Professional duties -- Fiduciary duties -- Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- Contracts -- Breach of -- Inducing breach.

Appeal by the defendant brother Chester Waxman from a judgment substantially allowing the plaintiff brother Morris Waxman's claims against Chester and others. Morris had alleged that Chester had breached his fiduciary duty by cheating Morris out of his half of IWS, the family scrap metal business. Morris claimed that Chester had engineered a surreptitious sale to himself of Morris' interest in the company, had wrongfully dismissed Morris as president of IWS, and had runn IWS to Chester and his sons' personal advantage between 1979 and 1998. At trial, it was determined that Morris was entitled to half of the profits and equity realized by IWS over the 19-year period in question, as well as punitive damages and two years' salary for wrongful dismissal. Morris also recovered damages from the family lawyer for the latter's role in the sale and transfer to Chester of Morris' shares in IWS. Morris also recovered $2.6 million in damages for Chester's interference in the economic relations of SWRI. Morris also succeeded in his claim against the IWS' comptroller, but was unsuccessful in his claim against the family's accountants. Chester appealed, arguing that the judge's factual errors were so numerous as to undermine the entire judgment. Morris appealed the holding that the family accountants did not breach their duty to him.

HELD: Appeal allowed in part. While there was no basis upon which to interfere with the significant findings of fact or of liability, the quantum of damages was slightly reduced. The case turned on credibility. The trial judge's credibility assessments flowed from a detailed consideration of the entirety of the evidence. Her conclusion that Chester had fabricated a case against Morris while attempting to prevent Morris from pursuing his action was not unreasonable. There was no evidence that the trial judge reasoned from a predetermined conclusion. There was no clear of palpable error in the trial judge's reasoning. Morris' appeal was dismissed. The family accountants did not owe Morris personally a duty of care in tort, as auditors, as fiduciaries, or based on its historical relationship with the brothers. Indeed, it would have been inappropriate for the accountants to report Chester's activities to Morris, absent a specific request from Morris that they do so, as they would then have been placed in a conflict of interest. The accountants owed a duty of care to IWS and the shareholders collectively.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1), 134(4).

Ontario Business Corporations Act, R.S.O. 1990, c. B.16 , s. 129(1), 248(1), 248(2), 248(3).

Appeal From:

On appeal from the judgments of Justice Mary Anne Sanderson of the Superior Court of Justice dated June 27, 2002, reported at (2002) 25 B.L.R. (3d) 1.

Counsel:

Alan Lenczner, Q.C. and Lorne Silver, for Chester Waxman et al. and Wayne Linton.
Barbara Murchie, for Paul Ennis and Ennis & Associates (C38611) and Paul Ennis.
Frank Bowman, Chris Hluchan and Sandy M. DiMartino, for Taylor Leibow. (C38616, C38611 and C38624)
Robert S. Harrison and Richard B. Swan, for Morris Waxman et al. (C38611 and C38616)

Table of Contents

The following judgment was delivered by

THE COURT:--

I

INTRODUCTION

1 Isaac Waxman arrived in Canada from Poland in 1911. Within a few years, he was providing for his growing family by selling scrap metal and other junk he collected using a horse and wagon. By the time Isaac died in 1972, his modest enterprise had become a multi-million dollar family business operating as I. Waxman and Sons Ltd. ("IWS").

2 Isaac's sons, Morris and Chester, began to work in the business in the 1940s. Blessed with strong work ethics, different and complementary skills, and a complete trust in each other, the brothers played a large role in the growth and prosperity of the business throughout the 1950s and 1960s. In the years immediately following Isaac's death in 1972, Morris and Chester continued to run the business together. Each owned fifty per cent of the shares of IWS and for all intents and purposes, treated the business as a partnership. It continued to grow and prosper. There was every reason to believe that this remarkable family success story would continue into a third generation of Waxmans, Morris' two sons and Chester's three sons.

3 By 1988, everything had changed. The love and mutual respect between Chester and Morris were gone, replaced by the powerful animosity that only a bitter lawsuit among family members can generate. The brothers and their sons have spent much of the last fifteen years and many, many millions of dollars trying to prove that each was cheated by the other. The accusations and recriminations run the full gamut from the dishonourable through the dishonest to the downright

criminal. Whatever the eventual legal outcome, Isaac's dream that his two sons should "share and share alike" in the business he started has been shattered.

4 These appeals are the latest round in this protracted and bitter fight. Chester and those aligned with him were largely unsuccessful at trial. They challenge almost every aspect of the trial judgments. Morris and his supporters resist Chester's appeals and appeal against the one part of the trial judgment that went against Morris and his supporters.

5 Because of the length of the trial and the complexity of the issues, these reasons are lengthy and, on occasion, repetitive. In essence, we have concluded that:

* there is no basis upon which to interfere with any of the significant findings of fact;
* there is no basis upon which to interfere with the findings of liability;
* the quantification of damages flowing from those findings should be varied downward to a relatively minor degree; and
* Morris' appeal should fail.

II

OVERVIEW OF THE PROCEEDINGS

6 In December 1998, some ten years after Morris Waxman first commenced legal proceedings, five actions proceeded to trial before Sanderson J. The trial lasted over two hundred court days. In June 2002, Sanderson J. delivered lengthy reasons in which she found in Morris' favour on most claims.

7 Three of the actions involved claims by Morris against Chester, his sons Robert, Warren and Gary, and IWS. In two of those actions Chester counterclaimed against Morris and his family, including his son Michael. In addition to these three actions, Morris commenced a fourth action against Paul Ennis, his lawyer, and a fifth action against IWS' accountants, Taylor Leibow, and IWS' comptroller, Wayne Linton.

8 The claims and counterclaims in the five actions revolve around the operations of two corporate entities, IWS and Solid Waste Reclamation Inc. ("SWRI"). The claims concerning IWS ("the IWS claims" or "the main action"), relate to the ownership of the shares in that company after December 1983, and the operation of IWS between 1979 and 1988. In essence, Morris alleged that Chester breached his fiduciary duty to Morris by cheating Morris out of his fifty per cent interest in IWS and further breached that duty by operating IWS between 1979 and 1988 to the personal advantage of Chester and his sons, and to the exclusion of the legitimate interests of Morris and his sons. Morris claimed that Chester and/or his sons:

* caused Morris unwittingly to sign documents transferring Morris' fifty per

cent interest in IWS to Chester in December 1983; at the same time caused Morris, again unwittingly, to sign lease documentation purporting to lease properties jointly owned by Morris and Chester to IWS on terms that were grossly unfair to Morris' interests; (For convenience we will refer to these purported transactions as the "share sale" and the "lease".)

* after 1983, excluded Morris from his fifty per cent participation in the equity and profits of IWS;
* improperly distributed the equity of IWS to themselves by way of bonuses in 1979, 1981 and 1982;
* under the guise of providing trucking services to IWS, improperly diverted assets belonging to IWS to corporate entities owned by Chester's sons, Robert and Gary, and controlled by Robert; and
* improperly fired Morris as president of IWS in October 1988.

9 Morris also advanced his IWS claims relying on the oppression provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA").

10 Morris' suit against Ennis arose out of the share sale in December 1983. He contended that Ennis, who was his long-time lawyer, acted negligently and in breach of the duty that he owed to Morris in connection with the share sale and lease in December 1983.

11 Morris claimed against Taylor Leibow and Linton in relation to both the share sale and the alleged improper diversion of the assets and equity of IWS to Chester and his sons. Morris alleged that Taylor Leibow and Linton breached the duty of care they owed to Morris in connection with those transactions.

12 Chester denied the IWS claims. He contended that far from misappropriating IWS assets or diverting profits from the company after 1979, he and his sons led IWS to an era of unparalleled prosperity. Chester claimed that during a difficult recession in 1982, Morris decided that he wanted to sell his interest in IWS. After lengthy negotiations, Chester agreed to buy Morris' shares. Morris did not want to tell his family about the sale, so he and his brother agreed that he would keep the office of president and many of the benefits connected with that position to preserve appearances. Chester contended that Morris came to regret the sale of his shares when IWS flourished under the leadership of Chester and his sons. Instead of taking responsibility for the decision he made to sell his shares, Morris, urged on by his son Michael, falsely accused Chester, Ennis, Linton and Taylor Leibow of misleading him and taking advantage of him. Lastly, Chester argued that IWS had ample cause to fire Morris in October 1988 as by that time he was actively working against the business interests of IWS.

13 Morris' SWRI claims arise out of events which occurred in 1988 and 1989, after the business and personal relationship between Morris and Chester had broken down. Morris and Michael ran SWRI from 1982 onward. SWRI was in the refuse business and had extensive dealings with Philip

Environmental Inc. ("Philip"). Morris alleged that in 1988 Chester set out to destroy the business of SWRI as part of a strategy to impoverish Morris so that he could not pursue his IWS claims against Chester. Morris alleged that Chester and Robert, using various means, including applying economic pressure on Philip and forging documents, caused Philip to stop doing business with SWRI, thereby leading to the breach of Philip's agreement with SWRI and ruining the business of SWRI.

14 Chester denied the SWRI claims, and in counterclaims advanced his own SWRI claims. Chester contended that he and Robert learned of the business affairs of SWRI in 1988 and became concerned that Morris was operating his own business to the detriment of IWS. Chester testified that he became aware of the SWRI operation before Morris sued him. Chester contended that Morris issued the IWS claims as a pre-emptive strike only after Morris learned that Chester and Robert had discovered that Morris and Michael were using SWRI to steal business from IWS. In the counterclaim Chester alleged that Morris and Michael used SWRI to divert business opportunities and profits from IWS to themselves between 1982 and 1989. He also advanced several relatively minor miscellaneous claims against Morris and Michael. In a second counterclaim brought by Chester in the inducing breach of contract action, Chester alleged that his children owned fifty per cent of the SWRI shares and that Morris had attempted to falsify the books and records of SWRI to make it appear as though his two sons owned all of the shares of the company.

15 Morris was largely successful at trial. On the IWS claims, the trial judge held that Morris had not sold his shares to Chester in December 1983 and that Chester held those shares in trust for Morris from December 1983 onward. She ordered the shares returned to Morris. In addition, she held that:

* Morris was entitled to fifty per cent of the profits generated by IWS and fifty per cent of any equity distributed by IWS to Chester and his sons between December 1983 and the release of her reasons in June 2002. She directed a reference to determine the amount of those profits and provided formulae for that determination;
* Morris was entitled to punitive damages of $350,000 from Chester and IWS;
* Morris was entitled to recover fifty per cent (minus certain payments that had been made to him) of bonuses paid to Chester and his sons by IWS in the years 1979, 1981 and 1982;
* Morris was entitled to recover certain profits ($1,180,073) improperly diverted from IWS to corporate entities that provided trucking services to IWS and were controlled by Robert;
* Morris was improperly dismissed as president of IWS in October 1988 and was entitled to damages from IWS equal to two years salary; and
* Morris was entitled to recover $98,000 for Chester's breach of contract in relation to the transfer by Morris in 1986 of his property in Ancaster, Ontario to Warren, Chester's oldest son.

16 Morris' claims against IWS under the oppression provisions of the OBCA also succeeded. The trial judge held that Morris could recover from IWS his share sale damages, the damages arising from the improper bonus payments, and the damages related to the improper diversion of IWS profits to trucking companies controlled by Robert.

17 The trial judge made tracing orders with respect to the distributions of profit from IWS between December 22, 1983 and June 27, 2000, the improper payment of bonuses, and the wrongful diversion of IWS profits to companies owed by Chester's sons. She declared that for the purposes of the tracing orders, Chester's sons were not bona fide purchasers for value without notice.

18 Morris also succeeded on his IWS claim against his lawyer, Ennis. The trial judge concluded that Ennis was liable for breach of fiduciary duty, breach of contract and negligence in connection with the share sale transaction and that Morris was entitled to damages from Ennis measured in the same way as the damage assessment made against Chester in connection with the share sale.

19 The trial judge concluded that Morris had made out his IWS claims against Linton and that Morris was entitled to recover from Linton the amounts awarded in connection with the share sale, the improper bonus payments and the improper diversion of IWS profits to corporate entities controlled by Chester's sons.

20 Morris' claims against Taylor Leibow were dismissed.

21 Morris also succeeded on the SWRI claims. The trial judge held that Chester, Robert and IWS had induced Philip to breach its contracts with SWRI. She awarded damages in the amount of $2.5 million plus punitive damages of $100,000. Chester's counterclaims were dismissed save for some limited success on the miscellaneous components of his counterclaim. He was awarded damages totalling about $76,000.

22 Chester appeals. He challenges most, if not all, of the critical findings of fact made by the trial judge. Chester also raises many legal issues relating to liability, the appropriateness of the non-pecuniary remedies awarded by the trial judge, and her damage assessments.

23 Ennis appeals. He attacks the trial judge's findings of fact and further argues that even if those findings stand, the trial judge erred in awarding a "trust" level of damages against him.

24 Linton appeals. He also challenges the trial judge's findings of fact and specifically contends that the finding that he was liable for knowing assistance or collusion with Chester and his sons in the structuring of the share sale, the improper payment of bonuses, and the diversion of profits from IWS was unfounded in fact and unavailable in law.

25 Morris appeals the dismissal of the action against Taylor Leibow. He argues that the trial judge erred in law in holding that Taylor Leibow did not owe him a duty of care in connection with the improper diversion of IWS profits and the improper payment of bonuses by IWS. Morris also

contends that the trial judge erred in law in finding that Taylor Leibow did not owe him a fiduciary duty. Lastly, Morris submits that the trial judge erred in holding that an undertaking given by Morris after the litigation started foreclosed his claim against Taylor Leibow. Taylor Leibow supports the holding of the trial judge and, in what it refers to as a cross-appeal, advances arguments rejected by the trial judge, which if successful would also lead to the dismissal of the action against Taylor Leibow.

26 The appeals were heard over thirteen days in April and May 2003. The number and complexity of the grounds of appeal necessitated lengthy facta, multi-volume compendia, and many volumes of legal authorities. The material filled the courtroom. In the course of oral argument, which extended over some sixty hours, counsel made extensive reference to this material and filed substantial additional written material. The industry, forensic skills and civility of counsel throughout the appellate process were greatly appreciated by the court. Like the trial judge, we commend counsel for reflecting the finest tradition of the bar, in what for their clients is a very bitter dispute.

III

THE EVIDENCE: AN OVERVIEW

27 The evidence at trial was extensive, detailed and contentious. Counsel left no evidentiary stone unturned and no forensic blow unstruck. The evidence ranged over the entire lives of Morris and Chester, but concentrated on the events between the mid-1970s and the late 1980s. It included not only detailed evidence from those involved in the events, but also copious and complex expert evidence. Some of the specific events, standing alone, would have led to a relatively complex commercial trial.

28 The trial judge had a daunting task. She had to resolve a myriad of difficult factual and legal questions. In the main, the evidence presented dramatically opposed versions of the key events. The trial judge had to make critical credibility assessments, which often left her with no realistic choice but to choose one of the two versions of events placed before her. Whatever may be said about the correctness of the trial judge's conclusions, her reasons, which extend over 2,618 paragraphs, are a model of organization, thoroughness, and clarity. They provide a detailed examination of virtually every issue raised at trial, fully inform the parties about why she decided the issues the way she did, and afford the dissatisfied parties with a full and complete opportunity to challenge the result on appeal. The trial judge's reasons also provided valuable assistance to this court in gaining an understanding of this factually and legally complex litigation.

29 Many of the grounds of appeal challenged findings of fact, thereby requiring a close review of the evidence. Others, which raise legal issues, also require a clear understanding of the factual substrata underlying those issues. To facilitate our review of the evidence, we begin with a brief description of the principal individuals, corporate entities, and properties referred to repeatedly in the evidence.

The Waxmans

Morris Waxman: Born in 1925, son of Isaac and older brother of Chester. Married Shirley in 1954. Father of Michael, Douglas and Shirley.

Michael Waxman: The older son of Morris, born in 1956. After obtaining an MBA in 1981, he wanted to become involved in the business of IWS. Morris also wanted Michael to be involved. Michael operated SWRI with his father after 1982. He is the prime mover on Morris' side of the litigation and is despised by Chester and Robert, who blame him for many of the problems that developed between the families.

Douglas Waxman: Morris' second son, born in 1963. A shareholder of SWRI. Only peripherally involved in the relevant events.

Chester Waxman: Son of Isaac Waxman born in 1926, a little more than a year after his brother, Morris. Married Bailey in 1951. Father of Warren, Robert, Gary and Brenda.

Warren Waxman: Born in 1953. Oldest son of Chester. Began to work full-time at IWS in 1974 as a salesman/buyer. He was principally involved in the ferrous division (iron scrap) of the business.

Robert Waxman: Chester's middle son, born in 1955. He began to work full-time at IWS in 1975 or 1976. Soon he was running the non-ferrous division of IWS. In Morris' eyes, Robert took over many of the functions that he had previously performed. Robert also controlled various corporate entities that supplied trucking services to IWS between 1978 and 1984. Chester and Robert are the prime movers on Chester's side of the litigation.

Gary Waxman: Born in 1956. The youngest son of Chester. He began to work full-time at IWS in 1977. Worked primarily as a salesman in the ferrous division of the IWS operation.

The Lawyers and Accountants

Paul Ennis: A partner at Ennis & Associates. Lawyer for IWS, Morris and Chester from early 1970s until 1988.

Kevin Hope: An associate in the Ennis law firm. Assisted Morris in the preparation of a will in late December 1983.

Ramsay Evans and Ralph Hayman: Partners at the law firm of Evans Husband, who were involved in the incorporation of SWRI.

Taylor Leibow: Accounting firm that acted for Morris, Chester, IWS and related companies from the 1940s until at least 1989.

Sam Taylor: The accountant at Taylor Leibow responsible for IWS-related accounts until 1977. He

was also a close friend of both Chester and Morris.

Steven Wiseman: Accountant at Taylor Leibow responsible for the IWS-related accounts from 1977 to 1988.

Wayne Linton: Comptroller at IWS from August 1979 to 1988.

Others

Ian Campbell: A business valuator. Prepared valuation of IWS as of December 31, 1978 and December 31, 1979.

Sheldon Kumer: Brother-in-law of Chester and Morris. Long-time employee of IWS and/or related entities.

Allen Fracassi: Principal of Philip, which had extensive business dealing with SWRI in the 1980s. In 1993, Philip purchased the IWS operation from Chester in exchange for cash and shares in Philip.

Corporate Entities

I. Waxman and Sons Ltd. ("IWS"): Initially an unincorporated proprietorship. Incorporated in 1956. As of December 1983, Chester and Morris each held half of the shares of IWS. Before 1981, IWS had three divisions: the ferrous division, which reclaimed and sold iron scrap; the non-ferrous division, which reclaimed and sold metal scrap other than iron, especially copper; and the refuse division, which collected and disposed of garbage. The ferrous and refuse divisions were sold in 1981.

Solid Waste Reclamation Inc. ("SWRI"): Originally incorporated when IWS attempted unsuccessfully to obtain the Hamilton-Wentworth garbage contract. It remained inoperative until 1982. Operated in the refuse business by Michael and Morris between 1982 and 1989.

Lasco: Owned a steel mill that smelted scrap steel. In September 1981, it purchased the assets of the IWS ferrous division and thereafter operated the division as a joint venture with IWS.

IW & S Ferrous Ltd. ("IWS Ferrous"): The joint venture company co-owned by Lasco and IWS after September 1981.

Laidlaw, Superior Sanitation Ltd. ("Laidlaw/Superior"): Purchased the assets, goodwill and customers list of the IWS refuse division in June 1981.

Morriston Investments Ltd. ("Morriston"), Chesterton Investments Ltd. ("Chesterton"): Holding companies of Morris and Chester respectively.

Windermere Investments ("Windermere"): A partnership of Morriston and Chesterton.

Greycliffe Holdings Ltd. ("Greycliffe"): A company incorporated in 1978, owned by Robert and Gary, and controlled by Robert. It provided trucking services for IWS. Continued to do so until February 1984. Morris alleged that Greycliffe grossly overcharged IWS for its services.

Icarus Leasing Inc., Robix Financial Corp., Big Rig Trucking Services Ltd., Servetross: Related companies under the control of Robert and also involved in providing trucking and other services to IWS.

Waxman Resources Inc. ("Waxman Resources"): In September 1993, about five years after this litigation began, Chester caused IWS to transfer substantially all of its assets to Waxman Resources in exchange for shares in that company.

Philip Environmental Inc. ("Philip"): Controlled by Allen Fracassi and his brother operated as a joint venture/subcontractor with SWRI in the refuse business from 1982 until 1989. In September 1993, Philip purchased the shares of Waxman Resources for $12 million plus shares in Philip. By 1997, Waxman Resources had sold the Philip shares for $18.4 million.

Properties

Windermere Road: A property located near Stelco and Dofasco purchased in two separate transactions in the 1950s and put in the names of Morris and Chester. Property was transferred to Morriston and Chesterton in 1963. IWS conducted its business from this property and Morris had an office there until he was fired in 1988. In 1981 when IWS sold its ferrous division, it leased part of Windermere Road to IWS Ferrous. A building referred to as the "Blue Building" and surrounding lands, which were used for the non-ferrous operations, were not included in the lease to IWS Ferrous.

80 Glow Avenue: A property bought by Chester and Morris personally in 1972. The IWS maintenance department was located on this property and it was the operational base for the refuse division of IWS. After September 1981, IWS Ferrous leased this property.

500 Centennial Parkway: This property consisted of 13 acres purchased in 1980, referred to as the "Front 13 Acres", and 7.7 acres purchased in 1981, referred to as the "Back 7.7 Acres". Title in the Front 13 Acres was initially held by IWS. The IWS non-ferrous division operated out of the Front 13 Acres as did SWRI after 1982. Robert and Michael had offices at this location. Title to the Back 7.7 Acres was held in trust for Morriston and Chesterton.

Ancaster property: Property located in Ancaster, Ontario and purchased in 1956. Morris transferred the property to Warren Waxman for $1 in 1986. According to Morris, Chester promised to "straighten out" the share transfer if Morris gave the Ancaster property to Warren so that he could build a home on it.

IV

THE NARRATIVE OF THE IWS CLAIMS

30 For our purposes, we divide the story underlying the IWS claims into eight chapters:

A. the IWS operation up to 1979;
B. the proposed estate freeze;
C. the 1979 bonuses;
D. the sale of the IWS ferrous and refuse divisions in 1981;
E. the 1981-82 bonuses;
F. the Greycliffe trucking operation (1978-84);
G. the share sale and related lease in December 1983; and
H. the descent into litigation (1984-93).

31 Parts of all of these chapters will be revisited when we address various grounds of appeal arising out of separate episodes. At this stage of our reasons, we provide an outline of the relevant evidence, a description of the competing positions of the parties, and a summary of the trial judge's findings of fact.

A. The IWS Operation up to 1979

32 Morris and Chester went to work for their father in the mid-1940s. By the mid-1960s, IWS had a thriving scrap metal and refuse business servicing major clients such as Stelco. Several family members were employed in the business.

33 Chester looked after the financial and legal affairs of IWS and also excelled at getting and keeping scrap metal accounts. Morris was in charge of the operations in the yard and was responsible for the purchase, repair and maintenance of equipment, trucking arrangements, and supervising employees working in the yard. Chester got the contracts and Morris made sure that IWS could fill them.

34 According to Sam Taylor and others, Chester and Morris had absolute trust in each other. One never second-guessed a decision made by the other in his area of expertise. The two brothers never argued publicly. If Chester told Morris that a certain transaction was necessary for the financial well-being of IWS, Morris accepted that representation without question. Similarly, if Morris told Chester that IWS needed a particular piece of equipment, Chester accepted that representation without question. Morris' wife Shirley described their relationship as like "two coats of paint on a wall".

35 Chester and Morris received relatively small salaries, but also drew funds from IWS on an as needed basis. If one of the brothers needed money to cover an extraordinary expense, such as the purchase of a home, he drew it from IWS. Neither brother attempted to control or monitor the

drawings of the other. At the end of the year, the drawings were calculated and the accountants attempted to describe these drawings in a manner which would minimize taxes for the brothers, while still passing muster with Revenue Canada.

36 Morris and Chester did not separate their personal business affairs from the business affairs of IWS. Taylor Leibow and IWS accounting personnel looked after the personal investments and bank accounts of Morris and Chester. They took instructions from Chester for both brothers' investments. The brothers' income tax was calculated and paid by IWS personnel. The amount of tax paid was added to each brother's drawings from the company.

37 In 1968, on Chester's instructions, both brothers, Morris and Chester, prepared identical wills. The wills provided that IWS would continue as a family business with each side of the family owning half of the shares for at least twenty years after the brothers died.

38 By 1969, Isaac was no longer physically able to act as president. Morris became president of IWS and Chester became vice-president. Their relationship did not change. As president of IWS, Morris was required to sign many corporate minutes and other documents. According to him, if documents were presented to him by Chester or by the IWS lawyers or accountants for his signature, Morris would not read the documents, but would simply sign them. Morris trusted that Chester would never ask him to sign something that was to his detriment.

39 Warren began to work full-time in 1974 and by the end of 1977 all three of Chester's sons were working full-time as salesmen. The mid-1970s were not prosperous years for IWS because of a recession in the steel industry, but by 1978, IWS began to rebound financially. Chester attributed this rebound to his and his sons' efforts and abilities. The trial judge concluded that the revival of the steel industry played a significant role in IWS' financial recovery.

40 At the same time that Chester's sons were becoming active in the affairs of IWS, Morris was heavily involved in an ultimately unsuccessful attempt to obtain a very large garbage contract with Hamilton-Wentworth. SWRI was incorporated in anticipation of obtaining the contract. Between 1975 and 1977, Morris spent a great deal of time attempting to secure this contract and consequently spent less time working in the yard at IWS.

41 Within about a year of Robert going to work full-time for IWS, he decided that he wanted to develop the non-ferrous division. Chester supported this initiative, which included installation of a very expensive copper chopping line in the Blue Building on Windermere Road. Although Morris had traditionally made decisions about the purchase of new equipment, he was not consulted by Chester before IWS proceeded to install the copper chopping equipment. The decision was made by Chester and Robert.

42 With the benefit of hindsight, it is clear that the relationship between Morris and Chester began to change in the mid-1970s when Chester's sons came into the business on a full-time basis.

43 Linton came to work for IWS in August 1979. He took his instructions on financial matters from Chester and seldom, if ever, consulted Morris. This was consistent with the division of authority that had developed over the years at IWS.

44 By 1979, IWS had emerged from the financial slump of the mid-1970s. Revenues had returned to the levels of the early seventies. All three of Chester's sons were hard at work for IWS. Neither of Morris' sons worked for the company. Morris had removed himself somewhat from the day-to-day activities of IWS while he pursued the garbage contract with Hamilton-Wentworth. At the same time, Chester's sons, and particularly Robert, were assuming supervisory roles that had previously fallen to Morris. The long-running tandem of Chester and Morris was being replaced by one consisting of Chester and his sons.

B. The Estate Freeze

45 In the mid-1970s, Morris and Chester were advised by their financial advisers that they should structure an estate freeze as a means of deferring tax on the increase in the value of IWS shares. There were many discussions concerning the estate freeze in the late 1970s and further discussions in early 1982. The estate freeze never came to pass and is not the subject of a discrete claim by Morris. Morris, however, relies on the evidence concerning the estate freeze to demonstrate Chester's ascendancy in financial matters, the changing nature of their relationship in the late 1970s and early 1980s, and their very different views about how the ownership of IWS should be divided among their five sons.

46 In the late 1970s, there were several discussions concerning the proposed estate freeze among Morris, Chester, Taylor, Ennis and Arthur Scace, a tax expert. Scace recommended that a formal valuation of IWS be prepared with a view to obtaining an advance tax ruling on the proposed estate freeze. Ian Campbell prepared two valuations of IWS. He valued the company at between $7 and $8.5 million as of December 31, 1978 and between $8.5 and $10 million as of December 31, 1979.

47 Chester wanted to structure the estate freeze so that sixty per cent of the common shares would go to his three sons and forty per cent would go to Morris' two sons. Morris was opposed to this division and said that he made it clear to Chester in their private discussions that any division of the shares should be on a 50-50 basis between the two families. In keeping with their practice they did not argue publicly about their differences.

48 An advance ruling from Revenue Canada was obtained, as suggested by Scace. The material filed with Revenue Canada indicated that Chester's sons would hold sixty per cent of the common shares and Morris' sons would hold forty per cent. The trial judge found that Morris was not aware of the details of the proposal sent to Revenue Canada on Chester's instructions. The trial judge also found at para. 134 that under the voting trust arrangements described in the material sent to Revenue Canada, "Chester would have had effective control of IWS". Counsel for Chester took issue with that finding, arguing that on the proposal Chester and Morris would have had joint control over eighty per cent of the voting shares during their lives. Counsel argued that even if

Chester had exclusive control over the other twenty per cent of the common shares, he would not have control over IWS. Apart entirely from the question of immediate control, the proposal sent to Revenue Canada would certainly have put Chester's sons in control of IWS after Chester and Morris died.

49 Chester testified that in order to secure his brother's agreement to a 60-40 split in the estate freeze, Chester had agreed to transfer a single share held in the name of Isaac back to Morris in 1979. According to Chester, the share had been held by Isaac so that Chester would have one more share than Morris and would have the ability to control the affairs of IWS. Chester testified that his father had wanted him to have control of IWS in the future.

50 The trial judge rejected Chester's evidence concerning the single share. The corporate records showed that the share had been transferred back to Isaac by Morris so that Isaac could qualify to be a director of the corporation, and that Isaac held the share in trust for Morris. The share was transferred back to Morris after Isaac died. According to Taylor, the share had always been beneficially owned by Morris. The trial judge also rejected Chester's evidence that Isaac had wanted Chester to control the company. Chester's evidence was contradicted by the terms of Isaac's will.

51 The trial judge also found that Morris had told Chester in their private conversation that any division of IWS shares as part of an estate freeze must be on a 50-50 basis. The trial judge further found that Chester ignored Morris' wishes when he directed that a proposal based on a 60-40 split of the shares should be sent to Revenue Canada for advance approval. The trial judge concluded that Chester's conduct in relation to the estate freeze reflected his changed attitude towards Morris and ownership of IWS. In his will, written in 1968, Chester had anticipated that IWS would be owned 50-50 by each side of the family for at least twenty years. By 1978, Chester saw his family as entitled to a sixty per cent interest in IWS. Lastly, the trial judge held, relying on Chester's own evidence, that Chester was using the estate freeze to gain control of IWS. According to Chester's evidence, there was no longer a need for an estate freeze when Morris decided to sell his shares to Chester.

52 In February 1982, there were further discussions among Chester, Ennis and Scace concerning the estate freeze. These discussions tie into the declaration of the 1982 bonuses to be discussed below. The estate freeze contemplated in February 1982 also involved a 60-40 split of the common voting shares. Morris was unaware of these discussions.

C. 1979 Bonuses to Chester's Sons

53 Morris alleged that bonuses totalling $250,000 allocated to Chester's sons for the year 1979, represented payment of shareholders' equity to non-shareholders. He contended that he was unaware of and did not agree to those payments and that as a fifty per cent shareholder was entitled to the return of $125,000 representing fifty per cent of the bonus payment.

54 In 1979, IWS revenues increased to $34.9 million from $25.2 million. Chester's three sons

were actively involved in the company and, according to Chester, largely responsible for the increased revenues. As noted above, a strong financial recovery by the steel industry contributed significantly to IWS' increased revenues.

55 In late 1979 or early 1980, Linton advised Chester that IWS would show substantial profits in 1979 and that the taxable income of IWS could be reduced by the payment of bonuses. Linton dealt only with Chester in relation to the bonuses and took his instructions from Chester. Linton in turn instructed Ennis to prepare certain corporate minutes to reflect the allocation and payment of the bonuses ordered by Chester.

56 Linton testified that initially he discussed a bonus of $100,000 with Chester, but later the amount was increased to $250,000. Initially, Chester told Linton to allocate $75,000 of the bonus to Chester, $75,000 to Morris, and the remaining $100,000 to his sons. Chester said that he would discuss the allocation with Morris. Linton testified that shortly afterwards Chester told him that Morris and he had decided that the entire $250,000 should go to the sons. Linton then told Ennis to prepare a minute declaring bonus payments totalling $250,000 to Chester's sons. That minute, dated December 17, 1979 and signed by Morris, indicates that the bonuses were approved in April 1980.

57 Chester testified that in late 1979 or early 1980, he and Morris discussed the payment of bonuses to Chester's sons in recognition of their contributions to IWS. Chester said that he and Morris agreed that bonuses totalling $250,000 would be paid to Chester's sons.

58 Morris testified that he had no discussions with anybody about the 1979 bonuses and was unaware of them until about 1998 when he learned of their existence in the course of this litigation. He acknowledged his signature on the minute, but testified that he signed IWS corporate documents when told to do so by Chester, Linton or Ennis. He had no knowledge of the minute allocating the $250,000 to the sons and would not have knowingly agreed to the payment since, in his view, this amount was part of the equity of the company, half of which belonged to him and, eventually, to his sons.

59 The trial judge did not accept Chester's testimony about the 1979 bonuses. She reached that determination based on documents from the files of Linton and Ennis that were contemporaneous with the events in issue. Based on those documents, she concluded that Chester had initially planned to allocate $75,000 to himself, $75,000 to Morris and $100,000 to his sons. In April 1981, when the bonuses were actually paid, Chester unilaterally decided to give the entire bonus to his sons. He instructed Linton to redo the corporate records to reflect the allocation of the entire $250,000 to his sons. Linton then wrote to Ennis indicating:

> I enclose necessary adjustments to minutes of December 17, 1979 changing allocation of bonuses. I will obtain Taylor Leibow's copy of minutes and destroy. Could you forward to me revised copy so that I may deliver same to Taylor Leibow for their audit files.

D. The Sale of the Ferrous and Refuse Divisions

60 In June 1981, IWS sold its refuse division to Laidlaw/Superior for a total of $1.6 million. Three months later, in September 1981, IWS sold its ferrous division and related equipment to Lasco for approximately $8.7 million. Neither transaction is challenged in this litigation. Both transactions are, however, closely connected to the 1981-82 bonuses and the share sale in December 1983.

61 Morris was primarily responsible for the operation of the refuse division. He had no interest in selling that division, but was told by Chester that IWS needed an infusion of cash and that the sale of the refuse division could provide the needed cash. Morris accepted Chester's assessment because this was the kind of financial decision that fell within Chester's area of expertise.

62 Chester told a different story. He said that he did not want to sell the refuse division, but did so only because Morris expressed little interest in keeping it and Chester knew that Michael would not do the hard work necessary to make the refuse division prosperous.

63 Chester began to negotiate with Laidlaw/Superior for the sale of the refuse division in the summer of 1980. These negotiations were interrupted temporarily while Chester negotiated with another company, but came to fruition in June 1981. Ennis testified that Chester had wanted to sell the refuse division throughout the year-long negotiations.

64 The sale to Laidlaw/Superior included IWS goodwill and customers list. The sale excluded certain hazardous waste accounts and other specialty refuse accounts, and allowed IWS to continue to service the refuse needs of its scrap metal customers. Morris, Chester, his sons and IWS also entered into non-competition clauses with Laidlaw. The remnants of the refuse division eventually fell under the auspices of SWRI, which was run by Morris and Michael until 1989.

65 The trial judge did not believe Chester's evidence concerning the sale of the refuse division to Laidlaw/Superior. Chester's explanation changed in the course of his evidence when certain documents were produced to him for the first time. The trial judge found that Chester initiated the sale of the refuse division, which was of little interest to him. He was much more interested in developing the scrap metal business in which his three sons were heavily involved by 1980. The trial judge further concluded that in deciding to sell the refuse division, Chester showed little concern for Morris' interests and saw no future role for Michael in the IWS operation.

66 In late 1980, Chester began to negotiate the possible sale of the ferrous division to Lasco. Lasco operated a steel mill and was a competitor of IWS in the ferrous scrap business. The transaction, which eventually closed in September 1981, included the following terms:

* IWS sold its ferrous division assets to IWS Ferrous, a joint venture company owned equally by IWS and Lasco, for $6,410,000;
* IWS sold a guillotine shearing machine to Lasco for $2,321,984.15;

* IWS Ferrous entered into employment contracts with Chester, his three sons and Sheldon Kumer, but not with Morris;
* IWS Ferrous leased the Glow Avenue property and the Windermere Road property (excluding the Blue Building and surrounding lands). The lease was a twenty year lease with rent at $19,000 per month, with increases in rent every five years tied to the consumer price index. Rents were payable to Morriston and Chesterton;
* IWS Ferrous was to pay IWS a tonnage fee of $4.00 for every ton of ferrous material processed.

67 The shareholder agreement between Lasco and IWS Ferrous provided that either could buy out the other's shares for a minimum of $4.5 million.

68 The trial judge found that Morris was involved in the negotiations leading to the transaction with Lasco. He was responsible for equipment valuations and other operational matters. He played no role in any of the financial details. She also held that no evidence was led explaining the reason for excluding Morris from the employment contracts entered into with IWS Ferrous. He had considerable expertise in operational matters relating to the ferrous division. She also concluded at para. 216 that the rents payable by IWS Ferrous to Morriston and Chesterton were "on the high side", but were within the range of what would be considered commercially acceptable.

69 After the Laidlaw/Superior and Lasco transactions, the business of IWS changed. By the fall of 1981, IWS had three sources of income. It continued to operate a non-ferrous division, received tonnage fees from IWS Ferrous (anticipated to be about $2 million a year), and operated a small refuse division.

70 After the sale to Lasco, IWS moved from the Windermere Road property to offices at the Centennial Parkway property, which had been purchased in 1980. IWS Ferrous continued to operate out of Windermere Road. Although Morris was still the president of IWS, he stayed at the Windermere Road property. Morris had very little to do with the day-to-day operation of the non-ferrous division, which quickly fell under Robert's control. Linton, who did move to the Centennial Parkway property, said that he had little day-to-day contact with Morris after the move and reported to Robert on matters involving the business of the non-ferrous division. An organizational chart prepared by Taylor Leibow in 1982 was consistent with Linton's testimony. Morris was shown as having little day-to-day responsibility for the IWS operations.

71 As Morris' role in IWS diminished in late 1981 and the roles of Chester's sons, especially Robert, increased at the same time, Michael, who was completing his MBA, was hoping to become involved in IWS. Michael's abilities and interests lay in financial matters, an area that had always been under the exclusive control of Chester. As far as Morris was concerned, Michael was not given an opportunity to become involved in the day-to-day operations of IWS. From Chester's point of view, Michael was given the same opportunity as Chester's sons, but was not prepared to work hard

enough to take advantage of that opportunity.

72 Chester made it clear in his evidence that he had no use for Michael. He said:

> Michael was the problem. Not me, not my sons. Michael. If he wanted to come in, he would have been welcomed in but if he expected to be pampered like he probably was at home, he wasn't going to get it from me or my three sons. It's a place to work and make money.

73 Later in his evidence after describing Michael as "arrogant", Chester said:

> [H]e personifies baleful or malignant passion. I don't know why but that's what he's made of. I don't believe my brother made a pact with him. I think Michael dominates him.

74 Robert and Michael disliked each other intensely.

75 IWS was financially strong as of late 1981. However, on the trial judge's findings, it had ceased to operate as an informal 50-50 partnership between Morris and Chester.

E. The 1981-82 Bonuses

76 In the fall of 1981, IWS had some $6.6 million in income as a result of the Laidlaw/Superior and Lasco transactions. By February 1982, IWS had declared bonuses totalling $6.6 million for 1981 and 1982. Of that amount, $4.7 million was payable to Chester and his sons, $1.4 million was payable to Morris, $500,000 was payable to Sheldon Kumer and Harry Liebovitz, another in-law employed by IWS. Nothing was payable to Morris' sons.

77 Chester testified that Lasco demanded non-competition agreements from Chester and his three sons as a condition to entering into the transaction with IWS. Chester's sons insisted that they should be compensated for agreeing not to compete with Lasco. Chester thought that his boys should be compensated since their efforts were largely responsible for IWS' prosperity and Lasco's interest in purchasing its ferrous division. As far as Chester was concerned, by the fall of 1981, he and his sons were the driving force behind IWS.

78 Chester testified that before the closing of the Lasco transaction in September 1981, he and Morris had agreed that bonuses should be paid to Chester's sons and to Sheldon Kumer and to Harry Liebovitz. Kumer and Liebovitz were married to sisters of Morris and Chester and were long-time employees of IWS. Chester further testified that he and Morris agreed on the specific amount that each of Chester's sons would receive. They agreed that Robert would receive a total bonus of $1.2 million, Warren $1.1 million, and Gary $1 million.

79 The evidence of Chester's sons was consistent with that given by Chester. Kumer, who was employed by Chester at the time of the trial, also testified that he was told before the Lasco deal

closed that he would be receiving a bonus of $400,000.

80 Morris testified that in October or November 1981, he attended a meeting at the offices on Centennial Parkway with Chester, Linton, and two of Chester's sons. Chester told Linton that the bonuses would be declared in favour of Morris, Chester, Chester's sons and two of the brothers-in-law who worked at IWS. The bonuses totalled about $500,000. Although Morris disagreed strongly with what Chester was saying, he followed his usual practice and did not challenge Chester in front of others. After the meeting was over, Morris told Chester that as far as he was concerned, he and Chester were 50-50 partners and that if Chester wanted to give bonuses to his sons, the bonuses would have to come out of his fifty per cent. After his private conversation with Chester, Morris understood that any bonuses that would be declared would be declared in equal amounts to Chester and Morris. They could do whatever they wished with their money.

81 Linton's evidence concerning the genesis of the decision to pay the 1981-82 bonuses differed from Chester's. He testified that the idea of bonuses originated with him as a means of reducing or deferring the taxes that IWS would owe on the substantial profits it made in the Laidlaw/Superior and Lasco transactions. Linton testified that bonuses were first discussed in October or November 1981, well after the Lasco transaction had closed. Up until this time Chester had made no reference to payments to his sons as compensation for the non-competition agreements. As of the middle of November 1981, the bonuses were still under discussion. In these discussions, the bonuses were viewed as part of IWS' financial strategy and not as compensation for Chester's sons agreeing to sign non-competition agreements.

82 Linton's working papers show that in November or December 1981, Chester instructed Linton to have Ennis prepare corporate minutes declaring bonuses for 1981. Ennis' notes set out the bonuses in the following amounts:

- Chester $500,000;
- Morris $500,000;
- Robert $250,000;
- Gary $250,000;
- Warren $250,000;
- Sheldon Kumer $200,00; and
- Harry Liebovitz $50,000.

83 By early January, Chester had changed his instructions to Linton, who then told Ennis to prepare minutes reflecting the following bonus payments for 1981:

- Chester $700,000;
- Morris $700,000;
- Warren $550,000;
- Robert $600,000;
- Gary $500,000;

- Sheldon Kumer $200,000; and
- Harry Liebovitz $50,000.

84 Ennis prepared a corporate minute dated December 23, 1981 reflecting the revised amounts. The minute was signed by Morris and his wife Shirley. Morris testified that he had no recollection of when or how he came to sign the minute and that he would not have agreed to the bonuses referred to in the minute had he been aware of them. There was no evidence as to how this minute came to be signed.

85 In early 1982, Chester and Linton had further discussions concerning the bonuses. Chester told Linton that if Revenue Canada questioned the bonuses to his sons, they could be justified as compensation for the non-competition agreements. This was the first time that Chester connected the bonuses to the non-competition agreements in discussions with Linton. Linton could see nothing to justify the amounts of the bonuses declared in favour of Chester's sons. He indicated in a memo to Chester that they would be "hard pressed" to justify those bonuses either in the context of a valuation of IWS or a review by Revenue Canada. Linton indicated that, had the bonuses been paid directly to Morris and Chester, there would have been no problems with Revenue Canada, although bonuses of that size may still have raised a problem for anyone trying to prepare an accurate valuation of IWS.

86 Despite a recession in the steel industry in 1982, the 1981 bonuses to Chester's sons were paid in full during 1982. In fact, Warren received $40,000 more than had been allocated to him in the bonus minute of December 23, 1981.

87 Morris had been allocated a bonus of $700,000 for 1981. That bonus was "paid" by reducing Morris' drawings account to zero when the amount outstanding in that account combined with tax payable on that amount equalled $700,000. Morris never received a bonus cheque or any other documentation that referred to the 1981 bonus allocated to him. The treatment of Morris' drawings account and the payment of his income tax was the same in 1981 as it was in previous years.

88 Neither Linton nor Ennis gave any evidence about discussing bonus payments with Morris at any time before the execution of the December 23, 1981 minute. Linton testified that he reviewed the 1981 financial statements with Morris and that those statements revealed the 1981 bonuses. However, the only 1981 IWS financial statement with Morris' name on it referred to payments to directors and senior officers of some $530,000. It did not refer, as did the final IWS financial statement for 1981, to the payment of bonuses in the amount $3.3 million.

89 An IWS minute signed by Morris authorizing bonuses for 1982 in the same amounts as the 1981 bonuses is dated February 22, 1982, only one month into the 1982 corporate year. It is unusual for a bonus to be declared before the end of the fiscal year.

90 Morris acknowledged that he signed the 1982 bonus minute. He did not know how or when he came to sign it and testified that he was unaware of the bonuses until much later. He further testified

that he would not have approved the bonuses had he been aware of them. No other witness gave any evidence about how or when the February 22, 1982 minute came to be signed.

91 Chester's sons did not get most of their 1982 bonuses. They were reallocated to Chester in 1985. Part of Morris' $700,000 1982 bonus was also reallocated to Chester. Morris' drawings and the tax owing on those drawings totalled $288,000 at the end of 1983. That part of his $700,000 bonus was used to reduce the drawings to zero and pay the tax owing. The remainder, $412,000, was reallocated to Chester. According to IWS records and Linton, this happened at the end of 1983 and the $412,000 became part of the purchase price paid by Chester to Morris for Morris' shares. Chester testified that Morris had agreed to give up part of his 1982 bonus in February 1982 and that when Morris ceased to be a shareholder at the end of 1983, he was no longer entitled to the remainder of the bonus. Bonuses assigned to Kumer and other employees in 1982 were also reassigned to Chester.

92 The trial judge found that Chester lied about the reasons for the 1981-82 bonuses. Relying on the evidence of Morris and Linton, Linton's working papers, and Ennis' notes (produced for the first time after Chester had testified), she concluded that the bonus payments had nothing to do with the non-competition agreements and the Lasco transaction. Rather, Chester's attempt to connect the two was an after-the-fact justification for the payment of huge bonuses to his sons, all of whom were young and quite new to the business world. The trial judge held that Chester decided to pay these bonuses well after the Lasco transaction closed and that the actual amounts of the bonuses were in a state of flux until early in 1982. The trial judge also found that Morris was not aware of the payment of these bonuses to Chester's sons and would not have agreed to them had he been made aware of them.

93 The trial judge decided that the 1981 and 1982 bonuses were in fact a distribution of IWS shareholders' equity, realized from the Laidlaw/Superior and Lasco transactions and accumulated over the previous thirty years, to individuals who were not shareholders. She further held that there was no valid business reason for allocating millions of dollars in shareholders' equity to Chester's sons. The trial judge held that Chester's unilateral decision to pay these bonuses to his sons reflected Chester's view that by the end of 1981, neither Morris nor his sons were of any significant value to IWS. She also determined that the eventual reallocation of almost all of the 1982 bonuses to Chester demonstrated his control over the financial affairs of IWS and further put the lie to his evidence that the bonuses were compensation for the boys agreeing not to compete with Lasco.

94 The trial judge concluded that the decision to declare the 1982 bonuses in February 1982 was connected to the estate freeze discussions, which Chester was then having with his tax advisers. By declaring the bonuses in February 1982, Chester hoped to lower the value of IWS for the purposes of the estate freeze, while at the same time putting the company's equity into the hands of the people he thought deserved it: himself and his sons.

F. The Greycliffe Trucking Operation

95 Morris claimed that between 1978 and early 1984, Greycliffe and related companies controlled by Robert diverted funds from IWS, thereby diminishing his equity in the company. Morris alleged that Robert caused IWS to pay exorbitant trucking rates to Greycliffe and related companies and caused IWS to pay trucking-related expenses that should properly have been paid by Greycliffe. The Greycliffe allegations came down to three factual issues:

* Did Morris know of and approve of the trucking arrangements made with Greycliffe on behalf of IWS?
* Were the rates charged to IWS by Greycliffe exorbitant?
* Did IWS pay expenses relating to the trucking operation that should have been paid by Greycliffe?

96 The first factual issue turned largely on the trial judge's assessment of the credibility of the various witnesses. The second required a consideration of competing expert evidence. The third turned to a large extent on Robert's credibility and the relevant documentary evidence.

97 Up until the mid-1970s, IWS owned its own trucks and hired drivers. Morris was responsible for this aspect of the IWS operation. In 1977, after experiencing labour problems with its unionized drivers, IWS attempted to use brokers to truck its product. These attempts were not successful. According to Robert and Chester, Robert approached Chester and Morris and offered to provide reliable trucking services for IWS at competitive rates using Greycliffe, a company he owned with his brother Gary. Robert said that he saw this as a chance to solve the IWS trucking problems, while at the same time earning extra income for himself. Robert agreed that the trucking problems could equally have been solved by setting up a subsidiary of IWS to perform trucking services.

98 The Greycliffe operation started slowly. By 1981, Greycliffe was trucking scrap iron to IWS customers in the United States. After the Laidlaw/Superior and Lasco transactions closed in 1981, Greycliffe began trucking the IWS non-ferrous product to its customers. By the fall of 1981, Robert was in charge of the day-to-day operation of Greycliffe and the day-to-day operation of the non-ferrous division of IWS. Robert effectively decided the rates that Greycliffe would demand and whether those rates were agreeable to IWS. Between 1980 and 1983, Greycliffe's business with IWS increased substantially. Its rates also increased by almost fifty per cent.

99 Chester, Robert, and Kumer all testified that Morris was aware that Robert owned Greycliffe and that Greycliffe was hauling product for IWS. According to them, Morris, who was in the Windermere Road yard every day as Greycliffe trucks came and went, was heavily involved in trucking-related matters and regularly attended at the informal late afternoon meetings where trucking matters were often discussed. They also testified that Morris reviewed the rates charged by Greycliffe, saw Greycliffe invoices, and signed cheques payable to Greycliffe from IWS.

100 Morris' evidence was very different. He said that he learned in late 1981 or 1982 that Greycliffe was doing some trucking for IWS. He had no knowledge of the rates charged by Greycliffe and had nothing to do with approving those rates. He did not see Greycliffe invoices and

did not sign cheques payable to Greycliffe.

101 Chester and his sons had control of IWS and Greycliffe documents after the litigation started. Chester did not produce any cheques to Greycliffe signed by Morris or any invoices bearing Morris' writing. According to Gary, most of the Greycliffe documents had been lost in a flood in the basement of the Centennial Parkway property in 1989. In Gary's cross-examination, it became clear that many documents that had been damaged in the flood were produced by Chester in the course of the trial. The documents that had apparently survived the flood, for example, certain SWRI documents, tended to help Chester's case. According to Gary, the Greycliffe documents were damaged beyond repair. Chester did not produce any of those documents to support his defence to the Greycliffe allegations. The trial judge ultimately concluded at para. 1072 that Chester's failure to produce various critical documents, including those said to have been lost in the "selective" flood, "was not accidental, but deliberate."

102 Robert testified that, by agreement, Greycliffe charged IWS common carrier rates. He produced one rate sheet, which post-dated the Lasco transaction. That rate sheet showed common carrier rates for haulage by dump-style vehicles. Greycliffe was not a common carrier and was hauling in vans, not dump-style vehicles. According to the expert evidence, industry practice dictated that haulage by van and by non-common carrier should be at much lower rates than those charged by common carriers using dump-style vehicles.

103 Although Robert insisted that there were many other rate sheets used by Greycliffe, he was unable to produce any of them. He suggested that Revenue Canada had been provided with the sheets in connection with a 1985 audit. Robert acknowledged in cross-examination that he had made no attempts to recover any of the documents from Revenue Canada.

104 According to the expert evidence tendered by Morris, Greycliffe was charging almost fifty cents per mile more than it should have for the service that it was providing. According to that same evidence, Greycliffe was enjoying profit margins of between forty-four and fifty-four per cent when normal profit margins in the industry were less than five per cent. Morris' experts opined that the profit margins enjoyed by Greycliffe could be achieved only through gross overcharging and/or the payment of Greycliffe expenses by IWS.

105 Chester attempted to counter the expert evidence called by Morris with evidence from a trucker named Stockwell, who operated a trucking business similar to Greycliffe's during the relevant time. In his evidence, Stockwell suggested that his own levels of profitability were consistent with those enjoyed by Greycliffe. Subsequent evidence showed that Stockwell grossly overstated the revenues generated by his trucking operation. His own financial records indicated that far from making the profits he suggested he had made, his operation had lost money in 1983.

106 There was evidence from a Greycliffe truck driver that Greycliffe drivers regularly fuelled up at the Windermere Road and Glow Avenue properties. Robert testified that IWS charged the cost of that fuel to Greycliffe. IWS records show some fuel set off charges up until September 1981. No

set-off charges appear after that date.

107 In the course of the 1983 audit, the IWS auditors referred to an expense of $25,000-$30,000 for "truck repairs", and indicated that those repairs should be charged to Greycliffe. Robert testified that these repairs represented the cost of replacing tires, and were properly charged to IWS because the damage had occurred when the Greycliffe trucks went through the yard at the Windermere Road property.

108 It was common ground that Greycliffe did not have any insurance expenses. It was insured under the IWS policy. According to Robert, this was the same arrangement that had been made with the brokers who provided trucking services prior to Greycliffe.

109 Greycliffe had no employees other than Robert, his wife, and the truck drivers. IWS employees regularly did administrative work for Greycliffe for which IWS was not compensated.

110 The IWS financial records showed that from time to time, petty cash advances were made by IWS to Greycliffe. There was no evidence of any reimbursement.

111 By February 1984, after Morris had purportedly sold his IWS shares and IWS was owned entirely by Chester, Greycliffe stopped providing trucking services for IWS. By then, Greycliffe had a racehorse inventory valued at $1.2 million. This inventory was funded by the profits Greycliffe had made hauling product for IWS.

112 For its year ending May 31, 1981, Greycliffe had revenues of $459,000, almost all of which came from providing services to IWS. Greycliffe and IWS were reported as related parties in Greycliffe's financial statement. No such notation appeared in the IWS financial statement for 1981. Steven Wiseman, who prepared the financial statement, indicated that he did not regard the relationship between Greycliffe and IWS as relevant to the users of the IWS financial statement. He repudiated an earlier position in which he had said that it was a mistake not to report Greycliffe as a related-party, and his evidence given on discovery in which he had indicated that he was not aware of any related-party transactions for the 1981 fiscal year.

113 Wiseman testified at trial that he was not concerned about the competitiveness of Greycliffe's rates, even though he knew Robert controlled Greycliffe and also made trucking decisions on behalf of IWS. There was evidence, however, that in early 1982, Wiseman discussed the rates being charged with Taylor who in turn spoke to Chester. There was a concern that if Revenue Canada found the Greycliffe expenses to be unreasonable, it would not allow IWS to deduct them for tax purposes.

114 Wiseman directed all his questions and concerns about Greycliffe and IWS to Chester and/or Robert, not Morris.

115 Greycliffe had revenues of $693,000 in 1982, most of which came from IWS. In the course

of preparing the 1982 financial statement, Linton told Wiseman that Robert did not want payments to Greycliffe disclosed as related-party transactions in the IWS financial statement, if disclosure could be avoided. Wiseman's working papers reveal that he was made aware of Linton's request and that he was aware of the very large payments made to Greycliffe. Wiseman's notes also indicate that, by this time, Robert was signing all cheques.

116 Wiseman met with Linton and Chester to discuss the request that Greycliffe's transactions not appear as related-party transactions. According to Wiseman, Linton said that he did not want to disclose those transactions as he did not want to "wave a red flag" for the tax department. After the meeting, Wiseman instructed his subordinates to remove the related-party note that had appeared in the 1982 draft financial statement. A related-party note did appear in the final version of the financial statement, but it made no reference to Greycliffe. The 1982 financial statement was given to Robert.

117 The trial judge found that Wiseman knew that Robert and Linton did not want the Greycliffe related-party transactions disclosed on the IWS financial statements. She further held that this had nothing to do with concerns about attracting the attention of Revenue Canada since the transactions were revealed as related transactions in Greycliffe's financial statement.

118 The Greycliffe transactions were revealed as related-party transactions in the IWS 1983 financial statement. This was prepared in 1984 after the purported transfer of Morris' shares to Chester.

119 The trial judge accepted Morris' evidence that he was not aware of any of the details involving the arrangements between Greycliffe and IWS. Robert made the arrangements. Morris was aware in late 1981 or early 1982 that Robert and Gary owned Greycliffe and that Greycliffe was doing some trucking for IWS. He did not know what rates were being charged and he was not involved in the payment of Greycliffe's account. In reaching this conclusion, the trial judge relied in part on the evidence of Warren, to the effect that he had no familiarity with the operations of Greycliffe or the terms on which it carried IWS' product even though he was in the Windermere Road yard on a regular basis. On the trial judge's findings, at para. 425, Morris "received only snippets of information about Robert's Companies". She found that Morris would not have agreed to the arrangement between Greycliffe and IWS if he were aware of the details.

120 The trial judge also determined that Greycliffe charged IWS rates well above market rates, particularly after September 1981. She found that Greycliffe was charging common carrier dump truck rates, although it was not a common carrier and it was using van-style haulage. In her view, this two-fold overcharging resulted in rates that were exorbitant, about fifty cents per mile higher than they should have been.

121 The trial judge found that IWS was absorbing fuel expenses that should have been borne by Greycliffe. In addition, IWS was paying for truck repairs that were properly chargeable to Greycliffe, and absorbing insurance and administrative costs that should have been charged back to

Greycliffe. The trial judge summed up her findings at para. 438:

> I find that IWS could have provided its own trucking services. Greycliffe was incorporated only because Robert wanted to make additional income for himself. All Greycliffe profits could have been earned within IWS. Each of Robert's Companies performed services that could have been performed by IWS or its subsidiaries, and the profits therefrom could have been retained in IWS. Those profits came right off IWS' bottom line, and deprived its shareholders of equity, which should have remained in IWS.

G. The Share Sale and Related Lease in December 1983

122 Before 1982, Morris and Chester had two very brief discussions about Morris selling his shares to Chester. The first occurred in September 1981. Morris was angry about a confrontation between Michael and Robert, and said to Chester that their sons could never work together. He suggested that Chester buy his shares. The next day Morris told Chester to forget what he had said in anger the day before. The second brief conversation occurred in late 1981 when Chester brought up the possibility of Morris selling his shares to Chester. Morris said he had no interest in selling his shares and asked Chester not to raise the topic again.

123 In 1982, a recession hit the steel industry and IWS fell into a business slump along with the rest of the scrap metal business. According to Chester and Linton, there were concerns about Lasco's survival. If Lasco did not survive, IWS Ferrous would fail and IWS would lose a major source of income. Chester testified that at a dinner in the summer of 1982 at the Trocadero Restaurant in Hamilton, Morris said that he was no longer interested in an estate freeze, but wanted Chester to buy his shares. Chester testified that he was upset at this request and thought that Morris was trying to get out of the business when times were difficult. Chester suggested to Morris that Morris should buy Chester's shares. Morris declined, indicating that it would make sense for Chester and his sons to continue in the business. Morris denied that this conversation took place. He said that although business was not good in the summer of 1982, he knew that IWS was financially sound and would rebound. He had no interest in selling his shares.

124 Chester testified that he was not immediately interested in buying Morris' shares because of the difficult business conditions. He spoke to his sons who told him that he should consider buying the shares if the price was right. Chester testified that he had two or three discussions with Morris in the late summer and early fall of 1982. Morris insisted on secrecy and, according to Chester, did not want Taylor or Wiseman or anyone else to know about the possible share sale. Morris' insistence on secrecy precluded going to any outside source, such as Campbell, for a valuation of IWS. Chester indicated that Morris insisted that only Linton be told of the possible sale. Chester saw no need for outside consultation since in his view, "[w]e both had an identical interest in the Share Sale."

125 In November 1982, at Chester's request, Linton prepared a valuation of IWS. He had never

prepared a business valuation before. Linton had been told that the estate freeze would not proceed and that Chester was considering buying Morris out. Linton did not discuss the valuation with Morris and sent the valuation only to Chester. Linton valued IWS on a break-up basis, even though he acknowledged in his evidence that there was no possibility that IWS was going to be liquidated. He valued fixed assets at cost, placed no value on the IWS interest in IWS Ferrous, and concluded that because Morris did not contribute to the success of the non-ferrous division, the value of that division should not be reflected in the value of Morris' shares. Linton eventually concluded that as of October 31, 1982, IWS had a value of between $3 and $3.5 million. In arriving at that amount, Linton took into consideration the anticipated dividends in 1982 in the amount of $2,288,000, half of which would go to Morris. According to these figures, Morris' fifty per cent interest in IWS was worth between $2.6 and $2.85 million.

126 Chester testified that he thought that Linton's valuation was low. However, Chester gave a copy of Linton's valuation to Ennis in 1983 when Ennis was working on the share sale. No other valuation was prepared in connection with the share sale. Morris testified that he was never shown Linton's valuation. In his view, the valuation was ludicrously low.

127 The trial judge accepted Morris' evidence that the discussion at the Trocadero did not occur. She also found that by 1982, Chester and his family were not prepared to split IWS on a 50-50 basis with Morris and his family. Instead, they were systematically "stripping IWS of much of its equity and diverting it to [Chester's] side of the family" (para. 494). Next, the trial judge found that despite the 1982 recession, IWS was financially sound. She relied on the evidence of Wiseman in coming to this conclusion. The trial judge also concluded that by the fall of 1982, an estate freeze was no longer under discussion. Chester's focus had shifted to purchasing Morris' shares.

128 The trial judge considered Linton's valuation in some detail. She concluded that it was written for Chester and to serve Chester's purpose, which was to drive down the value of Morris' shares. In support of this conclusion, the trial judge observed that although Linton approached his valuation on a break-up basis, IWS was purchasing expensive new equipment and expanding its non-ferrous operation.

129 Ennis' diary indicates that he met with Chester and Robert to discuss the sale of shares in February 1983. This was about one month after Chester and Michael had a serious discussion about Michael's future in the company and Michael's concern that Chester and his sons were not treating Morris properly. Michael did not think that Chester wanted him working for IWS in 1983.

130 Ennis denied that the meeting in February 1983 related to a potential purchase of Morris' shares by Chester. He also denied having any discussion about the sale with Chester in November 1982. Ennis testified that he was first consulted about a possible share sale in April or May 1983 when he spoke to Morris at their synagogue. Morris told him that he was going to sell his shares to Chester and that he wanted Ennis to act for him. Ennis testified that he told Morris that he could not act for Morris or Chester and could not give tax or business advice. Morris assured him that he and

Chester would work out all of the details and the purchase price. They needed someone they could trust to draw up a contract that would reflect their mutual wishes. Ennis said that Morris told him that he and Chester had agreed that Chester would pay $3 million for Morris' shares.

131 Chester testified that he received a call from Ennis in May 1983, indicating that Morris had asked Ennis to call Chester about the share sale. Chester said that he and Morris then met with Ennis. Contrary to Ennis' evidence, Chester testified that the purchase price was not agreed on until months later. Morris denied discussing the share sale with Ennis at this time.

132 Ennis testified that in the summer of 1983 he had discussions and meetings concerning the share sale with both Morris and Chester. He eventually drafted a share sale agreement in July 1983 showing a purchase price of $2.65 million to be paid over several years. In addition, Morris would receive the $700,000 1982 bonus allocated in February 1982. The draft sale agreement was accompanied by a draft lease whereby the Blue Building and the Back 7.7 Acres of Centennial Parkway were to be leased to IWS by Chesterton and Morriston for $5,000 per month. According to Chester, this was the rent that Morriston and Chesterton had been receiving since February 1982 and took into account IWS' assumption of all environmental risks as well as Chester's agreement to take responsibility for the less fortunate members of the extended Waxman family. Ennis did not discuss the draft agreement or lease with Morris.

133 Ennis also prepared a document referred to as the "Lasco Covenant Agreement", whereby Morris and Chester undertook to abide by the IWS Ferrous shareholders' agreement and the Lasco management agreement. The agreement was specifically said to be binding on Morris, Chester, and their heirs. Morris was experiencing heart problems in the summer of 1983. Michael loomed as his heir.

134 The trial judge concluded that Chester and Ennis first discussed the share sale in late 1982 and were actively discussing the potential share purchase in the summer of 1983. Morris had no involvement in these discussions and was not aware of them. The Lasco Covenant Agreement was drawn on Chester's instructions exclusively for Chester's benefit in the event that something happened to Morris before Chester could complete the purchase of Morris' shares. Morris signed the Lasco Covenant Agreement at Chester's request, believing it had something to do with the Lasco transaction. He did not read it.

135 The trial judge rejected Ennis' evidence that his first discussion about the sale of shares was with Morris at the synagogue. Relying on Ennis' own records, the trial judge found that he had had at least two previous discussions with Chester. The trial judge also accepted Morris' evidence that there was no discussion about the sale of shares at the synagogue.

136 The trial judge found that by early 1983, after Chester had his discussion with Michael, Chester was even more concerned about Michael's potential involvement in IWS. He knew that he would not be able to dominate Michael in financial matters in the same way he had dominated Morris.

137 As summer turned to fall in 1983, IWS' financial situation improved along with the rest of the economy. According to Chester, he and Morris continued to negotiate the share sale. Morris wanted to retain control of the refuse division, to remain as president of IWS, and he wanted Michael, himself and Shirley to remain on the IWS payroll. Chester said that he agreed to all of these stipulations. Ennis continued to meet with Chester, but not with Morris. He said that he spoke with Morris from time to time and inquired about the course of the negotiations between Morris and Chester.

138 Linton met with Chester four or five times in the fall of 1983 to discuss the share sale. Morris was not there. Linton never spoke to Morris about the share sale, although he saw him on a regular basis.

139 Morris had a longstanding heart problem. In September 1983, his heart specialist scheduled him for an angiogram. Morris fainted in October and was hospitalized. His specialist advanced the scheduled angiogram and told Morris that he might have to undergo open heart surgery. Morris met with his doctor to discuss the risks inherent in the angiogram and open heart surgery. Michael, Shirley, and a business associate all testified that Morris was not himself in the last three months of 1983. Shirley described Morris as withdrawn, preoccupied, frightened, and nervous. According to Morris' doctor, this was not unusual for a person facing open heart surgery. Chester testified that Morris seemed to be his same old self.

140 Between late November and December 22, 1983 Chester had many meetings with Ennis and Linton concerning the share sale. Ennis' notes indicate that initially Chester wanted an option to purchase Morris' shares, but that on about December 19, 1983 Chester decided to purchase the shares outright. Chester had discussed various ways of financing the purchase with Ennis and Linton. These included: reallocating part of Morris' 1982 bonus to Chester; IWS paying a dividend to Chester and Morris; and Morris gifting part of the dividend back to Chester.

141 In these meetings, Chester and Ennis also discussed the IWS lease with Morriston and Chesterton, which had first been discussed in the summer of 1983. Chester instructed Ennis that the rent to be paid to Morriston and Chesterton was to be $2,000 per month rather than the previously mentioned $5,000 per month. Chester offered no explanation for this change. Morriston's proposed share of the rent, $1,000 per month, was less than Morriston's carrying costs on the mortgage on the property. Chester also instructed Ennis that various terms were to be included in the lease. These terms effectively prevented Morriston from doing anything with the property without Chesterton's approval.

142 In his testimony, Morris said that he was completely unaware of Chester's discussions with Ennis and Linton and played no role in any of them. He testified that Chester mentioned the possible purchase of Morris' shares to him twice in November 1983. Morris told Chester that he was not interested and later went to see Chester and specifically asked him not to bring the topic up again. Morris, who was not feeling well, felt that Chester was "trying to wear him down".

143 Chester and Ennis testified that in anticipation of Chester buying Morris out, Shirley's shares were transferred to Morris on December 8, 1983. Shirley resigned as a director on the same day. Share certificates and a resignation dated December 8, 1983 were in the IWS corporate records. Shirley had no recollection of signing the documents and Morris had no recollection of signing a related corporate minute. Ennis' notes indicate that these documents may actually have been signed in May 1984.

144 Chester testified that by about December 12, 1983, he and Morris had agreed on a purchase price of $3 million. According to Chester, this was more than Morris' shares were actually worth. But Morris was adamant that $3 million should be the face value of the purchase price, even if he actually received something less than $3 million and his tax liability significantly increased because of the mode of payment. Chester testified that Morris never explained his insistence on a stated purchase price of $3 million.

145 Linton testified that by the middle of December, it was understood that part of the purchase price would come from the reallocation of part of Morris' 1982 bonus to Chester. Ennis' notes also reflect this reallocation. Wiseman testified that $412,000 of Morris' 1982 bonus was reallocated to Chester for the purposes of the share sale.

146 Linton testified that on Chester's instructions, he determined the amount of Morris' drawings account at the end of 1983 and doubled it to take into account taxation, yielding $288,000. Linton then drew the account down to zero by attributing $288,000 to Morris. This amount was deducted from the $700,000 bonus attributed to Morris for 1982, leaving $412,000. The $412,000 was reallocated to Chester and used to purchase Morris' shares. Linton said that the purchase price of Morris' shares was increased from $2.65 million to $3 million to reflect the use of these reallocated funds.

147 Chester denied giving Linton any of these detailed instructions. He acknowledged that $412,000 of Morris' 1982 bonus was reallocated to him, but insisted that the reallocation was unconnected to the purchase of Morris' shares. Chester said that it would be "immoral" to use the reallocated funds to purchase Morris' shares. It was Chester's evidence that because Morris was no longer a shareholder at the end of 1983, he was no longer entitled to the bonus. The bonus was, therefore, properly reallocated to Chester.

148 Although Ennis said that he had asked Morris from time to time about the discussions with Chester, all of his lengthy meetings were with Chester, not Morris. Ennis took all of his instructions from Chester and provided Chester with all of the documents that he produced. In cross-examination Ennis said that he saw no need to speak directly to Morris about the terms of any agreement until Chester had decided exactly what he wanted to do and how he wanted to do it. Ennis assumed that Chester was discussing matters with Morris and providing Morris with copies of the various draft documents that Ennis prepared. Ennis summarized his role in the following words:

> I am not negotiating this deal. I was only a scribe. I was to take instructions and

> draw a document when they worked out their agreement. I never interfered. I never insisted how they conduct themselves. They are experienced intelligent people who have made millions of dollars and know exactly how to handle themselves. They don't need me giving advice. They would not accept advice from me ... they are people who give advice.

149 The trial judge held that by December 19, 1983, Chester's discussions with Ennis and Linton had crystallized to the point that he had decided to buy Morris' shares. The details of the transaction were in a state of flux. The trial judge rejected the evidence of Ennis and Chester and found that Morris was not involved in or aware of any of the discussions pertaining to the share sale. In coming to that conclusion, the trial judge referred to the absence of any reference to Morris' involvement in notes prepared by Ennis or Linton. The trial judge summarized her findings concerning the situation as of December 19th as follows:

* Chester wanted Morris' side of the family out of the business and had decided to purchase Morris' shares.
* Chester wanted the transaction consummated quickly because of concerns about Morris' health and Chester's desire to avoid having to deal with Michael.
* Chester did not want the IWS accountants, Taylor Leibow, or any outside valuators, lawyers, or accountants to examine the specifics of the proposed share sale. The only valuation that was prepared was done in November 1982 by Linton.
* Ennis was dealing only with Chester and Linton. He took his instructions exclusively from Chester and did not discuss the share sale with Morris.
* Morris was oblivious to the ongoing share sale discussions and consequently never sought any professional advice.

150 Chester and Ennis testified that they met with Morris at Ennis' office on December 20th and 22nd to complete the share sale documentation. According to Chester and Ennis, both meetings were long and several documents relating to the share sale and the related lease were discussed and signed at both meetings. They testified that all of the pertinent documents were read out loud line by line by Ennis' assistant, Ms. Butner. Ennis and Chester also testified that Morris raised certain objections and questions in the course of the reading of the documentation and that changes were made in response to some of his comments. They testified that Morris raised questions about the amount of the initial payment to him and the timing of that payment. As a result of these questions Linton was told to revise the agreement. Chester also gave evidence that the documentation could not be completed on December 20th because Morris insisted that notice of the share sale be given to Lasco to avoid any possible problems with the IWS Ferrous shareholders agreement. Consequently, the final version of the share transfer agreement was not signed on December 20th, but was signed at the second long meeting on December 22nd. Chester and Ennis testified that the same oral line by line review of the documents occurred at the second meeting.

151 Morris denied that he ever attended a meeting where the share sale documentation and the lease were explained or discussed, much less read out loud line by line. He could recall attending one meeting, although he did not know the date, when Chester told him to sign certain documentation that Chester referred to as "the sale". According to Morris, Chester told him to look over the papers. Morris assumed that the documents related to the day-to-day business of IWS and were the kind of corporate documents he had routinely signed without reading when asked to do so by Chester. Morris also recalled that when he was about to sign one document, Chester said to Ennis, "this is to save your ass". Morris did not know what Chester was referring to when he made the comment. One of the documents signed by Morris was a waiver of independent legal advice.

152 Morris testified that when he signed the documents he had complete trust in Chester. He was also very concerned about his own health, particularly his upcoming angiogram, which was scheduled for December 29th, 1983.

153 The trial judge accepted Morris' evidence. She found at para. 726 that the relevant documents were signed at one meeting and that they not were read aloud, discussed, or explained in any way to Morris:

> Morris did not understand at the time that the documents he was being asked to sign were out of the ordinary. He thought he was signing IWS documents as its President in the usual course. He signed the documents because Chester asked him to do so and because he trusted Chester and Ennis. He did not want or intend to sell his shares. He had no idea that he was selling his shares or signing a lease. ... I do not accept that Morris was involved in *any* negotiations that produced this deal [emphasis in original].

154 In rejecting the version of events offered by Chester and Ennis, the trial judge relied on several factors. She noted that although Chester testified that it was Morris who wanted Lasco advised of the transaction, it was in fact Chester and Ennis who drove to Whitby, Ontario from Hamilton to personally speak to the president of Lasco on December 21, 1983. At this meeting, Chester and Ennis gave the president of Lasco a notification letter describing the pending share sale. The trial judge found that this trip was made at Chester's insistence and was consistent with Morris' testimony that he had no knowledge of the pending sale. The letter Chester and Ennis provided to Lasco was also inconsistent with the transaction having been completed by December 20th.

155 The trial judge found, on the basis of the documentation, that the share sale was not in its final form on December 20th and that many of the relevant documents had not yet been prepared. The trial judge further concluded that the evidence of Chester and Ennis that they along with Morris sat in a boardroom for hours while Ms. Butner read the documents line by line did not have the ring of truth. She observed that the documentation contained many errors, which would have been spotted and corrected had the parties gone through the line by line reading of the documents as described by Chester and Ennis. Finally, the trial judge noted that in Chester's detailed statement of

defence, he referred to only one meeting, which he said occurred on December 22nd.

156 Under the terms of the share sale, Morris sold his shares to Chester for $3 million. One million dollars was payable on January 4, 1984, and the rest was payable in instalments over five years. IWS was to declare a 1983 dividend of $1 million, $500,000 payable to each of Chester and Morris. Morris was then to immediately gift his $500,000 dividend to Chester. Morris was to lend IWS $500,000 repayable on October 8, 1984.

157 Morris' shares were to be transferred to Chester in stages beginning with a transfer of eighty-four shares in January 1984. There was a dispute over whether the share sale was structured to provide for the transfer of title of all of the shares to Chester upon the first payment or whether title was to be transferred in stages over the payment term.

158 In addition to the share sale, Morriston and Chesterton were to enter into a fifty year lease with IWS, initially covering the front of Windermere Road (including the Blue Building) and the Back 7.7 Acres of Centennial Parkway, but eventually covering all of the Windermere Road and Centennial Parkway properties.

159 It was Chester's evidence that in addition to the elements set out above, the share sale required him to assume full responsibility for members of the extended Waxman family who could not look after themselves and required IWS to take full responsibility for any environmental problems that might develop on the properties. IWS was also to continue to pay salaries and benefits to Morris and Michael, who would operate the refuse division.

160 After a detailed review of the evidence, including expert evidence, the trial judge decided that virtually all aspects of the transactions described above were grossly unfair to Morris. Based on the expert evidence that she accepted, the trial judge concluded that as of December 31, 1983, IWS was conservatively worth between $8.73 and $8.96 million. These figures did not include the $1 million dividend declared in 1983 or the $6.6 million in bonuses declared in 1981 and 1982. According to the expert evidence accepted by the trial judge, a purchase price of $3 million was "not in the ballpark of reasonableness or fairness".

161 The trial judge further held that Morris did not actually receive $3 million. She found that almost $1 million of the purchase price was Morris' own money (the reassigned 1982 bonus of $412,000 and the gifted dividend of $500,000). The trial judge also adjusted the real purchase price downward to reflect the fact that Morris was to be paid over time and without interest. She concluded that in actual 1983 dollars, Morris received the cash equivalent of $1,594,721.

162 The trial judge found that the loan of $500,000 to IWS was grossly unfair to Morris. The loan was without interest and for no stated purpose. Interest rates in late 1983 were about twelve per cent.

163 The trial judge next turned to the gifting agreement, whereby Morris received a $500,000

dividend and immediately gave it to Chester. She found that this transaction resulted in double taxation for Morris in that he paid tax on the dividend and also paid tax when that same money came back to him as part of the purchase price. She also found that Morris was deprived of certain tax benefits that would flow to IWS from the declaration of the dividend. Finally, she found that through the gifting arrangement, Chester effectively used $500,000 of Morris' money to buy Morris' shares from him.

164 The trial judge also determined that the lease was entirely one-sided in Chester's favour. She concluded that the lease was so one-sided that Morris would never have signed it had he been aware of the terms. The one-sided terms highlighted by the trial judge included the following:

* The lease was for fifty years with no increase in the rent during the fifty year term.
* The rent, $2,000 per month ($1,000 payable to Morriston), was about $9,000 per month below fair market value according to the expert evidence accepted by the trial judge.
* The rent did not increase after 2001, when the IWS Ferrous lease expired and all of the Windermere Road and Centennial Parkway properties came under the IWS lease.
* Should IWS default on the lease, Morriston could not take any action without Chesterton's permission. Chester controlled both Chesterton and IWS.
* Morriston could not sell or mortgage its interest in the property without the permission of Chesterton. Consequently, although the rent being paid to Morriston would be less than Morriston's carrying costs, Morriston could not sell or assign its interest in the property without Chesterton's permission.

165 Having concluded that the transactions as documented were grossly unfair to Morris, the trial judge then rejected Chester's evidence that his obligations included the unstated obligations for potential environmental liabilities and family responsibilities. The trial judge found that there were no discussions about environmental liabilities and no estimates of potential clean-up costs as of the end of December 1983.

166 Morris recalled that on the evening he signed the documentation Ennis phoned him at Chester's request. Ennis was upset and may have been drunk. He told Morris not to blame Chester, that it was all Robert's fault. Morris was distracted by his own health problems and pending angiogram and did not ask Ennis for any explanation.

167 Morris also testified that he wanted to prepare a will before his scheduled angiogram on December 29, 1983. He arranged to meet with Wiseman and Ennis' associate, Kevin Hope, at his home on December 26th. In the course of their discussions, Hope told Morris that he did not own

the Centennial Parkway property. Morris was shocked when Hope told him that he did not own Centennial Parkway. He could not understand how the property did not belong to him. Morris said that he felt as though he was "finished". Despite this, Morris did not ask Hope for any explanation because he was preoccupied with his will, concerns about his own mortality, and looking after his affairs for his family. Hope did not testify.

168 In his testimony, Wiseman recalled that Morris was upset when he learned that Centennial Parkway belonged to IWS. Wiseman said that Morris told him that he had sold his shares in IWS. Wiseman said that he had several discussions with Morris in the next few days and reviewed the share sale documents with him and Taylor on December 28, 1983. Wiseman said that it was obvious that Morris did not understand any aspect of the agreement and was very upset with what had happened.

169 The trial judge rejected Wiseman's evidence that Morris told him about the share sale on December 26, 1983, and reviewed the documentation with him on December 28th. In rejecting that evidence, the trial judge referred to prior inconsistent statements Wiseman had made in an earlier affidavit, and the contrary evidence of Taylor. Taylor's evidence, which was consistent with Morris' evidence, was that Morris first learned of the share sale in early January 1984. The trial judge also accepted the evidence of Shirley that Morris went into the hospital on December 28th and remained with her either in the hospital or at home until the end of the year. He did not meet with Wiseman or anyone else on these dates.

170 Linton testified that he did not discuss the share sale transaction with Morris until January 1984. Linton further explained that pursuant to that transaction, IWS declared a 1983 dividend of $1 million and had two $500,000 cheques prepared, one payable to Morris and one payable to Chester. Linton said that Morris endorsed his cheque to Chester to complete the $500,000 gift required under the share sale transaction. Linton also testified that Chester paid Morris $1 million by a cheque dated January 4, 1984, representing the first payment on the shares. Morris signed a $500,000 cheque payable to IWS on the same day. That cheque represented the loan from Morris to IWS. Chester's bank records confirm that $1 million was deposited into his account on December 30, 1983. That amount is described as a dividend. There is no documentation referring to the $500,000 cheque said to have been given by Morris to IWS. Many of the relevant banking records, which were in the possession of IWS or Chester up to and during the litigation, were not available.

171 The existence of the alleged $1 million cheque dated January 4, 1984 from Chester to Morris was supported by a duplicate carbon copy of a deposit slip produced by Chester. No other bank documents, such as Morris' bank statements, were available, although according to Linton, copies of these documents had been kept in three different places under the control of Chester and IWS. Taylor testified that on January 4th, Morris received a $500,000 cheque from IWS and that on Taylor's advice, Morris deposited that at the Continental Bank.

172 The trial judge concluded that there never was a $1 million cheque payable by Chester to

Morris dated January 4, 1984. In coming to that conclusion, she relied on the evidence of Morris, Taylor, and the absence of relevant banking documents. She held that the carbon copy of the deposit slip was not authentic. The trial judge further held that Morris did not endorse a $500,000 cheque over to Chester, but that $1 million representing the total dividend had simply been deposited into Chester's account. Lastly, the trial judge held that Morris received $500,000 on January 4th and that this money came to him by an IWS cheque.

173 Morris testified that he first learned of the share sale on January 5, 1984 after he and Taylor deposited the $500,000 cheque from IWS into Morris' account at the Continental Bank. Morris said that he had trouble understanding the documents and the explanations given to him by Wiseman and Taylor. He was very upset. Taylor confirmed that Morris was unhappy with the deal.

174 Morris said that he spoke to Chester several times in January and that Chester repeatedly told him to "calm down, just take it easy". Chester assured Morris that they would talk later and that things would remain the same.

175 Morris met with Wiseman on several occasions in January 1984. Although Wiseman and Morris disagreed on when the conversations took place - Wiseman said late December 1983 and Morris said early 1984 - they agreed that Morris was very upset about the transaction.

176 Morris testified that Taylor arranged a meeting with Chester and Wiseman at which Morris understood that the share sale would be discussed. Immediately before the meeting Chester told Morris not to say anything in the meeting. To Morris' surprise neither Taylor nor Wiseman raised the topic of the share sale at the meeting.

177 In early January, Linton and Chester discussed clarifying the nature of the share transaction. In Linton's view, it was unclear whether the share sale agreement called for a completed or a staged sale. The nature of the sale had tax ramifications for Morris and a potentially significant impact on Chester's ability to direct dividends from the company exclusively to himself as the sole shareholder. Linton prepared documents instructing Ennis to revise the share sale agreement so that it more clearly reflected a sale completed in January 1984. Chester subsequently signed those amending documents. Morris refused to do so and never did sign the amended share sale documents. Chester testified that he did not know until a couple of years later that Morris had refused to sign the documents. Chester further testified that he had no reason to believe that Morris was dissatisfied with the share transaction in January 1984. He saw no change in his relationship with Morris. The trial judge rejected this evidence and found that Chester knew in January 1984 that Morris was unhappy.

178 It was Morris' evidence that during his discussions with Chester in January, Chester assured him that nothing would change. He said that Morris would remain as president, would draw a salary, as would Michael, and would keep the same benefits. The trial judge held that these "concessions" by Chester in January gave Morris some reason to believe that Chester would in fact undo the share transaction.

179 Morris was scheduled for open heart surgery on February 1, 1984. He testified that immediately before going into the hospital, he was afraid, concerned for his family's future, and upset at what had happened between Chester and him. He felt that everything he had worked for all his life had been taken away from him. On January 29, 1984, Morris wrote a stream of consciousness description of events addressed to Taylor and Wiseman that was to be provided to his son Michael, if Morris died in the hospital. He left a copy with Wiseman. These notes, referred to as the "notes from the grave", figured prominently in the argument of both counsel for Chester and Morris. The trial judge spent many pages analyzing the notes and considering the competing submissions. She concluded that, read in their entirety, the notes supported Morris' position that he did not know what he had signed and that he believed Chester had tricked him into signing the documents. The trial judge described the notes as being

> indicative of a very troubled man trying to grapple with a growing recognition that his brother, whom he had loved and trusted implicitly since childhood, had betrayed him (para. 844).

180 Morris gave evidence that the night before his open heart surgery, Chester promised to tear up the share sale. Wiseman also testified that Morris told him of this conversation shortly after the operation.

H. The Descent into Litigation

181 Although to the outside world Morris still appeared to be involved in IWS, the company came under Chester's control after January 1, 1984. On Chester's instructions, Morriston and Chesterton were billed by IWS for legal costs relating to the drafting of the 1981 IWS Ferrous lease and for bookkeeping and management services. Chester instructed that any amounts owing for these services should be deducted from the rent owed by IWS to Morriston and Chesterton under the December 1983 lease agreement. This set-off meant that apart from January 1984, Morriston did not receive even the $1,000 per month rental amount called for by the lease.

182 Linton testified that Morriston's loss of the rent was more than made up for by the gaining of a tax deductible expense equal to the amount of the administrative and legal fees charged to Morriston by IWS. Morris testified that he did not learn that Morriston did not get any rents from IWS after January 1984 until after the litigation had started. No one ever asked Morris whether the legal and administrative fees could be set off against the rent.

183 The trial judge found that in the absence of any documentation to support the charges to Morriston, she could not accept that the administrative and legal charges imposed by IWS were real. She found that they were invented to permit IWS to avoid paying even the modest $1,000 per month in rent that the December 1983 lease required IWS to pay to Morriston. She also found that Linton did not seek Morris' approval of this scheme or even advise him about it. The beneficiary of the scheme was IWS or Chester.

184 Within two months of Chester's assuming full ownership of IWS, it severed its trucking relationship with Greycliffe. Greycliffe purchased the trucks it had been leasing and immediately sold several of them to IWS. IWS resold them at a loss the following month. Robert explained that Greycliffe had stopped trucking for IWS because IWS lost many of its American contracts and high insurance costs made the trucking business less attractive. The trial judge rejected this evidence noting that although Greycliffe's insurance rates spiked briefly, they then returned to previous levels. The trial judge concluded that Greycliffe ceased its trucking operation because once Chester and his sons had total ownership and control of IWS it made no sense to continue to siphon off IWS profits to Robert's company by paying exorbitant trucking rates.

185 During their discussions in early 1984, Morris said that Chester had assured him things at IWS would not change. Morris understood this to mean that he would continue to receive drawings from IWS on an informal, as-needed basis. In fact, on Chester's instructions, Linton charged Morris' drawings against the $500,000 loan purported to have been made by Morris to IWS as part of the share sale transaction. Morris knew nothing about the supposed loan and was unaware that drawings taken from him by IWS in 1984 were being charged against that loan.

186 Morris testified that he learned in April 1984 that Chester had not ripped up the share sale as he had promised the night before Morris had open heart surgery. Chester continued to assure him that he would do so. Morris testified that in June 1984, Chester finally showed him the actual share sale documents. When Morris questioned the effect of the documents, Chester said they would talk later. Chester denied that this discussion ever took place.

187 Ennis, Taylor and Wiseman all became concerned that the growing difficulties between Morris and Chester could lead to problems in the day-to-day operation of IWS and in the financial affairs of the company. Ennis and Chester were very concerned that Morris had not signed the amended share sale documents. Although Morris did not sign these documents, the dividend declared by IWS in 1984 went entirely to Chester. Under the terms of the share sale that had been signed by Morris, he still held shares as of the end of 1984.

188 In the spring of 1985, Linton assembled the information needed to complete Morris' 1984 tax return, drafted it and sent it to Wiseman. Wiseman had concerns about whether the share sale as documented was a staged sale or a sale that was completed in January 1984. Linton told Wiseman that it was a completed sale. He prepared Morris' tax returns on the basis that Morris had sold all of his 250 shares in January 1984.

189 In the spring of 1985, Wiseman met with Morris to discuss his 1984 tax return. Wiseman told Morris that the share sale transaction had to be finalized for tax purposes. Wiseman described a meeting with Morris, Chester, and Taylor where the restructuring of payments and the share transfer was discussed. According to Wiseman, Morris did not raise any concerns about the share sale. Also in the spring of 1985, Linton and Ennis met with Scace. Morris was not at that meeting. He said that Chester told him that this meeting was to find out how to undo the deal.

190 Morris said that he did not want to acknowledge the sale of any shares to Chester in his 1984 tax return. Wiseman told him that he should fill out the tax form on the basis that he had sold his shares, pay the taxes to avoid any penalty, but not mail the return. As had been the case for many years, Morris' personal taxes were paid by Linton through IWS. Linton delivered an IWS cheque in the amount of $156,638 payable to Revenue Canada. Linton then deducted that amount from the outstanding amount of the loan owing to Morris by IWS. All of this was done without consulting Morris. On the trial judge's findings, Morris was still unaware of the $500,000 loan that had supposedly been made by him to IWS as part of the share sale transaction.

191 Morris also testified that he met with Chester and his sons in the spring of 1985 to discuss the concerns he had about filing a tax return reflecting a share sale that Morris said had never happened. Morris prepared rather detailed notes in anticipation of the meeting. Those notes included eleven points that Morris wanted to discuss with Chester and his sons. Morris discussed those notes in some detail in his evidence and the trial judge made extensive reference to them in her reasons. Chester and his sons denied that the meeting ever occurred.

192 In the summer of 1985, Chester told Linton to pay the taxes on his sons' as yet unadvanced 1982 bonuses and to transfer the remaining balances to him. Linton did so and transferred about $594,000 in after-tax dollars to Chester. He had earlier transferred $412,000 of Morris' 1982 bonus to Chester along with about $650,000 in 1982 bonuses initially assigned to Kumer and other employees. In addition to these amounts, in 1985, Chester received a non-taxable $250,000 dividend, a $42,000 taxable dividend and a $625,000 bonus. He also advised Morris by letter in November 1985 that he would be postponing the $500,000 share sale payment due in 1985 under the terms of the share sale agreement.

193 Morris testified that he learned about the 1981 and 1982 bonuses for the first time in the spring of 1985 when Wiseman told him. This was in the context of discussions about Morris' tax returns and a possible restructuring of the share sale. Although Wiseman said that this discussion occurred in 1984 and not 1985, he agreed with Morris' evidence that Morris was very angry when he found out about the size of these bonuses and that they were assigned to Chester and his sons. Morris spoke to Chester about the bonuses and was told they were not real, but were for tax purposes.

194 The trial judge found that Morris first learned of the bonuses in the spring of 1985. She also found that in the spring of 1985 the restructuring of the share sale was discussed, but that Morris was not a party to these discussions. Documents prepared for those discussions grossly overstated the amount of money Morris had actually received on the share sale. She also found that Morris was not told how his 1984 taxes were paid or of the existence of the loan account from which the taxes were paid. The trial judge found that Wiseman ignored the terms of the share sale agreement in preparing Morris' taxes and in treating the share sale as completed as of January 4, 1984. She held that on a plain reading of the agreement, the sale was a staged one and Morris still held shares in IWS after January 1984. Consequently, even if the share sale was real, Chester was not entitled to

take for himself all of the dividends declared that year.

195 The trial judge rejected Chester's evidence that the reallocation of his sons' bonuses to him was not intended to be permanent, but rather was done for banking reasons. She rejected his evidence that he was holding the money on behalf of his sons. On the trial judge's calculation, Chester ended up with over $2.5 million of the $3.3 million in bonuses declared for 1982. Morris received slightly less than $300,000.

196 The trial judge also concluded that as of the end of 1985, Morris had received some $1,125,000 on account of the share sale. He had received $500,000 on January 4, 1984, a $500,000 credit with IWS represented as a loan to IWS, and a $250,000 cheque from Chester in December 1984. The $500,000 credit was drawn down as IWS paid various expenses (e.g. taxes) for Morris.

197 On Morris' evidence, Chester continued to promise he would undo the share sale in 1985 and 1986. In one of those discussions, Chester promised that he would "straighten out" the share sale if Morris would transfer his Ancaster property to Chester's son Warren. Morris transferred the property to Warren for $1 on January 1, 1986. After the transfer, Morris said he asked Chester to make good on his promise, but Chester stalled him and never did keep his promise.

198 Chester denied any such conversation. He said that the Ancaster property was partially paid for with partnership money in the 1950s and that Morris willingly transferred the property to Warren. Warren testified that Morris was not impressed with Warren's idea of building a house on the property, but willingly gave it to Warren.

199 By the middle of 1986, Ennis could see that Chester and Morris were not getting along. There were numerous corporate documents that Morris, as president of IWS, had not signed. Ennis assumed that the disagreement between the brothers had something to do with the 1983 share sale. In a memo to Chester dated February 10, 1986, Ennis showed Morris as the owner of 145 of the 500 IWS shares. This description was consistent, although not exactly the same, as the terms of the share sale as documented at the December 22, 1983 meeting. According to the amended share sale documents drawn in early 1984, Morris did not own any shares after January 1984. Morris had never signed the amended documents.

200 In April 1986, following his long established practice, Morris requested that Linton look after his 1985 income taxes. Morris owed just under $49,000 in taxes. On Chester's instructions, Linton deposited a personal cheque for $60,000 from Chester into Morris' account and typed the reference "payment for 5 Shares" on the back of the cheque. Under the terms of the share sale $60,000 was due to Morris in December 1986. Linton then prepared a cheque from Morris payable to the Receiver General for Morris' taxes. Morris was never told of the source of the funds for the payment of his taxes. The trial judge found that Chester knew that Morris was unhappy with the share sale and was attempting to build a "paper" record to support Chester's version of events.

201 By late December 1986, Morris had become sufficiently concerned about the way things

were being done at IWS to send the following letter to Linton:

> [N]o cheques or moneys for Morris Waxman from any source can be deposited by you or withdrawn for me without my written approval. This applies to any and all documents for whatever reason.

202 On the same day, on Chester's instructions and without Morris' authorization, Linton deposited $440,000 into Morris' account. This represented the $500,000 payment due to Morris under the share sale minus the $60,000 that Chester had put in Morris' account earlier in 1986. Linton later denied making this deposit. Morris learned that the money had been deposited into his account in early 1987, but he gave instructions that it should be returned to Chester. Chester testified that he called Morris to ask him what was going on and Morris told him that he was having considerable difficulty with the situation. Morris said that he had not told his family about the share sale and that he now wanted to re-purchase forty per cent of the IWS shares. Chester told him "that's not going to happen" and deposited the $440,000 into a trust account. All IWS dividends and bonuses for 1986 totalling $612,000 were paid to Chester.

203 While vacationing in early 1987, Morris came to understand that the public perceived that he had retired from IWS. This upset Morris and upon his return from vacation, he arranged a meeting with Chester and his sons. In preparation for that meeting, he wrote out in point form the topics that he wished to discuss. These included Morris' claim that Chester had "concocted a scheme to take from me what we worked for" and Chester's promise to "tear up everything". After the meeting, Morris continued to talk to Chester. Chester and his sons said there was no meeting. The trial judge accepted Morris' evidence.

204 In April 1987, Chester instructed Linton to draw a cheque for $90,000 to pay Morris' income tax for 1986. The cheque was to be drawn on the trust account Chester had established earlier that year when Morris returned the $440,000 to him. Chester wrote a covering letter enclosing the payment to Revenue Canada. Morris was unaware of the cheque or the source of the funds.

205 The trial judge found that as late as October 1987, Chester was describing IWS as a partnership between himself and Morris. He used this description in an interview given to a well-known business journal. Chester's public posture gave Morris cause to believe that Chester would keep his word and return the affairs of IWS to the way they had been in the 1970s.

206 By April 1988, Morris was becoming frustrated in his attempts to get Chester to undo the share transaction. He told Chester that he would be prepared to go ahead with an estate freeze based on sixty per cent to Chester's family and forty per cent to his family. Chester testified that Morris made an offer in early 1988, but that he told Morris IWS was a totally different company than it had been in December 1983 when Morris sold his shares. Chester suggested that Morris was trying to get back into the company at a time when the economy was good and prices were up.

207 Morris' 1987 taxes were paid in 1988 with a cheque drawn on the trust account that Chester

had established for the share purchase funds Morris had been refusing to accept since late 1986. Linton prepared the documentation and initially testified that he discussed it with Morris. On cross-examination, he said that his instructions came from Chester. Morris continued to refuse to have anything to do with the money Chester had ordered placed in the trust account.

208 Morris testified that by the summer of 1988, he felt alienated at IWS. It seemed to him that Robert was taking more control of the operation. Morris went to see a lawyer who wrote to Chester in July 1988 indicating that it was Morris' position that there had been "serious breaches of fiduciary duty and other matters which are fatal to the agreements." Morris' lawyer suggested an exploratory meeting. The concerns expressed in the letter were not addressed by Chester before September 1988.

209 Morris testified that on September 7th, he finally told Michael about the share sale. Michael was very upset. He confronted and threatened Chester at his Windermere Road office and then went to the Centennial Parkway office and did the same to Robert.

210 On October 26, 1988, Linton handed Morris a letter firing him as president of IWS and removing Michael, Morris and Shirley from the IWS payroll and benefit plans effective immediately. Morris was surprised that Linton was firing the president of IWS and shocked that his health benefits were being terminated when everyone in the family knew his wife Shirley had just been diagnosed with bladder cancer and required surgery. On the same day, Ennis gave Morris an account for legal services to Morriston stretching back over many years. The next day, Chester instructed Taylor Leibow not to release any documents or information of any kind relating to any partnership or activity in which Chester had an interest. Linton refused to give Morris his personal documents or documentation belonging to Morriston.

211 Robert acknowledged that in October and November 1988, he surreptitiously removed some documents and copied many others he found in the SWRI offices located at Centennial Parkway.

212 Chester testified that Michael was seen burning documents at Centennial Parkway in November 1988. Michael denied this and the trial judge accepted Michael's evidence.

213 Although Morris was fired from IWS on October 26, 1988, Michael continued to operate SWRI at the Centennial Parkway property until he received a lawyer's letter dated December 21, 1988 demanding that he leave the premises. The next day security guards prevented Michael from removing SWRI's possessions from the property. A confrontation occurred and the police were called. Michael eventually left the property but not before he wrecked the SWRI offices. By this time, Morris had started his lawsuit.

214 On the same day that IWS fired Morris, Linton wrote him a letter demanding that he repay IWS $51,058.02 said to be owed to the company. This was the first written notice Morris had of the loan account, which had been established to reflect the supposed $500,000 loan made by Morris to IWS as part of the share sale agreement. All of Morris' drawings since that time had been debited

against that loan account. By October 1988 the account had a negative balance of just over $51,000. Linton acknowledged that he had never provided Morris with any statement of accounts showing the status of this loan account before October 1988. Linton took all of his instructions in relation to this account from Chester.

215 Morris' evidence, which the trial judge accepted, was that he knew nothing about the loan account. He understood, as Chester had promised in early 1984, that his drawing privileges had stayed the same. He did not know that his drawings were being debited against the supposed loan. The trial judge rejected Linton's evidence that he reviewed the account with Morris on a regular basis.

216 1988 was a very good year financially for IWS. Shortly after Morris commenced the litigation, IWS, on Chester's instructions, declared bonuses of $8,750,000 for 1988. Of those bonuses, $3 million were allocated to Chester, $2.5 million to Robert, $1.7 million to Warren and $1,550,000 to Gary.

217 At the end of 1988, Chester put $1 million into the trust account he had established when Morris refused to take money in payment for the purchase of his shares. Chester described this payment as "Full and final payment" of the amount owing under the share sale.

218 The trial judge found that when Chester learned in the summer of 1988 that Morris had gone to a lawyer, Chester decided to develop a legal complaint of his own in connection with Michael's and Morris' operation of SWRI. As noted above, Chester and Robert interfered with Morris' attempts to get SWRI documents in December 1988 and in the previous weeks had surreptitiously obtained and copied SWRI documents.

219 By January 1989, it was all-out war between Chester and Morris. Chester had launched a counterclaim and IWS was refusing to pay the medical bills arising out of Shirley's cancer treatment. Both sides were continuing to struggle over access to and control of SWRI files and documents. The trial judge ultimately held that Chester and those acting for him had no entitlement to those documents.

220 IWS declared bonuses of $6,450,000 in favour of Chester and his sons for 1989 and dividends in Chester's favour of $300,000.

221 Between 1990 and 1992, Chester and his sons received bonuses totalling about $4.7 million. A dividend of $2,250,000 was declared in favour of Chester in 1993.

222 The trial judge summarized her findings on the dividends and bonuses IWS paid to Chester and his sons between 1984 and 1993 as follows. IWS declared:

* dividends of about $3.2 million in Chester's favour;
* bonuses of about $11.5 million in Chester's favour;

* bonuses of about $6.4 million in Robert's favour;
* bonuses of about $3.3 million in Warren's favour; and
* bonuses of about $3 million in Gary's favour.

223 In September 1993, IWS transferred substantially all of its operating assets to Waxman Resources in exchange for shares in Waxman Resources. Philip purchased shares in Waxman Resources for $12 million plus Philip shares. By 1997, Waxman Resources had sold the Philip shares for some $18.4 million, thereby receiving a total of about $30.4 million from the Philip sale. IWS retained the Front 13 Acres at Centennial Parkway, a small piece of the property at Windermere Road, the grease pit at Glow Avenue, the December 1983 lease, and the name "I. Waxman & Sons".

224 The trial judge put her ultimate conclusion on the funds received by Chester and his sons from IWS in these words:

> Therefore, between 1984 and 1993, Chester/his sons/IWS received a total of $57,875,031 comprised of $24,258,000 in bonuses to Chester and his sons, $3,197,000 in dividends to Chester and $30,420,031.24 to IWS from Philip (para. 1101).

V

NARRATIVE OF THE SWRI CLAIMS

225 As described above, three claims relate to SWRI:

* Morris claimed that Chester induced Philip to breach its contracts with SWRI [the inducing breach of contract claim];
* Chester counterclaimed in the main action brought by Morris alleging that SWRI misappropriated business and corporate opportunities belonging to IWS; and
* Chester counterclaimed in the inducing breach of contract action alleging that fifty per cent of the common shares of SWRI were improperly transferred from Chester's children to Morris' children in 1982.

226 For the purposes of this narrative, the SWRI claims will be divided into three parts, which correspond roughly to the three claims:

(a) the incorporation and reorganization of SWRI;
(b) the operation of SWRI from 1982 to 1988; and
(c) the termination of the SWRI-Philip relationship in 1989.

A. The Incorporation and Reorganization of SWRI

227 SWRI was incorporated in 1977 by Evans Husband. Chester and Morris intended to use the company to bid for the Hamilton-Wentworth Region garbage contract. Morris was the prime mover behind this attempt to get what was a potentially very lucrative contract. He failed.

228 As incorporated, SWRI had both preference and common shares. IWS held the two thousand preference shares. Fifty common shares were held in trust for Chester's children and fifty common shares were held in trust for Morris' children. Morris and Chester were directors of SWRI.

229 Up to 1977 SWRI did not conduct any business or have any assets. It remained dormant until 1980 when it was used in connection with an attempt to secure a refuse contract known as the "Sheppard's Quarry" contract. It was anticipated that IWS would be entering into a non-competition agreement with Laidlaw/Superior as part of Laidlaw's purchase of the IWS refuse division. To circumvent that agreement SWRI was used as the potential party to the Sheppard's Quarry contract.

230 A receipt signed by Ennis' assistant indicated that Ennis & Associates received SWRI's books and records from Evans Husband on October 21, 1980. Ennis drafted a letter of intent in connection with the Sheppard's Quarry contract showing SWRI as a party to that agreement. Ennis testified that the books and records of SWRI did not arrive at his law firm until July 1982. The trial judge, relying on his office records, found that his firm received the records in October 1980. She also found that Morris pursued the Sheppard's Quarry contract with Chester's support and that Chester knew that SWRI was being used as the potential party to the contract to circumvent any possible limitations arising from the non-competition agreements required by Laidlaw/Superior in connection with the purchase of the IWS refuse division. The trial judge accepted Morris' evidence that Chester said he did not want Michael and Douglas to be required to sign any non-competition agreements with Laidlaw/Superior.

231 Morris did not obtain the Sheppard's Quarry contract. SWRI did not carry on any business until the middle of 1982. In 1982, Allen Fracassi, a principal of Philip, came to IWS with a proposal that Philip and IWS share a contract for the transport and disposal of 100,000 containers of cement kiln dust. IWS could not pursue this opportunity as it would be in breach of its non-competition agreements with Laidlaw/Superior. Chester also had little interest in the waste aspect of IWS' business. To him it was a very small part of the IWS operation and was not "deserving of my focus."

232 Morris and Michael testified that Chester encouraged SWRI to pursue the business opportunity presented by Fracassi. The trial judge found that the books and records of SWRI, which were now at Ennis & Associates, were then altered to remove any connection between SWRI and IWS and any connection between SWRI and Morris and Chester. This was done to avoid any potential conflict with the non-competition agreements. The two thousand preference shares initially owned by IWS were deleted from the books and records as were any references to Morris and Chester as directors. Michael and Douglas, who unlike Chester's sons were not bound by any non-competition agreement, became the owners and directors of SWRI.

233 Chester denied any knowledge of the restructuring of SWRI. He maintained that Morris had secretly instructed Ennis to transfer the SWRI shares from Chester's children to Michael and Douglas. The trial judge rejected this evidence. She found that given the close relationship between Ennis and Chester and Chester's dominant role in that relationship, it was inconceivable that Ennis would restructure SWRI to exclude Chester's children without first consulting with and receiving instructions from Chester.

234 Ennis testified that he knew nothing about the original share structure of SWRI. Morris told him that the common shares were to be transferred to Morris' sons. Ennis denied removing any material from the SWRI corporate records or altering those records. According to Ennis, he acted on Morris' instructions alone, without any supporting documentation, because SWRI was a worthless shell company. He said that when the materials arrived at his law firm from Evans Husband there were virtually no corporate records.

235 The trial judge rejected Ennis' evidence for several reasons. A handwriting expert testified that a word on an altered share certificate stub referable to the preference shares was in all likelihood written by Irene Cook, an employee of Ennis & Associates. The Ennis & Associates accounts indicated that the restructuring of SWRI and the preparation and backdating of corporate records from 1982 to 1979 was done by the firm. Finally the trial judge observed that there were several serious inconsistencies between Ennis' trial evidence and his evidence on discovery.

236 The trial judge concluded that in September 1982, Ms. Cook, on Ennis' instructions, prepared minutes of an SWRI directors' meeting backdated to August 1, 1979. The minutes documented the transfer of common shares to Michael and to Ms. Cook as trustee for Douglas (who was under eighteen as of August 1979). Corporate records were also prepared to show Michael and Ms. Cook as directors. Further documentation was subsequently prepared transferring the shares from Ms. Cook, in trust, to Douglas as of May 4, 1981, the date he reached the age of majority. Corresponding documentation described Ms. Cook's resignation as a director and the appointment of Douglas as a director. On the reconstructed corporate records there was no apparent connection between IWS and SWRI or between Chester and Morris and SWRI. The preference shares were gone and the common shares were transferred to Michael and Douglas, in trust, as of August 1, 1979.

237 There was no direct evidence that Chester gave any instructions to Ennis in connection with the restructuring. The trial judge concluded, however, that the restructuring was done on Chester's instructions. She relied on Ennis' evidence that on all "major matters" he would contact Chester before acting and seek his instructions. The trial judge concluded that the restructuring of SWRI to permit it to pursue the business venture presented by Fracassi was a "major matter".

238 The trial judge found that initially Chester was motivated to restructure SWRI as a way of getting around the Laidlaw/Superior non-competition agreement. By 1982, however, Chester also saw SWRI as a vehicle to be used by Michael to pursue the waste business apart from IWS and to

keep Michael occupied elsewhere. Chester believed that if Michael busied himself with SWRI and the remnants of the IWS refuse business he would not be likely to try and interfere in the scrap metal business. On the trial judge's finding, after the restructuring of SWRI, Chester and Morris both understood that it could be used by Michael to build an active business.

239 The trial judge also found that documentation signed by Chester's children agreeing to the transfer of the common shares of SWRI was signed in 1982 and backdated to 1979. She found that the lawyer Hayman had arranged for the necessary consents. In coming to this conclusion, the trial judge relied on Hayman's evidence that although he had no specific recollection of obtaining these documents, it was his normal practice to obtain the beneficiary's written consent to transfers of shares. Hayman knew of no reason why he would not follow his usual practice on this occasion.

240 The original Evans Husband SWRI file went missing during the litigation. There was evidence that after the litigation started, Robert had reviewed the file in the Evans Husband office. Robert was asked if he removed any documents from the file during that review. The trial judge interpreted Robert's answer as indicating that he could not be sure whether or not he had removed any documents. The trial judge used the evidence of Robert's opportunity to remove the documents and his ambiguous answer to find that he removed SWRI documentation from the Evans Husband file after this litigation started.

241 The trial judge ultimately concluded that Morris, Michael and Douglas did not steal the shares of SWRI. Rather, Chester agreed that Michael could use SWRI to pursue the waste disposal business for himself and Douglas. When SWRI was "restructured" in 1982, it had no value and little attention was paid to the details of the corporate restructuring or the dates of the documents. Hayman had obtained the appropriate consents to transfer the common shares from Chester's children, but after this litigation had started Robert had removed them from the file. The preference shares held by IWS were cancelled as of 1982. The trial judge further held that to the extent that rectification of the SWRI records was necessary to reflect the changes made in the 1982, that rectification should be ordered.

B. The Operation of SWRI Between 1982-1988

242 SWRI started slowly. Its gross revenues for 1982 were $39,025. Gross revenues fell to $31,121 in 1983. Most of the revenue came from contracts with Philip for the removal of kiln dust and with Stelco for the disposal of wood. SWRI used IWS' administrative services and IWS provided haulage on some of the contracts. According to Morris, Chester approved of SWRI's involvement in these contracts. IWS could not have taken this business without violating its non-competition agreements with Laidlaw/Superior.

243 In 1984, SWRI's gross revenues increased substantially to $835,541. It continued to do most of its work with Philip and Stelco. Morris testified that Chester knew that SWRI's business was expanding. IWS continued to provide haulage services for SWRI in connection with some of its contracts. Many of the contracts were taken up by SWRI because either the non-competition

agreements with Laidlaw/Superior or the terms of the IWS Ferrous agreement prevented IWS from being involved.

244 In 1985, SWRI's gross revenues dropped to $405,895. In the course of that year, several waste accounts with IWS scrap metal clients were transferred from IWS to Philip. IWS had been allowed to keep these accounts under its contract with Laidlaw/Superior. Morris explained that the accounts were moved with the full support of Chester because new environmental regulations put a heavy onus on those involved in the disposal of this kind of waste. Some of the accounts were handled by SWRI directly and others by Philip with SWRI receiving a commission. According to Morris, Chester was fully aware of and content with these transactions. When it was suggested to Morris that he had stolen these accounts from IWS for SWRI, Morris responded:

> The accounts were turned over by Chester Waxman. They couldn't have been stolen. If he wanted them back, he had the power of an elephant compared to a flea, which Solid Waste was. All he had [to] do was walk to Stelco or any customer and tell them the accounts were his. He didn't need me to do that. He didn't need Michael to do [that].

245 SWRI's gross revenues for 1986 exceeded $1.3 million. The company continued to haul refuse of various kinds that had previously been handled by IWS. It also expanded a new business that involved hauling electronic air furnace flue dust ("EAF dust") from plants and processing for use in the manufacture of cement. Lasco became a prime source of the EAF dust for SWRI. Morris testified that Chester knew about this new aspect of the business and was instrumental in obtaining the contract with Lasco. IWS could not take the Lasco business because of its partnership with Lasco in IWS Ferrous. IWS was also not in the business of processing EAF dust for use in the manufacture of cement. Chester denied knowing anything about this new aspect of SWRI's business or assisting Michael in obtaining the contract with Lasco.

246 Laidlaw/Superior's non-competition agreements with IWS expired in 1986. Chester showed no interest in taking IWS back into the waste disposal business.

247 1987 was a very good year for SWRI. Gross revenues exceeded $3.1 million. The EAF dust business thrived, particularly with Lasco. Michael testified that Chester continued to assist him in developing new business for SWRI. Michael used his uncle's name to gain an introduction to potential customers.

248 1988 was also a good year for SWRI. Gross revenues were just under $3 million. Most of the revenue again came from the EAF dust business, about half of which was with Lasco. Philip continued to provide the haulage on several of the contracts and also had the necessary licences for the disposal of some of the environmentally sensitive waste products.

249 The trial judge concluded that between 1982 and 1988, SWRI operated in an open and public way out of the offices of Centennial Parkway. She rejected outright Chester's evidence that he was

unaware of the nature of SWRI's business activities until 1988. She referred to the evidence of Linton and Chester's sons who said they were aware of the nature of the SWRI business. She also referred to Ennis' evidence that he knew as early as 1983 that SWRI was an active company carrying on business. When Ennis was asked if Chester was aware of the activities of SWRI he said

> of course Chester knew that. Of course he knew they were carrying on business. Why would he not? They had offices at Centennial.

250 Linton also testified that "there was no secret" to the fact that SWRI was carrying on business in the 1980s. It participated in at least one project that attracted considerable public attention.

251 The trial judge further concluded that SWRI was distinct from and operated separately from IWS and that Chester knew this. Linton treated SWRI as a company separate from IWS, Ennis billed SWRI separately for services and when IWS needed an arm's length purchaser for a transaction involving a company called Intercelco, SWRI served as purchaser.

252 After an exhaustive consideration of the various accounts that SWRI serviced between 1983 and 1988, the trial judge concluded:

* Some of the SWRI accounts were with IWS customers. The accounts were initially held by IWS. Chester had agreed SWRI could take over these refuse contracts.
* Some of the business operated by SWRI, particularly the EAF dust business, was developed by SWRI and Philip. This business had nothing to do with IWS although Chester did help Michael get some of the contracts.
* Some of the SWRI contracts were contracts that IWS could not take either because of the Laidlaw/Superior non-competition agreements or because of IWS' involvement in the IWS Ferrous partnership.

253 Based on these findings of fact the trial judge rejected Chester's claim that SWRI had misappropriated IWS business and business opportunities. She dismissed this part of the counterclaim although she did allow relatively minor miscellaneous claims, which need not be detailed here.

C. The Termination of the SWRI-Philip Relationship in 1989

254 The relationship between SWRI and Philip grew and prospered until the early part of 1989. The legal relationship between Philip and SWRI varied from contract to contract. Sometimes Philip and SWRI were joint venturers and sometimes Philip was a sub-contractor of SWRI. Generally speaking, Philip did the physical work including transportation of the product as well as providing the necessary licences from the Ministry of the Environment.

255 Philip continued to do business with SWRI in January and February of 1989 following the commencement of Morris' lawsuit against Chester and Chester's counterclaim against Morris. Chester also counterclaimed against Philip. Fracassi and Robert discussed the potential settlement of Chester's counterclaim against Philip. Robert wanted Fracassi to sign a statutory declaration, but he was not prepared to sign the draft provided to him by Robert. At one stage of the negotiations between Fracassi and Robert, Fracassi threatened to sue IWS for intentional interference with its economic relationship with SWRI.

256 IWS discontinued its counterclaim against Philip on March 7, 1989. On the same day, Philip terminated its relationship with SWRI. Morris claimed that Philip was induced to terminate the relationship with SWRI in part by a promise from Chester to discontinue his counterclaim against Philip. Chester and Fracassi insisted that there was no connection between the discontinuation of the lawsuit and the termination on the very same day of the six-year business relationship between SWRI and Philip.

257 According to Fracassi, Philip terminated its business relationship with SWRI because Fracassi learned through Robert that SWRI had been cheating Philip on the Lasco contract involving the removal and treatment of EAF dust since 1986. The 1986 contract was for three years and in late 1988, Michael had negotiated a renewal of the contract.

258 Fracassi testified that in the course of discussions with the IWS lawyers about the counterclaim against Philip, he was presented with copies of three documents relating to the Lasco contract. The first was a copy of the Lasco contract with SWRI dated October 24, 1986, the second was a settlement letter between SWRI and Lasco dated February 24, 1987 altering the rates charged by SWRI as of October 1988, and the third was a proposal from SWRI to Lasco dated November 7, 1988 setting out the terms on which Michael proposed that the contract should be renewed.

259 According to Fracassi, he had received similar but not identical documents from Michael on or near the dates reflected in the three documents. Fracassi testified that the documents provided to him by Michael set out disposal and transportation rates that were lower than the rates set out in the copies given to him by the IWS lawyers in 1989. Philip had billed SWRI at these lower rates. Fracassi said that when he compared the documents Michael had given him with the documents the IWS lawyers had given to him in 1989 he realized that SWRI had been cheating Philip by paying it at the altered lower rates for transportation and disposal of the Lasco material. Fracassi said that as soon as he realized that his "partner" had been cheating him he immediately decided to terminate the business relationship. It was a coincidence that the termination happened on the same day that IWS discontinued its lawsuit against Philip.

260 It was common ground at trial that there were two sets of the three Lasco documents, one real and one altered. The transportation and disposal rates had been lowered on the altered set. It was also common ground that the altered set of the documents came into existence some time in or before March 1989. The dispute centred around the identity of the forger and the purpose of the

forgery.

261 Chester maintained that Fracassi should be believed. Michael had given him the altered version of the documents in the course of their business dealings to mislead Fracassi about the amount being paid by Lasco for disposal and transportation thereby allowing SWRI to increase its profit on the contract at the expense of Philip. Morris and Michael maintained that SWRI did not give Fracassi any of the Lasco documents. Philip was not a party to the contract and there was no need to give Philip the documents. Morris contended that Robert must have found copies of the actual Lasco documents during his surreptitious search through the SWRI documents in October and November of 1988. He must have then altered copies of the three documents and presented them to Fracassi to give Fracassi an excuse for ending the relationship with SWRI. Morris argued that the forged altered documents provided a pretext for the termination of the SWRI/Philip relationship, which in turn destroyed SWRI.

262 Fracassi and Robert told different stories about how they discovered the altered documents. According to Robert, he and Fracassi were reviewing the documents Robert had stolen from the SWRI offices and comparing them with the documents Fracassi had in his possession. They made a mutual discovery of the altered documents in the course of this comparison. Fracassi denied reviewing the documents with Robert. He said that the altered documents came, unrequested, from IWS' lawyers, with a letter which described the documents as "important and necessary in regard to this litigation". Fracassi did not know how Robert or IWS' lawyers acquired the documents but he did know that Robert had wanted him to see the documents so that he would know "what the transactions were".

263 The trial judge found that Philip did not receive copies of the Lasco documents from Michael. She accepted the evidence that Philip was not a party to the October 1986 agreement between Lasco and SWRI and that Philip was a sub-contractor of SWRI. In its capacity as a sub-contractor there was no reason to give Philip copies of the contract between Lasco and SWRI or copies of correspondence between Lasco and SWRI.

264 In rejecting Fracassi's evidence that Philip had been provided with the altered contracts by Michael and had relied on those documents when billing SWRI, the trial judge relied heavily on the evidence of the amounts actually charged by Philip as reflected in their invoices. Philip's charges did not coincide with the rates set out in the altered documents but rather coincided with the amounts set out in a letter from SWRI to Lasco dated November 17, 1986. That letter increased the rates that had been agreed on in October of 1986 as reflected in the October contract. There was no altered counterpart to the November 17, 1986 letter.

265 The trial judge found that whoever had prepared the altered version of the October 1986 contract was unaware of the November letter clarifying and adjusting the terms of the October agreement. In the trial judge's view, if SWRI were cheating Philip it would not have paid Philip at the rate described in the unaltered November 17, 1986 letter. In brief, Philip's own invoices

reflected payment in accordance with the actual terms agreed upon between Lasco and SWRI as of November 1986.

266 The trial judge's conclusion concerning the altered documents is set out at para. 1760:

> I find that Robert tampered with the documents, then presented them to Fracassi through his lawyer in both real and altered form in order to induce [Philip] to terminate its contract with SWRI. On March 3, or shortly thereafter, Robert, on Chester's instructions, also made Fracassi understand that if Philip stopped doing business with SWRI, it would be able to dramatically increase its revenues because it would be able to keep 100% of the profits it had been sharing with SWRI.

267 SWRI was virtually ruined by the termination of its business relationship with Philip. Within a year, SWRI revenues had dropped by ninety per cent. Philip acquired much of the business that it had previously shared with SWRI.

268 The trial judge found that Chester induced Philip to breach its contract with SWRI through the combined use of economic pressure (the dropping of the lawsuit if Philip stopped doing business with SWRI), promises of future business (the assuming of the SWRI contracts), and forged documents (the altered Lasco documents). She held that had Chester not interfered with the relationship between Philip and SWRI that relationship would have continued and prospered.

269 Morris tendered expert evidence that set out four ways in which the losses suffered by SWRI could be calculated. The trial judge chose the one most favourable to Morris. That approach assumed that the existing contracts between SWRI and Philip would be completed and renewed for an additional term. It also assumed growth in revenues from those contracts anticipated by SWRI management immediately before the breach. Using this methodology SWRI losses were about $2.8 million. After certain adjustments the trial judge fixed the damages at $2.5 million. She added $100,000 in punitive damages against Chester and Robert.

VI

THE GROUNDS OF APPEAL

A. The Findings of Fact: The Broad Attacks

i. Introduction

270 Chester's factum begins with the assertion that the trial judge made "at least" fifty findings of fact that were "demonstrably and palpably wrong". In oral argument, Mr. Lenczner, counsel for Chester, alleged "hundreds" of factual errors. The appellants contend that virtually every facet of the fact-finding process was fatally flawed. They argue that the trial judge disbelieved the witnesses

that she should have believed, believed the witnesses that she should have disbelieved, made erroneous assessments of the reliability of evidence, especially documentary evidence, ignored other relevant evidence, failed to properly weigh competing pieces of evidence, drew unwarranted inferences from primary findings of fact, failed to draw inferences that were obvious from other proven facts and gave unwarranted weight to certain expert evidence.

271 The appellants maintain that the factual errors made by the trial judge are so numerous, so obvious, and so crucial to the central issues at trial that they necessitate not only a rejection of the trial judge's factual findings, but also compel contrary findings of fact by this court. They submit that on a proper assessment of the evidence, Morris' claims should be dismissed in their entirety and Chester's counterclaims should succeed in their entirety.

272 Although the trial judge had to grapple with many difficult legal issues, this was first and foremost a factual dispute. The resolution of the factual disputes to a large extent determined the outcome of the trial. Not only were the facts hotly contested, the competing versions of the relevant events were diametrically opposed on most important factual issues. For example, Morris testified that apart from a few brief references, there was never any mention of him selling his IWS shares to Chester before December 1983, much less any negotiation for the sale of those shares. Chester, however, described lengthy negotiations between himself and Morris that went on for well over a year and culminated in two lengthy meetings in late December where he, Morris, and Ennis went over all of the relevant documents line by line at least twice.

273 Although there was evidence (e.g. parts of Wiseman's testimony and the "notes from the grave") that could have supported findings of fact about the share sale that were not consistent with either the evidence of Morris or Chester, no one suggested to the trial judge, or to this court, that those findings of fact should be made. The parties chose to stand or fall on the testimony of their chief spokesmen, Morris and Chester. Practically speaking, the trial judge was left with no middle ground on most important factual questions. Her findings of fact on the many crucial factual issues reflect the stark conflict in the versions of events presented in the evidence of Morris and Chester and in the arguments made at trial.

274 The either/or tenor of the evidence and arguments placed a premium on the trial judge's assessment of the credibility of the key witnesses, especially Morris and Chester. It is no overstatement to say that, despite the complexity of this litigation and the mass of evidence adduced by the parties, the outcome turned in large measure on the trial judge's assessment of the credibility of Morris and Chester. She made that assessment crystal clear in her reasons: Morris was credible; Chester was not.

275 As the trial judge's reasons demonstrate, her credibility assessments flowed from a detailed consideration of the entirety of the evidence. Her findings reflect both an overall assessment of the credibility of Morris and Chester and specific assessments of their credibility as it applied to the numerous events described by them in very different ways in their evidence. The overall credibility

assessments are obviously the product of the many specific assessments. The specific credibility assessments cannot, however, be viewed in isolation from each other. For example, the trial judge rejected Chester's evidence that Morris was aware of and agreed to the payment of bonuses to Chester's sons in 1979, 1981 and 1982. Her conclusion that Chester's evidence concerning the bonuses was not credible was a product not just of a close analysis of the evidence concerning the bonuses, but also of the trial judge's negative assessment of the credibility of Chester on other matters as diverse as his father's intentions with concerning the control of IWS after his death and Chester's knowledge of the operation of SWRI between 1982 and 1988.

276 The credibility findings made against Chester, and his sons, especially Robert, go beyond a simple rejection of their evidence as unreliable. The trial judge found that from 1988 onward, Chester and Robert engaged in a litigation strategy aimed at fabricating a case against Morris, while at the same time preventing Morris from pursuing his case against them. The trial judge held that Chester and/or Robert stole documents (e.g. the SWRI documents removed from the SWRI offices in the fall of 1988), fabricated documents (e.g. SWRI documents and the January 4, 1984 deposit slip), did not produce documents (e.g. the documents supposedly lost in the "selective" flood), and failed to produce other documents in a timely fashion.

277 The detailed and uncompromising credibility assessments made by the trial judge raise a very high hurdle for the appellants on these appeals. At every turn in their arguments, counsel for the appellants are met with credibility findings squarely against them. They cannot escape these pervasive credibility assessments by attacking these findings where they relate to specific issues in isolation from other credibility findings. The trial judge's finding that from the outset Chester's case was spun from dishonesty and greed hangs like a shroud over the appellants' submissions in this court.

ii. The Allegation that the Trial Judge Reasoned from a Predetermined Result

278 The appellants' attack on the trial judge's findings of fact is ambitious if not bold. Before turning directly to their arguments aimed at the findings of fact, it is necessary to dispose of an argument lurking just under the surface of the appellants' attack on the findings of fact.

279 In his facta, and to some extent in his oral submissions, Mr. Lenczner used language suggesting something other than factual errors by the trial judge. He referred to the trial judge "deliberately ignoring" and "manipulating" evidence in the course of her fact-finding. Counsel also submitted that the trial judge did not "treat the evidence objectively", was determined "to excuse every piece of evidence" that hurt Morris' claims, "pretended" that the evidence was other than it actually was in order to further Morris' claims, and "quite cunningly" drew inferences that favoured Morris.

280 Counsel's language strongly suggests an allegation of bias. When Mr. Lenczner was asked in oral argument whether he was alleging bias or some other form of improper judicial conduct, he disavowed any such contention and explained:

> I am saying that the trial judge started from a conclusion that she wanted to start from and worked backward and made facts to fit her conclusion which is not the correct process.

281 Despite counsel's statement, it remained unclear to the court at the end of argument whether the appellants were alleging bias or some other improper conduct by the trial judge. Nothing during the course of the trial provides a basis for such a claim, and the appellants did not suggest otherwise. Despite the length and complexity of this bitterly contested trial, the trial judge exemplified throughout the highest standards of judicial conduct.

282 The submission that the trial judge improperly began with the conclusions "that she wanted" and worked backward in her reasons to justify those conclusions has no merit. The trial judge's observations early in her reasons provide a candid description of her thought processes as the evidence and arguments unfolded. These observations refute any suggestion that she began with a preconceived notion of the desirable result. She concluded her description of her intellectual journey in these terms at para. 24:

> After a detailed analysis of all of the evidence, I eventually preferred the evidence of two witnesses over the evidence of many: specifically, that of Morris and Michael over that of Chester, his sons, Sheldon Kumer ("Kumer") and others. I concluded, given the nature of the allegations and my acceptance of the evidence of few over many, that it was necessary to set out in some detail the basis for my factual findings.

283 The submission that the trial judge's reasons reveal that she began with the desired conclusion and analyzed the evidence with a view to justifying that conclusion, misunderstands the nature and purpose of reasons for judgment. Reasons for judgment are written after the trial judge has analyzed the evidence, made the necessary credibility assessments and findings of fact, and reached her conclusions. Reasons for judgment are offered as an explanation for the result arrived at by the trial judge. They explain the result of the reasoning process. They are not exhaustive contemporaneous notes of the process itself: R. v. Sheppard (2002), 162 C.C.C. (3d) 298 at 308 (S.C.C.). They cannot be read as a travelogue of the trial judge's voyage of discovery through the evidence: R. v. Morrissey (1995), 97 C.C.C. (3d) 193 at 204 (Ont. C.A.).

284 The trial judge decided that Chester and others who testified in support of his version of events had lied, fabricated documents, destroyed other relevant documents, and failed to produce still other relevant documents. It is hardly surprising that her reasons paint those individuals in a poor light. Reasons for judgment that reflect and support conclusions and evidentiary assessments already made by the trial judge are not indicative of an improper analysis of the evidence or a preconceived notion of the appropriate result of the case. To the contrary, reasons for judgment that did not accurately reflect those conclusions and assessments would be seriously flawed.

iii. Overview of the Fact-Based Arguments

285 The appellants' attack on the fact-finding of the trial judge moves on three broad fronts. First, they contend that the findings were unreasonable. In support of this contention, the appellants ask this court to make an independent assessment of the evidence and test the trial judge's findings of fact against a reasonableness standard. For example, the appellants argue that when all of the evidence is examined, particularly the extensive documentation relating to the share sale, it is simply unreasonable to conclude that Morris did not know that he was selling his shares in IWS when he executed the various documents.

286 The second prong of the appellants' argument is based on alleged errors in the processing of the evidence by the trial judge. The appellants argue that the trial judge misapprehended evidence, failed to consider relevant evidence, and reached factual conclusions in the absence of any evidence to support those conclusions. For example, the trial judge found that Robert removed certain SWRI documentation from Hayman's file. This finding, say the appellants, was based on her understanding that Robert had testified that he may have removed such documentation. The appellants claim that Robert gave no such evidence.

287 The third challenge advanced by the appellants takes aim at the trial judge's credibility assessments. The appellants contend that even allowing for the high deference that this court must accord the trial judge's credibility assessments, many of those assessments are arbitrary, contrary to the overwhelming weight of the evidence, or are flawed by the various processing errors referred to above. For example, the appellants submit that the trial judge rejected Kumer's evidence concerning the 1981-82 bonuses for a reason which, even allowing for the widest deference, could not justify the rejection of that evidence.

288 In this part of our reasons, we address the appellants' challenges to the fact-finding of the trial judge on a general level with reference to some specific submissions to clarify our approach to these submissions and our response to them. Other specific submissions challenging findings of fact will be addressed in subsequent parts of these reasons. We do not pretend to address each and every factual argument made by the appellants. We are, however, satisfied that none of the arguments can prevail. To the very limited extent that any of these submissions demonstrate factual errors in the trial judge's reasons, those errors, considered separately or cumulatively, do not justify appellate intervention.

iv. The Standard of Review: Palpable and Overriding Error

289 As Cameron J.A. observed in H.L. v. Canada (Attorney General), [2002] S.J. No. 702 (C.A.) at para. 11:

> [T]he business of appeal - the right of appeal and the jurisdiction and powers of an appellate court - is very much that of statute and hence legislative policy choice. ...

290 Section 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA") provides for an

appeal from a final order of a judge of the Superior Court of Justice. Unlike other rights of appeal (e.g. s. 6(1)(a)), s. 6(1)(b) puts no limitation on the grounds that may be advanced on appeal from a decision by a judge of the Superior Court. Questions of fact may be raised on appeal. Section 134(1) of the CJA gives the appellate court wide remedial powers. Section 134(4) of the CJA recognizes that an appeal court can set aside findings of fact and, to a limited extent, make its own factual findings.

291 The Legislature has chosen not to address standards of review in the CJA. In the absence of any legislative pronouncement, the courts must fix the appropriate scope of appellate review. In doing so, the court must balance the goal of achieving justice in the individual case with the need to preserve the overall effective administration of justice. Jurisprudence from this court, and more importantly, from the Supreme Court of Canada, has determined that in appeals on factual findings, strong deference to the findings made at trial best strikes that balance. Absent statutory direction to the contrary, appellate courts must defer to all findings of fact made at trial unless the court is satisfied that the finding was the product of a "palpable and overriding" error. As the majority in Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 256 said:

> We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge - that of palpable and overriding error.

292 The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.

293 Whatever may be the arguments in favour of more aggressive appellate review of fact-finding, the policy reasons justifying strong appellate deference are powerful and have been repeatedly accepted by our highest court: see Housen at 248-51. The wisdom of the policy favouring appellate deference on questions of fact is evident in a case like this one. The evidence at trial occupied over two hundred days. The documents fill thousands of pages. The trial judge saw the witnesses and heard the evidence unfold in a narrative with a beginning, a middle, and an end. Our system of litigation is predicated on the belief that it is through the unfolding of the narrative in the testimony of witnesses that the truth will emerge. This court is not presented with a narrative, but instead with a description or summary of that narrative from the trial judge in her reasons, and from counsel in their written and oral arguments. The descriptions provided by counsel are not

designed to tell a story, but rather to support an argument. Of necessity, and in keeping with their forensic role, counsel's description of the narrative at trial is selective and focuses on parts of the narrative or on a particular interpretation of a part of the narrative.

294 In a case as lengthy and factually complex as this case, appellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the "palpable and overriding" standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding.

295 Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make.

296 The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: Housen at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

297 An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: Schwartz v. Canada, [1996] 1 S.C.R. 254 at 281.

298 For example, the trial judge found that by the late 1970s, Chester was trying to take control of IWS and push Morris out of the company. In connection with that finding, she analyzed evidence of a proposed trust drawn on Chester's instructions in connection with a potential estate freeze. The trial judge found that under the terms of the proposed trust, Chester would gain voting control of IWS and that Chester kept this fact from Morris. The appellants contend that the proposed trust did not give Chester voting control over IWS while Morris was alive. They submit that the trial judge misapprehended the effect of the document.

299 We think the appellants are correct in their interpretation of the trust document. However, the trial judge's conclusion that the relationship between Chester and Morris was changing and that Chester was forcing Morris out of the IWS operation in the late 1970s was based on many findings of fact. Her erroneous interpretation of the terms of the proposed trust cannot override all of the

other relevant factual findings she made. This error may be "palpable", but is clearly not "overriding".

300 Housen provides a detailed analysis of the "palpable and overriding" standard of review. Several specific points made in that analysis have direct application to the arguments advanced by the appellants. First and foremost, as indicated above, the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. This court cannot retry any aspect of this case.

301 The same deference must be shown to primary findings of fact flowing directly from credibility determinations (e.g. the trial judge's finding that Chester and Morris did not meet at the Trocadero restaurant to discuss the share sale in 1982), the interpretation of documents (e.g. the trial judge's interpretation of Morris' "notes from the grave"), or the weighing of expert evidence (e.g. the expert evidence concerning the valuation of IWS as of December 1983). This court must also show equal deference to findings of fact flowing from the drawing of inferences from primary findings of fact (e.g. the trial judge's inference from the unfavourable terms of the share sale and accompanying lease that Morris did not know he entered into those agreements): Housen at 248-56; Hodgkinson v. Simms, [1994] 3 S.C.R. 377 at 426; Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 at 388-89.

302 Housen is particularly important for its treatment of the standard of review as applied to the inference-drawing process at trial. The majority and dissent were divided on this issue. The dissent asserted at 296:

> [T]he appeal court will verify whether it [the inference] can reasonably be supported by the findings of fact that the trial judge reached. ...

303 The majority at 253 would not draw any distinction for the purposes of appellate review between "primary" findings of fact flowing directly from assessments of the credibility and reliability of evidence and secondary findings of fact based on inferences drawn from the primary facts.

> [T]he standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard. [emphasis added].

304 The majority in Housen explained its opposition to a standard of review based on an assessment of the reasonableness of factual inferences drawn at trial at 253:

> [W]e find that by drawing an analytical distinction between factual findings and factual inferences, the above passage [from the dissent] may lead appellate courts

> to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence [emphasis added].

305 After Housen, appellate courts will not review findings of fact, either primary or those drawn by inference, by asking whether on the totality of the record, those findings are reasonable. Cases from this court such as Keljanovic Estate v. Sanseverino (2000), 186 D.L.R. (4th) 481 at 488-489 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 300 and Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.) must be taken as overruled to the extent that they contemplate appellate review of findings of fact based on an independent albeit limited appellate reassessment of the reasonableness of the findings of fact made at trial.[1]

306 That is not to say that the approach favoured by the majority in Housen will change the result of many fact-based appeals. A process which yields findings of fact that cannot pass the reasonableness standard of review will almost always be tainted by at least palpable error. For example, in Equity Waste Management of Canada v. Halton Hills (Town), the court concluded that a finding of bad faith was unreasonable on the totality of the evidence. The court also found that the finding was the product of at least two palpable errors. Similarly, a finding of fact based on speculation and not logical inference will be subject to appellate correction not because the finding is unreasonable, although it clearly is, but because a process of fact-finding based on speculation is clearly wrong and, therefore, constitutes a palpable error: Rodaro v. Royal Bank of Canada (2002), 59 O.R. (3d) 74 at 94 (C.A.).

307 The emphasis in Housen on the application of the "palpable and overriding" standard to the process by which findings of fact are made moves reasons for judgment to the centre of the appellate review stage. Reasons for judgment can be so cryptic or incomplete as to provide little or no insight into the fact-finding process. Where reasons for judgment are so deficient that they effectively deny meaningful appellate review on a "palpable and overriding" standard, the inadequacy of the reasons may in and of itself justify appellate intervention: Sheppard, supra; R. v. Braich (2002), 162 C.C.C. (3d) 324 (S.C.C.).

308 While inadequate reasons may short-circuit effective appellate review of fact-finding and thereby justify appellate intervention, detailed reasons for judgment, which fully explain findings of

fact, make the case for a rigorous application of the "palpable and overriding" standard of review. Reasons for judgment which lay bare the fact-finding process at trial offer ample room for meaningful appellate review without resort to an evaluation of the reasonableness of the findings of fact made at trial.

309 The reasons for judgment in this case are extensive, to say the least. They offer a full review of the evidence, detailed findings of fact, extensive explanations for those findings, and an insight into the evolution of the trial judge's thought processes as this trial proceeded. The "palpable and overriding" standard of review as explained in Housen is made for reasons like those delivered by this trial judge. The reasons afford the appellants a meaningful right of appeal from findings of fact made at trial while at the same time demonstrating the wisdom of appellate deference to those findings of fact.

v. The Appellants' "Unreasonableness" Argument

310 The appellants rely heavily on the contention that this court could conduct a reasonableness review of the findings of fact made at trial. In particular, Mr. Lenczner argues that this court must consider whether specific findings were "reasonably supported by the evidence. Not unreasonably, but reasonably." He invites the court to weigh the evidence on contested issues, submitting that in most cases the evidence of Morris stood alone against the evidence of many other witnesses and the contemporaneous documentation. For the reasons outlined above, we do not agree that it is our function to conduct an independent review of the evidence to determine whether the trial judge's findings are reasonable. Rather, we must examine the reasons for "clear and palpable" error.

311 In the course of his submissions, Mr. Lenczner also advocated a much broader basis for factual review. In written submissions filed in reply, he described the standard of review in these terms:

> If a court has doubt whether a reasonable trier of fact, acting judicially could come to the conclusion the trial judge did, it must interfere. It cannot allow to stand a judgment it suspects as being unsafe.

312 This "lurking doubt" standard of review has never been accepted in civil appeals. It is close to the polar opposite of the "palpable and overriding" standard of review. Indeed, the "lurking doubt" standard has even been rejected in criminal appeals from conviction where s. 686(1)(a)(i) of the Criminal Code mandates a reasonableness review of criminal convictions: R. v. Biniaris, [2000] 1 S.C.R. 381. We cannot review the findings of fact against this standard.

313 Apart entirely from the various formulations of the standard of review articulated by counsel for the appellants, most of their fact-based arguments came down to an invitation to reweigh the evidence. As seductive as some of those arguments were, this court cannot do so.

314 Mr. Lenczner's submissions on the share sale are perhaps the best example of an argument

that invites reweighing of the evidence. In his factum, Mr. Lenczner spent pages reviewing the evidence relevant to the alleged share sale. He went over much of the same ground in his oral argument. His review of the evidence was done without regard to the findings of fact made by the trial judge. Indeed, much of his review assumed findings of fact that were directly contrary to those made by the trial judge. For example, he referred to Morris as having admitted that he knew he signed a waiver of independent legal advice at the time of the alleged share sale. Morris testified that he knew no such thing and the trial judge believed him. Similarly, in counsel's review of the evidence, he asserts that a meeting with a representative of Lasco on December 21, 1983 to advise him of the share sale was "suggested by Morris at the meeting on December 20". The trial judge found, based on Morris' evidence, that there was no meeting on December 20th and that Morris had no knowledge of the meeting with the Lasco representative.

315 This court cannot ignore findings of fact made at trial. It must accept each and every finding of fact unless it is tainted by a palpable and overriding error. Much of the appellants' argument on the facts ignores the requirement that appellate review take the facts as found by the trial judge unless on limited review of the facts there is cause to reject those findings.

316 The appellants present this as a case where the evidence of Morris stood virtually alone against all of the other evidence. Although it is true, as the trial judge observed, that there was more evidence supporting Chester's position on many of the contentious issues, we do not think that the trial judge's crucial findings of fact rest solely on the evidence of Morris. That is not to say that if they did, they would be subject to reversal on appeal. A trial judge conducts a qualitative and not a quantitative analysis of the evidence.

317 The trial judge's ultimate preference for Morris' version of events was based not on unquestioning acceptance of his evidence, but rather on a full assessment of the competing versions of events and a careful consideration as to the appropriate inferences to be drawn from her primary findings of fact.

318 Once again, the evidence concerning the share sale provides the best example of the complex nature of the fact-finding involved in this case. Morris testified that he had no idea that he signed documents purporting to sell his shares in IWS to Chester. Chester and Ennis testified that the sale was the product of long negotiations and that Morris knew exactly what he was signing. Clearly, the trial judge had to assess the credibility of these witnesses. In doing so, she had to look at the other evidence relating to the sale. Some of that evidence, for example Morris' signature on many documents relating to the transaction, offered potentially strong support for Chester's position. Other parts of the evidence, for example the evidence that the transaction and related lease as structured were grossly unfair to Morris, supported Morris' claim that he did not know about the sale or the lease. Still other evidence, for example Morris' conduct in the days and months following the sale, was equivocal and the inferences to be drawn from it depended very much on the trial judge's credibility assessments.

319 As the trial judge's reasons demonstrate, she was alive to the competing versions of events and to the evidence of prior and subsequent events that could shed light on Morris' state of knowledge. She considered all of the evidence, made her credibility assessments and assigned the weight to the evidence she accepted that she deemed appropriate. In the end, she accepted Morris' version of events. Clearly, the mass of evidence did not all point that way. It was open to the trial judge on this evidence to find that Morris did know that he was signing documents referable to the share sale. Other triers of fact might, as the appellants urge this court to do, have placed reliance on the contemporaneous documents and found in Chester's favour. The acknowledgement that a finding for Chester would have been reasonable is, however, no basis upon which this court can interfere with the contrary conclusion reached by the trial judge.

320 In the course of urging this court to redo the complex fact-finding exercise undertaken by the trial judge and to place more significance on certain parts of the evidence than did the trial judge, the appellants contend that the trial judge was obliged to make findings of credibility "in harmony with the objective contemporaneous documentation". We are unaware of any evidentiary hierarchy that requires a trier of fact to treat contemporaneous documents as the most probative form of evidence. Clearly, that kind of documentation was very important in this case. The trial judge's reasons reflect their significance. She referred at length to the mass of documentation placed before her. Sometimes she relied on contemporaneous documents to make findings of fact; sometimes she chose to make findings of fact that were not consistent with the contemporaneous documentation. For example, the trial judge relied on Linton's contemporaneous notes to reject the argument that the 1981-82 bonuses to Chester's sons were agreed to before the Lasco transaction and were compensation for the sons giving non-competition agreements to Lasco.

321 Where the trial judge did not give effect to contemporaneous documents, she provided detailed reasons for doing so. For example, in rejecting the argument that Morris' signature on the share sale documents demonstrated his knowledge of the sale, the trial judge referred to and accepted Morris' evidence that he habitually did not read or even look at documents presented to him for signature by Chester. The trial judge further found that Chester knew that Morris would not examine documents Chester gave him to sign and that Chester relied on Morris' usual practice when he placed the share sale documentation before him in December 1983. In view of these findings, the contents of the documents signed by Morris shed little, if any, light on what Morris knew about the share sale.

322 The trial judge's acceptance of Morris' evidence that he did not read the share sale documents before he signed them was crucial to the outcome of the entire litigation. It is fair to say that other judges may have rejected this part of Morris' evidence and concluded that he did know, at least on some level, that he was selling his shares. A holding that a reasonable trier of fact could have relied on the documentation is, however, far from saying that the trier of fact was obliged to make findings that were consistent with the documentation. The documentation was part of the evidence and had to be considered along with the rest of the evidence.

323 The appellants' submissions concerning the trial judge's interpretation of Morris' "notes from the grave" provide another example where this court was invited to consider the evidence afresh and draw its own conclusions rather than limit itself to a review of the trial judgment for "palpable and overriding" error.

324 The notes were prepared by Morris in late January 1984 just before he went into the hospital for heart surgery. The notes were left with Wiseman and Taylor and were to be given to Morris' sons if he died. Morris testified that when he prepared the notes in late January, he knew that he had signed documents purporting to sell his shares in IWS. He was upset with the way Chester had treated him and was worried about his pending surgery. According to Morris, the notes reflected his confusion and distress. The appellants argued at trial that the notes clearly demonstrated that Morris knew he was selling his shares when he signed the documents and that he had come to regret doing so.

325 Some of the notes are cryptic and ambiguous. Morris was examined and cross-examined at length on the meaning of the various items referred to in the notes. He testified that in the notes he was not distinguishing between what he knew by the end of January 1984 and what he knew when he signed the documents. He offered explanations for all of the items, none of which supported the appellants' contentions that he knew he was selling his shares. The trial judge analyzed this evidence over some sixteen pages in her reasons. She acknowledged that parts of the notes could be read to support the contention that Morris knew he was selling his shares in December 1983. She found, however, that "read as a whole and in context" they supported Morris' contention that he did not know what he signed and that he had been tricked by his brother and Ennis. In coming to that conclusion, the trial judge took into consideration Morris' explanation of the notes, the vague and inarticulate nature of parts of the notes and Morris' description of his state of mind when he prepared the notes.

326 The appellants do not point to any error in the trial judge's lengthy review of the evidence. Instead, they renew the positions advanced at trial. For example, Item 12 in the "notes from the grave" reads:

> Paul [Ennis] did not explain the documents to me except to make sure I signed one that exonerated him.

327 The appellants argued at trial, and again on appeal, that this note should be read as indicating that when Morris signed the document waiving independent legal advice, he knew what he was doing. The trial judge read this as indicating that by the time Morris wrote the "notes from the grave", he appreciated that he had signed a document purporting to exonerate Ennis from any liability in connection with Morris' signing of the documents. We see no palpable error in accepting Morris' explanation of what he meant when he wrote the note. It is not for this court to second-guess the trial judge's interpretation of the note.

328 The appellants make similar submissions on the trial judge's interpretation of Item 22 in the

"notes from the grave". It reads:

> If I had known that the Centennial property was not included, I would not have signed even under my condition.

329 The appellants argue that this was an admission by Morris that he knew he was signing documents referable to the share sale. All parties agreed that this item, if read literally, made no sense. Centennial Parkway was included in the purported share sale in the sense that it was owned by IWS. Morris explained that in writing the note, he meant to say that he would not have signed the documents had he been given any information about their contents. Some might find this a strained interpretation of the words in Item 22. It was, however, the trial judge's job to interpret the words. She was entitled to consider Morris' explanation in coming to that interpretation. In assessing that explanation, she had the benefit of seeing and hearing Morris testify for many days. She could assess his facility with the English language and factor that assessment into her interpretation.

330 The appellants have failed to demonstrate that the trial judge's treatment of the "notes from the grave" reveals any "palpable and overriding error".

331 In summary, this section of our reasons makes two points: first, the trial judge's findings of fact and credibility must be examined not against the reasonableness standard of review, but against the standard of palpable and overriding error; and second, our examination of the record reveals no such error.

332 However, we do not want to leave the impression that the appellants' attack on the trial judge's findings would have succeeded had we used a reasonableness standard of review. It would not. In our view, all of the trial judge's fundamental findings are reasonably supported - indeed, usually amply supported - by the trial record. To show this we take but one example, one we have used earlier: the trial judge's finding that Morris did not know he was signing away his interest in IWS or signing the accompanying lease. As we have said, other trial judges might have taken a different view of the evidence, but unquestionably Morris' evidence combined with the unfair terms of the sale transaction and the even more unfair terms of the lease, reasonably, even amply, supported the trial judge's finding.

333 We end this section with this observation: although "reasonableness" and "palpable and overriding error" are different standards of review they are not entirely distinct. The application of the one may inform the application of the other. So in this case, our conclusion that the trial judge's fundamental findings are reasonably supported by the evidence confirms, to a large degree, our principal conclusion that none of these findings is tainted by a palpable and overriding error.

vi. The Processing Error Argument

334 In addition to the all-out attack on the reasonableness of virtually all of the trial judge's

crucial findings on the central factual issues, the appellants also contend that the trial judge made innumerable processing errors in the course of her reasons. The phrase "processing errors" is borrowed from Keljanovic Estate v. Sanseverino, supra, at 489-90 where O'Connor J.A., for the majority, said:

> The second kind of error that may warrant appellate interference is what might be called a "processing error", that is an error in processing the evidence that leads to a finding of fact. This type of error arises when a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending that evidence. When the appellate court finds such an error it must first determine the effect of that error on the trial judge's reasoning. It may interfere with the trial judge's finding if it concludes that the part of the trial judge's reasoning process that was tainted by the error was essential to the challenged finding of fact.

335 The appellants argue that there was no evidence to support various findings of fact made by the trial judge. Clearly, a finding of fact in the absence of any evidence is a processing error of a most serious kind and constitutes a palpable error. It may or may not be an overriding error: Schwartz, supra, at 281.

336 Many of the "no evidence" submissions made by the appellants are, on closer examination, arguments that there was not enough evidence to support findings of fact made by the trial judge. The sufficiency of evidence is not open to review. Two examples from the many submissions made by counsel will suffice to make this point. The appellants maintain that there was no evidence that Morris' health in any way affected his cognitive functions in December 1983 when he signed the share sale documents. In the course of their submissions, the appellants, however, had to acknowledge that evidence from Shirley, Morris' wife, did support the contention that Morris was distracted and unable to concentrate in December 1983 because of his health concerns. Michael and Morris gave evidence to the same effect. The trial judge was entitled to accept the evidence of Shirley, Michael, and Morris. A finding based on that evidence cannot be characterized as a finding without evidentiary support.

337 Similarly, the appellants argue that there was no evidence to support the trial judge's conclusion that Chester's sons signed the necessary consents to the transfer of the SWRI shares when it was reorganized. Hayman gave evidence that it was his usual practice to obtain such consents, although he had no recollection of what had happened in this case. Evidence that Hayman acted in a certain way in performing routine legal duties is evidence that he acted in accordance with that habit on a particular occasion. That evidence of practice may not be particularly strong evidence does not mean that it amounts to no evidence.

338 Other "no evidence" submissions made by the appellants mischaracterize the nature of the challenged finding of fact made by the trial judge. For example, the appellants argue that there was

no evidence to support the trial judge's finding that Morris was not financially astute and was virtually incapable of understanding complex legal and financial matters. The appellants refer to evidence of many instances where Morris was very involved in complex business dealings.

339 As Mr. Harrison, counsel for Morris, demonstrated, however, the trial judge did not make the broad finding that Morris was generally incapable of understanding complex business negotiations and transactions. Rather, she found that insofar as the affairs of IWS were concerned, the natural abilities of Chester and Morris led to a clear division of responsibility between the two of them. This division of authority extended to Morris' personal finances, which in his mind were not distinct from those of IWS. Chester assumed responsibility for financial and legal matters. Morris was not sophisticated in such matters and trusted Chester totally, leaving decisions in those realms entirely to Chester. Morris assumed responsibility for overseeing the physical operation of the business. The trial judge found that it was this division in authority, combined with Morris' total trust in his brother that rendered Morris vulnerable to Chester's deception. There was ample evidence from sources as diverse as Linton, Taylor and Michael to support these findings of fact.

340 Some of the appellants' submissions that the trial judge ignored relevant evidence fail on a more basic level. Evidence that the appellants claim was ignored by the trial judge was in fact referred to, often more than once, by the trial judge in her reasons. These references demonstrate that the trial judge did not ignore the evidence. To the contrary, she considered it and rejected it as she was entitled to do.

341 For example, Chester argued at trial that the terms of the 1983 lease included IWS' assumption of potentially very significant environmental liabilities. On appeal, the appellants argued that the trial judge ignored this evidence when considering whether the terms of the lease made good business sense for both Morris and Chester. In fact, the trial judge referred to this evidence on more than one occasion and gave reasons for rejecting Chester's evidence that IWS' assumption of potential environmental liabilities was part of the lease arrangements.

342 On a first reading, the trial judge's reasons are impressive in both their thoroughness and lucidity. Repeated rereading of those reasons, with the benefit of thirteen days of oral argument and hundreds of pages of written argument, strengthens the initial impression. There is no basis for finding that the trial judge made important factual findings without any evidentiary support.

343 A second "processing error" alleged by the appellants is the failure of the trial judge to consider relevant evidence. The failure to consider relevant evidence can amount to a palpable error if the evidence was potentially significant to a material finding of fact. The appellants bear the onus of demonstrating a failure to consider such evidence. The mere absence of any reference to evidence in reasons for judgment does not establish that the trial judge failed to consider that evidence. The appellants must point to something in the trial record, usually in the reasons, which justifies the conclusion that the trial judge failed to consider certain evidence.

344 When assessing an argument that a trial judge failed to consider relevant evidence, it is

helpful to begin with an overview of the reasons provided by the trial judge. If that overview demonstrates a strong command of the trial record and a careful analysis of evidence leading to detailed findings of fact, it will be difficult for an appellant to suggest that the mere failure to refer to a specific piece of evidence demonstrates a failure to consider that evidence. The failure to refer to evidence in the course of careful and detailed reasons for judgment suggests, not that the trial judge ignored that evidence, but rather that she did not regard that evidence as significant. The reasons for judgment in this case leave no doubt that the trial judge knew this record, appreciated the contentious factual issues, and understood the positions of the parties and the evidence they relied on.

345 The trial judge, as she acknowledged in her reasons, did not refer to all of the evidence. No one would expect her to do so. For example, in considering the fairness of the lease allegedly entered into at the same time as the share sale, the trial judge made no reference to a lease for the same property entered into between IWS and Philip some ten years later. The appellants argue that the absence of any reference to this evidence demonstrates that the trial judge ignored it. We take the absence of any reference to this evidence as an indication that it had no significance to the trial judge in her consideration of the business efficacy of 1983 lease. This sorting of the evidentiary wheat from the chaff is the essence of the trial judge's job.

346 The appellants allege a third kind of processing error, which they describe as a failure to make consistent findings of fact. For example, they argue that the trial judge rejected outright the evidence of Linton wherever it assisted the appellants, but accepted those parts of his evidence that offered some support for Morris. As we understand this submission, the appellants argue that these inconsistent conclusions demonstrate that the trial judge treated the evidence differently depending on whether it helped or hurt the appellants.

347 We reject the premise of this argument. Consistency is not necessarily a hallmark of sound judicial fact-finding. Triers of fact must consider the entirety of the evidence of a witness in the context of the rest of the evidence that impacts on various parts of that witness' testimony. It is quite common for triers of fact to accept some, but not all, of a witness' testimony. For example, the trial judge accepted the part of Linton's testimony concerning the 1981-82 bonuses because that testimony was supported by credible documentation produced during the trial. She rejected other parts of Linton's testimony, for example his evidence concerning Greycliffe, because it was inconsistent with other evidence that she accepted and was not supported by the documentation. The trial judge's conclusion that Linton's evidence should be accepted in some areas and rejected in others not only does not reveal any processing error, but also offers strong support for Mr. Harrison's contention that the trial judge engaged in a careful and critical analysis of the entirety of the evidence.

348 A fourth processing error alleged by the appellants is the failure of the trial judge to make what the appellants described as "essential" findings of fact. In support of this submission, the appellants referred to the trial judge's failure to make any finding on whether the amounts of the

1982 bonuses were filled in on the minute referable to those bonuses when it was signed by Morris. The appellants contend that the trial judge had to make a finding on this factual issue before she could properly determine whether Morris knew about the bonuses.

349 We agree with the contention that a failure to make findings of fact that are essential to the ultimate determination of the issues in dispute amounts to a palpable and overriding error. We disagree, however, that the finding referred to above was an essential finding of fact. There was no evidence before the trial judge concerning the circumstances in which the minute was signed or the contents of the minute when it was signed. Morris, while acknowledging his signature, had no idea when and how he came to sign it. Neither Chester nor any of his witnesses gave any evidence about the circumstances surrounding the signing of the minute or its condition when it was signed. On the state of the evidence, and of course depending on her credibility assessments, it was open to the trial judge to conclude that whether or not the amounts were on the document when it was signed, Morris did not know about the bonuses. Indeed, on the evidence that she found credible, there was no basis upon which she could come to any conclusion on whether the amounts had been filled in on the minute before it was signed by Morris.

350 A fifth processing error relied on by the appellants arises out of the trial judge's alleged misuse of her rejection of evidence given by Chester and others in support of Chester. The appellants contend that the trial judge used the rejection of that evidence as evidence of the contrary facts. For example, Ennis and Chester testified that they were unaware of any medical problems that Morris was having in the fall of 1983. The trial judge rejected this evidence, but according to the appellants went on to use the rejection of this evidence as evidence that they in fact knew that he had serious medical problems in the fall of 1983.

351 Evidence that is rejected by the trier of fact has no evidentiary value and cannot be used as a basis for findings of fact: R. v. Hibbert (2002), 163 C.C.C. (3d) 129 at 148-52 (S.C.C.); R. v. O'Connor (2002), 170 C.C.C. (3d) 365 at 374-77 (Ont. C.A.). It would have been palpable error had the trial judge used the rejection of evidence given by Chester and Ennis as a basis for a finding that they knew Morris' health was precarious in the fall of 1983. There was, however, ample evidence from other sources to support that finding. Members of Morris' family and at least one other business associate gave evidence of Morris' obvious ill health in the fall of 1983. Morris fainted and had to be taken to the hospital in October 1983. Chester was aware of this incident. It was open to the trial judge, in the face of the evidence that Morris met and dealt with Chester and Ennis on a daily basis, to conclude that what was obvious to others concerning Morris' health would also be obvious to Ennis and Chester. This evidence provided ample support for the trial judge's finding at para. 641 that:

> Morris' health problems were becoming more evident in the fall of 1983. Chester knew Morris was feeling the strain both physically and mentally.

352 The rejection of the contrary evidence offered by Chester and Ennis, of course, made it easier

for the trial judge to draw the inferences she did from the evidence she accepted.

353 Mr. Lenczner also argues that the trial judge used her rejection of Chester's explanation for not obtaining an independent valuation of the IWS shares before the share sale as positive evidence that Chester did not obtain that valuation because it would have brought the previous bonuses and profit diversions to Morris' attention. Mr. Lenczner argues that this is another instance in which the trial judge used the rejection of evidence as the basis for a finding of fact.

354 We do not agree with this submission. It was common ground that no independent valuation of IWS was obtained in connection with the share sale, although one had been obtained earlier in connection with the possible estate freeze. The question for the trial judge was what inference, if any, should be drawn from the absence of an independent valuation? Chester's evidence that there was no need for an independent valuation because he and Morris knew the value of IWS was rejected by the trial judge as an explanation for not obtaining an independent valuation. She was left to decide what inference should be drawn from the absence of any valuation without regard to Chester's rejected explanation. There was evidence that Linton had warned Chester as early as February 1982 that the bonuses might not survive outside scrutiny. In assessing what inference to draw from the absence of any independent valuation, the trial judge was also entitled to consider the evidence, which she accepted, that the amount paid to Morris for his shares was well below fair market value. This evidence supported the inference that an independent valuation might well bring to light matters that Chester preferred left in the dark. The inference which the trial judge drew from the absence of an independent valuation of the IWS shares flowed from the evidence she accepted, not from her rejection of Chester's evidence.

355 Although evidence rejected as unworthy of belief has no evidentiary value, a finding that a party has fabricated evidence can be used as evidence against that party. The trier of fact cannot infer fabrication simply because evidence is rejected as untrue. There must be evidence of fabrication: R. v. O'Connor, supra.

356 The trial judge found that Chester and Robert fabricated evidence. For example, Chester alleged that he gave a cheque for $1 million to Morris in connection with the share sale on January 4, 1984. To support that evidence, he produced a carbon copy of a bank deposit slip showing a deposit of $1 million into Morris' account. The trial judge concluded that the deposit slip was a forgery. She gave reasons for that conclusion, which included (1) the absence of any other supporting banking documentation, although Chester, through IWS, had possession of Morris' banking records until well after the litigation began, and (2) Taylor's evidence that Morris deposited a $500,000 cheque from IWS and not a $1 million cheque from Chester into his account on January 4, 1984.

357 The evidence accepted by the trial judge permitted the inference that the bank deposit slip was forged. That finding, considered in conjunction with the other relevant findings, permitted both a rejection of Chester's evidence as untrue and a finding that he did not make a $1 million payment

to Morris on January 4, 1984.

358 No trial of this length and complexity will ever be error-free. Cloistered appellate counsel with months to pour over the trial record will find mistakes in the trial judge's processing of the evidence. We are satisfied, however, that none of those uncovered on this appeal rises to the level of "palpable and overriding" error.

vii. Alleged Errors in Credibility Assessments

359 Although the "palpable and overriding" standard of review applies to all factual findings, Housen, at 254-55 recognizes that findings of fact grounded in credibility assessments will be particularly difficult to disturb on appeal. Credibility assessments are inherently partly subjective and reflect the life experience of individual judges and their own perception of how the world works. Credibility assessments are also grounded in numerous, often unstated considerations which only the trial judge can appreciate and calibrate.

360 Deference to the findings of credibility includes giving full force and effect to those findings. An allegation that a trial judge has made a palpable and overriding error in assessing a witness' credibility can only be evaluated by examining the entirety of the record touching on that credibility assessment. Where a trial judge advances several reasons for rejecting a witness' testimony in its entirety as incredible, a demonstrated error in relation to just one of those reasons will not necessarily warrant reversal of the credibility assessment.

361 The trial judge's assessment of Robert's credibility makes this point. The trial judge disbelieved Robert's evidence on virtually every contentious issue. On her findings, Robert's conduct from the middle of 1988 forward was thoroughly dishonest. Her rejection of his evidence reflects the cumulative assessment of his credibility.

362 The appellants fasten on the trial judge's disbelief of Robert's evidence that he did not remove documents from Hayman's file on SWRI. In making this specific credibility finding, the trial judge relied on a single, ambiguous answer given by Robert in cross-examination as evidence that he admitted he may have removed the documents. We think she misapprehended this evidence. We are, however, satisfied that this mistake had no effect on her overall assessment of Robert's credibility or her findings of fact. Even if she was wrong in finding that Robert removed the documents, this did not affect her findings that the documents existed and at some point had been removed from the file.

363 In disbelieving Robert on virtually every significant fact, the trial judge relied on her finding that Robert had stolen documents, forged documents to induce Philip to breach its contract with SWRI, and had failed to produce and perhaps destroyed relevant Greycliffe documentation. We have no doubt that she would have arrived at exactly the same position on Robert's credibility had she not misunderstood his answer concerning the removal of documentation from Hayman's file. A single isolated misapprehension of one bit of the evidence does not justify interfering with the trial

judge's rejection of Robert's evidence as incredible on issues as diverse as the payment of the bonuses, the operation of Greycliffe, and the operation of SWRI.

364 Although credibility assessments, especially powerful ones such as those made in this case, are difficult to reverse on appeal, they are not immune from appellate review. For example, a credibility finding that is arbitrary in that it is based on an irrelevant consideration or tainted by a processing error can be set aside on appeal.

365 The appellants contend that several of the trial judge's findings of credibility reflect these kinds of errors. We reject those submissions. For the most part, these arguments reflect a misapprehension of what the trial judge said or refer only to part of the basis upon which the trial judge made the challenged finding of credibility.

366 For example, the appellants contend that Kumer's evidence was found to be unreliable based entirely on the fact that Chester had provided financial assistance to Kumer in 1979-80 when he was having trouble with the tax department. The appellants submit that the trial judge found that because Kumer received this assistance in 1979, he was prepared to lie in his testimony for Chester many years later. Counsel refer to this finding of credibility as "irresponsible" and arbitrary.

367 Assuming that a disbelief of Kumer based entirely on the financial assistance provided some years earlier by Chester would constitute an arbitrary finding of credibility, that is not what the trial judge did. Kumer, like Chester and his sons, gave evidence that the 1981-82 bonuses to Chester's sons had their genesis before the completion of the Lasco transaction in 1980 and provided compensation for the boys in exchange for their non-competition agreements. The trial judge concluded, primarily on the basis of the evidence of Linton and certain documents produced for the first time during the trial, that the decision to pay these bonuses post-dated the Lasco transaction and had nothing to do with the non-competition clauses. This finding was open to the trial judge and was buttressed by the evidence of Morris and the common sense observation that Chester's young sons hardly seemed entitled to half of the profits realized from the sale of two divisions of a company built by the combined lifetime efforts of Chester and Morris.

368 Having found that Kumer lent his voice to a fabricated explanation for the 1981-82 bonuses, the trial judge rejected his evidence as unreliable. She rejected his evidence not only as it related to the 1981-82 bonuses, but also as it related to other material matters in dispute such as Morris' knowledge of the relationship between Greycliffe and IWS. Rejection of the entirety of the contentious parts of a witness' evidence based on a finding of a single material, deliberate falsehood is not arbitrary. Juries are routinely told that they may reject a witness' evidence in its entirety if they are satisfied that that witness has deliberately lied to them on a material matter.

369 The appellants allege various other processing errors, which they say undermine all of the crucial credibility findings. Various combinations of processing errors are put forward in relation to various credibility findings. We do not propose to address each and every one of these arguments. Mr. Lenczner's detailed submissions directed at the trial judge's rejection of Wiseman's evidence

concerning his alleged discussions with Morris between December 26, 1983 and the end of 1983 are typical of this category of the appellants' arguments. We will address those submissions in some detail.

370 Wiseman testified that Morris told him on December 26th that he had sold his shares to Chester. Morris was upset. According to Wiseman, he and Morris discussed the sale on several occasions between December 26th and the end of the year. Wiseman further testified that Morris produced the share sale documents on December 28th and that he, Morris, and Taylor went over the documents.

371 Morris denied that he had any discussions with Wiseman concerning the share sale before the end of 1983. On his evidence, he only became aware of the share sale in early 1984. He testified that he did not see the share sale documents until much later.

372 The trial judge rejected this part of Wiseman's evidence. In doing so, she referred to:

* the inconsistencies between his trial testimony and his discovery;
* an inconsistency between his trial testimony and an affidavit he swore in October 1988; and
* the inconsistency between his trial testimony and a notation on the October 1988 affidavit.

373 Mr. Lenczner contends that the trial judge's rejection of Wiseman's evidence has no proper foundation in the record. He argues that the inconsistencies are so trivial as to be non-existent, that the finding ignores Wiseman's status as a "professional" and finally, that the notation referred to by the trial judge on the October 1988 affidavit was not made by Wiseman and, therefore, could have no relevance to his credibility.

374 Mr. Harrison responds that the trial judge's rejection of this part of Wiseman's evidence is not only free from any palpable and overriding error, but is also firmly rooted in the evidence. He begins with the sound proposition that one's status as a "professional" does not permit any presumption about the credibility of that person's evidence. He then submits that Wiseman testified at trial that Morris gave him the share sale on December 28, 1983. His trial testimony was very specific. At discovery, Wiseman was much less certain as to when he received these documents. In his October 1988 affidavit, he said that he had received them "in about January 1984".

375 Mr. Harrison argues that these answers reveal inconsistencies that were potentially significant. In any event, he submits that the significance of the inconsistencies was for the trial judge and not this court.

376 Mr. Harrison does not suggest that the notation on the October 1988 affidavit could assist in assessing Wiseman's credibility. Wiseman was not the author of the notation. To this very limited extent, the trial judge's reasons are in error, although it must be said that it is not at all clear that the

trial judge relied on the notation in assessing Wiseman's credibility.

377 Mr. Harrison further contends that in considering whether the trial judge's rejection of Wiseman's evidence reveals "palpable and overriding" error, this court must look beyond the factors specifically referred to by the trial judge in rejecting that part of Wiseman's evidence. Mr. Harrison says that the court must look to the evidence accepted by the trial judge. He refers to Taylor's evidence denying any meeting on December 28th and to the unchallenged evidence that Morris went into the hospital for an angiogram on December 28th and was indisposed for several days. Mr. Harrison submits that this evidence was accepted by the trial judge and that Wiseman's evidence concerning the events between December 26th and the end of the year simply cannot stand with that evidence.

378 Lastly, Mr. Harrison urges the court to have regard to the trial judge's overall assessment of Wiseman's credibility in considering whether her credibility finding on one part of his evidence reveals "palpable and overriding" error. For example, based on the evidence of Ray Harris, an expert called by Taylor Leibow, the trial judge found that Wiseman was not being truthful when he attempted to explain why he had not included a related party note for Greycliffe in the 1982 IWS financial statement. Mr. Harrison submits that having found that Wiseman engaged in a deliberate falsehood on a material issue, it was entirely appropriate for the trial judge to take a negative view of his credibility on other material issues, especially where that evidence was contradicted by witnesses, like Taylor, whose overall credibility was accepted by the trial judge.

379 The competing arguments with respect to the trial judge's finding that Wiseman's evidence was not credible as it related to the events between December 26 and December 31, 1983 demonstrate the following:

* The trial judge had a difficult credibility assessment to make. There were reasons to believe Wiseman's testimony and there were reasons to question his credibility.
* Counsel diligently and effectively presented the competing positions before the trial judge.
* The trial judge had a firm grasp of the trial record and the positions of the parties. Any deficiencies in her recollection or understanding of the evidence were insignificant.

380 In the end, we see no reason to interfere with her assessment of Wiseman's credibility, or her many other similar assessments. There was nothing arbitrary about her assessment, it did not reflect any significant misapprehension of the evidence, and it was not the product of an unfair balancing of the relevant credibility considerations. This trial judge may have attached more or less significance to certain factors going to the witnesses' credibility than other trial judges. It was her responsibility to decide how much weight should be given to the various factors. We are being asked to recalibrate her assessment of those factors. We cannot do so.

381 The appellants have not demonstrated any basis on which this court can interfere with the powerful credibility assessments made by the trial judge.

B. The Grounds of Appeal in the Main Action

i. Factual Issues in the Main Action

382 We turn now from the appellants' broad attacks to their specific challenges to the core findings of fact in the main action. These arise in the five most important episodes in the relationship between Morris and Chester, which were so carefully scrutinized in the main action. We have already dealt with a number of these challenged findings in addressing the appellants' broad arguments. We do so again in order to address the specific challenges raised by the appellants.

383 The first episode concerned the 1979 bonuses. The trial judge found Chester liable to Morris both for breach of fiduciary duty and, together with IWS, under s. 248 of the OBCA in connection with the 1979 bonuses. Judgment was granted against Chester and IWS for $125,000. Morris was also granted a tracing order to determine whether any of the $125,000 in bonuses declared in 1979 remains in the hands of persons other than a bona fide purchaser for value. In this connection (as with the other tracing orders made), the trial judge declared that Chester's sons, Robert, Warren, and Gary, are not bona fide purchasers for value.

384 The second episode concerned the 1981 and 1982 bonuses. The trial judge found Chester liable to Morris for breach of fiduciary duty in connection with those bonuses. She found Chester and IWS liable to Morris under s. 248 of the OBCA. She also found Chester's sons liable to Morris under s. 248 and for knowing receipt of the bonus monies they each received for these two years.

385 She quantified the relief against Chester and IWS at $2,312,000, which represents Morris' fifty per cent of the bonuses declared for those two years less the amount Morris actually received as bonus monies for these years. She also ordered that Morris could trace the bonus payments and recover them by a constructive trust or personally against Chester and IWS. She ordered Chester's sons to pay to Morris the sums of $622,000, $936,000 and $500,000 respectively, provided that ultimately Morris recovered no more than $2,312,000 in connection with the bonuses for these two years.

386 The third episode, and by far the most important, was the agreement that Chester said he made with Morris in December 1983 to buy Morris' shares in IWS. The trial judge found that Chester's actions in this connection made him liable to Morris for breach of fiduciary duty, undue influence, unconscionability and pursuant to s. 248 of the OBCA. She also found IWS liable to Morris pursuant to s. 248.

387 By way of remedy, the trial judge ordered that Chester held these shares on constructive trust for Morris from December 22, 1983 onward, and she ordered that they be transferred to Morris as of

June 27, 2002, the date of the trial judgment. She also ordered that Morris' lost profits during the period of constructive trust be quantified and that Morris is entitled to judgment against Chester and IWS for this amount or to trace these profits into the hands of persons other than a bona fide purchase for value without notice.

388 In this episode, the trial judge also dealt with the lease to IWS signed in December 1983 as part of the share sale. She found Chester liable to Morris and Morriston for breach of fiduciary duty, undue influence, and unconscionability in connection with that lease. She also found both Chester and IWS liable to Morris and Morriston under s. 248 of the OBCA. However, given that the loss to Morris and Morriston from this lease constituted a gain to IWS and that she had restored Morris to his ownership position in IWS, the trial judge did not order a separate remedy based on the lease.

389 The fourth episode addressed the profit diversions. The trial judge found Chester liable to Morris for breach of fiduciary duty, knowing assistance, and under s. 248 of the OBCA in connection with the profits diverted from IWS to Greycliffe and four other companies through which Robert provided trucking services to IWS. She also found IWS, Robert, and Robert's companies liable to Morris under s. 248. She quantified Morris' fifty per cent of these profit diversions at $1,180,073 and ordered personal judgment in this amount against Chester, IWS, and Robert. She also ordered judgment against Robert's companies in the amounts of the profits diverted to them. She granted Morris a tracing order in connection with these diversions.

390 The final episode involves the Ancaster property. The trial judge found Chester liable to Morris for breach of contract in connection with the Ancaster property and awarded Morris damages of $98,000.

391 Our evaluation of the appellants' specific attack on the fact-finding by the trial judge must be made in the context of the proper role of appellate review of facts as found at trial, which we have already described. The appellants argue that the trial judge was palpably wrong in her assessment of Morris, and in determining the fundamental facts that underpinned her conclusions in each of the episodes we have just outlined. We will deal with each of these episodes in turn.

(a) Morris' Financial Abilities

392 The appellants' attack is the finding, made in a number of different ways, that Morris had a relative lack of sophistication in financial matters. The appellants contend that the evidence compelled the opposite conclusion and that, given his financial astuteness, Morris surely knew he was agreeing to the bonus allocations, the share sale including the lease, and the profit diversions to Robert's companies.

393 Although there was evidence from which the trial judge might have drawn the conclusion urged by the appellants, there was clearly ample evidence to sustain the conclusion that she reached. There is no doubt that Chester, not Morris, ran the financial affairs of IWS. Taylor, the company's accountant, dealt with Chester, not Morris, regarding such matters. Linton, the company

comptroller, did the same and knew that Morris had no interest in or understanding of corporate tax matters. Others carried on aspects of Morris' personal banking for him. Michael testified about his father's limitations in this area. Indeed, Morris did so himself. Most importantly, the trial judge heard evidence over fifteen months that painted a picture of Morris' business abilities. She heard Morris testify over almost twenty-five days about many subjects that necessarily revealed his limited financial abilities. She was uniquely placed to draw the conclusion she did. It is not palpable error; indeed it is well-founded.

(b) The 1979 Bonuses

394 The appellants attack the basic findings of the trial judge concerning the 1979 bonuses, namely that Chester had never discussed them with Morris, and that Morris never agreed to them and indeed was unaware of them. The appellants point to Chester's evidence (that he discussed the 1979 bonuses with Morris and they agreed by early 1980 at the latest that all $250,000 would go to Chester's sons) and Morris' signature in three places on the 1979 bonus minute as necessitating the opposite finding.

395 However, Chester's version of events was contradicted by contemporaneous documentation produced by Linton and Ennis, which made clear that the 1979 bonuses were the result of a reallocation of a prior allocation of those bonuses and that this reallocation was not made until April 1981.

396 Moreover, Morris said he did not know about the 1979 bonuses until after the litigation began. His view that he and his brother should be building the company for the equal benefit of his sons and Chester's sons was entirely inconsistent with his agreeing to the 1979 bonuses going entirely to Chester's sons as Chester alleged. As to his signature on the bonus minute, there was ample evidence of Morris' practice of signing corporate documents brought to him by Chester without reading them, which is exactly what he said happened in this instance.

397 In all the circumstances, the conclusion of the trial judge that Morris neither knew about nor agreed to the 1979 bonuses is not palpably wrong. It is eminently supportable.

(c) The 1981 and 1982 Bonuses

398 One of the main issues in this action involves the bonuses allocated and paid by IWS for 1981 and 1982. These bonuses totalled $6.6 million: $3.3 million for each of the two years. For each of these two years, Morris and Chester were each to receive $700,000 and Chester's sons, Warren, Robert and Gary were to receive $550,000, $600,000 and $500,000 respectively.

399 The appellants do not contest the trial judge's finding that this $6.6 million represented the proceeds of two sales by IWS in which it sold its refuse division and its ferrous division. However, their fundamental challenge is to the findings that Morris did not know about these allocations, had no discussions with Chester about them and did not agree to them. The appellants argue that these

findings fly in the face of the evidence of Chester, his sons, and his brother-in-law, Kumer, and most importantly the two corporate minutes recording the allocations for these years. Morris signed each minute in three places. The appellants contend that the findings are palpably wrong and must be reversed, thus sustaining the validity of the bonuses.

400 We disagree with the appellants. There was ample evidence supporting the trial judge's findings and contradicting the story told by Chester, his sons and Kumer. That story was that the bonus allocations were all discussed with Morris and settled before the closing of the sale of the ferrous division in September 1981. However, Linton's evidence, supported by contemporaneous documentation from both himself and Ennis, made clear that the idea for the final allocation of these bonuses originated with Linton, not Chester, and was not raised until October or early November 1981. Although he discussed the idea with Chester, he never did so with Morris.

401 Although Morris acknowledged his signatures on the corporate minutes, he could not recall signing them. His evidence was that he did not read the minutes, no one told him about the bonus allocations, and he did not agree to them. The trial judge accepted this. In our view, it was clearly open to her to do so.

402 In addition to Morris' own evidence, there was evidence of his pattern of signing corporate documents in the appropriate place when asked to do so, but without reading their contents. There was evidence from Wiseman that when he told Morris about the 1981 and 1982 bonuses in early 1985, he believed that Morris was learning of this for the first time. Moreover, there was the fact that Morris raised no complaint about the allocations until 1985, which was completely inconsistent with his knowing about them at the time. It is inconceivable that Morris would have accepted, without protest, a distribution of the proceeds of the sale of two divisions created in large part through his own efforts where the allocation was so skewed towards Chester and his sons.

403 The appellants rely heavily on Morris' signatures on the two corporate minutes to demonstrate that Morris must have known of these bonus allocations. However, there was no evidence from anyone about the circumstances under which Morris signed. The trial judge could not know whether he was hurried and distracted and simply followed his previous pattern of signing corporate documents or whether he had time to calmly review the corporate minutes. The corporate signatures themselves, even where the allocations are on the same page an inch or two above those signatures as in the 1981 minutes, do not compel the conclusion that Morris knew of them, let alone agreed to them.

404 In summary, there was a clear evidentiary foundation for the trial judge's findings about Morris' lack of knowledge of these bonus allocations. She made no palpable error in making them.

405 The appellants also quarrel with the trial judge's finding that these bonuses were a distribution of shareholder equity arising from the sale of the two divisions of the company and the further finding that there was no valid business reason for allocating millions of dollars to Chester's sons. However, here again there was significant evidence in support of these findings. Linton said

exactly this in his testimony: he could see nothing to justify these bonuses to Chester's sons. The divisions that were sold had been built over forty years. Chester's sons were young men in their mid-twenties who had been with IWS for relatively short periods of time and for whom these bonuses represented exorbitant payments. The trial judge was perfectly justified in concluding that neither their services nor the non-competition agreements they signed as part of the two sales warranted these payments. She was equally justified in finding that these bonuses represented a distribution of shareholder equity.

406 In short, we conclude that the fact-finding of the trial judge in connection with the 1981 and 1982 bonuses is well-founded and does not constitute palpable and overriding error.

(d) The Share Sale and Lease

407 The share sale and the trial judge's findings of fact in connection with it are at the heart of this appeal.

408 The trial judge's core conclusion is that Morris did not participate in any negotiations to sell his shares and had no idea, when he was asked to sign the documents on December 22, 1983, that he was selling his shares or signing a lease. The appellants attack these findings and argue that they must be set aside and indeed reversed.

409 The trial judge came to these conclusions in the context of a very careful and detailed review of the evidence about the share sale and its aftermath. That evidence covered the seven years from 1982 to 1989. Her review, complete with numerous footnoted references to the evidence, encompasses some 740 paragraphs and 190 pages of her reasons for judgment as reported. In evaluating the appellants' attack on the trial judge's findings, three considerations, which we have already discussed in detail, must be kept in mind.

410 First, as with every other major episode in this very long trial, the trial judge was presented with two starkly different versions of events.

411 Chester, supported by Ennis, said that he and Morris negotiated the terms of the share sale over a series of meetings running from the summer of 1982 through to December of 1983. Morris then executed the agreements at two meetings on December 20 and 22, 1983 at which the documents were reviewed in detail. Thereafter, for a number of years, Morris conducted himself in a way that revealed that he was fully cognizant of the deal when he signed and that this conduct also constituted his ratification of it.

412 On the other hand, Morris said that he had no negotiations with his brother concerning the sale of his shares. When he was asked to go to Ennis' office on December 22, 1983 he was distracted by his own health problems and his imminent angiogram. He assumed that he was simply being requested to sign routine corporate documents. Receiving no contrary explanation, he signed as he was asked, without reading the documents, just as he had done many times before. Only on

January 5, 1984 did he learn what the documents contained and thereafter he consistently and vehemently told his brother that he had to straighten out what had happened and restore Morris' fifty per cent ownership of the company.

413 The fact-finding required of the trial judge was thus necessarily shaped by the parties, presenting as they did these fundamentally contradictory scenarios. In determining the facts surrounding the share sale, any choice of a third scenario lying between these stark alternatives would have faced the practical difficulty that neither side was saying that it happened that way. Indeed, Mr. Lenczner argued that this court (and therefore presumably the trial judge) could not determine that the truth lay somewhere between the two alternatives - for example that although there had been no negotiations, at some level Morris knew on December 22nd that he was signing away his shares. He submitted that to find these to be the facts and attach legal consequences to them would deprive Chester of due process since Morris had not pleaded his case on this basis. Thus, while the trial judge was certainly not bound to choose one story or the other, the way the evidence about the share sale was presented is a relevant factor in considering whether her finding that it happened as Morris described was palpably wrong.

414 Second, in making her fundamental findings, the trial judge was also guided by her overall credibility assessments of the major witnesses. These assessments were reached over the fifteen months of the trial and, with Morris and Chester, after seeing each of them in the witness box for a number of days. Particularly in connection with the share sale, much of her task required her to weigh Morris' word against Chester's. The trial judge was left with no doubt in her general assessment of their credibility: overall, she found that Morris was credible and Chester was not. Indeed, by the end of the trial she had concluded that Chester had fabricated much of his story.

415 Third, it must be remembered that this trial addressed a number of episodes in the relationship between these two brothers. While the share sale was by far the most significant, other episodes preceded it, such as the 1981-82 bonuses, and episodes that followed it, such as the story of SWRI. The facts as found by the trial judge reflect a significant degree of consistency in the behaviour of the principal actors throughout all of these episodes. The overall picture that emerges is one into which each episode fits coherently. The holistic nature of fact-finding in a complex trial such as this, with its many interrelated episodes, makes more difficult the finding of a palpable error at the core of any one episode taken in isolation. The appellants implicitly recognize this in asking that we find palpable error and reverse the fundamental findings of fact not just in the share sale episode, but in all the other episodes as well.

416 These general considerations must be kept in mind in considering the appellants' position that the trial judge's fundamental finding concerning the share sale constituted palpable and overriding error.

417 The trial judge accepted Morris' evidence that there were no negotiations and that on December 22, 1983 he thought he was signing corporate documents in the ordinary course, not

selling his shares to his brother.

418 The appellants argue that this finding cannot stand in the face of Chester's evidence, supported by Ennis, of substantial negotiations initiated by Morris leading to the execution of the agreement at two meetings on December 20th and December 22nd, and in the face of Morris' repeated signatures on the sale documents and Morris' own statements. The appellants contend that this evidence, taken together with Morris' conduct over the ensuing five years, require the setting aside of this finding and compel the conclusion that Morris knew he was selling his shares and is bound by his signature.

419 We do not agree. For a number of reasons, in addition to the general considerations we have just outlined, it was open to the trial judge to accept Morris' version of what happened.

420 The trial judge's conclusion reflects her general assessment of Morris' credibility. As we have already discussed, that assessment must be respected in this court. Over the course of this very lengthy trial and with ample opportunity to form her view, she found him a truthful witness. She acknowledged that she began with an initial scepticism about Morris' professed lack of knowledge of events, but as the trial unfolded and as she listened to the appellants' version of events, this scepticism dissipated. She gave a number of examples of instances where little and seemingly unlikely details of Morris' evidence were borne out in ways he could not have predicted. In the end, her conclusion about Morris' credibility was careful and considered, and based on reasoning that withstands scrutiny. This is just the kind of finding that attracts very significant deference in this court.

421 Beyond the general assessment of Morris' credibility, his version of events was also consistent with his clear and lifelong aspiration to pass the business on to the next generation. For his part, that meant his sons, Michael and Douglas. For Morris to negotiate and conclude the sale of his shares to his brother would have been entirely inconsistent with his fundamental objective. This reality strengthens the soundness of the trial judge's finding.

422 Equally, the trial judge's analysis of the manifest unfairness of the share sale provides important support for her findings about what happened. The trial judge found that in December 1983 the shares of the company were conservatively worth $8.735 to $8.963 million, apart from the $1 million dividend declared in 1983 to fund the share sale. The fair market value of Morris' fifty per cent interest would therefore have been about $5 million. Yet the share sale nominally called for Morris to receive only $3 million.

423 However, the trial judge found that Morris only received the equivalent of $1,594,721 for his interest, far less than its fair market value of $5 million, and even far less than the nominal sale price of $3 million. The trial judge gave three reasons for her finding:

* Some of the payments were in reality dividends to which Morris was entitled to in any event;

* The payments were sourced in part from the reallocation of Morris' bonus to Chester and a notional loan from Morris to Chester; and
* Other payments were made over several years and without interest.

424 Finally, the lease signed as a part of the share sale required Morris, through his holding company, to lease to IWS the land he owned together with Chester for a term of fifty years at a rate well below market, with no inflation protection or rent adjustment. Over the life of the lease the trial judge accepted that this represented a rent that was $2,529,607 below market.

425 Overall, as revealed by the trial judge's analysis of the share sale, it was patently unfair, unconscionable, and manifestly disadvantageous to Morris. Had Morris understood its terms, neither he nor any reasonable person in his position would have agreed to it. This alone constitutes a powerful validation of the trial judge's conclusion that there were no negotiations and that Morris did not agree to sell his shares.

426 Put together with the other considerations we have discussed, the trial judge had good reason to accept Morris' version of events. On the other hand, the trial judge had ample reason to reject Chester's story. She made no palpable error in doing so.

427 Here too, her assessments of general credibility are important, since so much of the debate about whether there were any negotiations is simply Chester's word against that of his brother. And as we have said, those assessments display no reversible error. Beyond that, however, there was much to support her rejection of Chester's story.

428 One example is the alleged meeting at the Trocadero restaurant. Chester testified that it was Morris who broached the share sale in the summer of 1982 when the brothers met over dinner at the restaurant. Chester made clear that the tone of his response to Morris' proposal was markedly negative. Morris denied that any such meeting took place. Chester's version was undermined by the fact that this allegedly seminal event is not even mentioned in his very detailed pleading. Moreover, his supposedly negative response is inconsistent with other steps he had taken to diminish Morris' voice in the company and with his desire to exclude Morris' sons from the company over the longer term.

429 A second example is Chester's testimony that he knew by the end of July 1983 that Morris was only interested in having Chester buy all of his shares. Yet despite this knowledge, supposedly derived from the negotiations that Chester said were going on, Ennis' notes reflect that as late as November 23, 1983 he and Chester were discussing an option to purchase the shares, not an outright purchase of shares.

430 A third example is Chester's testimony about extensive negotiations and discussions between himself and Morris over a number of months. However, there are no notes reflecting any such negotiations or discussions with Morris, or demonstrating that any of the many draft documents prepared by Ennis made their way to Morris. As the trial judge said, there are only notes of

discussions among Chester, Ennis, and Linton.

431 A fourth example concerns Ennis' evidence. He attempted to support many aspects of Chester's story that there were ongoing negotiations, but his evidence was seriously undermined by his own documentation. Ennis said that he was first consulted about the share sale in May 1983 when Morris approached him about it at the synagogue, a conversation Morris denied. Ennis' own notes reveal that well before that, as early as September 22, 1982, he was meeting with Chester in Morris' absence to discuss share purchase alternatives. Similarly, Ennis' evidence that he met with Chester on February 7, 1983 about another subject was contradicted by his own notes, which recorded a general discussion about the sale of shares. Ennis' records showed many meetings with Chester through the fall of 1983 and many drafts of the sale documents. In cross-examination, Ennis admitted that he never discussed share sale drafts or specific terms of the deal with Morris before December 20, 1983. In the end, the trial judge had an ample basis to find that Ennis' evidence provided no support for Chester's story of negotiations with Morris, and instead supported her conclusion that Chester conceived the sale entirely without Morris' knowledge and had Ennis prepare documents for Morris to sign, without his having seen them before.

432 A final example concerns Chester's testimony, again supported by Ennis, that the share sale documents were signed at two meetings at Ennis' office on December 20 and December 22, 1983. This testimony proved to be fraught with difficulties. Chester said that at these meetings, the documents were reviewed in detail, read aloud, and had changes made to them. This evidence was a vital part of Chester's story that Morris knew all about the share sale and agreed to it.

433 Morris, on the other hand, said there was only one meeting, on December 22, 1983, and that without explanation he was asked to sign documents in his various capacities as owner, officer, and director. He did as he was asked as he had done many times before. He trusted his brother and his lawyer and signed without reading the documents.

434 The trial judge rejected Chester's evidence that there were two meetings and found that the meeting of December 22nd took place as Morris described.

435 There was good reason for her doing so. Chester's original pleading, which he reviewed and approved before it was issued, referred to only one meeting, namely, December 22nd. Chester and Ennis gave accounts of the alleged December 20th meeting with Morris that were inconsistent in a number of respects. If the chronology had unfolded as Chester described, several of the documents would not have read as they did. These include a letter prepared by Ennis and used by Chester on December 21st in a meeting to explain what was happening to Lasco. The letter referred to the share sale as having an initial closing date of December 31, 1983, whereas Chester's and Ennis' evidence was that at the December 20th meeting, a decision was made to amend the agreement to provide for a January 1984 closing date.

436 Thus in the end, the trial judge rejected Chester's story about the negotiating and signing of the share sale and accepted Morris' story. Her fundamental finding at paras. 725-6 is as follows:

> On one occasion only, on December 22, 1983, Morris was called into Ennis' office to sign Share Sale documents. I accept Morris' evidence that the meeting was brief. None of the documents were read aloud, reviewed, discussed or explained.
>
> Morris did not understand at the time that the documents he was being asked to sign were out of the ordinary. He thought he was signing IWS documents as its President in the usual course. He signed the documents because Chester asked him to do so and because he trusted Chester and Ennis. He did not want or intend to sell his shares. He had no idea that he was selling his shares or signing a lease.

437 In our view, this finding does not constitute palpable and overriding error.

438 The appellants also launch a number of very specific attacks on the trial judge's fundamental finding.

439 The appellants' most vigorous assault on her core finding is founded on the fact that Morris signed and initialled the share sale documents, some of which were highly distinctive, in more than fifty places. The appellants claim that no one doing this could have been mistaken about what these documents so clearly indicated. The appellants argue that Morris must have known that what he was signing were documents effecting the sale of his shares.

440 We do not agree. The context in which Morris signed all these documents must be kept squarely in mind. The trial judge determined that over the months before the signing, Morris had not been involved in any negotiations with Chester to sell his shares and had no idea of the meetings between Chester and Ennis to set up this sale. Morris came to Ennis' office on December 22nd, completely trusting Chester, who was his brother and Ennis who was his lawyer. He simply followed his usual pattern in such a business circumstance, signing where he was asked to sign by two people he trusted implicitly. He was only a few days away from an angiogram, which was to be followed by open-heart surgery shortly after. He was understandably preoccupied with his own health. Moreover, given the unfairness of the deal, the trial judge was not palpably wrong in finding that Morris did not know what he was signing.

441 The appellants also mount an attack on the trial judge's core finding based on parts of Morris' own evidence. The appellants contend that taken individually, and certainly taken collectively, these references compel the conclusion that Morris knew he was selling his shares. The appellants cite a number of examples of both what Morris said at the time and what he acknowledged had been said to him.

442 Morris testified that on December 14, 1983, when meeting with Ennis about his will, he responded to a suggestion by Ennis that he sell his shares in the company to Chester by saying "I don't want to, but if I ever did, Chester wouldn't screw me and all the properties would have to

remain 50/50." Morris also testified that on December 22nd Chester said "this is the sale" but that since he was out of sorts that day because of his health problems, he did not know what Chester meant. Morris agreed that after he signed one of the documents that day, Chester said to Ennis, "oh, this is to save your ass". Morris also said that as he was driving back to the office he stopped his car and vomited. When asked why, he said, "probably because I wasn't feeling good. I could have been anxious, I could have been nervous about what was happening to me. The possibility of subconsciously maybe knowing what happened to me, I don't know. I don't know. I can't answer it. I just don't know. And I don't remember today." That night he said that Ennis called him and seemed drunk or crying. Ennis said not to blame Chester, that it was Robert's fault. Morris did not know what he was talking about. Finally, on December 26, 1983 when Morris met with Ennis' associate, Hope, together with Wiseman to prepare his will prior to entering the hospital, Hope told him that he did not own the Centennial Parkway property. Morris acknowledged that he was very taken aback and felt that he was "finished" and "a goner". However, while he was upset at this news, he was so confused and concerned about his looming angiogram that he did not understand what Hope told him. The appellants claim that if Morris still thought he owned his shares he would not have reacted so violently because as co-owner of IWS he would still have "owned" the Centennial Parkway property.

443 The trial judge was undoubtedly alive to all of this evidence. Indeed she referred to virtually all of it in her reasons for judgment. None of Morris' own statements is incompatible with the conclusion that Morris did not participate in any negotiations and did not understand that he was selling his shares, and simply did not comprehend the implication of the statements made to him. Moreover, contrary to the appellants' submission, this evidence does not compel the contrary conclusion to that reached by the trial judge, namely that Morris had negotiated the deal and fully understood what he was signing. Even if taken in isolation, this evidence does not provide significant support for such an inference.

444 Although it would probably have been open to the trial judge to infer from this evidence that while Morris had not negotiated a deal with his brother, he did vaguely understand at some level what was happening on December 22nd, it was certainly not necessary that she do so. And, as we have said, the way the case was presented to her made this a less likely conclusion.

445 In summary we cannot find that these statements by Morris render her findings about the share sale palpably wrong.

446 The appellants also rely on Wiseman's evidence regarding events on December 26 and December 28, 1983 to attack the core finding about the share sale. As we have said at paras. 369-380 of our reasons, it was entirely open to the trial judge to reject this evidence and conclude that Morris did not discuss the share sale with Wiseman in this time period and that he first learned of the sale on January 5, 1984.

447 The appellants also submit that Morris' conduct after January 1984 demonstrated that he

knew about and affirmed the share sale. The appellants refer particularly to Morris' acceptance of share sale payments, his investment and reinvestment of some of these payments, his signing of annual tax returns, which included capital gains from the sale of his shares, and his "notes from grave" made in late January 1984.

448 The appellants argue that in reaching her core finding on the share sale in the face of these successive acts of ratification, the trial judge committed reversible error. They urge this court to conclude that these events demonstrate Morris' complete knowledge, awareness, and acceptance of the transaction of December 1983.

449 The trial judge considered all the post-sale evidence with care, including this evidence, and rejected the conclusion advanced by the appellants. She found that Morris did not accept the share sale but rather complained about it from the time he first learned of it. This finding was well founded in the evidence. Morris testified to this effect. Taylor, Wiseman, and Ennis each knew of Morris' dissatisfaction with the sale from very early on. The trial judge accepted that Morris' treatment of his tax returns simply reflected his view that it was business as usual and his hope that Chester would respond to his complaint by putting it right and in the meantime he did nothing to make the dispute public, which was consistent with the strong family tradition of settling things internally. As for the "notes from the grave", she accepted Morris' explanation and read them as indicative of a very troubled man trying to grapple with a growing recognition that his brother, whom he had loved and trusted implicitly since childhood, had betrayed him. She did not interpret them as an admission that Morris had known of the share sale all along and agreed to it. We see no error in her interpretation.

450 In addition to complaining about the trial judge's failure to draw the inference from Morris' post-sale conduct that he had agreed to the deal, the appellants argue that several of her particular findings are palpably wrong. The appellants point first to her finding that Morris did not receive a cheque from Chester for $1 million on January 4, 1984. However, the trial judge gave clear reasons for this finding, weighed the evidence before her, and considered what banking documents would have been available had there been such a cheque. It is not the role of this court to second-guess such a finding.

451 Second, the appellants claim that in rejecting Wiseman's evidence about a meeting he had with Morris in April 1985, the trial judge misinterpreted an exhibit, which Wiseman said he reviewed with Morris at that meeting. The respondents concede this point, but claims that in a trial of this length and complexity absolute perfection in interpreting every piece of evidence cannot be expected and that this mistake is innocuous. We agree. The trial judge has a sound basis to accept Morris' version of his conversation with Wiseman apart from this exhibit, particularly given her findings of general credibility. Although the trial judge's interpretation of the exhibit is an error, it is not a palpable and overriding one.

452 To summarize, we conclude that the trial judge committed no palpable and overriding error

in her fact-finding about the share sale. She was entitled to apply the law to the factual basis that Morris had not negotiated the sale and did not understand or agree to it.

(e) The Greycliffe Profit Diversions

453 The appellants make two major complaints about the trial judge's fact-finding in connection with the profits diverted from IWS to Greycliffe and four other companies through which Robert provided trucking services to IWS. These services began in the late 1970s and continued until Chester ended them in February 1984, shortly after the share sale.

454 First, the appellants argue that the trial judge was palpably wrong to find that while Morris knew Greycliffe was doing some trucking for IWS, he did not know the rates being paid by IWS and had never agreed to them. The appellants claim that this conclusion flies in the face of significant contrary evidence. Chester and Robert testified that they discussed the entire arrangement with Morris and that he consented to it. Linton gave evidence that Morris signed cheques payable to Greycliffe. Morris was clearly interested in the trucking being done by IWS and, on a daily basis, was in the yard, which the Greycliffe trucks were constantly using. Indeed, Morris acknowledged that he was aware that Greycliffe was providing some trucking services to IWS.

455 In our view, the trial judge's conclusion does not represent palpable and overriding error. She accepted Morris' evidence that he never discussed these trucking services with Chester or Robert and was completely unaware of the rates being charged to IWS. He said that he simply assumed that while Chester's sons were providing some trucking services, he had no idea to what extent, and he also assumed that when his own sons came into the business they would be able to take equivalent amounts out of the company. Morris said that he had no idea of the size of the actual profit diversions until after the lawsuit started and that he viewed them as "sinful." It was entirely open to the trial judge to prefer Morris' evidence over that of Chester and Robert. This preference is consistent with and reflects her general credibility assessments, which we have found to be unassailable on appellate review. Moreover, the appellants produced no documentation to support his version of events, for example, IWS cheques to Greycliffe that had been signed by Morris.

456 Finally, the extent of the profit diversions provides solid support for Morris' evidence. The trial judge found that Greycliffe's profit ratios for these years were in the range of approaching fifty per cent of gross revenues, some twelve times the broad industry average. Given Morris' concern that Chester's side of the family not be preferred to his own, Morris would never have accepted such exorbitant profits going to companies owned by Robert. He certainly would never have agreed to this arrangement.

457 Second, the appellants take issue with the trial judge's use of expert evidence to assist her in determining how much Greycliffe overcharged, saying that this was a matter of fact, not opinion. The appellants also argue that the trial judge ought not to have accepted the particular expert evidence called by the respondents.

458 In our view, neither of these points has merit. The determination of what are reasonable rates charged by various sectors of the trucking industry and what reasonable profits result not information within the knowledge or experience of a trier of fact and is properly the subject of expert evidence. See R. v. Mohan (1994), 89 C.C.C. (3d) 402 (S.C.C.) at 413. Further, the appellants do not offer any cogent reason to undermine the trial judge's decision to prefer the respondents' experts over those of the appellants. Their opinions were reasonable and well-founded. Although one of those experts had not served a pre-trial report, he was called with leave in response to the appellants' unsuccessful challenge of bias in relation to the respondents' first expert.

459 In all, we see no palpable error in the trial judge's fact-finding in connection with the profit diversions.

(f) The Ancaster Property

460 The last episode dealt with by the trial judge in the main action concerned the Ancaster property. Morris acquired it in 1956 and on January 1, 1986 he conveyed it to Warren for $1. The trial judge found that he did so in return for Chester promising him that Chester would "straighten out", meaning he would undo the share sale. Chester denied any such conversation.

461 The trial judge accepted Morris' version, concluded that there was a contract on these terms, and found that Chester had breached it, since he had not undone the share sale. She awarded Morris damages equivalent to the market value of the property on January 2, 1986 which she found to be $98,000.

462 Once again the appellants submit that Chester's evidence should have been preferred to Morris'. Once again, we disagree. It was entirely open to the trial judge to accept Morris' evidence over Chester's. She found him to be a significantly more credible witness.

(g) The Valuation Findings

463 The final focus of the appellants' attack on the trial judge's fact-finding in the main action concerned certain of her conclusions about valuation.

464 First, the appellants challenge her determination of the value of the Centennial Parkway property owned by IWS, which was an important component of the value of its shares as of December 1983. The appellants contend that the trial judge was palpably wrong to base her conclusion on the evidence of Steven Pocrnic, an expert witness called by the respondents, because his methodology was flawed.

465 We do not agree. The trial judge carefully reviewed and understood the two different valuation methods used by Pocrnic in reaching his conclusion. His report was prepared in accordance with the Uniform Standards of Professional Appraisal Practice. His ultimate valuation was consistent with the price paid by IWS for the property in 1980 multiplied by the average

increase in sale prices in the Hamilton region between 1980 and 1983. There was no palpable error in the trial judge's acceptance of Pocrnic's expert opinion of the value of the Centennial Parkway property.

466 Second, the appellants challenge the trial judge's acceptance of the evidence of the respondents' expert witness Frank Vettese about the value of IWS itself as of December 1983. The appellants contend that it was palpably wrong for the trial judge to accept this valuation since it was based on the inclusion of the profits of Greycliffe in calculating the maintainable earnings of IWS.

467 In our view, the trial judge did not err in this respect. There was no need for IWS to use a separate trucking company. It could have gone forward doing its own trucking. Indeed, Chester terminated the Greycliffe services soon after the share sale. It was therefore entirely appropriate to value IWS by including the Greycliffe enterprise.

468 Third, the appellants argue that the trial judge erred in admitting and relying on the opinion evidence of the witness Stephen Cole, who was called by the respondents to assist in establishing the value of the IWS shares. The appellants baldly assert that his evidence was argument, not opinion and, in any event, he had not prepared a formal valuation report.

469 We find nothing in this argument. No objection was taken to Cole's qualifications to express the opinion that he did. Although he did not prepare a formal valuation report, his evidence and his report provided an analysis of the financial aspects of the transaction reflected in the share sale documents and the fairness of it from a financial point of view. He was qualified to give this opinion and the trial judge was entitled to accept and rely on it.

470 Finally, the appellants argue that the trial judge committed palpable and overriding errors in quantifying the unfairness of the lease that Morris signed as part of the share sale. The errors alleged are that the trial judge did not compare the rent under the lease to the rental amounts which Morris had accepted for the land before the sale and that the expert opinion of Les Robertson about fair market rent for the land, which the trial judge accepted, was based on a flawed methodology.

471 We do not agree. The trial judge was entitled to calculate the fairness of the lease by comparing the rents it provided to fair market rents rather than to what Morris had previously received. The lease was to have effect in the context of Morris selling his interest in the company. As for the expert witness Robertson, he explained that his methodology added value for the unused lands surrounding the building covered by the lease. He did so because of the extent of these surplus lands and because scrap yard properties derive considerable economic value from open land area. The trial judge did not err in accepting Robertson's opinion of the fair market rent based on this methodology.

ii. Contested Rulings in the Main Action

472 In addition to the appellants' attacks on the findings of fact made by the trial judge, they also

challenge two rulings and all of the various legal bases on which the trial judge found liability in the main action. We will deal with each of these in turn.

(a) The Pleadings Amendment Ruling

473 At the end of January 1999, almost two months into the trial, counsel for Morris sought leave of the court to amend three paragraphs of the statement of claim in the main action. In essence, the proposed amendment withdrew the assertion that at the December 22, 1983 meeting, Chester and Ennis presented the share sale agreement to him with no forewarning and represented that it was at fair market value, but that the Centennial Parkway property was excluded. The proposed amendment substituted the assertion that at the December meeting Morris was presented with papers to sign which he neither read nor understood. It said nothing about any representations by Chester or Ennis.

474 In support of the motion, counsel filed an affidavit of Michael who said that he acted on his father's behalf in dealing with the lawyers in the preparation of the statement of claim and that he thought that the original paragraphs were an appropriate method of pleading representation by omission.

475 Counsel for Chester brought a cross-motion seeking, among other things, to cross-examine Michael on his communications with his lawyers.

476 The trial judge dismissed the cross-motion and allowed the amendments. In our view, she was correct to do so.

477 The trial judge first dealt with a motion to amend under Rule 26, which requires that at any stage of an action leave to amend be granted absent non-compensible prejudice. Since Morris had clearly and consistently taken the position reflected in the proposed new paragraphs of the claim from the time he was first examined for discovery in 1991, the trial judge could find no prejudice to the appellants. This conclusion is unassailable, the more so because, although the motion to amend followed Morris' cross-examination, counsel offered to produce him for further cross-examination on the amendment. Once the amendment was granted, this offer was not taken up.

478 The trial judge also dealt with this motion under Rule 51.05, which requires leave of the court to withdraw an admission. She correctly looked to Antipas v. Coroneos (1988), 26 C.P.C. (2d) 63 (Ont. H.C.J.) for the three-part test required by the rule: that the proposed amendment raise a triable issue; that the party provide a reasonable explanation for the change of position; and that there be no non-compensable prejudice. She found that test met here.

479 In our view, the paragraphs Morris sought to withdraw do not constitute an admission for the purpose of the rule. They are not statements of fact relevant to the case that Chester was seeking to

make. Indeed, he expressly denied the allegations in these paragraphs in his own statement of defence. Chester did not rely on the misrepresentation alleged in those paragraphs; he did not seek to prove that he made representations to Morris that Morris was receiving fair market value.

480 However, even if these paragraphs are treated as admissions, the trial judge was correct in finding that the test in Antipas was met. The proposed amendment raised a triable issue and caused no prejudice. The finding of the trial judge that the explanation for the change in position offered by Michael was reasonable was one clearly open to her and one with which we would not interfere.

481 Moreover, that explanation - that Michael believed that the original pleading represented a proper way to plead what happened - would not have been affected by disclosure of the communications between Michael and Morris' solicitors. The relevant fact was Michael's belief, not where it came from. In any event, the trial judge properly ruled these communications to be privileged. She did not err in refusing to permit cross-examination on these communications.

482 We agree with the ruling of the trial judge.

(b) The Celia Butner Ruling

483 Counsel for Chester sought to have a signed statement of Ms. Celia Butner dated July 29, 1991 admitted into evidence for the truth of its contents.

484 Ms. Butner had been a long-time employee of Ennis. She was present with Ennis, Morris and Chester during all or part of the meeting in December 1983 at which the share sale documents were signed. As a legal assistant to Ennis, she had known the Waxman brothers for several decades. At the time of trial she was incapable of giving evidence due to her severe cognitive deficit.

485 The trial judge dismissed the request, finding that while necessity had been demonstrated, counsel had not shown sufficient indicia of reliability to warrant admitting the written statement for its truth. The appellants challenge that ruling in this court.

486 We agree with the trial judge's ruling. She properly applied the criteria of necessity and reliability required by the hearsay nature of the statement.

487 Ms. Butner's medical condition undoubtedly served to meet the necessity criterion. However, there was ample basis for the trial judge to conclude that the written statement lacked the threshold reliability to be admitted for its truth. Ms. Butner was a long-time employee of Ennis and the statement was elicited by Ennis' lawyer in the context of litigation against him at a time when Ms. Butner was aware of key elements of her employer's defence and had helped to gather documents to support it. The statement was made some seven years after the events in question. The statement was reduced to writing by Ennis' counsel after counsel's interview with her. Neither her statements at the interview nor those as reduced to writing were made under oath or cross-examined upon. The interview was not recorded verbatim in any form. The written statement could possibly have been

influenced by Ennis, as indicated by his letter to his counsel in which he sought to discuss a draft of the statement. And finally there were three drafts of the written statement. The last of these was signed by Ms. Butner, but it differed from counsel's notes of the interview giving rise to the statement. It was proper for the trial judge to conclude that the statement was not sufficiently reliable to be admissible.

iii. The Liability Issues in the Main Action

488 The trial judge began her discussion of liability in the main action by setting out the basic positions of the parties - positions which were reiterated in this court. We can do no better than to reproduce her summary at paras. 1202-04:

> Counsel for the Defendants strongly urge me to take a very technical, common-law/contractual approach to the issue of liability, and without saying so directly, advocate that I should ignore equitable considerations. They submit that all or most of the evidence to which I have already referred is irrelevant to an appropriate resolution. They ask me to treat the Share Sale as if it were a commercial transaction between two equally sophisticated and knowledgeable arm's length businessmen, who should have been expected to protect their own interests. They submit that one who signs a contract, without taking the trouble to read it, is liable and cannot plead ignorance of its terms.
>
> Submitting that this rule is a complete answer to Morris' claims, they say Chester should be allowed to enforce documents signed by Morris, as if Chester were an innocent arm's length commercial purchaser. They would have it that, having established Morris signed the Share Sale documents, he has no case. Having established that Morris signed the bonus minutes, he has no claim to a larger share of the bonuses. On their view of the law, Morris slipped up. He should have protected himself better, obtained more information, sought more advice. Morris and only Morris must bear responsibility for his own carelessness. "On all of the evidence, the only person responsible for this over-lengthy trial is the very person who participated actively and willingly in every event - Morris Waxman."
>
> The Plaintiffs submit that Morris' signing of Share Sale documents in December 1983 must be considered in context. Chester is not an innocent outsider seeking commercial certainty. He is not trying to enforce documents signed in circumstances about which he has no personal knowledge or involvement. Chester's actions, as well as Morris', must be carefully scrutinised. These events took place in a close family context. For Morris and Chester, business and family were inseparable. Chester knew of Morris' pride of place in IWS, his perception

> of self-importance arising out of responsibility for defined aspects of the IWS business and his exceptional trust in Chester. Chester knew Morris could not conceive that Chester would ever attempt to cheat him or IWS. Chester abused Morris' trust. He took advantage of Morris' vulnerability resulting from his dependence in financial matters exacerbated by poor health. Relief from contractual obligations is widely and frequently given on equitable grounds including breach of fiduciary duty, undue influence, unconscionability and under s. 248 of the Business Corporations Act [footnotes omitted].

(a) The Fiduciary Duty Issue

489 The trial judge primarily based her conclusion that Chester was liable to Morris on her findings that Chester had a fiduciary duty to his brother in connection with the share sale, the bonuses, and the Greycliffe profit diversions and that he breached that duty.

490 She came to the fiduciary duty finding by two routes. First, given the history of their lives and the way IWS had always been run, the brothers were partners in the business. The incorporation of the business in 1956 did not change that reality. She found that, as partners, Morris and Chester owed each other fiduciary duties. Indeed Chester conceded as much in his evidence.

491 Second, the trial judge applied the criteria developed in the jurisprudence to determine the existence of a fiduciary duty absent a traditionally recognized fiduciary relationship such as a partnership. She found that whether one uses the approach of the majority or that of the minority in the seminal case of Hodgkinson, supra, the conclusion is the same: the brothers owed each other fiduciary duties. She summarized her finding as follows at para. 1262:

> I find that, in all of the circumstances here, there was a fiduciary expectation that arose from the conduct and the relationship of the parties. Chester owed Morris fiduciary obligations in the exercise of his power and discretion over financial and legal matters, even as they affected Morris personally. They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability.

492 The trial judge then went on to determine the scope of the fiduciary duty owed by Chester to Morris and found that in the context of their relationship, it encompassed a duty of good faith, a duty to avoid conflict and, most importantly, a duty of disclosure.

493 She set out her conclusion that Chester breached this duty to Morris in connection with the share sale in these words at para. 1283:

> Chester breached his fiduciary duty to Morris with respect to the Share Sale, the lease and other documents signed on December 22, 1983, when he failed to adequately disclose to Morris the fact of the sale and the nature of the documents. It was not enough to simply say "this is the sale and look over the documents." Chester asked Morris to sign documents he knew Morris had not read and would not read, to transfer shares he did not want to transfer. Chester knew Morris was ill. He did not disclose the other information set out above. I have found that Chester did indeed "trick"/"hoodwink" Morris into signing documents that day. Chester stood to benefit enormously. In all of the circumstances here, Chester clearly breached his fiduciary duty to Morris.

494 Her conclusion in respect of the bonuses was equally clear at paras. 1284-5:

> Morris relied upon Chester and reasonably expected he would act in IWS' and his own personal best interest. Given his 50% ownership, Morris was entitled to assume he would receive 50% of IWS profits and equity.
>
> Given the division of responsibility within the partnership, Chester's willing assumption of responsibility for financial matters, his cultivation of Morris' trust, and Morris' resulting total dependence and reliance on Chester in financial matters, his knowledge that Morris did not read corporate documents before he signed because corporate documents were Chester's responsibility, Chester owed Morris a duty to properly disclose the declaration of the 1979, 1981 and 1982 bonuses to Morris and obtain his consent. Chester did not do so.

495 Turning to the Greycliffe profit diversions, the trial judge found that Chester allowed Robert to use Greycliffe and related companies to extract exorbitant amounts from IWS that should have remained with the company, and that he kept Morris in the dark about this. She concluded as follows at paras. 1292-93:

> Chester knew that profit diversions to related companies were affecting IWS' profitability. He had the power to stop the improper profit diversions. He waited until shortly after the Share Sale to do so.
>
> Chester breached his fiduciary duties to Morris in respect of the profit diversions to Greycliffe and the other related companies. He failed in his duty of good faith, his duty of disclosure, his duty to avoid a conflict.

496 The appellants main challenge to these conclusions is to the findings of fact which underpin them. Apart from this, however, the appellants mount three legal attacks on these findings, all of which assume the facts as found by the trial judge.

497 First, the appellants contend that fundamental to the application of the fiduciary principle is the intention to contract and that the principle can be properly resorted to only if Morris intended to sell his shares to Chester. The appellants argue that the fiduciary principle cannot be used to find liability where a person signed documents but claimed he did not know the nature and character of the documents he was signing. The appellants contend that unless Morris can demonstrate the applicability of the concepts in cases like Marvco Color Research Ltd. v. Harris, [1982] 2 S.C.R. 774 (concepts like fraud, misrepresentation, and non est factum), the principle of personal responsibility requires that he be bound by his signature. That signature cannot be touched by the principle of fiduciary breach. This argument addresses the conclusions of the trial judge both in relation to the share sale and the bonuses.

498 Second, the appellants argue that no fiduciary duty can arise on the facts as found because they involve no more than the sale of shares by one shareholder to another and because Chester gave no express undertaking to act in Morris' best interest in connection with that transaction. This argument addresses the share sale but not the bonuses or the profit diversions.

499 Finally, the appellants argue that, in connection with the share sale, Chester did not breach his fiduciary duty should one be found to exist. The appellants contend that he did not withhold any material facts about the condition of the company or its value from Morris.

500 We will deal with each of these arguments in turn, but first it is important to be clear on the role of an appellate court in reviewing findings of fiduciary duty made at trial.

501 In Hodgkinson, at 425-26, LaForest J. made clear that significant deference must be granted on appeal to findings at trial on whether or not there was a fiduciary duty and whether or not there was a breach of such a duty. He said that absent manifest error, such as a material and identifiable error of law or a clear and identifiable error of fact in appreciating the evidence, an appellate court should not interfere.

502 We turn then to the appellants' first argument, namely that the fiduciary principle cannot be used to relieve Morris from the consequences of his own signature.

503 We disagree with this proposition. As LaForest J. said in Hodgkinson, at 405, the fiduciary principle is an equitable doctrine designed to protect vulnerable parties in transactions with others. It focuses on the relationship between the participants to the transaction and the presence of factors such as loyalty, trust and confidence that characterize the relationship as fiduciary. In LaForest J.'s words at 406 of Hodgkinson, "the fiduciary principle monitors the abuse of a loyalty reposed".

504 There is no suggestion in the jurisprudence that this principle can apply only where the

fiduciary relationship and the abuse of loyalty exist in a transaction where a contract has been concluded by parties who mutually intend to do so. Quite the opposite. In Guerin v. Canada, [1984] 2 S.C.R. 335 at 384, Dickson J. said: "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."

505 The existence of a fiduciary duty depends on the precise circumstances of the particular relationship, not on the presence of any legal precondition such as the existence of a contract. Apt here is the phrase of Lord Scarman, repeated by LaForest J. in Hodgkinson, at 413-14: "[t]here is no substitute in this branch of the law for a meticulous examination of the facts".

506 Moreover, a scan of the jurisprudence on fiduciary duty quickly demonstrates its application in many circumstances that do not require a contractual relationship: see for example the relationships of parent/child (M.(K.) v. M.(H)., [1992] 3 S.C.R. 6); government/foster children (K.L.B. v. British Columbia, [2003] 2 S.C.R. 403); custodial/non-custodial parents (Frame v. Smith, [1987] 2 S.C.R. 99); and doctor/patient (McInerney v. MacDonald, [1992] 2 S.C.R. 138).

507 To do as the appellants argue would dramatically limit the utility of the fiduciary principle with untenable results. Where a dishonest fiduciary has persuaded his beneficiary to sign contractual documents, the fiduciary ought not to be better off because he has ensured that the beneficiary has no understanding of the documents whatsoever. In the context of this case, the fiduciary principle does not make Chester better off for ensuring that Morris did not understand what he was signing than he would have been had he explained to Morris the contents of those documents.

508 Nor can it be said that this application of the fiduciary principle undercuts the principle of personal responsibility reflected in cases like Marvco, supra. Unlike that case, this was not a commercial transaction done at arm's length between two business people. Morris and Chester had a relationship that developed over a lifetime. It was one of complete loyalty and trust in connection with the business of IWS and their interests in it. The evidence of the fiduciary nature of this relationship was overwhelming.

509 In these circumstances it was entirely appropriate for the trial judge to apply the fiduciary principle despite Morris' signatures, given that Chester had Morris sign knowing that he had no understanding of what was really going on, either with the share sale or the bonuses. While the result might have been different if Chester had persuaded the trial judge that Morris' signatures were indeed fully informed, Chester's evidence to this effect was simply disbelieved. Thus we would not give effect to the appellants' first argument.

510 The appellants' second argument is that the fiduciary duty does not arise on the sale of shares by one shareholder to another, particularly where there has been no express undertaking by the selling shareholder to act in the other's interest.

511 Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, Tongue v. Vencap Equities Alberta Ltd. (1994), 148 A.R. 321 (Q.B.), aff'd (1996), 184 A.R. 368 (C.A.); Dusik v. Newton (1985), 62 B.C.L.R. 1 (C.A.). Although a fiduciary relationship between parties may not always extend to a share sale between them, the evidence that it does so in this case is again overwhelming. We repeat the trial judge's findings that make this clear:

> They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability (para. 1262).

512 Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship. He did not need to make any express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.

513 The appellants' third argument is that Chester did not breach his fiduciary duty to Morris in connection with the share sale because he did not possess any information material to the value of the share sale, which Morris did not also have. In our view, this argument entirely misses the mark. Not only did the trial judge find as a fact on the basis of ample evidence that Morris was unaware of much material information relevant to the value of IWS prior to December 23, 1983, she also provided a number of other examples: see paras. 1271-72 of her reasons.

514 Even more importantly, she found that Chester did not explain to Morris that he was being asked to sign share sale documents turning over his interest in IWS to Chester. Chester had Morris sign knowing that Morris trusted him implicitly and that Morris had no idea what was really going on. How could this be anything other than a breach of the fiduciary duty Chester owed to his brother?

515 In short, we find that the appellants' legal arguments relating to fiduciary duty must all fail.

(b) The Undue Influence and Unconscionability Issues

516 The trial judge used both concepts as alternative bases for the remedies she ordered against

Chester in connection with the share sale. The appellants argue that she erred in doing so in the absence of a finding that the share sale was a concluded contract to which Morris, at some level, consented. We find it unnecessary to address this issue. Given our other findings, the answer to the question posed by the appellants could have no effect on the outcome of this appeal.

(c) The Oppression Issue

517 The trial judge found that Morris was entitled to relief under s. 248 of the OBCA in connection with the share sale, the December 1983 lease, the 1979, 1981 and 1982 bonuses, the wrongful termination of his employment, and the profit diversions to Greycliffe and related companies. In each case she found that there was oppression warranting a remedy, although not always against the same defendants.

518 For the share sale, the December 1983 lease, the 1979 bonuses, and Morris' wrongful termination, Chester and IWS were found liable to Morris under s. 248. For the 1981 and 1982 bonuses, Chester, IWS, and Chester's three sons were found liable to Morris under s. 248. And for the profit diversions, Chester, IWS, Robert, and Robert's companies were found liable to Morris under s. 248.

519 Section 248 reads in part as follows:

> 248.(1) A complainant ... may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation of any of its affiliates effects or threatens to effect a result;
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the

foregoing ...

> (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
> (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
> (j) an order compensating an aggrieved person;
> (k) an order directing rectification of the registers or other records of a corporation under section 250 ...

520 The appellants raise a number of legal arguments to challenge the trial judge's findings under this section.

521 First, the appellants argue that Morris cannot resort to the oppression remedy where the acts he complains of, particularly the share sale (including the December 1983 lease) and the bonuses, were effected by his own signatures on various corporate documents. The appellant looks for assistance to s. 129(1) of the OBCA, which provides:

> 129.(1) A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or a committee of directors, is as valid as if it had been passed at a meeting of directors or a committee of directors.

522 We cannot agree with this submission. Morris' signatures were procured through Chester's breach of his fiduciary duty. We do not think that the deemed validity provided by s. 129(1) extends to signatures obtained in this way, at least as against the signatories who were owed that duty. If the Legislature had intended to eradicate such fiduciary obligations it would have done so explicitly. Moreover, nothing in s. 248 suggests that Morris' signatures on the corporate documents bar him from being a complainant under s. 248(1) or deprives the court of its broad discretion to conclude that the various actions were oppressive towards him.

523 Finally, s. 248(3) gives the court a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or amending unanimous shareholder agreements, corporate articles or by-laws. This statutory language is to be given a broad interpretation consistent with its remedial purpose: see Ferguson v. IMAX Systems Corp. (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

524 On the facts as found by the trial judge, Chester conducted the business and affairs of IWS -

the share sale, the lease, the bonuses, and the profit diversions - in a manner that was clearly oppressive of Morris' interests. The appellants do not contest that in this appeal. It was open to the trial judge to use her remedial jurisdiction under s. 248 to rectify the acts of oppression as she did even if there were otherwise valid corporate resolutions authorizing those acts.

525 The appellants' second argument is that only IWS can make a claim under s. 248 in respect of the bonuses since the monies paid out were from the corporation. The appellants claim that Morris cannot use s. 248 since his is a derivative claim only.

526 The simple answer to this argument is that Morris clearly qualifies as a complainant for the purposes of s. 248 as it was he who was personally aggrieved by the distribution of bonus monies for 1979, 1981 and 1982. This distribution was done at the expense of his interest in the company. That these claims could have been the subject of a derivative action does not prevent them from also constituting a proper case of oppression: see Jabalee v. Abalmark Inc., [1996] O.J. No. 2609 (C.A.).

527 Third, the appellants contend that using s. 248 to find liability against Warren, Robert, and Gary for receipt of the 1981 and 1982 bonuses is wrong in law. None of the sons was a shareholder or director of IWS.

528 Again there is a simple answer to this assertion. On the facts as found, there is no doubt that the payment of these bonuses was oppressive of Morris' interests. The recipients were not innocent strangers to this. As the trial judge found, the sons could not reasonably have ever thought that they deserved the bonuses or that Morris had agreed to them. Providing a remedy against them for accepting those monies properly rectifies the oppressive actions. The trial judge did not err in exercising her broad remedial authority under the statute to do so.

529 Fourth, the appellant argues that the oppression remedy ought not to be applied to capture conduct that occurred before the remedy came into force and that the trial judge erred in doing so. The oppression provisions of the OBCA came into force on July 29, 1983.

530 We do not agree. There is no doubt that the trial judge ordered relief under s. 248 for events that occurred, or at least commenced, before July 29, 1983. The 1979 bonuses preceded that date. Payments of the 1981 and 1982 bonuses began before that date but continued after it. So did the Greycliffe profit diversions.

531 The trial judge based this application of s. 248 on the finding that the oppression provisions, although not procedural, were intended to be retrospective in application: see Re Mason and Intercity Properties Ltd. (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

532 We agree that the oppression provisions of the OBCA are not merely procedural. They provide significant substantive rights and remedies. However, because of the facts of this case, we need not decide whether there is a sufficiently clear expression of legislative intent to require that

these provisions be given full retrospective application to conduct that was completely concluded before their enactment. Rather, we think that the essence of the trial judgment is that starting at least in 1979 and continuing well beyond July 1983, the appellants conducted the business of IWS in a way that was oppressive of Morris. This pattern of conduct, although it commenced before July 1983, was ongoing well after that date. This is equally true of the subcomponents of that pattern, such as the improper payment of bonuses and the Greycliffe profit diversions. They too were going on well after July 1983. This ongoing pattern of oppression is what Professor Sullivan describes as a continuing fact situation: see R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Markham: Butterworths, 1994) at 514-15.

533 In providing remedies under s. 248 for conduct that took place in part before July 1983, but that continued after this date, the trial judge was simply doing what the legislation expressly contemplates, namely making orders to rectify the pattern of oppressive conduct complained of. We do not need to decide if the legislation may be applied to a pattern of conduct that was fully concluded before the provisions became effective.

534 Fifth, the appellants contend that the trial judge erred in applying the oppression remedy to events that occurred five or more years before the claim was made.

535 Again, we disagree. The appellants seek assistance from Jaska v. Jaska (1996), 141 D.L.R. (4th) 385 (Man. C.A.). In that case the court determined that the counterpart Manitoba legislation could not reach back in time to the extent sought by the respondents. In Jaska, however, the result depended on a general limitation period imposed by the Manitoba Limitations of Actions Act, R.S.M. 1987, c. L150, which has no counterpart in Ontario, and in part on an exercise of the court's discretion in the circumstances of that case.

536 The trial judge understandably found the Jaska case of little assistance to her, because in this case there is no similar legislative provision and the oppression of Morris continued right up until the commencement of the action. The trial judge exercised her discretion to apply her broad remedial authority to the pattern of oppressive conduct that started in 1979. In doing so she neither abused her discretion nor ran afoul of any legislative limitation period.

537 Sixth, the appellant argues that the trial judge erred in applying s. 248 to order a remedy against IWS in connection with the share sale, since IWS was not a party to the sale. In our view, the trial judge was correct to do so. A dispute over a transaction that determined shareholder control of a corporation is one "in respect of" that corporation as that phrase is used in the opening paragraph of s. 248(2). As such, it clearly engages the court's jurisdiction under this section: see GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)), per Blair J.

538 Having found such a transaction here and having concluded that it was oppressive to Morris, the trial judge found that part of the appropriate rectification of that oppression was a remedial order against IWS itself because of its deep involvement in the process. This order represents no error in

the exercise of her broad remedial authority, given the very significant participation of IWS in the oppression, as the trial judge spelled out graphically at para. 1387 of her reasons:

> The way in which the Share Sale was implemented deeply implicated IWS. Chester, acting as if he were already the 100% owner of IWS, put the resources of IWS at his own disposal to make his share purchase so that he would have 100% ownership of IWS. By causing the corporation to act, he engaged s. 248(2)(a). He arranged for IWS to declare a million-dollar dividend that he would use to pay for part of Morris' shares; for IWS to reallocate $412,000 of Morris' 1982 bonus to himself to pay for Morris' shares; for IWS to borrow $500,000 from Morris, interest-free; for Linton, the IWS comptroller, to issue an IWS cheque in the amount of $500,000 payable to Morris, even though the Share Sale Agreement provided that payments were to be made by Chester personally. By his actions and IWS' actions, Chester secured control of IWS. Chester made IWS a party to the December 1983 lease.

539 In short, the appellants' oppression arguments all must fail.

(d) The Knowing Receipt/Knowing Assistance issue

540 The trial judge employed the doctrines of knowing receipt and knowing assistance in dealing with two aspects of the main action, namely Morris' claim in connection with the 1981 and 1982 bonuses, and his claim in relation to the profit diversions from IWS to Robert's companies, primarily Greycliffe.

541 She found Robert, Gary and, Warren liable to Morris for knowing receipt of their 1981 and 1982 bonuses. She found that they had at least constructive knowledge that these bonuses were paid to them in breach of Chester's fiduciary duty to Morris. She ordered that they pay to Morris amounts equivalent to the full payments they received. This relief duplicates the relief granted under s. 248 of the OBCA to Morris against his three nephews in connection with those bonuses.

542 As to the profit diversions, the trial judge found Chester liable to Morris for knowingly assisting Robert to dishonestly divert the profits to Robert's companies in breach of his fiduciary duty to IWS (and therefore presumably to Morris as well). In the same way, she found Robert's companies liable to Morris for knowingly receiving these profits.

543 The trial judge ordered Chester to pay Morris an amount equal to fifty per cent of the profits diverted and ordered Robert's companies to pay to Morris fifty per cent of the profits they each received. The relief ordered on this basis against Chester duplicated the relief based on s. 248 of the OBCA and the relief based on Chester's breach of fiduciary duty to Morris. The relief against Robert's companies duplicates that ordered against them pursuant to s. 248.

544 The appellants argue that the trial judge made two errors of law in applying the doctrines of

knowing receipt and knowing assistance.

545 First, the appellants argue that these doctrines cannot apply where there is only a breach of fiduciary duty. Rather, they can only apply where the monies wrongly paid out are trust monies and here, the 1981 and the 1982 bonuses are simply corporate funds paid out pursuant to signed corporate resolutions.

546 We do not agree that these two doctrines have such a narrow compass. We agree with the trial judge that both are available in the context of a breach of fiduciary duty and not simply where trust monies are involved. Thus she did not err in applying these doctrines without concluding that either the 1981 and 1982 bonuses or the profit diversions constituted trust monies.

547 Laskin J.A. made clear that a breach of fiduciary duty may trigger the imposition of liability on third parties in Gold v. Rosenberg (1995), 129 D.L.R. (4th) 152, aff'd on other grounds [1997] 3 S.C.R. 767. Speaking for this court, he said at 154:

> Beginning with the judgment of Lord Selborne in Barnes v. Addy (1874), L.R. 9 Ch. App. 244, courts have imposed the obligations of a trustee on third parties who participate in another's breach of trust or breach of fiduciary duty. Third parties may be liable as "constructive trustees" if they knowingly receive trust property obtained in breach of trust (the "knowing receipt" cases) or if, without receiving trust property, they knowingly assist in its misapplication (the "knowing assistance" cases).

548 Paul Perell, in his article "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Advocates' Q. 94, makes the same point, namely that these equitable doctrines apply to both breaches of trust and breaches of fiduciary duty. An example of the latter application is found in MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255 (B.C.S.C.), cited with approval in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 at 239.

549 Moreover, in this context there is no reason in principle to differentiate between the beneficiary of a trust obligation and the beneficiary of a fiduciary obligation. Both are equally deserving of the protection of equity as against a third party who knowingly assists in the dishonest breach of that obligation or knowingly receives funds paid in breach of it.

550 The appellants' second argument is that Robert, Warren, and Gary can be found liable in knowing receipt for no more than one-half of the bonuses they received for 1981 and 1982.

551 We agree with this submission. The trial judge based her conclusion on the finding that Chester's sons knew that the source of the money used to pay those bonuses was the proceeds of the sale of the two divisions of IWS of which Morris owned fifty per cent. She further found that reasonable young men in their position would have known that the bonuses were a distribution of IWS equity and not the payment of reasonable compensation.

552 Although she did not say so expressly, the trial judge clearly concluded from these findings that Chester's sons had constructive knowledge that half their bonus monies represented Morris' equity in IWS and were paid to them in breach of Chester's fiduciary duty to Morris. The trial judge did not conclude that Chester's sons had constructive knowledge that Morris had a beneficial interest in one hundred per cent of the bonus monies they received for these two years. Nor could she have done so on these facts. As a distribution of equity, Morris had a beneficial interest in only half of it.

553 The elements of the doctrine of knowing receipt are set out in the Perell article, supra, at 110: a trust or fiduciary relationship; the third party receiving property from the trust or fiduciary relationship in his or her own personal capacity; and the third party having actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty. Thus liability for knowing receipt does not extend beyond the property which the third party knows (or is deemed to know) has been received in breach of trust or fiduciary duty.

554 In this case Chester's sons knew that their bonus monies for 1981 and 1982 represented a distribution of IWS equity, half of which was Morris'. Their knowledge (either actual or constructive) that Chester was in breach of his fiduciary duty to Morris by paying these bonuses could therefore extend only to the fifty per cent in which Morris had a beneficial interest; they could be liable in knowing receipt for no more than this amount.

555 Although the appellants do not expressly argue the point, the same logic applies to the remedy under s. 248 of the OBCA against Chester's sons in respect of the 1981 and 1982 bonuses. The payment of those bonuses constitutes an act of oppression against Morris in so far as the payment was made with Morris' fifty per cent share of the proceeds from the sale of the two divisions of IWS. And under s. 248(2), the order to rectify that matter must be limited to the fifty per cent of the bonuses received by Chester's sons for 1981 and 1982.

556 In the body of her reasons, the trial judge found that an order may be made against Chester's sons in respect of the receipt of the 1981 and 1982 bonuses both under s. 248 of the OBCA and in knowing receipt. In her summary of liability findings, the trial judge found Chester's sons liable to Morris for these bonuses only in knowing receipt. The formal judgment orders that they pay Morris the sum equivalent to the full amount of the bonuses. Whether that order is based on only the doctrine of knowing receipt or also on s. 248 of the OBCA, we amend it to provide for liability in an amount equal to fifty per cent of the bonuses received by Chester's sons for 1981 and 1982.

(e) Remedy for the Greycliffe Profit Diversions Issue

557 As we have described, the trial judge found liability on a number of different bases against Chester, IWS, Robert, Robert's companies, and Gary in relation to the profits diverted from IWS to Greycliffe and the related companies owned by Robert.

558 Chester was found liable for breaching his fiduciary duty to Morris by knowingly allowing

the improper profit diversions. He was also found liable to Morris under s. 248 of the OBCA and for knowingly assisting Robert in breaching his fiduciary duty to IWS (and therefore presumably to Morris as a fifty per cent owner) by charging IWS rates that far exceeded competitive rates.

559 IWS was found liable to Morris under s. 248 of the OBCA as were Robert and Robert's companies. Robert's companies were also found liable to Morris in knowing receipt.

560 The trial judge then went on to find that because all the services provided by Greycliffe and related companies could have been done by IWS itself, all the diverted profits could have been retained within IWS. She therefore ordered Chester and IWS to pay to Morris an amount equivalent to fifty per cent of all profits received from IWS by Greycliffe and related companies after allowing for a modest additional management fee of $50,000 that IWS would have had to incur to perform these services itself. The various companies were all ordered to pay Morris fifty per cent of their individual profits from IWS.

561 Against this backdrop, the appellants make two legal arguments. First, the claim for profit diversions is a claim for the diversion of IWS corporate revenue and can only be made by IWS or by way of a derivative claim, neither of which was made here. The simple answer to this is that the trial judge found liability against these various parties on a number of legal bases that are quite independent of whether IWS could also have made a claim itself. The fact that IWS might have done so does not in any way undermine the validity of claims based on fiduciary breach, knowing receipt, knowing assistance, or s. 248 of the OBCA.

562 Second, the appellants argue that in ordering payment equivalent to fifty per cent of all the profits made by Greycliffe and Robert's other companies, the trial judge went too far. We agree with this. Morris was undoubtedly aware that Robert was providing some trucking and related services to IWS through companies like Greycliffe. His concern was that after the fact, he discovered that the level of profits received by those companies was so excessive as to be (in his own words) "a sin" rather than the reasonable rate of profit he would have anticipated. He was also candid in admitting that "reasonable" was to be assessed generously, since the profits were being earned by a member of the family, and that he would expect the same treatment to be accorded to his sons if and when they joined the business.

563 This reality was recognized by the trial judge when she identified just what it was that constituted Chester's breach of fiduciary duty to Morris, the oppression under s. 248 and Robert's breach of fiduciary duty: it was that Robert arranged for his companies to receive excessive profits for their services to IWS and that Chester knowingly permitted this to happen. The gravamen of the conduct was not that Robert's companies made any profit at all on these services, but that these profits were more, indeed much more, than was reasonable.

564 Having found that excessive profits were what attracted liability, the trial judge's remedial order in Morris' favour could not properly extend beyond his share of that portion of the profits received by Robert's companies that was excessive. In basing her order on all profits received by

these companies, the trial judge reached beyond the fiduciary breaches and the oppression that she had found. Her remedy also compensated for the payment of reasonable profits, which were the product of neither. She erred in so doing.

565 If the correct remedial order for the profit diversions should reflect only those profits that were excessive or unreasonable, the question is whether this court can make that order. While all parties made it clear that a new trial was to be avoided at all costs, the state of the record before us makes the challenge of fixing a proper remedial order a less precise exercise than is desirable. Nonetheless, in the interest of finality we must attempt it.

566 The evidence accepted by the trial judge showed that Greycliffe, the main provider of trucking services to IWS, was operating at a profit ratio of approximately fifty per cent or thereabouts, while the industry average hovered around five per cent. For this purpose we will take Greycliffe to be typical of Robert's other companies. Using this as a rough and ready tool of analysis we conclude that a profit ratio of half that or twenty-five per cent would constitute a reasonable level of profit for these companies in the circumstances. While still significantly above the industry norm, this profit ratio reflects that the profits were going to a family member and that the context here was the Waxman family.

567 On this basis, in operating at a fifty per cent profit ratio, half of all the profits received by Robert's companies were beyond the reasonable level of twenty-five per cent, and thus excessive. The order should therefore provide Morris with his half of that half. We amend the part of the order relating to profit diversions so that the amounts to be paid by Chester, IWS, Robert, and his companies are half of those ordered by the trial judge in each case.

(f) The Ancaster Property Claim

568 The trial judge found that Morris transferred this property to Warren because Chester promised that if he did so, Chester would "straighten out" the share sale. She found that both brothers understood that this meant returning the parties to their shareholdings prior to December 22, 1983. She concluded that since Chester breached his promise, Morris was entitled to receive damages for breach of contract equal to the value of the property at the time it was transferred to Warren.

569 The appellants argue that the trial judge erred in failing to conclude that this contract was fatally vague. We do not agree. The trial judge had ample evidence to conclude that the brothers fully understood what Chester was obligated to do in return for Morris transferring the property to Warren.

570 The appellants also argue that Morris is not entitled to this relief if he also succeeds in having the court return him to his shareholding position as it existed prior to December 22, 1983. We agree with this and indeed counsel for the respondents candidly conceded as much in argument. In effect, Morris will have received Chester's performance of his promise through court order and should not

receive damages as well. Thus we order that the trial judgment be amended in this respect.

(g) The Constructive Trust and Tracing Issues

571 The trial judge's findings of liability in the main action were based fundamentally on breach of fiduciary duty, undue influence, unconscionability, and oppression under s. 248 of the OBCA. While we have not found it necessary to deal with undue influence and unconscionability, the breach of fiduciary duty entitled the court to turn to equitable principles in devising appropriate remedies. So too did s. 248. The task under s. 248 is very much the same since s. 248(3) empowers the court upon a finding of oppression to make any order "it thinks fit". It is important to keep in mind that the various remedies the trial judge ordered were made in this context.

572 In connection with the share sale, the trial judge imposed a constructive trust. She ordered that Chester held fifty per cent of the shares of IWS on constructive trust for Morris from December 22, 1983 (the date of the share sale) to June 27, 2002 (the date of her judgment), when she ordered Chester to transfer the shares from his name to Morris' name. She provided a remedy for the profits and the equity taken out of the company during the existence of the constructive trust by ordering that Morris could elect one of two ways, which she described in detail, for calculating his fifty per cent of those amounts. She then ordered that to recover his share of these post-sale payouts, Morris could elect between a proprietary remedy, namely a constructive trust on his portion of those amounts, or a personal remedy against both Chester and IWS for damages equivalent to his portion of those amounts.

573 In connection with the 1979 bonuses, the trial judge ordered that both Chester and IWS were liable to pay Morris $125,000, which was equivalent to fifty per cent of those bonuses. She ordered that Morris could elect a proprietary remedy as an alternative which would yield an order that Chester had held Morris' $125,000 on constructive trust for Morris since December 17, 1979.

574 For the 1981 and 1982 bonuses her remedies were much the same. Morris was entitled to a personal judgment against Chester for his fifty per cent (less what Morris in fact received) or to elect an order that these sums were subject to a constructive trust. She also held that Robert, Warren, and Gary were personally liable for the bonus amounts they received for 1981 and 1982 (which, as we explained earlier, we have reduced by one-half).

575 The trial judge used the same approach for the profit diversions to Greycliffe and Robert's other companies. Personal remedies were ordered against Chester, IWS, and Robert for Morris' fifty per cent share of those profit diversions and against each of the companies for fifty per cent of the profits they received. She again permitted Morris to instead elect a proprietary remedy and to choose that any portion of his fifty per cent be subject to a constructive trust.

576 The trial judge also ordered Chester to pay punitive damages of $350,000 in connection with the share sale, the bonuses, and the profit diversions.

577 Finally, to support the constructive trust remedy, the trial judge ordered a tracing process to permit Morris to attempt to trace the amount subject to constructive trusts into the hands of persons other than bona fide purchasers for value without notice. She also found that none of Robert, Warren, or Gary qualified as such persons. This process would permit Morris to make an informed election between the personal and the proprietary remedies provided for as alternatives by her judgment.

578 The appellants argue that the trial judge erred in several respects in this exercise of her remedial jurisdiction. Before turning to the specific arguments, it is worth reiterating that the remedies ordered all flowed from the trial judge's use of (1) the equitable tools of fiduciary breach, undue influence, and unconscionability and (2) the broad remedial powers given by s. 248 of the OBCA. All her remedies are therefore entitled to significant deference in this court: see McBride Metal Fabricating Corp. v. H & W Sales Co. (2002), 59 O.R. (3d) 97 (C.A.); Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563 (C.A.).

579 The appellants first argue that the trial judge erred in the exercise of her discretion in reinstating Morris as a fifty per cent shareholder with the accompanying share of post-sale profits, since this is a business to which he has not contributed and in whose management he has not participated for twenty years. Rather, Morris should simply be entitled to damages for lost opportunity, measured by the difference between the fair market value of IWS on December 23, 1983 and the price set in the share sale agreement.

580 The answer to this is twofold and straightforward. First, it would effectively ignore the trial judge's finding that Morris never intended to sell his shares. Second, as LaForest J. said in Hodgkinson, at 440, equity's objective in a circumstance like this is restitutionary, namely to put Morris in as good a position as he would have been in had the fiduciary breaches not occurred. Moreover, particularly where the breach is found to be dishonest, equity does not permit the failed fiduciary to profit from his wrongdoing. The remedies ordered by the trial judge in relation to the share sale and the post-sale profits accomplish just that. They restore Morris to his ownership position as it was before December 23, 1983. They also recognize his entitlement as owner since that time. They permit Chester and his sons reasonable bonuses beyond their generous salaries for their contributions to IWS during the period of the constructive trust. In our view, these remedies are appropriate. They represent no error in the exercise of the trial judge's remedial discretion.

581 The appellants also argue that the trial judge erred in making her tracing orders, saying that she used them as an additional remedy. They contend that a tracing order cannot be used as a remedy, but is merely a process. The appellants also argue that the tracing orders are too invasive of the lives of Chester and his sons to be a proper exercise of judicial discretion.

582 We do not agree. The tracing orders here do not constitute additional remedies. They simply provide the process by which Morris can attempt to trace the property in which he has a beneficial interest through the remedy of constructive trust. If the process is successful, it is the constructive

trust that will provide Morris with his remedy should he elect it. As that process unfolds, those into whose hands the property can be traced will be able to advance any defences available to them.

583 While the trial judge has precluded Chester's sons from advancing the defence of being bona fide purchasers for value without notice, her finding in this regard is overwhelmingly supported by the evidence. Her order that the 1979 bonuses can be traced into their hands for the purpose of the constructive trust remedy is quite consistent with her finding that they are not personally liable in knowing receipt for these amounts. The former is simply a proprietary remedy based on Chester's breach of fiduciary duty to Morris in paying the 1979 bonuses.

584 Nor can it be said that these tracing orders, as invasive as they may be, are so invasive of the lives of Chester and his sons as to be an erroneous exercise of the trial judge's remedial discretion. These orders are the natural corollary of the constructive trust orders made by the trial judge, which in turn are the consequence of the egregious breaches by Chester and his sons of their equitable obligations.

585 The appellants' third submission is that the trial judge erred in ordering punitive damages both because the circumstances lacked the necessary blameworthy conduct and because there was no finding of an actionable wrong independent of the breaches of fiduciary duty found by the trial judge. This argument also fails. The trial judge concluded that Chester's conduct met or surpassed the requirement that it be sufficiently malicious, oppressive, and high-handed as to deserve public censure by the court. On the facts as found, that conclusion is unassailable.

586 Moreover, where liability is founded on breach of fiduciary duty, an independently actionable wrong is not a precondition of punitive damages. Although that is necessary in an action based on breach of contract, where this "private law" agreed to by the parties defines the extent of their obligations to each other, the situation is different where the common law imposes an obligation on one to act as a fiduciary for another. In Norberg v. Wynrib, [1992] 2 S.C.R. 226 for example, McLachlin J., writing for herself and L'Heureux-Dubé J., found an award of punitive damages for breach of fiduciary duty to be appropriate without finding an independently actionable wrong. In doing so, she cited with approval the following passage from M.V. Ellis, Fiduciary Duties in Canada (Don Mills: Richard DeBoo, 1988) at 20-24:

> Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest.

587 Finally, in her supplementary reasons, the trial judge makes clear that Robert, Warren, and Gary are personally liable in knowing receipt for the post-sale profits they received. Although the appellants have not raised it, we amend this part of her judgment by ordering that their liability is limited to one-half of the sums so received. We do so on the same basis as we did for the 1981 and 1982 bonuses, namely that they could not have had constructive knowledge that any more than

one-half of these sums belonged beneficially to Morris.

588 In summary, with the modest exceptions we have set out, we find no error in the trial judge's legal analysis in the main action.

589 We therefore vary the judgment in the main action but only in the following respects:

a) Robert, Warren and Gary are liable for only one half of the 1981 and 1982 bonuses that they received: see para. 556.
b) Chester, IWS and Robert and his companies are liable for only one half of the amounts ordered by the trial judge in relation to the Greycliffe profit diversions: see para. 567.
c) The order for damages in relation to the Ancaster property is set aside: see para. 570.
d) Robert, Warren and Gary are liable for only one half of the post sale profits that they received: see para. 587.

C. The Grounds of Appeal Relating to SWRI

590 Three separate claims in the litigation involved SWRI. In one action, Morris, Michael, and SWRI claimed that Chester, Robert, Gary, and IWS had induced Philip to breach its contract with SWRI. Chester and his children counterclaimed in that action, alleging that their shares in SWRI had been transferred to Michael and Douglas improperly and without their consent. The trial judge found Chester, Robert, and IWS liable to SWRI for inducing the breach of the contract with Philip and assessed damages at large at $2.5 million and punitive damages at $100,000. She dismissed the counterclaim, finding that Chester's children had consented to transfer their shares in SWRI to Morris' sons.

591 In the main action, IWS counterclaimed against SWRI, Morris, Michael, Shirley, and Douglas for theft of its business and corporate opportunities. The trial judge dismissed the counterclaim, except on three minor matters, which are not in question in this appeal. In dismissing the counterclaim she found that Chester and IWS were aware of and consented to SWRI's handling of all of the business that IWS had handled.

592 Chester, Robert, and IWS appeal all three adverse findings. Their three general submissions are:

1. The trial judge erred in finding Chester, Robert, and IWS liable to SWRI for inducing the breach of its contract with Philip; in the alternative she erred in her assessment of damages.
2. The trial judge erred in finding that Chester's children consented to the transfer of their shares in SWRI to Michael and Douglas.
3. The trial judge erred in dismissing IWS' counterclaim for theft of its business and

corporate opportunities.

The factual background to these three submissions is set out at paragraphs 225 to 269 of these reasons.

i. The Inducing the Breach of Contract Claim

593 Beginning in 1982, Morris and then Michael developed a close and valuable business relationship with Alan Fracassi, the principal of Philip. SWRI provided the customers and invoiced them and Philip supplied the trucking services to haul their waste. Morris issued his claim in the main action in 1988 and in January 1989 IWS counterclaimed not only against SWRI, Morris and Michael, but also against Philip for misappropriation of waste accounts allegedly belonging to it. On March 7, 1989, Philip wrote to SWRI terminating their six-year business relationship. That same day, IWS dropped its counterclaim against Philip. The termination of Philip's relationship with SWRI had dramatic financial consequences: SWRI was effectively put out of business, as its profits decreased by ninety per cent, while Philip's profits skyrocketed, nearly doubling in less than a year.

594 It was in this context that the trial judge held IWS, Chester, and Robert liable to SWRI for inducing the breach of its contract with Philip. In so holding she applied the elements of the tort of inducing breach of contract to her factual findings. The appellants do not challenge her legal analysis. Instead, they attack her findings of fact and credibility. For the brief reasons that follow, we conclude that her findings are well supported by the record, disclose no palpable and overriding error and, therefore, are unassailable on appeal.

595 To succeed in its tort action for inducing breach of contract SWRI had to prove these five elements:

1. It had a valid and enforceable contract with Philip;
2. The defendants, IWS, Chester, and Robert, were aware of the existence of this contract;
3. The defendants procured the breach of the contract;
4. The breach was effected by wrongful interference on the part of the defendants; and
5. As a result of the breach it suffered damages.

See Posluns v. Toronto Stock Exchange and Gardiner, [1964] 2 O.R. 547 (H.C.), aff'd [1966] 1 O.R. 285 (C.A.), aff'd [1968] S.C.R. 330. The trial judge concluded that SWRI had made out these five elements. We agree with her conclusion.

596 Although Philip and SWRI had exchanged draft agreements, they never formalized their arrangement in a written contract. Nonetheless, the trial judge found that the parties had a valid and enforceable contract arising out of their negotiated agreements to transport and process waste for every major SWRI customer. There is no basis to interfere with that finding. It satisfies the first

element of the tort.

597 The appellants acknowledged that they were aware of the contractual relationship between SWRI and Philip. Their awareness satisfies the second element of the tort.

598 Both at trial and on appeal the main issue was whether SWRI had made out the third element of its cause of action: did the appellants procure the breach of the contract? Each side told a different story of why Philip terminated the contract in March 1989. The appellants, bolstered by the testimony of Fracassi, claimed that Philip ended its relationship with SWRI because it discovered that SWRI had "cheated" it on the Lasco contract. According to Fracassi, Michael gave him altered copies of the three agreements between SWRI and Lasco that we referred to earlier - the letter agreement of October 24, 1986, the settlement agreement of February 24, 1987, and the proposed letter of November 1988 - to hide the amount of profit SWRI was earning on the Lasco contract. The altered copies showed reduced transportation charges to Lasco for hauling its waste. Fracassi claimed that he first saw authentic copies of these agreements between SWRI and Lasco in reviewing documents given to his lawyer by lawyers for Robert, Chester, and IWS in March 1989. On discovering the discrepancies he severed Philip's relationship with SWRI.

599 Morris and Michael denied the appellants' version of what occurred. They contended that the appellants pressured Philip to sever the relationship in order to drive SWRI out of business. According to Morris and Michael, the appellants offered two inducements: IWS would drop its counterclaim against Philip and IWS would not compete for any of the business that SWRI and Philip had developed, not even business that had originated with IWS. Morris and Michael claimed that Robert altered the Lasco documents in early 1989 and gave them to Fracassi to provide him with a pretext for ending Philip's business relationship with SWRI.

600 The trial judge accepted Morris and Michael's evidence and their account of what occurred. She therefore found that the appellants had procured or caused the breach of the contractual relationship between SWRI and Philip. She wrote:

> After February 20, 1989, IWS did not release Philip from its counterclaim until Philip agreed to stop doing business with SWRI. I find that Robert insisted that Philip cease doing business with SWRI as a condition of the dismissal of IWS' counterclaim against it. Philip at first refused to do so, eventually relenting only after Robert provided them with forged documents, which suggested SWRI had defrauded Philip and when Chester/IWS offered other financial incentives (para. 1762).

She concluded that the appellants had induced the breach intentionally. At para. 1780, she wrote: "The termination of Philip's contractual relationship with SWRI was precisely what Chester and Robert intended. They knew SWRI would be severely damaged as a result."

601 The evidence amply supports the trial judge's conclusion that SWRI had proved the third

element of its cause of action. This evidence includes the following:

a) The timing of Philip's termination of its relationship with SWRI Philip ended the relationship with SWRI the very day IWS dropped its counterclaim against Philip. The trial judge properly rejected Fracassi's evidence that the timing was a coincidence.

b) The altering of the Lasco documents

The appellants alleged that Michael altered the documents and used them to conceal SWRI's profits. Michael denied this allegation and the trial judge accepted his denial, as she was entitled to do. Instead, she found that Robert altered the documents in early 1989 and gave them to Fracassi, who, knowing they were false, used them as a pretext to terminate his relationship with SWRI. Her finding is supported by the invoices SWRI sent to Lasco, which show transportation charges consistent with the authentic agreements; and by the different stories Fracassi and Robert told about how each "discovered" that the Lasco agreements had been altered. According to Robert, he met Fracassi at the Centennial Parkway offices, and in the course of going through files Fracassi had brought with him, discovered that some of the Lasco documents in those files differed from those in SWRI's files. According to Fracassi, however, no such meeting took place. Fracassi said he stopped doing business with SWRI after Robert's lawyers sent the authentic documents to his lawyer and he compared them with the altered documents. Not surprisingly, the trial judge rejected these "confusing, inconsistent and unpersuasive" stories.

c) Fracassi's first exposure to the altered Lasco documents

This point is closely related to the last point. Fracassi's story hinged on his claim that he received copies of the altered documents at the time each was written, that is, in October 1986, February 1987, and November 1988. He said that because he was a joint venture partner with SWRI he received copies of all contracts between SWRI and its customers.

Two pieces of evidence undermine Fracassi's claim: Michael's evidence, which the trial judge accepted; and the nature of the arrangement between Philip and SWRI on the Lasco account. Although SWRI and Philip were joint venture partners for other customers, on the Lasco account they were

> contractor and subcontractor. As a subcontractor Philip was not entitled to receive and did not receive copies of the agreements between SWRI and Lasco.

d) Philip's motive

> Philip obviously had a strong motive to end its contract with SWRI. Because of the appellants' promise not to compete, Philip stood to maintain all the SWRI business and to reap all the profits instead of having to share them.

e) Philip's termination letter

> This letter made no reference to the altered Lasco documents or to Philip having been cheated as a basis for terminating its relationship with SWRI.

602 SWRI easily established the last two elements of its cause of action. The appellants had no lawful grounds for interfering with the contract between SWRI and Philip, let alone by proffering tampered documents to justify Philip's termination of its relationship with SWRI. And SWRI sustained substantial damages because of the breach of contract: its profits fell by approximately $2.7 million in the first year after the breach. For these reasons we uphold the trial judge's finding of liability.

603 The appellants argue in the alternative that if they are liable for inducing breach of contract, the damages "at large" awarded by the trial judge, $2.5 million, are excessive and should be substantially reduced. We see no merit in this submission.

604 The trial judge largely accepted the evidence of the respondents' expert, Vettese, and relied on one of his four alternative loss calculations. She set out her key finding at para. 1800 of her reasons:

> Based on Michael's evidence, I find that of the four sets of assumptions used by Vettese, the assumptions in Alternative D and damages of $2,770,000-$2,840,000 are the most appropriate. However I find that those assumptions are conservative given the evidence of Michael, which I accept about expectations of growth in the business. Vettese's calculations do not include all of SWRI's customers.

After making various adjustments she arrived at a figure of $2.5 million.

605 The appellants challenge the assessment by challenging Vettese's assumptions. In his loss calculation, which was relied on by the trial judge, Vettese assumed that SWRI's customers at the date of breach would continue to do business with SWRI for the expiry of their contract term and an additional renewal term. The appellants submit that this assumption was not reasonable because Lasco, SWRI's most important customer, and perhaps other customers, too were dissatisfied with SWRI's rates and were looking for another waste handler. We do not accept this submission for the simple reason that after the breach Philip maintained the Lasco account and most other SWRI accounts.

606 The appeal against the finding of inducing breach of contract and the award of damages therefore fails.

ii. The Share Transfer Issue

607 As we have said, SWRI was incorporated in 1977 with two thousand preference shares and one hundred common shares. IWS held the preference shares. Ramsay Evans and Hayman, lawyers at the firm of Evans Husband, held the common shares in trust: fifty for Morris' three children and fifty for Chester's four children. By the time of trial, the IWS corporate records showed that the preference shares had been eliminated and that Michael and Douglas owned all of the common shares.

608 The appellants alleged that they discovered this change in SWRI's shareholdings in the summer of 1988. They counterclaimed for misappropriation of their shares in SWRI. They pointed out that there was no board of directors resolution cancelling the preference shares; there were no consents to the transfer of the common shares; and there was no compliance with Article 9 of SWRI's letters patent, which required written evidence of a share transfer.

609 The trial judge dismissed the counterclaim. Although troubled by the absence of corporate records documenting the restructuring, she found that the appellants had knowingly consented to the elimination of the preference shares and the transfer of the common shares. She found that the share restructuring took place in Ennis' law office in 1982 and was backdated to 1979. She also found that Chester actively directed the restructuring, largely to be able to claim that he, his sons and Morris never had anything to do with SWRI, thus permitting them to escape the scrutiny of anyone seeking to enforce the Laidlaw/Superior non-competition covenants. The trial judge ordered that, if necessary, SWRI's minute book and share registry be rectified to reflect what she found was everyone's intention: that Michael and Douglas own and run SWRI, and that IWS, Chester and his children have no further interest in it.

610 The appellants make two arguments on appeal: first, that the trial judge's finding of consent was unsupported by the evidence and contrary to the sworn testimony of Chester's sons; and second, that the transfer of the common shares was ineffective because of non-compliance with Article 9 of SWRI's letters patent. We do not accept either argument.

611 Ennis' account to Morris dated September 29, 1982, and his handwritten notes show that his office effected the restructuring of SWRI in 1982. The corporate records of SWRI showed that the restructuring was backdated to August 1, 1979. A minute of that date shows that Hayman,[2] as trustee, transferred fifty common shares to Michael Waxman and fifty common shares in trust to Cook, a legal assistant in Ennis' office. A later minute dated May 4, 1981 shows that Cook transferred the fifty shares she held in trust to Douglas Waxman.

612 The principal question the trial judge had to resolve was whether Chester's sons consented to the transfer of their common shares to Morris' sons. The secondary question was who bore responsibility for eliminating IWS' ownership of the preference shares.

613 In support of their claim that Morris orchestrated the restructuring of SWRI without their consent, the appellants pointed to the following evidence: the sworn testimony of Chester's sons that they did not consent to the transfer of their shares; Ennis' evidence that he took instructions on the restructuring from Morris and Ennis' September 29, 1982 account, which was sent only to Morris; the absence of any written consent; and the absence of any corporate records reflecting the elimination of the preference shares.

614 The trial judge, nevertheless, found that Chester directed the restructuring of SWRI, including eliminating the preference shares, and that Chester's children consented to transfer their common shares to their cousins. In our view, her findings are not tainted by any palpable and overriding error. Instead, they are supported by several important pieces of evidence.

a) The Evidence of Hayman

615 Hayman, whose evidence the trial judge accepted, testified that though he could not recall obtaining the consent of Chester's children or signing backdated documents, his normal practice was to seek consents from the beneficiaries before signing off on their behalf or agreeing to a backdating and he could think of no reason why he would depart from his practice in this case. As we have said at para. 337 of these reasons, Hayman's evidence of his normal practice may not be especially strong evidence but it is some evidence of what occurred.

b) The Timing of the Restructuring

616 The restructuring took place in 1982. At that time SWRI was a near dormant company with revenues of less that $40,000. It had no value to Chester or Robert.

c) The Reasons for the Restructuring

617 The trial judge accepted Morris' evidence that the restructuring of both the common and preference shares was done for two main reasons: to ensure that IWS, Chester, Robert, and Morris had no connection to the company and, therefore, could not be found in breach of the non-competition covenants with Laidlaw/Superior; and to give Michael a business to pursue, which

would keep him away from IWS. These reasons for the restructuring provided cogent support for the trial judge's key finding of consent.

d) Chester's Role in Business Decisions Affecting IWS

618 The trial judge rejected Ennis' evidence that Chester played no role in the restructuring and instead found that he actively directed it. This finding was open to her on the evidence. Indeed, it was consistent with Ennis' acknowledgement that Chester was actively involved in all important business decisions affecting IWS.

e) The Active Operations of SWRI

619 SWRI carried on an active business from offices at the Centennial Parkway building, as did IWS and Robert. It defies credulity that Chester did not know until the litigation started who owned and ran SWRI.

f) The Disappearance of the Written Consents and Other Records of SWRI Reflecting the Restructuring

620 In 1988 or 1989, after the litigation started, Robert Waxman went to the Evans Husband law office and went through the original SWRI file. The trial judge found that when he did so, he removed the consents. This finding was based on the evidence of opportunity and Robert's answers on his cross-examination, referred to at para. 1902 of the trial judge's reasons:

A. There may have been a file there one day I was there with Ross Husband.

Q. Right. And I suggest to you you were allowed to look through it?

A. I don't know if I looked through it or not.

Q. Is it reasonably possible that you did?

A. Not necessarily.

Q. Do you deny looking through it?

A. No, I don't.

Q. And in fact, did you take documents out of that file?

A. No.

Q. Are you sure?

A. No. [emphasis in original]

621 The appellants urged that the trial judge misunderstood the significance of Robert's second "No". As we have said at para. 362 she may well have misapprehended this piece of evidence. But in the light of the evidence of opportunity and the trial judge's overall assessment of Robert's credibility, she committed no palpable and overriding error in inferring that Robert used his review of the SWRI files to purloin the consents.

622 For all these reasons, the appellants' attack on the trial judge's finding of fact that they consented to the restructuring of SWRI must fail.

623 Nor can the appellants succeed in their alternative argument that the restructuring did not comply with Article 9 of SWRI's letters patent. Article 9 provides that no share should be transferred "without the sanction of the directors of the Corporation expressed either by resolution passed by the board or by an instrument or instruments in writing signed by a majority of the directors". The records of SWRI produced at trial did not contain any documents transferring the common shares that would satisfy Article 9. Similarly, the records of SWRI did not contain a board resolution or other document cancelling IWS' preference share certificate.

624 Still, the validity of the restructuring depended not on formal documentation, but on the consent of the shareholders. Consent is a question of fact. And as we have already said, the trial judge's finding of consent is supported by the evidence, and reflects no palpable error.

625 Moreover, we agree with the trial judge that s. 250 of the OBCA gave her the discretion to rectify SWRI's corporate records to give effect to the restructuring she found had occurred. Sections 250(1) and (2)(a) provide:

> 250.(1) Where the name of a person is alleged to be or have been wrongly entered or retained in, or wrongly deleted or wrongly omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the court for an order that the registers or records be rectified.
>
> (2) In connection with an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order requiring the registers or other records of the corporation to be rectified;
>
> ...

The discretion vested in the court under this section is broad: see Re Teddy Bear Valley Mines Ltd., [1993] O.J. No. 1588 (Ont. Ct. (Gen. Div.)). This discretion supports the trial judge's rectification order.

626 Accordingly, we do not give effect to the appellants' appeal from the dismissal of their counterclaim for misappropriation of the shares of SWRI.

iii. The IWS Claim for Theft of Business and Corporate Opportunities.

627 The appellants did not press this submission in oral argument. In their factum, however, they contended that Morris breached his fiduciary duty to IWS by misappropriating waste accounts and other corporate opportunities belonging to it for the benefit of SWRI. They submit that the trial judge erred in failing to find a breach of fiduciary duty. They focus on four particular waste accounts: Stelco, Proctor and Gamble, Domtar, and Munroe.

628 In advancing this submission the appellants rely on the principle exemplified in Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592: a person owing a fiduciary duty to a company is precluded from appropriating for himself property, a business advantage, or corporate opportunities belonging to the company. A fiduciary who does so must disgorge the misappropriated profits. This principle seeks to avoid conflicts between a fiduciary's personal interest and duty to the company.

629 Morris Waxman was a director and then the president of IWS. He therefore owed a fiduciary duty to IWS during the period he transferred waste accounts belonging to IWS to SWRI, the company run by his sons.

630 However, Morris has a defence to his transfer of IWS' accounts to SWRI: the informed consent of the shareholders of IWS. The only two shareholders of IWS were Morris and Chester. The trial judge found as a fact that Chester and IWS actively consented to the business activities of SWRI and the transfer of the accounts from IWS to SWRI. She specifically found that Chester and IWS consented to the transfer of the four waste accounts singled out by the appellants. The absence of a directors' or shareholders' resolution formalizing IWS' and Chester's consent was immaterial because consent is a question of fact, and in a closely-held company such as IWS, where the brothers had ongoing discussions about the company's business, a formal resolution would not be expected.

631 Thus the appellants' submission that the trial judge erred in finding Morris did not breach his fiduciary duty to IWS is nothing more than an attack on the trial judge's finding of consent. Yet that finding is amply supported by the evidence. As the trial judge pointed out, Chester had several good reasons for consenting to the transfer of IWS' waste accounts to SWRI. Chester wanted to mollify his brother about the share sale; he considered the waste business unimportant and had no interest in it; he wanted a corporate vehicle to keep Michael away from IWS; and the non-competition covenants with Laidlaw/Superior precluded IWS from handling many of these waste accounts, one of which was Stelco.

632 The appellants did not demonstrate that the trial judge made any reviewable error in her finding of consent. They submit, however, that to avoid liability for breach of fiduciary duty, Morris needed more than the informed consent of the shareholders. He also had to show that IWS was not in the waste business or had wholly withdrawn from it. The appellants say Morris could not do this because IWS remained in the waste business.

633 As the trial judge accurately pointed out, the case law does not support this second requirement. Informed consent alone provides a defence even if the fiduciary is pursuing a business opportunity that conflicts with the business of the company: see Canadian Aero Services v. O'Malley, supra at p. 606.

634 Moreover, even if Morris had to satisfy this second requirement, the trial judge found as a fact that he did so. IWS did not carry on and did not intend to carry on a broad-ranging waste management business. It engaged in a very limited waste business for a few of its scrap metal customers. The trial judge found that the specialized industrial waste business pursued by SWRI did not overlap with the limited waste business undertaken by IWS. We have no basis to set aside this finding.

635 For these reasons the appeal of the dismissal of the counterclaim for misappropriation of IWS' waste accounts fails.

D. The Wrongful Dismissal Appeal

636 In Morris' action for wrongful dismissal, the trial judge found that he was dismissed by IWS without cause on October 26, 1988. She awarded Morris $64,672 in damages based on two years' notice. She calculated this using only his basic annual salary of $33,185 exclusive of any draws or other special payments from IWS, which he typically received prior to his discharge. She did so on the basis that the latter would be encompassed in the determination of post-sale profits described previously.

637 We see no basis to quarrel with either the notice period or the damage calculation and indeed the appellant IWS raises neither in argument.

638 The appellant company contests only the findings of fact that sustain the trial judge's conclusion, particularly those in relation to SWRI, which it says constitute cause. Second, it argues that Morris' conduct after his discharge should be found to constitute just cause.

639 We have already found that there is no basis to interfere with the findings of fact by the trial judge. And there is simply no basis in law to find that his conduct after termination can constitute just cause for his earlier dismissal.

E. Ennis' Appeal

640 As we have already noted, Ennis had been the Waxman family's lawyer for many years. On the share sale he acted for both Morris and Chester. In 1989, Morris and Morriston sued Ennis in a separate action for failing to meet his legal obligations in connection with the share sale and lease.

641 The trial judge found Ennis liable for breach of fiduciary duty, breach of contract, and negligence. She largely rejected his explanation for his actions. She concluded that he should not have acted for either brother on the sale because of the inevitable conflict in acting for both. She found that, having decided to act, he failed to meet even his most minimal obligations to Morris, including failing to explain to him the share sale and lease documents.

642 The trial judge concluded that had Ennis met his legal obligations, Morris would not have sold his shares and Morriston would not have signed the lease. Because of Ennis' breach of his fiduciary duty, Morris lost the profits from his one-half interest in IWS and Morriston incurred losses on the December 1983 lease. The trial judge found Ennis jointly and severally liable for those losses in the same amount that she had found Chester liable in the main action.

643 Ennis appeals both the finding of liability against him and the damages award. His appeal on liability depends on overturning the trial judge's finding that Morris did not know that he was selling his shares. His appeal on damages seeks to limit the equitable damages ordered by the trial judge or to substitute common law damages.

i. Ennis' Appeal on Liability

644 Ennis challenges several adverse findings of fact made by the trial judge. But his counsel fairly concedes that, if this court upholds the trial judge's finding that Morris did not know he was selling his shares, Ennis cannot succeed on his appeal against liability.

645 We have upheld the trial judge's finding that Morris did not know that he was selling his shares. Combined with Ennis' admission that he acted for Morris and Chester on the share sale, that finding is fatal to his appeal on liability.

646 Ennis acknowledges that he had a fiduciary duty to Morris in connection with the share sale. At the heart of the fiduciary duty lies the duty of loyalty, which includes the duty to avoid conflicting interests: see R. v. Neil, [2002] 3 S.C.R. 631 and Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599 (C.A.), leave to appeal to S.C.C. refused (1982), 37 O.R. (2d) 499n. Ordinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them. In a transaction of this magnitude Ennis simply could not act for Chester and Morris. By doing so he put himself into a hopeless conflict of interest, and, as the trial judge found, he severely compromised his representation of Morris. The trial judge was unquestionably correct in concluding that merely by acting on the sale, Ennis breached his fiduciary duty to Morris.

647 Moreover, having decided to act, Ennis breached even the most basic obligations of a lawyer to his client. Three obligations in particular come to mind. First, Ennis did not raise with Morris the problem in acting for both him and his brother. He did not explain the potential conflict, nor did he obtain Morris' consent to act for both sides. Rather than recommend that Morris obtain independent legal advice, Ennis arranged for Morris to sign a waiver of such advice. This waiver was ineffective because it was uninformed, and, in any event, was obtained only after the share sale documents had been signed.

648 Second, Ennis showed no commitment to Morris' cause and, correspondingly, Morris did not receive from Ennis the zealous representation to which he was entitled. Ennis did not explain to Morris the pitfalls and dangers of the share sale: see Clarence Construction Ltd. v. Lavallee (1980), 111 D.L.R. (3d) 582 (B.C.S.C.), aff'd (1981), 132 D.L.R. (3d) 153 (B.C.C.A.). He did not discuss the terms of the sale with Morris, much less review the share sale documents with him. He did not even discuss the clearly one-sided nature of virtually every term of the lease (see para. 164 of our reasons). Instead he sat silently at the meeting on December 22, 1983 when the documents were signed, thereby lending a false aura of normalcy to the closing, as the trial judge found.

649 Third, Ennis showed no regard for his obligation of candour to Morris. As the trial judge accurately observed, quoting LaForest J. in Hodgkinson, at 452, the duty to disclose "lies at the core of the fiduciary principle." Ennis could not keep from Morris any relevant information that he received from Chester. Yet the trial judge detailed nine pieces of relevant information that Ennis did not disclose to Morris (para. 2295). These included the fact that Morris was being asked to sign documents selling his shares, the fact that the $3 million sale price did not reflect the 1979 and 1981-2 bonus allocations, details about the terms of the lease with Morriston, and Linton's valuation memo of November 1982. The trial judge's findings on Ennis' non-disclosure are amply supported by the record.

650 For all these reasons we decline to give effect to Ennis' appeal on liability.

ii. Ennis' Appeal on Damages

651 The basic rule of equitable compensation is that the injured party will be reimbursed for all losses flowing directly from the breach. The trial judge applied this principle in assessing damages against Ennis for breach of his fiduciary duty. She held that from the time of the share sale onwards Morris was deprived of all the benefits of his fifty per cent ownership in IWS. The loss of these benefits flowed directly from Ennis' breach. Thus, together with Chester, Ennis was jointly and severally liable for these losses. He was also jointly and severally liable to Morris and Morriston for any losses flowing from the December 1983 lease.

652 Ennis contends that the trial judge's award of damages should be reduced for any one of three reasons. First, he submits that the proper measure of damages is the difference (if any) between the price at which Morris sold his shares in IWS and the fair market value of those shares in December 1983. Second, he submits that the trial judge erred in failing to consider that he neither controlled

nor profited from the business of IWS. Third, he submits that the trial judge erred in failing to apply the common law principles that limit damages. We do not accept the first two submissions, but we do give effect to the third.

653 Ennis' first submission ignores the findings of the trial judge and the principles of equitable compensation. The trial judge found that had Ennis fulfilled his fiduciary duty Morris would not have sold his shares to his brother. Fixing damages at the difference between the sale price and the fair market value of the shares assumes a contrary finding: that Morris wanted to sell his shares and, but for Ennis' breach of duty, would have obtained a better price.

654 Moreover, the trial judge found that Ennis breached his fiduciary duty, which is a duty that lies in equity. Therefore, at least as a starting point, Ennis' damages must be assessed as the trial judge assessed them: damages flowing from Morris' loss of his fifty per cent interest in IWS. Morris is entitled to be put in as good a position as he would have been in if the breach had not occurred and he had remained a half-owner of the family business. Accordingly, we see no merit in Ennis' first submission.

655 Ennis' second submission seeks to reduce the award of damages because he had no control over IWS and did not profit from the business as Chester did. In our view, neither of these factors affords a basis in equity to reduce the award.

656 That Ennis had no control over or interest in IWS leads to but a single difference between the award against him and the award against Chester. Chester was required to convey fifty per cent of his shares of IWS to Morris. Ennis, obviously, had no such shares to transfer, nor was he required to pay Morris the value of his fifty per cent interest. Otherwise, in our opinion, the damages Ennis is required to pay should not be reduced because he did not exert any control over IWS.

657 Admittedly, in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, LaForest J. observed at 578 that "[t]here is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on". But he made this observation simply to reject the argument that the remedy for breach of fiduciary duty should automatically be the same as the remedy for breach of trust. In breach of trust cases the object of the trust must be restored to the beneficiary, or, if that is not possible, the beneficiary must be compensated for the value of the object. In breach of fiduciary duty cases the court assesses the losses flowing from the breach.

658 Likewise, a damages award lower than that made against Chester should not be made against Ennis simply because he did not profit from the business of IWS. Lack of profit does not automatically reduce equitable compensation for breach of fiduciary duty. Canson itself makes this clear. In that case the defendant, a solicitor, failed to tell his clients of the secret profit earned by a third party when the solicitor acted for them in buying a piece of land. The clients were entitled to

recover the secret profit. That was not disputed. What was disputed was whether they could recover more because of the solicitor's admitted breach of fiduciary duty. The court did not bar further recovery for breach of fiduciary duty simply because the solicitor had not benefited from the breach of fiduciary duty, though on the facts further recovery was denied. For these reasons, we decline to give effect to Ennis' second submission.

659 That brings us to Ennis' third submission: that the amount of equitable compensation awarded by the trial judge should be reduced because of limiting common law principles such as remoteness, causation and intervening act. Based on the Supreme Court's decisions in Canson and Hodgkinson, we accept this submission.

660 Traditionally, these common law limiting principles had no place in equity. The rationale for keeping these concerns out of equity has been the desire to enforce fiduciaries' strict standards of good faith. But as Canadian law has changed to permit plaintiffs to sue "in whatever manner they find most advantageous", correspondingly courts have recognized - as LaForest J. said in Hodgkinson at 444 - that "equity is flexible enough to borrow from the common law." Increasingly, courts seek to achieve similar compensation for "similar wrongs", whether the action is framed in contract or tort or as breach of fiduciary duty. Indeed, as LaForest J. commented in Canson at 587: "[I]t would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization."

661 Our former colleague, Finlayson J.A., made the same point in Martin v. Goldfarb (1998), 41 O.R. (3d) 161 (C.A.) when he approved the following passage from the reasons of the trial judge in that case at 173:

> Regardless of the doctrinal underpinning, plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract or tort. The objective of the expansion of the concept of fiduciary relationship was not to provide plaintiffs with the means to exact higher damages than were already available to them under contract or tort law.

662 Thus, both the Supreme Court of Canada and this court have applied common law principles to limit equitable compensation. Their application is subject to two overriding considerations. First, the court can consider the principles of "remoteness, causation, and intervening act where necessary to reach a just and fair result": see Hodgkinson at 443. Second, these principles should be applied only if doing so does not raise any policy concerns: see Canson at 581 and Hunt v. TD Securities Inc. (2003), 66 O.R. (3d) 481 (C.A.) at 506.

663 We apply these principles to the award against Ennis. We do so giving a measure of deference to the trial judge's assessment. In our view, the principle of intervening act warrants reducing the damages award. Specifically, we consider Chester's repeated assurances to Morris that the share sale would be rectified to be an intervening act that should limit the award of damages

against Ennis.

664 Morris learned the truth about what he had signed from Taylor and Wiseman in January 1984. He immediately objected to the sale and wanted it set aside. He knew then the facts grounding a cause of action against Ennis and Chester. But he did not sue them because Chester assured him that they would resolve the matter privately, consistent with the Waxman family culture. Importantly, the trial judge found at para. 1518 that "Morris was unduly influenced by Chester and was not free of that influence until approximately the time he filed suit. He did not seek legal advice because Chester led him on and because he mistakenly believed that Chester would voluntarily straighten out.'" The trial judge made no finding that Ennis led Morris on or that Ennis gave Morris any false assurances. Instead, Chester's conduct - and Chester's conduct alone - caused Morris to put off seeking legal advice or issuing a statement of claim. For this reason, Chester's defence based on Morris' post-sale conduct failed.

665 Chester's assurances to Morris, his leading him on, amount to an intervening act for which Ennis should not be held responsible. Ennis had no control over Chester's conduct and he is entitled to point to that conduct to limit the award of damages against him: see McKittericket al. v. Duco, Geist and Chodos et al. (1994), 76 O.A.C. 310. The trial judge did not consider this intervening act and her failure to do so justifies our intervening in the award.

666 Finally, we must fix a cut-off point for the damages award against Ennis. Any point necessarily entails a measure of arbitrariness, but we think it is fair to assess Morris' damages against Ennis in the amount of his losses from being deprived of a fifty per cent interest in IWS and from the December 1983 lease, to the end of January 1985. We choose that date for three reasons: First, less than a month after having signed the share sale and lease documents Morris knew that his brother had cheated him. From then on Morris' focus became not so much Chester's trickery but whether Chester would make good on his assurance that he would undo the sale. Ennis played no role in this.

667 Second, even if Chester had acted on his assurance, undoing the sale would have perhaps taken up to a year. Ennis must bear responsibility for this time period.

668 Third, after finding out that his brother would not undo the share sale, Morris was entitled to a reasonable time to consider what to do. In the light of these considerations, fixing a January 31, 1985 cut-off date for the damages award against Ennis seems to be reasonable.

669 We see no policy concerns standing in the way of this award. Morris still recovers the full amount of his losses from Chester. Ennis must still pay a substantial amount, but is responsible only for the earlier portion of Morris' losses, not the later portion attributable to Chester's assurances. And Ennis is not penalized for his breach. Instead, the award against him is closely tied to the duty that he violated.

iii. Conclusion

670 In the light of the findings of the trial judge and Ennis' admission that he acted for both brothers on the share sale, we dismiss Ennis' appeal against liability. We allow his appeal against damages in part. Because we consider Chester's assurances to Morris that the share sale would be undone to be an intervening act for which Ennis cannot be held accountable, we reduce the damages payable by him to all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, to the end of January 1985. Ennis is jointly and severally liable for those losses. If the parties cannot agree on the amount we direct a reference to quantify these damages.

F. Morris' Appeal Against Taylor Leibow

671 In a separate action Morris and Morriston, sued IWS' long-time auditor, Taylor Leibow, for negligence and breach of fiduciary duty. Morris advanced two principal claims: first, Taylor Leibow failed to ensure that IWS' financial statements properly reflected related-party transactions, especially transactions with Greycliffe, or to bring the extent of these related-party transactions to his attention; and second, Taylor Leibow failed to discuss the bonuses with Morris.

672 The trial judge dismissed both claims. She found that if Taylor Leibow owed a duty of care to Morris, it breached that duty by failing to advise him that the related-party transactions between Greycliffe and IWS were not at fair market value, and by failing to advise him that IWS had paid out excessive bonuses, to his detriment. However, applying the Supreme Court of Canada's decision in Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, she held that though Taylor Leibow owed Morris a prima facie duty of care, that prima facie duty was ousted by policy concerns about indeterminate liability. She also held that Taylor Leibow did not owe a fiduciary duty to Morris. Additionally, she held that Morris' claim on the related-party transactions with Greycliffe was barred by an agreement and undertaking that he had signed in 1998 in order to obtain copies of Taylor Leibow's working papers.

673 Morris appeals and Taylor Leibow cross-appeals. The overriding issue on the appeal is whether the trial judge erred in holding that Taylor Leibow did not have a duty to warn Morris about the related-party transactions with Greycliffe or about the bonuses. In contending that she erred, Morris makes four submissions:

1. The trial judge erred in relying on Hercules to limit the scope of Taylor Leibow's liability.
2. The trial judge erred in failing to hold that Taylor Leibow owed a duty to Morris separate and apart from its role as auditor of IWS, based on its historical relationship with Morris and Chester.
3. The trial judge erred in failing to find that Taylor Leibow owed a fiduciary duty to Morris.
4. The trial judge erred in finding that Taylor Leibow could rely on the agreement and undertaking in defence to Morris' claim on the related-party transactions.

674 Taylor Leibow seeks to uphold the trial judge's finding that it owed no duty to Morris and her

finding on the agreement and undertaking. Moreover, on its cross-appeal it seeks to set aside her findings of negligence on the ground that they are not supported by the evidence.

i. Background

675 Taylor Leibow audited IWS' financial statements annually for over thirty years. It also audited the statements of the companies related to IWS, including Greycliffe. From the 1940s to the late 1970s, Taylor was the partner in charge of the audits. From the late 1970s on, Wiseman took over as the partner in charge, though Taylor was consulted and gave advice from time to time.

676 Beyond auditing IWS and the related companies, Taylor Leibow was retained to give advice on special projects, for example the Lasco and Laidlaw transactions. It gave advice about the estate freeze that Chester and Morris considered in the 1970s. And it annually reviewed the individual tax returns of Morris and Chester.

ii. The Trial Judge's Negligence Findings

677 To put Morris' submissions in context, we will briefly review the trial judge's findings of negligence. These findings assume, of course, that Taylor Leibow had a duty of care to warn him about the related-party transactions with Greycliffe and the bonuses.

(a) Findings on the Related-Party Transactions

678 The 1981 financial statement of Greycliffe prepared by Wiseman included a related-party note, which read as follows: "The rates charged by the company are at market value for services rendered."

679 The 1980, 1981, and 1982 financial statements of IWS, prepared by Linton and audited by Taylor Leibow, contained no related-party notes about the transactions between IWS and Greycliffe. In these transactions, according to the trial judge's findings, Robert had diverted IWS profits of over $2.3 million to Greycliffe and his other companies by the end of 1983.

680 In light of the note on the 1981 Greycliffe financial statement and the absence of any related-party notes on the IWS statements, the trial judge concluded that Taylor Leibow fell below the standard of a reasonably competent auditor. If Taylor Leibow owed a duty of care to Morris personally then it was liable in negligence, either for failing to include a related-party note on the IWS statements or for failing to alert Morris to its suspicions about the fairness of Greycliffe's rates. In so concluding, the trial judge rejected Wiseman's evidence that he saw no reason to discuss the fairness of Greycliffe's rates with Morris because Morris knew what was going on in both companies.

681 The trial judge's conclusion was amply supported by the evidence. This evidence included:

* Morris' expert, Al Rosen, whose opinion evidence the trial judge accepted,

testified that the 1981 Greycliffe note was a "very strong note". Under generally accepted standards of auditing, the note required Taylor Leibow to gather enough external corroborative evidence to verify its accuracy. Taylor Leibow had to verify that Greycliffe was charging and IWS was paying fair market rates. This it did not do.

* Because haulage costs amounted to over seven per cent of IWS revenues, Rosen also testified that, in his view, IWS' related-party transactions with Greycliffe were material and should have been disclosed in the 1981/1982 financial statements.
* Linton told Wiseman that Robert preferred not to include a related party note on the IWS financial statements. In Rosen's opinion, this preference for non-disclosure would have raised the suspicions of any reasonable auditor.
* In 1982 an employee of Taylor Leibow, Demers, concluded that IWS' financial statements should have reflected the company's related-party transactions with Greycliffe.
* Taylor Leibow's 1982 working papers included an organization chart for IWS, which showed Morris' diminished role in the company.
* Wiseman was concerned enough about Greycliffe's charges to IWS that he spoke to Taylor about them. Taylor then apparently spoke to Chester, but neither Taylor nor Wiseman spoke to Morris.

(b) Findings on the Bonuses

682 Taylor Leibow was not consulted about the 1981/1982 bonuses before they were declared or about the 1983 reallocation of Morris' bonus. However, it became aware of the bonuses and the reallocation during its audits. The trial judge found that by early 1982, Wiseman knew from his audit of IWS that much of the company's equity (attributable to the proceeds of the Lasco and Laidlaw sales) had been distributed, apparently without justification, to Chester's sons. She therefore concluded that if Taylor Leibow owed a duty of care to Morris, it was negligent in failing to discuss with him both the 1981/1982 bonuses and the 1983 reallocation of Morris' own bonus.

(c) Findings on Causation and Remedy

683 The trial judge concluded that if Taylor Leibow had voiced its concerns about the related-party transactions and the bonuses to Morris, then his trust and confidence in his brother would have been eroded. The trial judge inferred that had this happened, Morris would have obtained independent legal and financial advice or would have talked to Michael. In the trial judge's view, had Morris done either, the share sale would not have occurred.

684 The trial judge did not assess damages against Taylor Leibow in connection with the related-party transactions and bonuses. However, in the light of her findings on causation, and assuming Taylor Leibow owed Morris a duty of care, presumably the trial judge would have

awarded damages against the auditor in amounts similar to those she awarded against Chester.

685 In this court, Mr. Harrison fairly acknowledges that the trial judge's conclusion on causation may not be supportable because of concerns about remoteness. Therefore, on appeal, Mr. Harrison limits the remedy he seeks for his client to discrete sums for the failure to warn about IWS' transactions with Greycliffe and about the bonuses. For the profits Greycliffe diverted from IWS, Morris asks for damages of $1,180,073 and for the excessive bonus payments he seeks damages of $2,312,000. These amounts track the amounts awarded against Chester and IWS.

iii. Analysis

(a) Did the Trial Judge Err in Relying on Hercules to Limit the Scope of Taylor Leibow's Liability?

686 Morris' principal submission is that the trial judge erred in relying on the Supreme Court of Canada's decision in Hercules to conclude that Taylor Leibow did not have a duty of care to warn Morris about the bonuses and related-party transactions. This submission has two branches. First, Hercules was a negligent misrepresentation case and should not automatically be applied to a duty to warn case. Second, even if Hercules applies, it recognizes exceptional cases in which an auditor's prima facie duty of care is not ousted by policy considerations. Morris argues that his relationship with Taylor Leibow establishes one of these exceptional cases. We do not agree with either branch of Morris' submission.

687 Hercules was a negligent misrepresentation case. It concerned the extent of an auditor's duty to shareholders of a company for negligently prepared financial statements. Morris' claim against Taylor Leibow is not for negligently prepared audited statements of IWS, but for failure to warn him about information Taylor Leibow uncovered or should have uncovered during the course of its audits. Morris frames his claim as a failure to warn rather than in negligent misrepresentation because the latter cause of action requires proof of actual reliance. As Morris maintains that he did not read the audited financial statements of IWS, he can hardly claim that he relied on them. But, however framed, the claim against Taylor Leibow - like the claim against the auditors in Hercules - arises out of its audit retainer with the company.

688 More important, Hercules did no more than apply the two-stage test from Anns v. Merton London Borough Council, [1978] A.C. 728, which has consistently been applied by the Supreme Court of Canada to determine the scope of liability for a wide array of negligence claims, especially, as this one is, claims for the recovery of pure economic loss. Under the Anns test the court asks first whether the parties have a sufficient relationship of proximity to establish a prima facie duty of care, and second, whether policy considerations negate that prima facie duty.

689 Although negligent misrepresentation imports considerations of reasonable reliance not relevant to a negligent failure to warn, for either claim the general framework in Anns will

determine whether a duty of care exists. The Supreme Court itself applied the general framework that LaForest J. set out in Hercules in subsequent duty to warn decisions, such as Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210. Therefore, the trial judge cannot be criticized for drawing on the analysis in Hercules to decide whether Taylor Leibow owed the duty of care contended for by Morris.

690 The more important question is whether the trial judge was correct in concluding that Taylor Leibow had no duty of care to warn Morris that the bonus allocations and related-party transactions were detrimental to his interests. We think that she was.

691 The two-stage Anns test recognizes that policy considerations play a significant role in determining whether a duty of care exists. In its latest formulation of the test - in Cooper v. Hobart, [2001] 3 S.C.R. 537, decided after the trial judgment in the present case - the Supreme Court concluded that policy infuses both stages of Anns. McLachlin C.J.C. wrote at 550-51:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

692 At the first stage of Anns the trial judge found, at para. 2441 of her reasons, a sufficient relationship of proximity to establish a prima facie duty of care:

> In all of the circumstances, I find that the auditors owed a prima facie duty of care to Morris. The test in Anns v. Merton London Borough Council, adopted by the Supreme Court of Canada in Hercules has been met here. A sufficient relationship of proximity or neighbourhood exists between the auditors and Morris such that carelessness on the part of the auditors would be likely to cause damage to Morris. The auditors were clearly aware that Morris was a 50% shareholder of IWS and a client. It was foreseeable that Morris would reasonably rely on the IWS financial statements [citations omitted].

693 Nonetheless, at the second stage of Anns, though "troubled" by the result, she concluded at paras. 2447 and 2449 that this prima facie duty was ousted by policy concerns about indeterminate

liability:

> I agree with the submissions of counsel for Taylor Leibow that, absent a specific request by Morris for protection by the Auditors or by Taylor or by Wiseman, any duty of care arising from the audit engagement was owed to IWS.
>
> There was no evidence here to the effect that in respect of the audit Taylor Leibow was specifically retained to provide information to Morris. While I am troubled by this aspect of the case, I find that Taylor Leibow owed no duty of care in respect of the audit to Morris personally, that policy considerations about indeterminate liability override the prima facie duty of care. The facts here do not fall within the exceptions discussed by the Supreme Court in Hercules [citations omitted].

694 In our opinion, policy concerns at both stages of Anns negate any prima facie duty of care. We accept the trial judge's findings on the "proximity" between the parties. Proximity here means that Morris and Taylor Leibow had a sufficiently close relationship that in doing its audit work Taylor Leibow had an obligation to be mindful of Morris' legitimate interests: see Hercules, at 187-88. The evidentiary record supports this finding of proximity. For example, although IWS was Taylor Leibow's client, Wiseman acknowledged that the "real clients" were Morris and Chester.

695 We turn from this finding of proximity to policy considerations. In Hercules, LaForest J. concluded that in doing audit work for a company, in preparing reports and in reviewing a company's financial statements, auditors normally owe no duty of care to individual shareholders. Auditors perform these functions to permit shareholders as a group to collectively oversee the administration and management of a company. Ordinarily they do not do their work to enable individual shareholders to make personal business decisions.

696 Imposing a duty on auditors to look out for the interests of individual shareholders raises the concern first articulated by Cardozo C.J. in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.C.A. 1931) at 444, and often repeated since: that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". The Supreme Court of Canada has fastened on this concern as a policy consideration limiting the circumstances in which a duty of care is established. In most cases this policy concern will - at the second stage of Anns - negate any prima facie duty of care owed by auditors to individual shareholders of a company. The trial judge relied on this "residual" policy concern to negate the prima facie duty that Taylor Leibow owed to Morris. We agree with her reasoning on this point.

697 Admittedly, in Hercules LaForest J. recognized that there might be exceptional cases in which the policy concern about indeterminate liability did not arise and, thus, the prima facie duty of care owed by an auditor to an individual shareholder would not be negated. The exceptional case requires the shareholder to show two things: the auditor knows the shareholder's identity; and the

shareholder uses the auditor's work for the specific purpose for which it was undertaken. In his reasons in Hercules, LaForest J. discussed these two requirements several times. For example, he wrote at 198:

> In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the Anns/Kamloops test and a duty of care may quite properly be found to exist.

698 Like the plaintiffs in Hercules, Morris has established the first requirement but not the second. And as in Hercules, Morris' failure to establish the second requirement negates the prima facie duty of care.

699 Taylor and Wiseman had known Morris for a very long time. This relationship alleviates any concerns about liability to an indeterminate class. However, Morris did not seek to use Taylor Leibow's work for the purpose for which it was undertaken. Taylor Leibow undertook its audit work for the typical purpose of an audit engagement, to permit the controlling directors and shareholders, Morris and Chester, to better administer and manage the business of IWS. It did not perform its audit work to allow one shareholder, Morris, to make sure he was not being cheated by the other shareholder, Chester. In other words, by accepting an audit engagement for IWS, Taylor Leibow did not undertake to conduct its work with an eye to the personal interests of either of the two shareholders. To hold otherwise would expose Taylor Leibow, unknowingly, to liability in an indeterminate amount for an indeterminate time, here potentially over $50 million over the course of more than a decade.

700 Taylor Leibow would only have had a duty of care to look out for Morris' personal interests, and to warn him of any actions taken by his brother that were detrimental to those interests, if it had agreed to such an expansion of its mandate. Yet the evidence shows that Taylor Leibow never undertook or agreed to do work that it was not specifically asked to do. And the evidence shows that Morris never asked Taylor Leibow to expand its mandate to protect his interests or warn him about actions that might detrimentally affect his position in IWS: to the contrary, Morris' total reliance on Chester was central to his position in the litigation.

701 Indeed, the evidence is to the contrary. Morris never brought any of his business concerns to the auditors even after the estate freeze discussions in the 1970s aroused his suspicions about the future operations and control of IWS. In other words, he never retained Taylor Leibow to give him personal advice about his interests in IWS. Thus, in doing its audit work for IWS, Taylor Leibow had no obligation to bring the information it discovered to Morris' attention.

702 During its audits, Taylor Leibow did become concerned about whether the seemingly

excessive bonuses to Chester's sons could be justified. It also learned about Robert's request not to include a related-party note for Greycliffe in IWS' financial statements. Wiseman spoke to Taylor about both matters, and Taylor then spoke to Linton and Chester, but not to Morris. In both instances Taylor Leibow's concerns were tax concerns. Therefore, Taylor went to the two people responsible for tax matters: Linton and Chester. Taylor Leibow had reason to be concerned about Revenue Canada; it had no reason to be concerned about one brother cheating the other.

703 Morris' submission that Taylor Leibow owed him a duty of care raises a second problem, a problem that arises out of the relationship between the parties and, thus, at the first stage of the Anns test. The problem is one of potential conflict of interest. Suppose Morris had gone to Taylor Leibow and said: "I am concerned about the way my brother is running IWS. When you do the audit, let me know if you find anything suggesting that my fifty per cent interest in the company is being diluted." Most likely, Taylor Leibow would have replied: "To comply with your request would put us into a conflict of interest with your brother and our client IWS. We cannot act."

704 During oral argument, counsel for Morris contended that the analysis in Hercules did not apply to a closely-held company such as IWS, which was more akin to a partnership between the two brothers. He argued that Taylor Leibow had a "whistle blower" obligation, which included telling one brother that the other was trampling on his interests. We take a different view. Especially in a closely-held company such as IWS, unless both "partners" agreed that the auditor would take on this whistle blower role, doing so would potentially put it in an untenable conflict of interest.

705 Therefore, concerns about Morris not using Taylor Leibow's work for the purpose for which it was undertaken and about a potential conflict of interest negate the prima facie duty of care that Taylor Leibow may have owed to Morris Waxman. Accordingly, we decline to give effect to this ground of appeal.

(b) Did the Trial Judge Err in Failing to Hold that Taylor Leibow Owed a Duty to Morris Beyond its Role as Auditor of IWS?

706 Morris contends that in assessing Taylor Leibow's obligation to him, the trial judge focused too narrowly on an auditor's duty to end users of audited financial statements. Morris submits that Taylor Leibow owed him a duty of care not just as the auditor of IWS, but as his long-time and trusted financial advisor and personal accountant. Morris says that this duty included the obligation to tell him of information contrary to his personal interests. Thus, if Taylor or Wiseman knew that his fifty per cent interest in IWS was being eroded, either had an obligation to tell him.

707 In support of this submission Morris points to these considerations: his long-standing relationship with Taylor and Taylor Leibow, stretching back nearly forty years; his "notes from the grave" in which he claimed that in business matters Taylor, Wiseman, and Chester were the people he most trusted; and Taylor's own acknowledgment that Morris and Chester were as close to him as any non-family members could be. Perhaps most important, Morris relies on Wiseman's evidence that during the discussions about an estate freeze, he felt an obligation and responsibility to make

sure Morris understood that Chester was contemplating a 60/40 split in the ongoing ownership interests of IWS.

708 To us, this evidence falls short of establishing that Taylor Leibow had a general duty to warn Morris any time it discovered information suggesting his half-interest in IWS was being diminished. By themselves, neither the length of Taylor Leibow's relationship with Morris nor the closeness of that relationship can create the duty of care contended for by Morris. And Morris' "notes from the grave" - handwritten comments that were never communicated to Taylor or Wiseman - cannot create a duty of care either.

709 Whether a duty of care existed must depend on what Taylor Leibow was retained to do, and on the reasonable expectations of the parties arising from that retainer. Here, Morris' submission contradicts the undisputed evidence. Taylor Leibow was retained from time to time for very specific tasks: to review the tax returns of the Waxman family, including Morris, and to advise Chester and Morris during the estate freeze discussions, which explains why Wiseman brought the potential 60/40 split in IWS to Morris' attention.

710 Tellingly, Morris never retained Taylor Leibow to look out generally for his business or personal interests. He never looked on Taylor Leibow as his trusted personal or financial advisor. Indeed he never asked Taylor Leibow to provide him with financial or investment advice. And the trial judge found that, historically, Taylor Leibow never did anything for Morris that it was not asked to do.

711 Morris and Chester made business decisions about IWS and personal investment decisions within the Waxman family. They made them separately, or together, but typically without the advice of their outside auditor. Taylor Leibow was not consulted about the bonus payments. It was not consulted about the share sale or any of the discussions leading to it.

712 Absent a specific request to do so, Morris could not reasonably expect that Taylor Leibow would advise him of the possible erosion of his fifty per cent interest in IWS. Had Taylor Leibow been asked to accept such a retainer it may well have refused. For by accepting it, as we said earlier, the firm risked being in the middle of a conflict between two brothers and long-standing friends, who were the directors of an important corporate client.

713 Therefore, we conclude that Taylor Leibow owed no duty of care in tort to Morris personally. It owed no duty as auditor and it owed no duty based on its historical relationship with Morris and Chester. Taylor Leibow was the auditor for IWS and it was to the company and to the shareholders collectively that it owed a duty of care.

(c) Did the Trial Judge Err in Failing to Find that Taylor Leibow Owed a Fiduciary Duty to Morris?

714 Morris submits that the trial judge erred by failing to find that Taylor Leibow owed him a

fiduciary duty, a duty that again would include advising him of information contrary to his interests. We decline to give effect to this submission for two reasons: the trial judge's express finding to the contrary; and the absence of the traditional hallmarks of a fiduciary relationship between Morris and Taylor Leibow.

715 The trial judge found at para. 2448 of her reasons that, "[o]n the facts of this case, given the authorities cited above, I find no specific circumstances sufficient to give rise to a fiduciary duty owed to Morris personally in respect of the audit."

716 A finding on the existence of a fiduciary duty is typically a question of mixed fact and law: the application of the well-recognized legal characteristics of a fiduciary relationship to the specific facts of any given relationship. Here, Morris does not suggest that the trial judge misapplied the law. Therefore, her finding that Taylor Leibow owed no fiduciary duty to Morris personally is largely factual and is entitled to deference on appeal: see Hodgkinson, supra at p. 425-6.

717 Morris seeks to escape the consequences of this finding by two alternative arguments. He argues that although the trial judge found that Taylor Leibow owed no fiduciary duty as auditor, she did not decide whether it owed an "independent" fiduciary duty. Alternatively, he argues that the trial judge's conclusion on fiduciary duty really just meant that Taylor Leibow owed no duty to Morris in tort. We do not agree with either argument.

718 We acknowledge that the trial judge's finding, uncharacteristically, is not as clear as it might be. It comes in a section of her reasons dealing with a duty of care in tort, and is in the middle of a series of three paragraphs under the heading "Taylor Leibow Owed No Duty of Care to Morris in the IWS Audit" (paras. 2447-49). Moreover, the scope of the phrase "in respect of the audit" is perhaps somewhat confusing. Nonetheless, we have no reason not to take the trial judge's words at face value.

719 Unquestionably, the trial judge knew the difference between a duty of care in tort and a fiduciary duty. No one could seriously suggest otherwise. To say that the words "in respect of the audit" limited the scope of the finding to Taylor Leibow's duty as auditor would mean that the trial judge failed to address Morris' claim of an independent fiduciary duty, a failure that would be inconsistent with the thoroughness of her reasons. Thus, we take her finding to mean that Taylor Leibow owed no independent fiduciary duty as well as no fiduciary duty as auditor to advise Morris of information contrary to his interests learned during its audits. Morris accepts that if this is our view of the scope of the trial judge's finding then, because of appellate deference to that finding, his submission must fail.

720 However, even if we were to accept the limited scope of the finding contended for by Morris, we see no basis for an independent fiduciary duty. Simply because Taylor Leibow is a firm of professional accountants and gave advice to Morris personally from time to time does not automatically give rise to a fiduciary relationship between them: see Brant Investments Ltd. v. Keep Rite Inc., (1991) 80 D.L.R. (4th) 161 at 172 (Ont. C.A.); Roman Corp. v. Peat Marwick Thorne,

(1994) 12 B.L.R. (2d) 10 at 28 (Ont. G.D.). Nor do Morris' assertions, largely self-serving, that he "trusted" and "relied on" Taylor Leibow create a fiduciary duty. We must consider whether their relationship is characterized by the accepted badges of a fiduciary relationship: whether Taylor Leibow had scope to exercise some discretion or power; if so, whether it could exercise that discretion or power unilaterally to affect Morris' legal or practical interests; and whether Morris was vulnerable to the exercise of that discretion or power.

721 None of these badges was present. When Morris consulted others about his own business and financial affairs, invariably he went to Chester, occasionally to Linton. He gave Taylor Leibow neither discretion nor power over his business affairs. Taylor Leibow learned about decisions taken by IWS, for example the bonuses, after they had been made. It had no power over the business interests of Morris, or indeed of IWS. Equally, Morris had no particular vulnerability to Taylor Leibow. He was the president of IWS, a director of the company and active in its significant operations. Taylor Leibow provided very few services to Morris personally. Save for preparing his tax returns, he did not rely on Taylor Leibow.

722 Either because of the trial judge's express finding or because the hallmarks of a fiduciary relationship are not present, we decline to give effect to Morris' submission that Taylor Leibow owed him a fiduciary duty.

(d) Did the Trial Judge Err in Finding that Taylor Leibow Could Rely on the Agreement and Undertaking in Defence of Morris' Claim on the Related-Party Transactions?

723 Although it is unnecessary to consider this issue because of our conclusion that Taylor Leibow owed no duty to Morris personally, for the sake of completeness we will address it.

724 In July 1998, after Morris had sued Taylor Leibow on the bonuses but before he had sued on the related-party transactions, Taylor Leibow gave him copies of its working papers. In exchange for doing so Morris signed - with legal advice - an "agreement and undertaking" in which he undertook not to sue Taylor Leibow for "any alleged negligence or other deficiency with respect to their accounting and auditing work". The full text of Morris' undertaking provided as follows:

> IN CONSIDERATION of the making available by Taylor Leibow of its working paper files for I. Waxman & Sons Limited for 1979 through 1984, Greycliffe companies for 1979, 1980, 1981 and 1983 and Icarus Leasing Inc. for 1982 and 1983, the undersigned hereby agree and undertake that they shall not commence any civil proceeding against Taylor Leibow claiming damages on the basis of any alleged negligence or other deficiency with respect to their accounting and auditing work with respect to the aforesaid companies for the fiscal years indicated above.

725 The trial judge concluded that the undertaking was akin to a release and she held that it

barred Morris' claim against Taylor Leibow for negligently failing to include a note about the related-party transactions in IWS' financial statements.

726 Morris submits that Taylor Leibow cannot rely on the agreement and undertaking to bar his claim for three reasons: first, the undertaking releases only claims for a negligent audit, not for a failure to warn; second, the undertaking does not release Morris' claim in tort or breach of fiduciary duty against Taylor Leibow based on their long-standing relationship; and third, Taylor Leibow is precluded from relying on the undertaking because, before Morris signed it, Wiseman gave materially false evidence on discovery.

727 The first two reasons advanced by Morris depend on limiting the scope of the undertaking to release only claims for negligently performed audits. We do not agree that the undertaking is so limited. Its scope turns on how broadly the phrase "with respect to their accounting and auditing work" is defined.

728 In our view, the phrase is broad enough to bar Morris' claim of a failure to warn. If Taylor Leibow had a duty to warn Morris about IWS' related-party transactions with Greycliffe, that duty arose from its audit work. It was during its audit work that Taylor Leibow learned of, or should have learned of, the diversion of profits from IWS to Greycliffe. Thus, we think that the undertaking Morris signed released Taylor Leibow from all future claims arising from its audit work, whether the claim was for negligent misrepresentation or for a failure to warn, and whether it was based on Taylor Leibow's duty as auditor or on an independent duty derived from its long-standing association with Morris.

729 Morris' final attack on the undertaking rests on his assertion that Wiseman lied on discovery. Had Wiseman told the truth, Morris says he would have sued Taylor Leibow for failing to warn him about the related-party transactions before releasing any claims. We find Morris' position unpersuasive.

730 Wiseman was examined for discovery in 1997. During his examination he testified that when he conducted the 1981 and 1982 audits of IWS he was unaware of any material related-party transactions. Later, at trial, Wiseman testified that at the time of the 1981 and 1982 audits he was aware of the substantial related-party transactions with Greycliffe. The trial judge accepted Wiseman's evidence at trial.

731 When Wiseman gave his discovery evidence about the related-party transactions he qualified his answers by saying that he had not reviewed Taylor Leibow's working papers before being discovered. Indeed, almost twenty years had passed since he had last seen them. Wiseman later clarified his discovery evidence in a letter from his counsel dated November 16, 1998. Morris did not complain about this clarification. If Wiseman's original discovery evidence was inaccurate, it was not deliberately so. Indeed the trial judge did not find that Wiseman lied on his discovery.

732 Moreover, Wiseman's answers did not preclude Morris from suing Taylor Leibow on the

related-party transactions. Before signing the undertaking Morris knew the following: he knew IWS' transactions with Greycliffe were not noted on IWS' financial statements; he knew Taylor Leibow had audited the statements; he had, and therefore must be taken to have known, the contents of Linton's working papers. And he had sued in the main action for alleged profit diversions. He could have expanded that allegation to include a claim against Taylor Leibow but chose not to do so.

733 For all these reasons we are satisfied that the trial judge was correct in her conclusion that Morris' undertaking barred his tort claim against Taylor Leibow for failing to warn him of IWS' related-party transactions with Greycliffe.

iv. Conclusion on Morris' Appeal

734 We conclude that the trial judge was correct in holding that Taylor Leibow owed neither a duty of care in tort nor a fiduciary duty to Morris. We also conclude that she was correct in holding that the agreement and undertaking that Morris signed barred his claim against Taylor Leibow on the related-party transactions with Greycliffe. For these reasons, we dismiss Morris' appeal against Taylor Leibow.

v. Taylor Leibow's Cross Appeal

735 Taylor Leibow cross-appealed against the trial judge's findings of negligence. However, counsel for Taylor Leibow did not press us to consider the cross-appeal if we dismissed Morris' appeal. As we have done so, apart from what we have already said, we think it unnecessary to further consider the cross-appeal.

G. Linton's Appeal

736 Wayne Linton has appealed the judgment against him in the Taylor Leibow action. The trial judge found him liable for knowingly assisting Chester in his dishonest breaches of fiduciary duty toward Morris. In some parts of her reasons she also appears to have found Linton liable on the basis of oppression. We need not consider whether in law Linton could be liable under s. 248 of the OBCA, because we have determined that she properly found him liable for knowing assistance, and liability under s. 248 would add nothing to her remedy.

737 In concluding that he was liable for knowing assistance, the trial judge underlined a number of the findings of fact involving Linton that she made in the main action. She found that he was aware of all the reasons that made Morris vulnerable to Chester's breaches of trust, including Morris' poor health in late 1983, and his complete trust in Chester in the conduct of the financial affairs of IWS.

738 The trial judge then went on to highlight various actions of Linton throughout the 1980s that demonstrate how faithfully he followed Chester's directions in complete disregard of Morris' best

interests. She provided a lengthy list of these actions at para. 2565 of her reasons.

739 The trial judge concluded that Linton was actively involved in helping Chester to effect the 1979, 1981, and 1982 bonuses and to structure and implement the share sale. She found that he did so knowing that these transactions were dishonest breaches of fiduciary duty by Chester.

740 Turning to the profit diversions to Robert's companies, the trial judge found that Linton was aware of the nature and extent of those related-party transactions, but did not reflect them in his drafts of the IWS financial statements between 1980 and 1982. Indeed, he relayed to the auditors Robert's desire that there be no such disclosure. In general, she found that Linton did Chester's bidding in allowing Robert to improperly divert unreasonable profits to his companies. The trial judge concluded that by doing these things, Linton participated in Chester's dishonest breach of fiduciary duty to Morris.

741 She ordered that Linton pay damages to Morris in the same amounts as ordered against Chester for the consequences of the share sale during the period of constructive trust; for the 1979, 1981 and 1982 bonuses; and for the profit diversions before the share sale. She found IWS vicariously responsible for Linton's conduct and therefore held it liable in like measure. However, because in most instances Linton acted at Chester's behest and did not personally benefit, she did not assess punitive damages against him.

742 In this court, counsel argued that Linton cannot be liable in knowing assistance in relation to the bonuses or the consequences of the share sale because no trust monies were involved. However, as we have explained earlier, this doctrine applies equally where the knowing assistance is of a dishonest breach of fiduciary duty. The findings of the trial judge make graphically clear that this was such a case, both concerning the bonuses for 1979, 1981 and 1982 and concerning the share sale.

743 Counsel also argues that the trial judge found Linton liable for the bonuses based on "collusion and knowing assistance of oppression", neither of which are pleaded nor viable in law. Although both phrases appear in her reasons, we think a fair reading is that neither served as a basis for liability. Rather, liability is squarely and expressly founded on Linton's knowing assistance of Chester's breaches of fiduciary duty. The trial judge's findings of fact amply sustain this conclusion.

744 Counsel's final argument in relation to Linton's liability for the bonuses and the share sale challenges the trial judge's findings of fact. In dealing with the appeal in the main action we have addressed the broad and detailed factual picture painted by the trial judge of the sorry history of IWS from 1979 to the time of trial and her detailed description of the roles of the various players in it. We have found no reason to interfere with her factual findings.

745 Counsel also says that the trial judge erred in finding Linton liable for the profit diversions based only on Linton's conveyance to the auditors of Robert's wish that the 1982 IWS financial statement not disclose related-party transactions. He argues that the real fault is that of the auditors,

who made the final decision not to disclose, and since Morris did not read the statements, Linton's acts had no adverse effect in argument.

746 We do not read the reasons of the trial judge that way. We see her conclusion concerning Linton's role in the profit diversions to be based on her finding that he was actively involved in this particular dishonest breach of fiduciary duty by Chester. Although not expressly stated in her reasons, the trial judge's findings throughout concerning Chester, Morris and Linton make this conclusion inevitable.

747 We therefore dismiss Linton's appeal from the finding of liability against him. However, just as we did in the main action (and for the same reasons) we vary the judgment against Linton to provide for half the amount of profit diversions ordered by the trial judge. Otherwise Linton's appeal is dismissed.

VII

CONCLUSION

748 As indicated at the outset, we agree with the trial judge's disposition except in minor ways. For convenience we repeat these minor variations here.

* Robert, Warren and Gary are liable for only one half of the 1981 and 1982 bonuses that they received: see para. 556.
* Chester, IWS and Robert and his companies are liable for only one half of the amounts ordered by the trial judge in relation to the Greycliffe profit diversions: see para. 567.
* The order for damages in relation to the Ancaster property is set aside: see para. 570.
* Robert, Warren and Gary are liable for only one half of the post sale profits that they received: see para. 587.
* Ennis is liable for all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, only to the end of January 1985: see para. 670.
* Linton is liable for only one half of the amounts ordered in relation to the Greycliffe profit diversions: see para. 747.

749 Despite these minor variations, overall we have found the trial judge's reasons thorough, lucid and fully reasoned. Our repeating reading of them in the course of preparing our own reasons have amply enhanced this view. The trial reasons represent a significant achievement at the end of a long and complex proceeding.

750 The parties have not yet addressed the issue of costs. We invite counsel to do so by written submissions. Before filing those submissions, counsel are to meet with Goudge J.A., who will

determine the appropriate procedure.

751 The appeals are dismissed save in the limited respects we have indicated.

752 As we leave this case two impressions linger: the tragedy of a family shattered and the service accorded to the administration of justice by counsel and a trial judge who, in difficult circumstances, performed their roles in exemplary fashion.

DOHERTY J.A.
LASKIN J.A.
GOUDGE J.A.

1 These reasons do not address appellate review of jury verdicts. Those verdicts, which of course are not supported by reasons, are tested against a reasonableness standard: McKinley v. B.C. Tel, [2001] 2 S.C.R. 161 at 191; Marshall v. Watson Wyatt & Co. (2002), 57 O.R. (3d) 813 at 819 (C.A.).

2 Mr. Evans had passed away.

TAB 10

Case Name:

Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 v. Royal Crest Lifecare Group Inc. (Trustee of)

IN THE MATTER OF the Bankruptcy of the Royal Crest Lifecare Group Inc.
Between
Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 and 2225-12, and Service Employees International Union, Locals 204 and 532, appellants, and Ernst & Young Inc., in its capacity as Trustee in Bankruptcy for the Royal Crest Lifecare Group Inc., Confederation Life Insurance Company, in liquidation and the National Life Assurance Company of Canada, respondents, and Attorney General of Ontario, intervenor

[2004] O.J. No. 174

98 C.L.R.B.R. (2d) 210

181 O.A.C. 115

46 C.B.R. (4th) 126

[2004] CLLC para. 220-014

128 A.C.W.S. (3d) 212

2004 CarswellOnt 190

Docket No. C39457

Ontario Court of Appeal
Toronto, Ontario

Borins, MacPherson and Cronk JJ.A.

Heard: September 17, 2003.

Judgment: January 21, 2004.

(74 paras.)

Labour law -- Labour relations boards and judicial review -- Boards, jurisdiction -- Successor rights and obligations -- Bankruptcy -- Practice -- Actions, commencement of -- Preliminary matters -- Leave to commence action.

Appeal by the Canadian Union of Public Employees from the dismissal of its application. The respondent Royal Crest Lifecare Group operated several nursing and retirement homes. It was petitioned into bankruptcy after it defaulted under its loan agreements. The trustee applied for an order that it was not bound by the collective agreements between Royal and the Union. It also sought an order that it not be deemed a successor employer under the Labour Relations Act. The Union applied for leave to pursue an application before the Ontario Labour Relations Board for the trustee to be designated as a successor employer. Both applications were dismissed. The bankruptcy judge considered the applications to be premature. The trustee did not appeal.

HELD: Appeal dismissed. The judge did not apply the wrong test under section 215 of the Bankruptcy and Insolvency Act. He considered that there was no evidentiary basis for the proposed application. There was evidence to support the judge's conclusion that the applications were premature. The judge did not decide the successor employer issue, which was within the exclusive jurisdiction of the Board. He did not decide this issue on its merits as he merely dismissed the applications.

Statutes, Regulations and Rules Cited:

Bankruptcy Act, s. 186.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 46, 72(1), 215.

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Courts of Justice Act, R.S.O. 1990, c. C-43, ss. 101, 109.

Employment Standards Act, S.O. 2000, c. 41.

Human Rights Code, R.S.O. 1990, c. H-19.

Labour Relations Act, S.O. 1995, c. 1, Sch. A., s. 69, 69(1), 69(2), 69(12), 114(1).

Occupational Health and Safety Act, R.S.O. 1990, c. O-1.

Pay Equity Act, R.S.O. 1990, c. P-7.

Pension Benefits Act, R.S.O. 1990, c. P-8.

Pension Benefits Standards Act, R.S.C. 1985, c. 32.

Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sch. A.

Appeal From:

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated January 16, 2003, reported at (2003), 40 C.B.R. (4th) 146.

Counsel:

Sean Dewart and Michael Kainer, for the appellants.
John A. MacDonald, for the respondent, Ernst & Young.
Harold P. Rolph, for independent counsel, for the trustee.
L. Joseph Latham and Joseph K. Morrison, for the respondent, Confederation Life.
Kyla E.M. Mahar, for the respondent, National Life.
Robin K. Basu, for the intervenor.

Reasons for judgment were delivered by MacPherson J.A., concurred in by Cronk J.A. Separate reasons were delivered by Borins J.A.

MacPHERSON J.A.:--

A. INTRODUCTION

1 On January 10, 2003, a large group of related companies collectively known as The Royal Crest Lifecare Group Inc. ("Royal Crest"), which operated five nursing homes, six retirement homes and six mixed care (nursing and retirement) homes in southern Ontario, was petitioned into bankruptcy by several banks after it defaulted under its loan agreements with the banks. Ernst & Young Inc. ("Ernst & Young") was appointed as trustee of the estate of the bankrupt.

2 On the same day, and before the same judge, Farley J., who made the bankruptcy order, the trustee and the unions representing many of the employees of the bankrupt company brought duelling motions.

3 The trustee sought an order that it not be bound by the collective agreements between Royal

Crest and the unions and that it not be deemed to be a successor employer under the Labour Relations Act, S.O. 1995, c. 1, Sch. A. (the "LRA"), and other labour and employment laws.

4 The unions resisted the trustee's motion. In addition, based on their view that the question of successor employer' came within the exclusive jurisdiction of the Ontario Labour Relations Board (the "OLRB"), the unions made a cross-motion before the bankruptcy judge. In their cross-motion, the unions sought leave, pursuant to s. 215 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), to pursue an application before the OLRB seeking the designation of the trustee as a successor employer.

5 The bankruptcy judge dismissed the trustee's motion. The trustee does not appeal.

6 The bankruptcy judge also dismissed the unions' cross-motion, but "without prejudice to such a motion being brought back on again with appropriate factual underpinning". The unions appeal.

B. THE FACTS

(1) The parties and the events

7 Royal Crest operated 17 long-term care facilities in Southern Ontario. These homes provided approximately 2300 beds for patients and residents. Royal Crest employed about 2200 full-time and part-time employees. Canadian Union of Public Employees Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 and Service Employees International Union Locals 204 and 532 (the "unions") represent approximately 1400 of these employees.

8 Unfortunately, by late 2002 Royal Crest was in serious financial difficulty. It owed its creditors, mostly banks, in excess of $128 million and was in default under its loan agreements.

9 On October 21, 2002, Royal Crest was granted protection under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") by order of Crane J. On November 13, 2002, the proceedings under the CCAA were terminated and Ernst & Young was appointed as interim receiver pursuant to s. 46 of the BIA. The interim receiver immediately engaged the former employees under terms and conditions of employment similar, but not identical, to those provided in the various collective agreements. One of the terms of employment to which the employees had to agree was that they accepted that Ernst & Young was not a successor employer.

10 On January 10, 2003, Royal Crest was petitioned into bankruptcy. Ernst & Young was appointed as trustee.

(2) The litigation

(a) Before the bankruptcy judge

11 On January 10, 2003, the trustee and the unions brought their duelling or mirror motions on the question of whether the trustee should be deemed to be a successor employer within the meaning of s. 69 of the LRA.

12 The bankruptcy judge dismissed the trustee's motion. He reviewed considerable case law, much of it conflicting. It seems clear from his reasons that he doubted two of the propositions advanced by the trustee: (1) a trustee in bankruptcy cannot be a successor employer; and (2) collective agreements terminate with bankruptcy. All that the bankruptcy judge was prepared to order, consistent with Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, was:

> This Court orders that the employment of all employees engaged by the Interim Receiver is terminated by virtue of the bankruptcy. The Trustee is hereby authorized to engage any or all of such former employees of the Bankrupt or any other persons.

The trustee does not appeal this component of the bankruptcy judge's order.

13 The bankruptcy judge also dismissed the unions' cross-motion. Again, the bankruptcy judge conducted a full review of the relevant legislation and case law. He concluded:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E & Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

The unions appeal the bankruptcy judge's decision relating to their cross-motion.

(b) The appeal

14 The appeal is unusual in an important respect. Most appeals involve the same parties, issues and arguments that were before the trial, application or motion judge. To some extent, that is true of this appeal. Some of the matters that were before the bankruptcy judge, and which he resolved, are raised again on appeal.

15 However, significant attention was devoted on the appeal (in facta and in oral argument) to an issue that was invisible, or almost invisible, in the hearing before the bankruptcy judge. The issue is the relationship, in constitutional law terms, between the federal BIA and the Ontario LRA.

16 The appellants raised the purported constitutional issue in their factum by framing the first issue of the appeal as:

(a) Did the learned bankruptcy judge err in effectively finding a conflict between the provisions of the Bankruptcy and Insolvency Act and the Labour Relations Act, 1995, where none in fact exists?

17 Rather than ignore the fact that the appellants' argument appeared to be put no higher than the assertion that the bankruptcy judge had made an implicit determination of a constitutional issue raised by no one, the respondent trustee decided to mount a full-scale attack on the applicability of the successor employer provisions of the LRA in a bankruptcy context. The trustee served a Notice of Constitutional Question upon the Attorney General of Canada and the Attorney General of Ontario, pursuant to s. 109 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

18 The Attorney General of Ontario intervened in the appeal. He noted that no Notice of Constitutional Question was served in the proceedings before the bankruptcy judge and, consequently, he had no opportunity to participate in those proceedings.

19 During the appeal hearing, the panel permitted the appellants and the trustee to make their constitutional arguments. However, at the conclusion of these submissions, the panel indicated that it did not need to hear further submissions on this issue, including submissions from the Attorney General who had filed an extensive factum on the purported constitutional issue. The panel essentially agreed with the Attorney General's submissions that: (1) the constitutional issue was not raised before, or addressed or determined by, the bankruptcy judge; and (2) the appeal could, and should, be determined without the necessity of dealing with the constitutional issue.

C. ISSUE

20 The sole issue on the appeal is whether the bankruptcy judge erred in the exercise of his discretion by refusing to permit the unions to proceed, on January 10, 2003, to the OLRB to have the question of the status of the trustee as successor employer resolved.

D. ANALYSIS

(1) The standard of review

21 A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.

22 The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

23 Appellate courts have long recognized the unique difficulties faced by judges in bankruptcy

and CCAA proceedings. The result is that appellate courts accord considerable deference to judges' decisions in these contexts: see, for example, Re Algoma Steel Inc., [2001] O.J. No. 1943 (C.A.); Banque National de Paris (Canada) v. Opiola, [2001] 6 W.W.R. 95 (Alta. C.A.); and Ford Credit Canada Ltd. v. Fred Walls & Sons Holdings Ltd., [2003] B.C.J. No. 454 (C.A.).

(2) The test under s. 215 of the BIA

24 The LRA gives the OLRB exclusive jurisdiction to decide successor employer applications: see ss. 69(12), 114 and 116. However, in bankruptcy proceedings, a party seeking to challenge a decision by a trustee must seek leave from a judge. Section 215 of the BIA provides:

> 215. Except by leave of the court, no action lies against ... a trustee with respect to any report made under, or any action taken pursuant to, this Act.

The appellants acknowledge that they require the leave of the court in order to pursue their application to the OLRB.

25 The case law establishes that the threshold for granting leave under s. 215 of the BIA is a low one. In Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688 at 690 (C.A.) ("SOCAN"), Charron J.A. stated:

> [T]he evidence required to support an order under s. 215 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. However, the evidence does not have to be sufficient to enable the motions judge to make a final assessment of the merits of the proposed claim. The sufficiency of the evidence must be measured in the context of the purpose of s. 215 which is to prevent the trustee from having to respond to actions which are frivolous or vexatious or which do not disclose a cause of action ...

See also: Mancini (Bankrupt) et al. v. Falconi et al. (1993), 61 O.A.C. 332 and Vanderwoude et al. v. Scott and Pichelli Ltd. et al. (2001), 143 O.A.C. 195.

(3) Discussion

26 The appellants contend that the bankruptcy judge made three errors in his reasons relating to their cross-motion: (1) he applied the wrong test for a BIA s. 215 application; (2) he determined a matter - whether the trustee was a successor employer - within the exclusive jurisdiction of the OLRB; and (3) he incorrectly found that the various collective agreements were in "suspended animation".

27 I do not agree that the bankruptcy judge applied the wrong test. The cross-motion was directly related to s. 215 of the BIA and the relevant case law was argued before the bankruptcy judge. It is

true that the test under s. 215 of the BIA establishes a low threshold for granting leave. However, SOCAN makes it clear that there must be an evidentiary basis for the proposed cause of action.

28 The bankruptcy judge clearly turned his mind to this component of the test. In dismissing the cross-motion, he invited the unions to bring a further motion "with appropriate factual underpinning".

29 It is important to place the appellants' cross-motion in its proper context. Prior to January 10, 2003, there was no live successor employer issue because Ernst & Young, acting as interim receiver, engaged current employees only if they contractually agreed that Ernst & Young was not a successor employer. On January 10, 2003, this picture changed in a major way. When receiving orders were made and Ernst & Young was appointed as trustee of the estate of Royal Crest, the status of the trustee as a potential successor employer emerged as a live issue because the existing employment relation was automatically terminated: see Re Rizzo & Rizzo Shoes Ltd., supra. Both the trustee and the unions decided, virtually instantaneously, to resort to their preferred institutions, the court and the OLRB respectively, to resolve the issue.

30 It is clear that the bankruptcy judge regarded both motions as premature. In my view, this conclusion was amply supported by the chronology of events and the record before the bankruptcy judge.

31 The trustee has many responsibilities - to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

32 Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly business as usual' for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

33 I also do not accept the appellants' submission that the bankruptcy judge decided the successor employer issue. He explicitly did not do this. He dismissed the trustee's motion seeking an order that the trustee not be deemed a successor employer and authorized the trustee to engage former employees of the bankrupt company. He also dismissed the unions' cross-motion, but coupled that dismissal with an invitation to bring another motion later with an "appropriate factual

underpinning". In my view, these careful combined dispositions establish clearly that the bankruptcy judge did not decide the successor employer issue on its merits. Rather, he regarded resolution of that issue on January 10, 2003 as being premature. Accordingly, in the exercise of his discretion, he left it open.

34 Finally, I do not agree with the appellants' challenge to the bankruptcy judge's description of the various collective agreements as "not terminated but rather ... put into suspended animation".

35 On January 10, 2003, the first day of the bankruptcy, it strikes me that this description was entirely apt. On that date, it was simply too early to attach formal, and final, legal labels to the relationship between the trustee and the employees. Importantly, the bankruptcy judge explicitly recognized the existence and importance of the collective agreements. Immediately after his description of the collective agreements as contracts put into "suspended animation", he effectively gave some advice to the trustee regarding the importance of the employment relationship established by those agreements:

> The trustee will also have to appreciate that if it does not accede to the union demands for union dues, pension contributions and grievance-type procedures, then conceivably after a period of time (which may vary in length) the personnel which it has employed may become disenchanted with continuing at the various locations and value may evaporate or start to do so unless "corrective" or "ameliorating" measures are taken.

36 For these reasons, I conclude that the bankruptcy judge did not err, in the exercise of his discretion, by deciding that the appellants' cross-motion seeking leave to make an application on the successor employer issue to the OLRB was premature and, therefore, should be dismissed.

E. DISPOSITION

37 I would dismiss the appeal with costs fixed at $20,000 inclusive of disbursements and G.S.T.

MacPHERSON J.A.
CRONK J.A. -- I agree.

38 BORINS J.A. (dissenting):-- I have had the advantage of reading the reasons for judgment of my colleague, MacPherson J.A. With respect, I am unable to agree with his conclusion that this appeal should be dismissed.

39 In my view, this appeal is about the exercise of judicial discretion in the context of an application by two trade unions (the "appellants") pursuant to s. 215 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") for leave to bring an application before the Ontario Labour Relations Board (the "OLRB") under s. 69(12) of the Labour Relations Act, S.O. 1995, c. 1, Sch. A (the "LRA") for a declaration that Ernst & Young, Inc. ("EYI"), the trustee in bankruptcy of

The Royal Crest Lifecare Group ("Royal Crest"), is a successor employer. Thus, the issue in this appeal is whether there is any basis on which this court can interfere with the discretion exercised by Farley J. in dismissing the appellants' application under s. 215 of the BIA. For the reasons that follow, I have concluded that the bankruptcy judge erred in the exercise of his discretion.

I

40 At the outset, I find it helpful to repeat what I said about the standard of appellate review of the exercise of judicial discretion in Wong v. Lee (2002), 58 O.R. (3d) 398 at 408-409:

> The standard of appellate review of judicial discretion has been considered by the Supreme Court of Canada in a number of cases. In Reza v. Canada, [1994] 2 S.C.R. 394 at pp. 404-05, 116 D.L.R. (4th) 61 at p. 68, the Supreme Court held that:
>
> > ... the test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given sufficient weight to all relevant considerations: Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 76-77, per LaForest J. See also Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110, at pp. 154-55.
>
> In Friends of Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 76-77, LaForest J. stated that in Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, the Supreme Court had essentially adopted the following standard of review articulated by Viscount Simon L.C. in Charles Osenton & Co. v. Johnston, [1942] A.C. 130 at p. 138 (H.L.):
>
> > The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

II

41 It is also helpful to reproduce the legislation that is relevant to this appeal.

Bankruptcy and Insolvency Act

s. 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

s. 215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Labour Relations Act, 1995

s. 69(1)In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

s. 69(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

s. 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that

> arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

III

42 Although MacPherson J.A. has reviewed the facts which formed the basis for both the appellants' s. 215 application and the trustee in bankruptcy's application for declarations that it is not a successor employer under s. 69(12) of the LRA and other labour and employment laws, his review does not make reference to a number of facts that, in my view, are relevant to this appeal. Therefore, I propose to outline these additional facts.

43 When EYI was appointed as interim receiver of the estate of Royal Crest on November 12, 2002, it immediately engaged the former Royal Crest employees on a temporary basis under terms and conditions of employment similar but not identical to those provided by the collective agreements. EYI was authorized to do so by a term of the order that appointed it as interim receiver. Excluded terms were access to a grievance procedure, full recognition of seniority, payment of union dues and contributions to the company pension plan. The former Royal Crest employees are members of the appellant unions which, prior to the bankruptcy, had entered into collective agreements with the Royal Crest companies. At the time of the interim receivership, there were, and remain, several outstanding labour relations issues, such as: outstanding grievances involving employee discipline; outstanding pay equity adjustments; the negotiation of a first time collective agreement; and default in contributions to the pension plan.

44 On November 13, 2002, EYI delivered a letter to each employee containing an offer of employment and discussing, inter alia, the terms of employment. In addition, the letter contained the following information:

> Our appointment as Interim-Receiver is on a temporary basis and for the limited purpose of continuing the operation of the homes and protecting the assets. It is our intent to stabilize the operations of the home by assuming control of the homes and protecting the interests of the stakeholders, including the residents whose health, safety and well being is of central concern. To assist in achieving this objective, we have retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Pursuant to the terms of the Order, your employment by the Companies has been terminated. We would like to engage your services on a temporary basis to assist with the continued operation of the homes, which will assist the Interim-Receiver in fulfilling its mandate to determine the best way to ensure the future of the

> homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> ...
>
> In making this offer, the Interim-Receiver is acting solely in its capacity as Interim-Receiver and without personal or corporate liability. By accepting this offer you acknowledge that the Interim-Receiver is not a successor employer within the meaning or contemplation of the Ontario Employment Standards Act, 2000, the Ontario Labour Relations Act or other similar federal or provincial legislation.

45 On January 10, 2003, EYI was appointed as trustee in bankruptcy of the estate of Royal Crest under the BIA. On January 17, 2003, pursuant to s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 (the "CJA"), EYI was appointed as receiver over the assets, property and undertaking of Royal Crest for the purpose of realizing thereon. Although clause 11 of this order expressly precluded the engagement of any or all of Royal Crest's former employees, on January 17, 2003, the trustee delivered a letter to the former employees that contained an offer of employment.

46 The relevant portions of this letter read as follows:

> As noted previously, the Interim Receiver was appointed on a temporary basis until the appointment of the Trustee, and therefore the role of the Interim Receiver has come to an end effective January 17, 2003. The Trustee will continue to operate the homes in the same manner as the Interim Receiver, and the Trustee has retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Your employment with the Interim Receiver has ceased effective January 17, 2003 and the Trustee will immediately re-engage your services on a temporary basis to assist with the continued operation of the homes, on the same terms and conditions as outlined in the Offer of Employment. Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> You will be paid the same regular wages or salary that you have been receiving from the Interim Receiver. The Trustee will continue to provide all benefits provided by the Interim Receiver to you. The Trustee, in the same manner as the Interim Receiver, is unable to continue to provide benefits provided by the Companies to you prior to the appointment of the Interim Receiver (including,

> but not limited to, life insurance, disability or pension benefits or RRSP contributions). The Trustee will be making the usual payroll deductions to the appropriate government authority on your behalf.
>
> In making this offer, the Trustee is acting solely in its capacity as Trustee and without personal or corporate liability. By continuing to work in the homes after January 17, 2003 you will be deemed to have accepted this offer, have read and understand fully the terms of this letter and agreed to be bound by its terms. You have also acknowledged that the Trustee is not a successor employer within the meaning or contemplation of the Ontario ESA, the Ontario Labour Relations Act or similar federal or provincial legislation.

47 From the foregoing, it is clear that from the outset EYI, in its various capacities, recognized that it was prudent to operate the nursing homes as a going concern for two related reasons: (1) to accommodate the 2300 patients and residents of the homes; and (2) to maximize the potential dividend to be paid to Royal Crest's creditors by selling the nursing homes as a going concern. Moreover, it recognized that the most efficient way to continue to operate the homes was to engage the former employees of Royal Crest. Indeed, this appeared to be of such importance to EYI that in its second letter to the employees it wrote: "Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns".

48 When the appellants' motion was before the court, it was clear that the operation of the homes was continuing in the same manner as it had before Royal Crest was granted protection under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C.36 (the "CCAA") on October 21, 2002, and throughout the two month period of the interim receivership. It appeared that this operation would continue in the same manner until the trustee in bankruptcy was able to sell the nursing home business as a going concern. Thus, when the appellants' s. 215 motion was before the court, approximately 2200 employees were continuing the operation of the nursing homes for approximately 2300 patients and residents, and would continue to do so subsequent to EYI's appointment as trustee in bankruptcy and receiver until EYI was able to obtain a purchaser willing to acquire the nursing homes as a going concern.

49 From the letters it wrote to the former employees of Royal Crest, it is clear that EYI did not wish to be declared a successor employer under s. 69(12) pf the LRA. It is evident from EYI's application for an order declaring that the trustee in bankruptcy is not a successor employer under the LRA, the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, the Employment Standards Act, S.O. 2000, c. 41, the Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sch. A, the Pay Equity Act, R.S.O. 1990, c. P.7, the Human Rights Code, R.S.O. 1990, c. H.19, the Pension Benefits Act, R.S.O. 1990, c. P.8 and the Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp.) or any other legislation or common law governing labour relations, that EYI recognized that

in the administration of an estate under the BIA, a trustee in bankruptcy is required to do so in conformity with provincial legislation governing employees and employee rights.

IV

50 The test that applies in considering an application under s. 215 of the BIA for leave to bring proceedings against a trustee has received considerable judicial attention. As MacPherson J.A. points out, the case law establishes that the threshold for granting leave is a low one. However, in applying the test it is necessary to consider that s. 215 is part of the machinery of the BIA which is designed to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. As such, the purpose of s. 215 is to protect the trustee against frivolous and vexatious proceedings, or proceedings that have no factual basis.

51 This court considered s. 186 of the former Bankruptcy Act, the predecessor of s. 215, in Mancini (Bankrupt) et al. v. Falconi et al. (1993), 61 O.A.C. 332. After reviewing a number of authorities, in para. 7 Osborne J.A. set out the factors to be considered on a s. 215 application:

> The following principles can be taken from the decided cases:
>
> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted: see Peat Marwick Ltd. v. Thorne Riddell, supra.
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave: see Re Lufro Ltée; Leblond v. Tremblay (1985), 54 C.B.R. (N.S.) 199 (Que. C.A.).

52 In para. 12 Osborne J.A. stated that the court is required to consider the evidence filed in support of the application in the context of the proposed proceeding when adjudicating a s. 215 leave application. He continued: "The issue is not whether the evidence on the [s. 215] motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted [against the trustee]" [emphasis in original].

53 Osborne J.A. commented further on what factors the evidence must establish and the sufficiency of the evidence in paras. 16-17:

> In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. *On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.*
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186 [emphasis added].

V

54 The bankruptcy judge's reasons for rejecting the appellants' s. 215 application are reported as Royal Crest Lifecare Group Inc. (Re), [2003] O.J. No. 756. Early in his reasons, in para. 6, the bankruptcy judge identified "the contentious issue or battlefield [to be] whether the trustee in bankruptcy can become a successor employer [pursuant to s. 69 of the LRA] if the trustee hires employees to do the work previously engaged in by employees pre-bankruptcy". After reviewing the positions of the parties, the bankruptcy judge considered the trustee's submission that collective agreements terminate upon an employer's bankruptcy. He appears to have accepted the reasoning of the Nova Scotia Court of Appeal in Saan Stores Ltd. v. Nova Scotia (Labour Relations Board) (1999), 172 D.L.R. (4th) 134 that although bankruptcy terminates the employment relationship between a bankrupt employer and its employees, a collective agreement is "not rendered inoperative" by reason of an employer's bankruptcy.

55 In paras. 24-26 the bankruptcy judge discussed the statutory mandate of a trustee in bankruptcy. In my opinion, as this discussion is relevant to his ultimate decision to dismiss the appellants' application, it is helpful to reproduce it in its entirety:

> It seems to me that when one appreciates that the mandate of a trustee in bankruptcy is to maximize value of the assets vested in the trustee on a bankruptcy for the purpose of providing a dividend to the creditors to partially satisfy their claims, the circumstance of operating the business (if the assets are the business and undertaking) *is merely ancillary and incidental to that function of realizing upon the assets*. Coupled with the rather "new-found" objective and thrust of the BIA since the 1992 amendments with the significant social and economic policy with particular positive impact for employees and the

communities in which these employees live to have businesses, if possible and practicable, sold as a going concern (such being the usual way in which to maximize value as well), *it would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of "successor employer" against the trustee or a conclusion that a trustee who hires personnel "inherits" an operative collective agreement. Simply put, what role is the trustee truly playing - is it acting qua realizor of the assets or is it acting qua employer in essence.* Where the business cannot be conveniently mothballed (e.g. a steel mill where the blast furnaces must be kept active or otherwise the furnaces would "solidify" or, as here, where the residents cannot be easily transferred both physically and as well with concern for their emotional disruption), it seems that the trustee may be "forced" to operate the business during the period of marketing through sale. The maintenance of going concern goodwill will also be an important factor in determining whether it is reasonable to continue some or all of the operations, even if it were not a physical problem to shut down operations. *If the trustee did not operate the business where that was physically necessary or to maximize value of realization, then the trustee would be acting contrary to the principles of the BIA and in so acting would be derelict in its duties and obligations under that federal insolvency statute.*

It seems to me that where a trustee is operating the business as incidental to the trustee disposing of it and realizing on the assets and there is no question or issue raised that it is pursuing a marketing and ultimately sale/disposition program *in a reasonable and bona fide way with due dispatch, then the question of employment of personnel is only incidental to its function of realizing on the assets (and protecting stakeholder interests in going concern preservation).*

I certainly agree with the observations of Spence J. in 588871 at p. 33:

> PMTI also contended that this motion involves an important policy question. If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, *no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA.*. I think this concern may properly be taken into account.

I do not regard this as an "in terrorem" argument as so characterized by CUPE's

counsel. Spence J. went on to state at p. 33:

> With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The [OLRB] clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. *The courts should ordinarily defer to the [OLRB] on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the [OLRB] against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. It seems to me that such matters are properly to be addressed by this court on this application for leave under the BIA and not to be deferred for decision to a tribunal which is not charged with responsibility in respect of the bankruptcy law.* The stay of proceedings imposed by s. 215 of the BIA is one part of the machinery of the Act which functions to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. The stay imposed under s. 215 has a proper effect in this case, for the reasons mentioned above. Accordingly, the request for leave nunc pro tunc should not be granted [emphasis added].

56 In paras. 29-30, the bankruptcy judge then gave what I understand to be his reasons for dismissing the appellants' application:

> *There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.*

In the meantime it appears to me that the collective agreement is not terminated but rather is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the operation of the business acquires the business [emphasis added].

57 Read as a whole, as I read his reasons, the bankruptcy judge dismissed the appellants' application for leave to commence proceedings before the OLRB for a declaration that EYI is a successor employer under s. 69(12) of the LRA because he was of the view that if the application before the Board were to succeed, a declaration that the trustee in bankruptcy is a successor employer would interfere with the mandate of a trustee, saddle the trustee "with (heavy) personal liabilities", would discourage trustees from carrying on a business as a going concern and would be incompatible with the termination of a collective agreement consequent to the bankruptcy of an employer. As a result, the bankruptcy judge agreed with the opinion of Spence J. in Re 588871 Ontario Ltd. (1995), 33 C.B.R. (3d) 28 (Ont. Gen. Div.), that although the OLRB has exclusive jurisdiction over the determination of "whether a business has been sold by one employer to another", the court should not defer to the jurisdiction of the Board where a successor employer application is made in the context of a bankruptcy; instead, this determination should be made by a court "charged" with responsibilities in respect to bankruptcy law.

58 As his ultimate reason for dismissing the application for leave, the bankruptcy judge stated that the trustee in bankruptcy had not "been dragging its feet" and there was no suggestion that it would do so. However, the dismissal of the application was without prejudice to it being reinstated "with appropriate factual underpinning ... to demonstrate that the trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

VI

59 In analyzing the bankruptcy judge's reasons for dismissing the appellants' application under s. 215 of the BIA it is helpful to recall that the authorities are uniform that the test to be applied by the court sets a low threshold.

60 With respect to the first element of the test established in Mancini, in my view, there can be no question that the proposed application to the OLRB is neither frivolous nor vexatious. At the time of the application, EYI was operating the same business that was operated by Royal Crest and had hired the same employees that had been employed by Royal Crest to perform the same function that they had performed previously. EYI had done so as interim receiver for two months prior to its appointment as trustee in bankruptcy and receiver. Moreover, neither EYI nor the bankruptcy judge suggested that the proposed application to the OLRB was frivolous or vexatious.

61 Under the second element of the test, the proposed application to the OLRB must disclose "a cause of action" against the trustee in bankruptcy. This is to be decided on the basis of evidence that is sufficient to establish a factual basis for the proposed OLRB application. In the context of these proceedings, the "cause of action" against the trustee consists of the assertion that in the operation of the Royal Crest's business as a going concern, the trustee had become a successor employer within the meaning of s. 69(12) of the LRA. It would appear that the trustee's operation of Royal Crest's business as a going concern for the benefit of its creditors and the patients and residents

mitigates in favour of a finding by the OLRB that the trustee is a successor employer. There is little doubt that the evidence of the history of EYI's operation of the business since its appointment as interim receiver on November 12, 2002, provided a factual basis for the appellants' application as contemplated by the second element of the Mancini test.

62 In considering whether the proposed application to the OLRB discloses a cause of action against the trustee in bankruptcy it is important to recognize that s. 69(2) of the LRA provides that a union continues to be the bargaining agent for the employees of the person, or entity, to whom a business is sold until the OLRB otherwise declares. As pointed out by George W. Adams in his text, Canadian Labour Law, 2nd ed. looseleaf (Aurora: Canada Law Book Inc., 2003) at 8.10:

> ... collective bargaining rights flow through changes in ownership so long as there is a continuation of the same business. It is the business - and not the employer - to which collective bargaining rights have become attached ... The successor provisions [of the LRA] have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon sale.

63 Moreover, as Mr. Adams points out at 8.190, labour boards have adopted a broad and liberal interpretation of successorship provisions, including what constitutes the sale of a business under s. 69(1) of the LRA, in accordance with the remedial nature of the legislation. After reviewing the case law, Mr. Adams concludes:

> For the most part, the Ontario and British Columbia courts accept and recognize that the substantial similarity of work performed subsequent to a transaction to that performed prior to a transaction normally creates a strong inference there has been a transfer of a business. The criteria relevant to such an interpretation are: (a) substantially the same jobs being performed at the same time and places; (b) in respect of substantially the same goods and services; and (c) for substantially the same customers or patrons.

64 In determining whether the appellants' proposed application to the OLRB disclosed a "cause of action" against the trustee in bankruptcy, it was necessary that the bankruptcy judge consider not only the purpose of the successorship provision in s. 69 of the LRA, but the criteria relevant to the determination of whether the trustee could be found by the OLRB to be a successor employer. The bankruptcy judge failed to do so. Based on the above criteria, there is an abundance of evidence in the record to establish a factual basis for the proposed successorship application to the OLRB.

65 As for the third element of the Mancini test, the bankruptcy judge must not make a final assessment of the proposed claim or application. Although the bankruptcy judge did not in fact do so in this case, in my view he came perilously close to doing so. He followed the decision of Spence J. in Re 588871 Ontario Ltd. that the question of successorship should be effectively decided on a motion to the bankruptcy court under s. 215 of the BIA, contrary to s. 114(1) of the LRA that

provides that the OLRB has exclusive jurisdiction to exercise the powers conferred upon it by the LRA.

66 In addition, I have difficulty in understanding what the bankruptcy judge meant in para. 24 by his characterization of the trustee's role as "acting qua realizor of the assets or qua employer in essence". In my view, if it is the opinion of the trustee in bankruptcy that the maximum dividend for creditors can be achieved by selling the bankrupt's business as a going concern it stands to reason that the trustee can do so only if it has the necessary employees to operate the business. The bankruptcy judge reasoned that the trustee's employment of personnel was "only incidental" to its function of realizing on the assets and "protecting stakeholder interests in going concern preservation". With respect, I do not agree with this reasoning. The operation of the business as a going concern and the re-hiring of Royal Crest's employees to accomplish this are neither incidental nor ancillary to the trustee's role to maximize and maintain the value of the assets for the benefit of the creditors. In my view, they are central to that role. Without the former Royal Crest employees, the trustee could not operate the nursing home business as a going concern. The employees have statutory rights which an employer must respect. The unions were attempting to protect and enforce their members' rights in seeking leave to apply to the OLRB to obtain a successorship ruling.

67 The bankruptcy judge returned to this theme in para. 29, where he gave his ultimate reason for dismissing the appellants' s. 215 application. He was of the view that the length of time during which the trustee in bankruptcy had operated the business was pertinent to whether or not the trustee might be declared a successor employer under s. 69 of the OLRA. Thus, he permitted the appellants to make a further application should the trustee "[slip] over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

68 Moreover, in my view the bankruptcy judge minimized the fact that this case involves the rights of employees and workers and that under the legislative scheme of the LRA the only recourse available to the unions in protecting the rights of their members was to bring the appropriate proceeding before the OLRB. In addition, the bankruptcy judge appears to have placed the trustee's role under the BIA ahead of the employees' statutory rights conferred by the statutes that I have listed in para. 12. In doing so, it seems that he overlooked the proposition that except in the case of "operational conflict", valid provincial law of general application continues to apply in a bankruptcy context: Husky Oil Operations Ltd. v. M.N.R., [1995] 3 S.C.R. 453. This is also recognized in s. 72(1) of the BIA where Parliament has explicitly called for the application of provincial law in administering a bankrupt estate, except to the extent that it is inconsistent with the terms of the BIA.

69 In making these observations I am mindful that the court did not require submissions from the parties on the constitutional issue raised by the respondent trustee and I do not intend, by my observations, to be taken as determining that issue. The purpose of my observations is to indicate that as the rights of employees and workers are central to the unions' s. 215 application, it is my view that early recourse to the OLRB was an appropriate factor for the bankruptcy judge to take into account in applying the Mancini test.

70 In summary, the bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the essential character of the issues that the unions sought to advance before the OLRB on behalf of their members. While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. As, in my view, the bankruptcy judge did not give sufficient weight to these considerations and to the test to be applied on an application under s. 215 of the BIA as explained in Mancini, he erred in the exercise of his discretion.

71 In my opinion, the unions' s. 215 application was timely and prudent. Nothing about the application was premature. The unions should not be faulted for bringing it on the day that the court appointed EYI as trustee in bankruptcy. It was brought in response to EYI's application for a declaration that it be deemed not to be a successor employer. EYI was no stranger to the business operation of Royal Crest. For two months prior to its appointment as trustee, as interim receiver it had operated the nursing home business with Royal Crest's former employees. As trustee, it was intending to operate the business with the same employees. The employees had statutory rights which the unions believed required recourse to the OLRB for their protection. Had the bankruptcy judge granted the unions' application for leave to apply to the OLRB, or, indeed, should this court do so, the work of the trustee in administering the estate would not have been delayed or frustrated as it would have continued its operation of the nursing homes, thereby benefiting both the creditors and the residents, while it continued its search for a purchaser of the business as a going concern. At the same time, the unions would have been able to prepare their application to the OLRB.

72 Indeed, nothing changed in the operation of the business on January 10, 2003 other than the status of EYI, which continued that operation as trustee in bankruptcy rather than as interim receiver. The trustee was of the opinion that the record supported its application, which acknowledged the existence of the collective agreements, for a declaration that it was not a successor employer. The unions relied on the same record. Moreover, had the bankruptcy judge granted the unions' application for leave to bring a s. 69(12) application before the OLRB, the record could only have improved in the time that it would have taken for the application to be heard by the OLRB.

VII

73 For all of the foregoing reasons, it is my view that there was a wrongful exercise of discretion by the bankruptcy judge as a result of his failure to apply the test in Mancini and to give sufficient weight to the relevant considerations as argued before us by the appellants. Therefore, this is a proper case for this court to interfere with the bankruptcy judge's exercise of discretion.

74 In the result, I would allow the appeal with costs, set aside the order of the bankruptcy judge and substitute an order granting leave to the appellants pursuant to s. 215 of the BIA to bring an application to the OLRB under s. 69(12) of the LRA.

BORINS J.A.

cp/e/nc/qw/qlhcc/qlgxc

TAB 11

H.L. *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General for Saskatchewan *Intervener*

INDEXED AS: H.L. *v.* CANADA (ATTORNEY GENERAL)

Neutral citation: 2005 SCC 25.

File No.: 29949.

Hearing: May 13, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Rehearing: December 13, 2004.

Judgment: April 29, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeals — Saskatchewan Court of Appeal — Questions of fact — Applicable standard of appellate review on questions of fact in Saskatchewan — Whether Court of Appeal correct in setting aside trial judge's pecuniary damages award for loss of past and future earnings — Whether Court of Appeal applied proper standard — The Court of Appeal Act, 2000, S.S. 2000, c. C-42.1, s. 14.

L brought an action for sexual battery against S and the federal government for acts that had occurred 20 years earlier when L was about 14 years old. S, who worked on a reserve for the federal government, sexually abused L on two occasions. L left school when he was about 17 years old, without completing the eighth grade. He was unable to retain meaningful employment between 1978-1987. During that time, he drank heavily, was incarcerated frequently and relied on social assistance to meet his needs. Between 1988-2000, he worked sporadically. The evidence given by L and two expert witnesses satisfied the trial judge that L's poor

H.L. *Appelant*

c.

Procureur général du Canada *Intimé*

et

Procureur général de la Saskatchewan *Intervenant*

RÉPERTORIÉ : H.L. *c.* CANADA (PROCUREUR GÉNÉRAL)

Référence neutre : 2005 CSC 25.

N° du greffe : 29949.

Audition : 13 mai 2004.

Présents : Les juges Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

Nouvelle audition : 13 décembre 2004.

Jugement : 29 avril 2005.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Appels — Cour d'appel de la Saskatchewan — Questions de fait — Norme de révision en appel applicable à une question de fait en Saskatchewan — La Cour d'appel a-t-elle eu raison d'annuler les dommages-intérêts pécuniaires accordés par le juge de première instance pour les pertes de revenus antérieure et ultérieure? — A-t-elle appliqué la norme appropriée? — Loi de 2000 sur la Cour d'appel, L.S. 2000, ch. C-42,1, art. 14.

L a intenté une action contre S et le gouvernement du Canada relativement à des voies de fait de nature sexuelle dont il avait été victime 20 ans plus tôt vers l'âge de 14 ans. S, qui travaillait alors pour le gouvernement fédéral dans une réserve, l'a agressé sexuellement deux fois. L a quitté l'école à l'âge de 17 ans environ sans avoir terminé sa huitième année. Entre 1978 et 1987, il n'a pu conserver un emploi convenable. Il buvait beaucoup, se retrouvait souvent derrière les barreaux et avait recours à l'aide sociale pour subvenir à ses besoins. De 1988 à 2000, il a travaillé sporadiquement. Les témoignages de L et des deux experts ont convaincu le juge

employment record between 1978-1987 was attributable to his alcoholism, emotional difficulties, and criminality, which were in turn attributable to the sexual abuse perpetrated by S. He found as well that L's sporadic work record between 1988-2000 was consistent with the emotional difficulties described by the experts in their assessments of the psychological effects of sexual abuse. The trial judge maintained L's action against S and the federal government, since he found that the criteria for the imposition of vicarious liability on the government had been met. He awarded L non-pecuniary damages, pecuniary damages for loss of past and future earnings and pre-judgment interest. With respect to L's claim for loss of future earnings, in the absence of specific evidence in this regard, the trial judge relied inferentially on the evidence relating to L's past earning capacity. The Court of Appeal dismissed the federal government's appeal as it related to vicarious liability and to the award for non-pecuniary damages, but allowed the appeal in relation to pecuniary damages and pre-judgment interest. The Court of Appeal set aside the award for pecuniary damages for loss of past and future earnings on the ground that, on its assessment of the evidence, the evidence fell short of proving the loss. Leave to this Court was granted by the Court of Appeal, pursuant to s. 37 of the *Supreme Court Act*, to clarify the correct standard of review applicable to the Saskatchewan Court of Appeal.

Held (Bastarache, LeBel, Deschamps and Charron JJ. dissenting in part): The appeal should be allowed in part. The trial judge's award of pecuniary damages for loss of past earnings is restored, but the award must be reduced to reflect the time L spent in prison and the social assistance he received during the period covered by the award.

Per McLachlin C.J. and Major, Binnie, Fish and Abella JJ.: In Saskatchewan, as elsewhere in Canada, a trial judge's primary findings of fact and inferences of fact are only reviewable on appeal on a standard of palpable and overriding error. *The Court of Appeal Act, 2000*, in particular s. 14, did not create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces. To the contrary, an examination of both the 2000 Act and its predecessors, their legislative history, and their judicial interpretation in this Court and by the Saskatchewan Court of Appeal itself all lead to the conclusion that the 2000 Act did not change the standard of review applicable in Saskatchewan to appellate review on questions of fact: the appeal is a review for error, and not a review by rehearing. Courts of appeal in Canada, absent an express

de première instance que L avait peu travaillé de 1978 à 1987 à cause de son alcoolisme, de ses difficultés émotionnelles et de sa criminalité, qui eux étaient attribuables aux abus sexuels commis par S. Le juge a également conclu que les emplois occupés sporadiquement de 1988 à 2000 s'inscrivaient dans la suite logique des difficultés émotionnelles décrites par les experts dans leur évaluation des effets psychologiques de l'abus sexuel. Il a accueilli l'action de L contre S et le gouvernement du Canada, estimant réunies les conditions auxquelles l'État pouvait être tenu responsable du fait d'autrui. Il a accordé à L des dommages-intérêts non pécuniaires, des dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure et de l'intérêt avant jugement. En ce qui concerne la perte de revenus ultérieure alléguée, faute d'éléments de preuve précis à l'appui, le juge de première instance s'est fondé, par inférence, sur la preuve relative à la capacité de gain antérieure de L. La Cour d'appel a rejeté l'appel du gouvernement du Canada quant à la responsabilité du fait d'autrui et aux dommages-intérêts non pécuniaires, mais elle l'a accueilli relativement aux dommages-intérêts pécuniaires et à l'intérêt avant jugement. Elle a annulé les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure au motif que, suivant son appréciation de la preuve, l'existence de ces pertes n'était pas établie. Elle a accordé l'autorisation de se pourvoir devant notre Cour en application de l'art. 37 de la *Loi sur la Cour suprême* afin que soit déterminée la norme de révision que devait appliquer la Cour d'appel de la Saskatchewan.

Arrêt (les juges Bastarache, LeBel, Deschamps et Charron sont dissidents en partie) : Le pourvoi est accueilli en partie. Les dommages-intérêts pécuniaires accordés pour la perte de revenus antérieure sont rétablis, mais leur montant est abaissé pour tenir compte du temps que L a passé en prison et des prestations d'aide sociale qu'il a touchées pendant la période considérée.

La juge en chef McLachlin et les juges Major, Binnie, Fish et Abella : En Saskatchewan, comme ailleurs au Canada, les conclusions du juge de première instance relatives à des faits prouvés directement et ses inférences factuelles ne sont susceptibles de révision en appel que selon la norme de l'erreur manifeste et dominante. La *Loi de 2000 sur la Cour d'appel* — son art. 14 en particulier — n'a pas créé en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs ou de l'objet. Au contraire, le libellé de la Loi de 2000 et des lois qui l'ont précédée, l'historique législatif de chacune d'elles et leur interprétation par notre Cour et par la Cour d'appel de la Saskatchewan mènent à la conclusion que la Loi de 2000 n'a pas changé la norme de révision en appel applicable dans la province à l'égard d'une question de fait : l'appel est instruit par

legislative instruction to the contrary, cannot disregard the governing principle of appellate intervention on questions of fact. They may make their own findings and draw their own inferences, but only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact, including inferences of fact, that are clearly wrong, unreasonable, or unsupported by the evidence. A court of appeal cannot substitute for the reasonable inference preferred by the trial judge, an equally, or even more, persuasive inference of its own. These principles are consistent with this Court's recent decision in *Housen*. [3-6] [13-16] [74] [80] [89] [110]

In this case, the Saskatchewan Court of Appeal reversed the trial judge on six points: (1) qualification of the experts, (2) causation, (3) mitigation, (4) incarceration, (5) collateral benefits, and (6) loss of future earnings. The Court of Appeal erred in interfering with the trial judge's findings on the first three issues because it applied the wrong standard and improperly substituted its own opinion of the facts for that of the trial judge. The trial judge, however, made "palpable and overriding errors" on the last three issues. His finding that S's sexual abuse of L caused his loss of income due to imprisonment is both contrary to judicial policy and unsupported by the evidence. L's lack of gainful employment caused by his imprisonment resulted from his criminal conduct, not from his abuse by S or from the alcoholism. The award for loss of past earnings should thus be reduced to reflect the time L spent in prison. The trial judge also erred in not deducting from the same award the social assistance payments L had received during the relevant period. The trial judge's failure to make such deduction constitutes a severable error of principle. Finally, the trial judge's award for loss of future earnings must be set aside. The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely. [111] [137] [142-143] [145] [148] [152]

Per Bastarache, LeBel and Deschamps JJ. (dissenting in part): In Saskatchewan, the nature of appellate review is by way of rehearing and not review for error. The grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for appeals, and the Act's historical foundations, clearly lead

voie de contrôle d'erreur (« *review for error* »), et non par voie de nouvelle audition. Au Canada, à défaut d'une prescription expresse contraire de la loi, une cour d'appel ne peut faire fi du principe régissant l'appel d'une conclusion de fait. Elle peut tirer ses propres conclusions et inférences, mais seulement s'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou qu'il a tiré des conclusions de fait, y compris des inférences de fait, manifestement erronées, déraisonnables ou non étayées par la preuve. Une cour d'appel ne peut substituer à l'inférence raisonnable retenue par le juge de première instance sa propre inférence tout aussi convaincante, sinon plus. Ces principes sont conformes au récent arrêt *Housen* de notre Cour. [3-6] [13-16] [74] [80] [89] [110]

En l'espèce, la Cour d'appel de la Saskatchewan a infirmé la décision de première instance au regard de six points : (1) la compétence des experts, (2) la causalité, (3) la limitation du préjudice, (4) l'incarcération, (5) les prestations parallèles et (6) la perte de revenus ultérieure. Elle a eu tort de modifier les conclusions du juge de première instance quant aux trois premiers, car elle n'a pas appliqué la norme appropriée et a irrégulièrement substitué sa propre interprétation des faits à la sienne. Cependant, le juge de première instance a commis des erreurs « manifestes et dominantes » quant aux trois derniers points. Sa conclusion que les abus sexuels ont causé la perte de revenus due à l'incarcération n'est ni conforme aux principes judiciaires ni étayée par la preuve. L'absence d'emploi rémunérateur imputable à l'emprisonnement résultait du comportement criminel de L, et non de son alcoolisme ou des actes de S. Le montant des dommages-intérêts accordés pour la perte de revenus antérieure doit donc être abaissé en fonction du temps que L a passé en prison. Le juge de première instance a également eu tort de ne pas en déduire les prestations d'aide sociale touchées par L pendant la période considérée. L'omission de le faire constitue une erreur de principe dissociable. Enfin, les dommages-intérêts accordés pour la perte de revenus ultérieure doivent être annulés. Le fait qu'une personne a connu des problèmes émotionnels et de toxicomanie qui ont nui à sa capacité de gain ne permet pas à lui seul de conclure, selon la prépondérance des probabilités, qu'il en sera toujours ainsi. [111] [137] [142-143] [145] [148] [152]

Les juges Bastarache, LeBel et Deschamps (dissidents en partie) : En Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur (« *review for error* »). Le sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, l'objet de la Loi et des dispositions établissant le cadre législatif de l'appel, de même que les fondements historiques de la Loi permettent clairement

to that conclusion. *The Court of Appeal Act, 2000* is the only one among all of the statutes governing the powers of appellate courts in Canada that relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves. [157] [243] [296]

A number of Saskatchewan Court of Appeal cases also support the conclusion that the nature of appellate review in Saskatchewan is by way of rehearing. To the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with this conclusion, they can be reconciled. In particular, in *Housen*, the mere fact that this Court did not, on an appeal from the Saskatchewan Court of Appeal, refer to *The Court of Appeal Act* but instead used a statement from a different province's Court of Appeal that is in conflict with the clear language of that Act to define the role of the appellate court in Saskatchewan, demonstrates that *Housen* should not be used to understand the nature of appellate review in that province. Rather, the application of *Housen* as an authority should be limited to general standards of appellate review only. [259] [294-298]

Appellate review by way of rehearing is not a retrial or a *de novo* hearing. On an appeal by way of rehearing, the Court of Appeal is not limited to a review of the lower court's decision and can form its own judgment on the issues and direct its attention to the merits of the case. This does not mean, however, that the Court of Appeal can ignore the trial judge's findings. The special advantage of the trial judge calls for a measure of deference on the part of the Saskatchewan Court of Appeal when, pursuant to the direction in s. 14 of the Act, it is considering what the evidence proves. Factual findings that engage the special advantage of the trial judge will be accorded some deference and the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding. Factual findings that do not engage the special advantage of the trial judge are not entitled to the same level of deference. The Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a simple error in his or her fact finding. In the case of inferences of fact, since a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. Nevertheless, given the respect that is to be accorded to the office of the trial judge, in the cases of inferences of fact or of findings of fact that do not engage the special advantage of the trial judge, the

de tirer cette conclusion. Parmi les lois qui régissent les pouvoirs des cours d'appel au Canada, la *Loi de 2000 sur la Cour d'appel* est la seule à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de décider en se fondant sur sa propre appréciation de la preuve. [157] [243] [296]

Un certain nombre de décisions de la Cour d'appel de la Saskatchewan appuient la conclusion que, dans la province, l'appel est instruit par voie de nouvelle audition. Les arrêts de notre Cour et de la Cour d'appel de la Saskatchewan qui semblent contredire cette conclusion peuvent être conciliés avec elle. Dans *Housen*, en particulier, le simple fait que, dans le cadre d'un appel de la décision de la Cour d'appel de la Saskatchewan, notre Cour a passé sous silence la *Court of Appeal Act*, mais a cité un passage d'une décision d'une autre cour d'appel contredisant le libellé clair de cette loi pour définir le rôle de la cour d'appel en Saskatchewan montre que l'arrêt *Housen* ne saurait servir à déterminer la nature de la révision en appel dans cette province. L'arrêt *Housen* ne devrait valoir que pour les normes générales de révision en appel. [259] [294-298]

L'appel par voie de nouvelle audition n'équivaut ni à la reprise du procès ni à une audition *de novo*. Dans le cadre d'un tel appel, la Cour d'appel n'est pas confinée à l'examen de la décision du tribunal inférieur. Elle doit former sa propre opinion sur les questions en litige et se pencher sur le fond de l'affaire. Il ne s'ensuit cependant pas qu'elle peut faire abstraction des conclusions du juge de première instance. L'avantage particulier dont bénéficie ce dernier exige de la Cour d'appel de la Saskatchewan qu'elle fasse preuve d'une certaine déférence lorsqu'elle apprécie la preuve conformément à la prescription de l'art. 14 de la Loi. La Cour d'appel doit faire preuve de déférence vis-à-vis des conclusions factuelles qui font jouer cet avantage particulier; elle n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits. La conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance ne commande pas la même déférence. La Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si une simple erreur a été commise dans l'appréciation des faits. Le juge de première instance n'étant pas mieux placé que la Cour d'appel pour tirer une inférence de fait d'un ensemble de faits dûment établis, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à la sienne est celui de la raisonnabilité. Vu le respect que commande la charge de juge de première instance, lorsque l'avantage particulier du juge ne

Court of Appeal will presuppose that the trial judge has drawn reasonable inferences of fact or made factual findings free of error. [178] [245] [253-256]

The Court of Appeal correctly applied the appropriate standard when it set aside the trial judge's pecuniary damages award for both past and future loss of earnings, because the factual inferences on which the award was based were not reasonably supported by the evidence and were therefore not reasonable. Even if the more stringent standard set out in *Housen* applied here, the Court of Appeal's decision would still be upheld. The trial judge's findings were so unreasonable that they amounted to palpable error in the appreciation of the evidence and the inferences drawn. With respect to past loss of earnings, the trial judge's first inference that S's sexual abuse caused L's alcoholism was based primarily on the general expert evidence. However, the expert witnesses in this case transcended their respective fields of expertise when they testified as to the etiology of alcoholism and the cause of L's alcoholism in particular. Since the expert witnesses were not properly qualified to express opinions on this subject, their evidence in this regard is entitled to no weight, and L's testimony as to the effect of S's sexual abuse on his alcoholism could not, on its own, provide a sufficient evidentiary basis for the trial judge's inference that S's sexual abuse caused L's alcoholism. The trial judge's second inference that S's sexual abuse caused L's emotional problems which resulted in L losing employment income also lacks a sufficient evidentiary foundation. The evidence adduced at trial only demonstrated that L did not work between 1978-1987 and worked only sporadically between 1988-2000. It does not prove that L was wholly or largely unable to work because of his emotional problems. L's sporadic work record, in itself, is as consistent with choosing not to work as with being unable to work. With respect to future loss of earnings, since it was not reasonable for the trial judge to conclude that L suffered a loss of employment income because of S's sexual abuse, given the evidentiary gaps in the trial judge's causal chain, it was likewise not reasonable for him to conclude that L will continue to suffer such a loss in the future. [306] [313-317] [323-325] [329]

Per Charron J. (dissenting in part): There is agreement with the majority's analysis on the governing standard of review for appeals in Saskatchewan and the Court of Appeal thus erred in finding that the standard was other than that adopted by this Court in *Housen*. However, on application of the appropriate standard of review, the Court of Appeal was correct in setting aside the entire award for pecuniary damages. There is agreement with

joue pas, la Cour d'appel présupposera néanmoins que l'inférence de fait est raisonnable ou que la conclusion factuelle est exempte d'erreur. [178] [245] [253-256]

La Cour d'appel a bien appliqué la norme appropriée en annulant les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure, car les inférences factuelles sur lesquelles se fondait cet octroi n'étaient pas raisonnablement étayées par la preuve et n'étaient donc pas raisonnables. Même au regard de la norme plus stricte établie dans l'arrêt *Housen*, la décision de la Cour d'appel serait quand même confirmée en l'espèce. Les conclusions du juge de première instance étaient si déraisonnables qu'elles entachaient d'une erreur manifeste l'appréciation de la preuve et les inférences tirées. En ce qui concerne la perte de revenus antérieure, la première inférence du juge — les abus sexuels de S ont causé l'alcoolisme de L — se fondait principalement sur la preuve d'expert générale. Or, en l'espèce, les témoins experts ont outrepassé leurs domaines d'expertise respectifs en témoignant sur l'étiologie de l'alcoolisme en général et sur la cause de l'alcoolisme de L en particulier. Comme ils n'étaient pas dûment qualifiés pour se prononcer sur ces sujets, leurs témoignages n'ont aucune valeur à cet égard. Le témoignage de L concernant l'incidence des abus sexuels sur son alcoolisme ne pouvait à lui seul étayer suffisamment l'inférence du juge de première instance selon laquelle les abus sexuels de S avaient causé l'alcoolisme de L. La deuxième inférence du juge — les abus sexuels étaient à l'origine des problèmes émotionnels qui avaient fait perdre des revenus d'emploi à L — ne s'appuie pas non plus sur une preuve suffisante. La preuve offerte au procès établissait seulement que L n'avait pas travaillé de 1978 à 1987 et qu'il n'avait travaillé que sporadiquement de 1988 à 2000. Cette preuve n'établit pas que L était totalement ou en grande partie incapable de travailler à cause de ses problèmes émotionnels. Le fait qu'il a travaillé sporadiquement peut aussi bien résulter d'un choix que d'une incapacité. Pour ce qui est de la perte de revenus ultérieure, comme il n'était pas raisonnable de conclure que L avait subi une perte de revenus d'emploi à cause des abus sexuels de S, étant donné les lacunes, sur le plan de la preuve, de la chaîne causale établie par le juge de première instance, il n'était pas non plus raisonnable de conclure que L continuerait de subir une telle perte. [306] [313-317] [323-325] [329]

La juge Charron (dissidente en partie) : L'analyse des juges majoritaires concernant la norme de révision en appel applicable dans la province de la Saskatchewan est juste, et la Cour d'appel a donc eu tort de conclure que la norme applicable n'était pas celle établie par notre Cour dans *Housen*. Toutefois, compte tenu de l'application de la norme de révision appropriée, la Cour d'appel a annulé à bon droit la totalité des dommages-intérêts pécuniaires

the minority that the same error informed the trial judge's decision to award pecuniary damages in respect of both past and future loss of earnings. The trial judge found that there was a causal connection between the acts of sexual abuse and a lifelong inability to earn income. The evidence did not support this finding and, consequently, the award for loss of income, past and future, is unreasonable. [347-348]

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By Fish J.

Applied: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53; **referred to:** *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Markling v. Ewaniuk*, [1968] S.C.R. 776; *Kosinski v. Snaith* (1983), 25 Sask. R. 73; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Harrington v. Harrington* (1981), 33 O.R. (2d) 150; *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244; *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68; *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35; *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

By Bastarache J. (dissenting in part)

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33; *Fox v. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Hallberg v. Canadian National Railway Co.* (1955), 16 W.W.R. 538; *Taylor v. University of Saskatchewan* (1955), 15 W.W.R. 459; *Audergon v. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10; *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53;

accordés. Comme le concluent les juges minoritaires, la même erreur entachait la décision du juge de première instance d'accorder des dommages-intérêts pécuniaires pour les pertes de revenus passée et future. Le juge a en effet conclu à l'existence d'un lien de causalité entre les abus sexuels et l'incapacité permanente de gagner un revenu. La preuve n'étayait pas cette conclusion, de sorte que l'indemnisation pour les pertes de revenus passée et future est déraisonnable. [347-348]

Jurisprudence

Citée par le juge Fish

Arrêts appliqués : *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *M.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 477, 2003 CSC 53; **arrêts mentionnés :** *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Markling c. Ewaniuk*, [1968] R.C.S. 776; *Kosinski c. Snaith* (1983), 25 Sask. R. 73; *R. c. W. (R.)*, [1992] 2 R.C.S. 122; *Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Harrington c. Harrington* (1981), 33 O.R. (2d) 150; *Pelech c. Pelech*, [1987] 1 R.C.S. 801; *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244; *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68; *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35; *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18; *Janiak c. Ippolito*, [1985] 1 R.C.S. 146; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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Bigsby v. Dickinson (1876), 4 Ch. D. 24; *Coghlan v. Cumberland*, [1898] 1 Ch. 704; *Montgomerie & Co. v. Wallace-James*, [1904] A.C. 73; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253; *Benmax v. Austin Motor Co.*, [1955] A.C. 370; *Coventry v. Annable* (1911), 19 W.L.R. 400, aff'd (1912), 46 S.C.R. 573; *Greene, Swift & Co. v. Lawrence* (1912), 2 W.W.R. 932; *Miller v. Foley & Sons* (1921), 59 D.L.R. 664; *Messer v. Messer* (1922), 66 D.L.R. 833; *Monaghan v. Monaghan*, [1931] 2 W.W.R. 1; *Kowalski v. Sharpe* (1953), 10 W.W.R. (N.S.) 604; *Tarasoff v. Zielinsky*, [1921] 2 W.W.R. 135; *Matthewson v. Thompson*, [1925] 2 D.L.R. 1211; *French v. French*, [1939] 2 W.W.R. 435; *Wilson v. Erbach* (1966), 56 W.W.R. 659; *Tanfern Ltd. v. Cameron-MacDonald*, [2000] 1 W.L.R. 1311; *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577; *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37; *Whitehouse v. Jordan*, [1981] 1 All E.R. 267; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Warren v. Coombes* (1979), 142 C.L.R. 531; *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244; *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214; *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232; *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68; *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35; *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18; *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Marquard*, [1993] 4 S.C.R. 223; *Parker v. Saskatchewan Hospital Assn.*, [2001] 7 W.W.R. 230, 2001 SKCA 60; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *State Rail Authority of New South Wales v. Wiegold* (1991), 25 N.S.W.L.R. 500; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (les juges Cameron, Vancise et Lane) (2002), 227 Sask. R. 165, 287 W.A.C. 165, [2003] 5 W.W.R. 421, [2002] S.J. No. 702 (QL), 2002 SKCA 131, qui a confirmé en partie un jugement du juge Klebuc (2001), 208 Sask. R. 183, [2001] 7 W.W.R.

C.C.L.T. (3d) 186, [2001] S.J. No. 298 (QL), 2001 SKQB 233, and supplementary reasons (2001), 210 Sask. R. 114, [2001] 11 W.W.R. 727, [2001] S.J. No. 478 (QL), 2001 SKQB 233. Appeal allowed in part, Bastarache, LeBel, Deschamps and Charron JJ. dissenting in part.

E. F. Anthony Merchant, Q.C., Eugene Meehan, Q.C., and *Graham Neill*, for the appellant.

Roslyn J. Levine, Q.C., and *Mark Kindrachuk*, for the respondent.

Barry J. Hornsberger, Q.C., for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, Fish and Abella JJ. was delivered by

FISH J. —

I. Introduction

This appeal turns on the applicable standard of appellate review on questions of fact in Saskatchewan, and on the application of that standard by the Court of Appeal in this case. Our concern is with all of the facts, and nothing but the facts: with facts proved directly and with facts inferred, but not with questions of law or questions of mixed law and fact.

Legislatures may fix by statute the powers of the appellate courts they are constitutionally authorized to create. The Legislative Assembly of Saskatchewan has done so, most recently in *The Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1 ("*2000 Act*").

The *2000 Act* did not enlarge materially the powers previously vested in the Saskatchewan Court of Appeal. Nor did it purport to modify at all the manner in which those powers have been exercised for nearly half a century.

More particularly, the *2000 Act* did not change the standard of review applicable in Saskatchewan to appellate intervention with respect to findings of fact. The criteria that govern the exercise by the Court of Appeal of its statutory powers in this regard remain unchanged. Like other appellate courts across the country, it may substitute its own

722, 5 C.C.L.T. (3d) 186, [2001] S.J. No. 298 (QL), 2001 SKQB 233, et motifs supplémentaires (2001), 210 Sask. R. 114, [2001] 11 W.W.R. 727, [2001] S.J. No. 478 (QL), 2001 SKQB 233. Pourvoi accueilli en partie, les juges Bastarache, LeBel, Deschamps et Charron sont dissidents en partie.

E. F. Anthony Merchant, c.r., Eugene Meehan, c.r., et *Graham Neill*, pour l'appelant.

Roslyn J. Levine, c.r., et *Mark Kindrachuk*, pour l'intimé.

Barry J. Hornsberger, c.r., pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Major, Binnie, Fish et Abella rendu par

LE JUGE FISH —

I. Introduction

Le présent pourvoi porte sur la norme de révision applicable en appel à l'égard d'une question de fait en Saskatchewan et sur l'application de cette norme en l'espèce par la Cour d'appel. Il a pour objet tous les faits et seulement eux, qu'ils soient prouvés directement ou inférés, et non des questions de droit ou mixtes de fait et de droit. 1

Une législature peut définir dans une loi les pouvoirs de la cour d'appel que la Constitution l'autorise à créer. L'assemblée législative de la Saskatchewan l'a fait pour la dernière fois dans la *Loi de 2000 sur la Cour d'appel*, L.S. 2000, ch. C-42,1 (« *Loi de 2000* »). 2

Cette loi n'a pas accru sensiblement les pouvoirs de la Cour d'appel de la Saskatchewan. Elle ne visait pas non plus à modifier la manière dont ces pouvoirs étaient exercés depuis près d'un demi-siècle. 3

Plus particulièrement, la *Loi de 2000* n'a pas changé la norme de révision applicable en appel à l'égard d'une conclusion de fait. Les critères régissant l'exercice des pouvoirs légaux de la Cour d'appel à ce chapitre demeurent les mêmes. À l'instar des autres cours d'appel du pays, la Cour d'appel de la Saskatchewan peut substituer sa propre 4

view of the evidence and draw its own inferences of fact where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence.

5 This standard of appellate review is subject, of course, to statutory exceptions. It does not apply where the legislature has expressly provided otherwise. Nothing in the *2000 Act* reflects any such intention or has any such effect. It sets out the powers of the Court of Appeal in considerable detail; in other Canadian jurisdictions, equivalent powers are conferred in more general terms. As we shall see, however, the *2000 Act* neither bestows on the Court of Appeal for Saskatchewan unique powers of appellate intervention on questions of fact nor ordains their exercise in a manner that, within Canada, is exclusive to Saskatchewan.

6 In my respectful view, the Court of Appeal departed from the applicable standard in this case.

7 I would therefore allow the appeal in part, with costs, as explained in the reasons that follow.

II. Overview

8 This matter reaches us, exceptionally, with leave granted by the Court of Appeal itself, pursuant to s. 37 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. In reversing the trial judge, the Court of Appeal felt empowered by its governing statute to "rehear" the case. Speaking for the Court of Appeal on the leave application, Bayda C.J.S. acknowledged that a very different standard — "review for error" — had been held applicable in "the recent majority decision of the Supreme Court of Canada in *Housen v. Nikolaisen et al.*, [2002] 2 S.C.R. 235". "Both conclusions", said the Chief Justice, "cannot be right" ((2003), 238 Sask. R. 167, 2003 SKCA 78, at para. 11). I agree, of course, and, in my respectful view, it is the standard applied by the Court of Appeal — the "rehearing" standard — that is wrong.

appréciation de la preuve et tirer ses propres inférences de fait lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve.

Évidemment, cette norme de révision s'applique en appel sous réserve des exceptions prévues par la loi. Le législateur peut l'écarter expressément. Aucune disposition de la *Loi de 2000* ne traduit pareille intention ni n'a cet effet. Les pouvoirs de la Cour d'appel y sont énoncés de manière très détaillée; dans les autres provinces ou territoires canadiens, les pouvoirs équivalents sont formulés de façon plus générale. Or, nous le verrons, la *Loi de 2000* ne confère pas à la Cour d'appel de la Saskatchewan un pouvoir d'intervention unique à l'égard d'une question de fait ni ne prescrit l'exercice de ce pouvoir selon des modalités qui, au Canada, sont propres à la Saskatchewan.

En toute déférence, la Cour d'appel n'a pas respecté la norme de révision applicable en l'espèce.

Je suis donc d'avis d'accueillir le pourvoi en partie, avec dépens, pour les motifs qui suivent.

II. Vue d'ensemble

Exceptionnellement, la question nous est soumise avec l'autorisation de la Cour d'appel elle-même, en application de l'art. 37 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26. La Cour d'appel a infirmé la décision de première instance après avoir estimé que sa loi constitutive l'investissait du pouvoir de « réentendre » l'affaire. Saisie de la demande d'autorisation, elle a reconnu, par la voix du juge en chef Bayda, qu'une norme très différente — celle du [TRADUCTION] « contrôle d'erreur » (« *review for error* ») — avait été jugée applicable par [TRADUCTION] « les juges majoritaires de la Cour suprême du Canada dans le récent arrêt *Housen c. Nikolaisen et al.*, [2002] 2 R.C.S. 235 ». Le Juge en chef a opiné que [TRADUCTION] « les deux points de vue ne pouvaient être valables » ((2003), 238 Sask. R. 167, 2003 SKCA 78, par. 11). Je suis évidemment d'accord avec lui et, à mon humble avis, c'est la norme fondée sur le pouvoir de la Cour d'appel de « réentendre » l'affaire qui doit céder le pas.

I shall deal later with the difference between the majority and minority reasons in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. For present purposes, it will suffice to mention that this Court in *Housen* was unanimous on the issue that concerns us here: All nine Justices agreed that the standard of appellate review on questions of fact in Saskatchewan is review for error and not review by rehearing. They agreed as well that findings of fact by the trial judge will be disturbed on appeal only for errors that can properly be characterized as palpable and overriding.

It was not contended in *Housen*, either in the Saskatchewan Court of Appeal or in this Court, that the standard of appellate review in Saskatchewan differed significantly from the prevailing standard elsewhere in Canada. And none of the parties found it necessary or useful to refer in their written or oral submissions in this Court to the *2000 Act* or its predecessors. This should not be thought surprising. On second reading, the Minister of Justice assured the Legislative Assembly of Saskatchewan that Bill 80 which, upon its adoption, became the *2000 Act*

> doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.

(*Saskatchewan Hansard*, June 7, 2000, at p. 1626)

Moreover, the Saskatchewan Court of Appeal, both before and after the coming into force of the *2000 Act*, had consistently held that a trial judge's findings of fact can be set aside only where palpable and overriding error is shown. It affirmed and reiterated that principle well before this Court's judgment in *Housen*, and even before *Lensen v. Lensen*, [1987] 2 S.C.R. 672. Thus, for example, in *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), Bayda C.J.S. stated that the palpable and overriding standard had been followed by the Saskatchewan Court of Appeal "for a long time and most certainly since [1960]" (p. 218).

Lensen, also an appeal from Saskatchewan, was decided under the predecessor to the *2000 Act*. This

Je ferai état plus loin de ce qui a opposé les juges majoritaires aux juges minoritaires dans *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33. Il suffit pour l'instant de mentionner que les neuf juges de notre Cour étaient unanimes quant à la question qui nous intéresse en l'espèce : en Saskatchewan, l'appel interjeté à l'égard d'une conclusion de fait est instruit par voie de contrôle d'erreur, et non de nouvelle audition. Ils ont également convenu que les conclusions de fait du juge de première instance ne pouvaient être modifiées en appel qu'en cas d'erreur pouvant à juste titre être qualifiée de manifeste et de dominante.

Dans *Housen*, nul n'a prétendu en Cour d'appel de la Saskatchewan ni devant notre Cour que la norme de révision en appel applicable dans cette province différait sensiblement de celle s'appliquant ailleurs au Canada. Et aucune des parties n'a jugé nécessaire ou utile de faire mention de la *Loi de 2000* ou des lois qui l'ont précédée dans ses plaidoiries orales ou écrites devant notre Cour. Cela n'est pas étonnant. En deuxième lecture, le ministre de la Justice a assuré à l'Assemblée législative de la Saskatchewan que le projet de loi 80 (devenu la *Loi de 2000* après son adoption) :

> [TRADUCTION] ne modifie en rien la compétence de la Cour d'appel. Il ne fait que reformuler sa compétence historique afin que la Loi puisse être comprise par ses « utilisateurs ».

(*Saskatchewan Hansard*, 7 juin 2000, p. 1626)

En outre, la Cour d'appel de la Saskatchewan, tant avant qu'après l'entrée en vigueur de la *Loi de 2000*, avait toujours statué que les conclusions de fait d'un juge de première instance ne pouvaient être écartées que si l'existence d'une erreur manifeste et dominante était établie. Elle a affirmé et réaffirmé ce principe bien avant *Housen*, et même avant l'arrêt *Lensen c. Lensen*, [1987] 2 R.C.S. 672. Dans *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), par exemple, le juge en chef Bayda a dit que la Cour d'appel de la Saskatchewan appliquait la norme de l'erreur manifeste et dominante [TRADUCTION] « depuis longtemps, et très certainement depuis [1960] » (p. 218).

Dans *Lensen*, notre Cour était également saisie d'un pourvoi contre un arrêt de la Cour d'appel de

Court dealt specifically in that case with the governing provision of the Saskatchewan statute, but laid down a uniform norm for appellate courts across the country.

13 As we shall see, the decisive provisions of the *2000 Act* are identical in substance to the corresponding provisions of the Act it replaced. This underlines the present relevance of the Court of Appeal's decisions prior to November 1, 2000, when the current Act came into effect. And it reflects the legislative intention, mentioned earlier, not to "change the jurisdiction of the Court of Appeal in any way" (*Saskatchewan Hansard*, at p. 1626).

14 Finally, I agree that the powers of the Saskatchewan Court of Appeal are set out in its constituent statute in greater detail than is the case in most other provinces. Greater detail in an empowering statute, however, does not invariably signal a legislative intent to confer broader powers. Often, the opposite is true. In any event, the *2000 Act* must be read in the light of this Court's jurisprudence — and appellate decisions in Saskatchewan itself — immediately prior to its adoption. Neither the text of the Act nor its legislative history indicates a departure from the principles set out in those cases.

15 In short, I am not at all persuaded that the *2000 Act* was intended to create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces. Nothing in the record before us, in the relevant provisions of the Act, or in the Court of Appeal's own earlier appreciation of its proper role suggests to me that it has now been invested with a general jurisdiction to "rehear" trials — that is, to apply a "rehearing" standard when it reviews judgments at trial.

16 To a significant extent, that is what it did here. In my respectful view, it improperly substituted its own opinion of the facts for that of the trial judge. The court evidently viewed with skepticism the trial judge's conclusions regarding the damages suffered by H.L. as a direct result of Mr. Starr's proven

la Saskatchewan rendu en fonction de la loi qu'a remplacée la *Loi de 2000*. Elle a dûment analysé la disposition pertinente de la loi de la Saskatchewan, mais elle a énoncé une seule et même norme applicable à toutes les cours d'appel du pays.

Comme nous le verrons, les dispositions en cause de la *Loi de 2000* sont identiques, sur le fond, à celles qu'elles ont remplacées, d'où la pertinence, dans la présente affaire, des décisions rendues par la Cour d'appel avant le 1er novembre 2000, date d'entrée en vigueur de la loi actuelle. Cela traduit également l'intention du législateur, signalée précédemment, de ne [TRADUCTION] « modifie[r] en rien la compétence de la Cour d'appel » (*Saskatchewan Hansard*, p. 1626).

Enfin, je conviens qu'en Saskatchewan, la loi pertinente énonce les pouvoirs de la cour d'appel de façon plus détaillée que dans la plupart des autres provinces. Cependant, le fait qu'une loi constitutive soit plus exhaustive ne traduit pas invariablement la volonté du législateur de conférer des pouvoirs plus étendus. C'est souvent l'inverse. Quoi qu'il en soit, la *Loi de 2000* doit être interprétée à la lumière des décisions de notre Cour — et des décisions de la Cour d'appel de la Saskatchewan elle-même — rendues juste avant son adoption. Ni le libellé de la Loi ni son historique législatif n'indiquent une dérogation aux principes issus de ces arrêts.

En résumé, je ne suis pas du tout convaincu que la *Loi de 2000* visait à établir en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs ou de l'objet. Ni le dossier qui nous a été présenté ni les dispositions pertinentes de la Loi ni l'appréciation de son rôle par la Cour d'appel elle-même ne me permettent de conclure que cette dernière est désormais investie du pouvoir général de « réentendre » une affaire, c'est-à-dire de se prononcer sur un jugement de première instance à l'issue d'une « nouvelle audition ».

Or, dans une large mesure, elle a agi en l'espèce comme si tel était le cas. À mon humble avis, elle a irrégulièrement substitué sa propre interprétation des faits à celle du juge de première instance. Elle a manifestement mis en doute les conclusions du juge de première instance sur le préjudice infligé

misconduct. Doubt as to the soundness of the trial judge's findings of fact, however, is not a recognized ground of appellate intervention.

I would therefore allow the appeal in part and restore the trial judge's award for past loss of earnings, except where the errors imputed to him are indeed "palpable and overriding".

III. The Facts and Judgment at Trial

H.L., a former resident of Gordon First Nation Reserve, brought an action for sexual battery against William Starr and the Government of Canada for acts that had occurred some twenty years earlier: (2001), 208 Sask. R. 183, 2001 SKQB 233. Mr. Starr was employed at that time by the federal Department of Indian and Northern Affairs ("Department") as Residence Administrator of the Gordon Student Residence on Gordon First Nation Reserve.

With the approval of the Department, Mr. Starr had organized various extracurricular activities for the students and other children living on the Reserve. It was through one of these activities, an after-school boxing club, that Mr. Starr came into contact with H.L. H.L. was then about 14 years old. Mr. Starr sexually abused H.L. on two occasions by subjecting him to acts of masturbation and to requests for sexual favours.

H.L. testified that Mr. Starr's assaults had a profound and enduring impact. He felt "ashamed" and "dirty", and was afraid to tell anyone what had happened, because he thought no one would believe him. He "tried to find a way to get out of going to school because [he] didn't want to be around anybody", and "had a hard time concentrating because it was on [his] mind".

H.L. testified that he had never even "touched" alcohol before the assaults occurred, but began consuming excessive amounts shortly thereafter, when he was 15 or 16 years old. Alcohol provided an "escape" from his recurring thoughts about the sexual assaults. "[M]y way of dealing with it", he

directement à H.L. par les actes répréhensibles prouvés de M. Starr. Cependant, douter de la justesse des conclusions de fait du juge de première instance ne constitue pas un motif reconnu d'intervention en appel.

17 Par conséquent, je suis d'avis d'accueillir le pourvoi en partie et de rétablir la décision du juge de première instance quant à la somme accordée pour la perte de revenus antérieure, sauf erreur véritablement « manifeste et dominante » de sa part.

III. Les faits et le jugement de première instance

18 H.L., un ancien résidant de la réserve de la Première nation de Gordon, a intenté une action contre William Starr et le gouvernement du Canada relativement à des voies de fait de nature sexuelle commises quelque vingt ans plus tôt : (2001), 208 Sask. R. 183, 2001 SKQB 233. M. Starr travaillait alors pour le ministère fédéral des Affaires indiennes et du Nord Canada (« ministère ») et administrait le pensionnat situé dans la réserve.

19 Avec l'aval du ministère, M. Starr avait mis sur pied divers programmes d'activités parascolaires destinés aux élèves du pensionnat et aux autres enfants de la réserve. C'est dans le cadre de l'une de ces activités — un club de boxe — que M. Starr avait rencontré H.L. L'appelant avait alors 14 ans. M. Starr l'a agressé sexuellement deux fois en le soumettant à des actes de masturbation et en sollicitant ses faveurs sexuelles.

20 H.L. a témoigné que les actes de M. Starr l'avaient marqué profondément et pour longtemps. Il s'était senti « honteux » et « souillé » et avait craint de se confier à quiconque, pensant que personne ne le croirait. Il avait [TRADUCTION] « cherché un moyen de quitter l'école, car [il] ne voulait avoir affaire à personne », et « avait du mal à se concentrer à cause de ce qui s'était passé ».

21 H.L. a témoigné qu'il n'avait jamais « touché » à l'alcool auparavant, mais qu'il avait commencé à en faire une consommation excessive peu de temps après; il était alors âgé de 15 ou 16 ans. L'alcool lui permettait de « fuir », de ne plus penser sans cesse aux agressions sexuelles. Il a dit : [TRADUCTION]

said, "was to go out and get drunk." That is why he "started drinking at a young age and got addicted to alcohol".

22 Because he had difficulty concentrating and was by then "already into alcohol pretty bad", H.L. left school when he was about 17 years old, without completing the eighth grade. H.L. characterized the sexual abuse perpetrated by Mr. Starr as the most traumatic event of his life.

23 Both H.L. and Canada called witnesses who were qualified as experts in assessing the psychological effects of sexual abuse. Both experts had tested H.L. and interviewed him extensively. Canada's expert, Dr. Arnold, adverted to factors other than H.L.'s sexual abuse by Mr. Starr that had, in his view, contributed to H.L.'s addiction to alcohol. He noted, in particular, that H.L. had grown up in a home that modelled alcohol abuse and violence. Dr. Arnold concluded, however, that Mr. Starr's sexual abuse of H.L. was a "specific triggering event" that led to H.L.'s abuse of alcohol.

24 Asked whether H.L. would have become an alcoholic in any event, Dr. Arnold stated: "He may have had vulnerability, but except for the exposure to the sexual abuse, may not have developed a substance abuse problem. So I have to be careful when I say that, the risk is there, but except for that triggering event it may not have occurred. We don't know." Invited to elaborate, Dr. Arnold added:

> What we have [here] is an individual who has a risk because of his upbringing, so he's — he has a risk and a vulnerability. If specific stressful life events come along and he's exposed to them, such as sexual abuse, he is at more risk than someone who doesn't have that history of vulnerability.

25 H.L.'s expert, Mr. Stewart, testified that H.L. was primarily traumatized by the sexual abuse perpetrated by Mr. Starr, which could be linked to his withdrawal and drinking problems:

> [T]hey certainly coincide with his abuse, and again research would indicate that substance abuse . . . is a direct result of being abused, so with other interviews and assessments and people that I've seen in therapy that

« [M]a façon de réagir à la situation était de sortir et de me soûler. » C'est ainsi qu'il [TRADUCTION] « a commencé à boire à un jeune âge et est devenu alcoolique ».

Comme il avait de la difficulté à se concentrer et était alors [TRADUCTION] « déjà très dépendant à l'alcool », H.L. a quitté l'école à l'âge de 17 ans environ sans avoir terminé sa huitième année. H.L. a dit des abus sexuels commis par M. Starr qu'ils avaient été l'événement le plus traumatisant de sa vie.

H.L. et le procureur général du Canada ont chacun fait entendre un expert de l'évaluation des effets psychologiques de l'abus sexuel. Les deux experts avaient soumis H.L. à des tests et l'avaient interrogé longuement. Selon l'expert du procureur général du Canada, le Dr Arnold, d'autres facteurs que les abus sexuels avaient contribué à la dépendance de H.L. à l'alcool, notamment le fait d'avoir grandi dans une famille où sévissaient l'abus d'alcool et la violence. Le Dr Arnold a toutefois conclu que les abus sexuels avaient été un [TRADUCTION] « événement déclencheur » à l'origine de l'alcoolisme de H.L.

Lorsqu'on lui a demandé si H.L. serait devenu alcoolique de toute façon, le Dr Arnold a répondu : [TRADUCTION] « Il aurait pu être vulnérable, mais n'eût été les abus sexuels, il aurait pu ne jamais abuser de substances intoxicantes. Je dois donc être prudent lorsque j'affirme que le risque existe, mais que sans cet événement déclencheur, il aurait pu ne pas se réaliser. Nous ne le savons pas. » Invité à préciser sa pensée, le Dr Arnold a ajouté :

> [TRADUCTION] Nous avons affaire à un individu prédisposé par son éducation, il est donc — il est prédisposé et vulnérable. Si un événement stressant se produit, s'il est victime d'abus sexuel par exemple, il est plus prédisposé qu'un autre ne présentant aucune vulnérabilité.

L'expert de H.L., M. Stewart, a témoigné que l'appelant avait avant tout été traumatisé par les abus sexuels, que l'on pouvait rattacher à son repli sur soi et à son problème d'alcool :

> [TRADUCTION] [I]ls coïncident certainement avec les abus sexuels et, là encore, les recherches indiquent que la toxicomanie [. . .] est une conséquence directe de l'abus, alors si je me fie à d'autres entrevues et évaluations et

have undergone sexual abuse, they find it extremely difficult to concentrate . . . .

Mr. Stewart explained that some "resilient" children are able to "shrug off" sexual abuse, with the benefit of a strong home and family life and the opportunity to disclose the abuse in a safe manner. Children who have been abused by a trusted authority figure, on the other hand, are more adversely affected.

The trial judge, Klebuc J., accepted the evidence of H.L. and the experts. He found that the sexual assaults committed by Mr. Starr caused H.L. to suffer enormous humiliation, self-blame and loss of self-worth, to lose interest in his education, in part due to his inability to concentrate, and to develop alcoholism.

Klebuc J. recognized that H.L. had a dysfunctional home life. He found, however, that no divisible injury could be attributed to it; nor was it a "necessary cause" of H.L.'s injuries. There was no evidence that H.L. suffered from a "crumbling skull", or pre-existing condition that would have led to his losses regardless of the sexual battery (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 34-36). Rather, if H.L. was particularly vulnerable, this amounted to a "thin skull", within the meaning of *Athey*, exonerating neither Canada nor Mr. Starr from their liability for the consequences.

H.L. was unable to retain meaningful employment between 1978 and 1987 (the "first period"). During that time, he drank heavily and was incarcerated frequently. He relied on social assistance to meet his needs. Between 1988 and 2000 (the "second period"), he worked sporadically.

H.L. testified that his inability to maintain steady employment was attributable to his abuse of alcohol, manifested by extensive and recurring periods of indulgence.

The impact of the sexual assaults on H.L.'s ability to maintain steady employment was addressed as well by the experts. Dr. Arnold, for example,

aux personnes que j'ai vues en thérapie, la victime d'abus sexuels a énormément de difficulté à se concentrer . . .

26 M. Stewart a expliqué que certains enfants « résilients » bénéficiant de liens familiaux étroits et ayant la possibilité de dévoiler l'abus en toute confiance peuvent se « délester » de l'abus sexuel. Par contre, l'enfant abusé sexuellement par une personne en situation d'autorité en qui il avait confiance est plus gravement atteint.

27 En première instance, le juge Klebuc a ajouté foi aux témoignages de H.L. et des experts. Il a conclu que les agressions sexuelles commises par M. Starr avaient amené H.L. à ressentir une grande humiliation, à s'en prendre à lui-même, à perdre son estime de soi, à se désintéresser de ses études, en partie à cause de son incapacité à se concentrer, et à sombrer dans l'alcool.

28 Le juge Klebuc a reconnu que H.L. avait grandi au sein d'une famille dysfonctionnelle. Il a cependant conclu qu'aucune partie du préjudice ne pouvait être imputée séparément à ce fait, qui ne constituait pas non plus une « cause nécessaire » du préjudice subi. Rien ne prouvait que H.L. souffrait d'une vulnérabilité déjà « active » ou d'un état préexistant qui aurait causé le préjudice indépendamment de l'agression sexuelle (voir *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 34-36). En fait, si H.L. était particulièrement vulnérable, il s'agissait d'une vulnérabilité « latente », au sens de l'arrêt *Athey*, ne soustrayant ni l'État ni M. Starr à leur responsabilité pour les conséquences subies.

29 Entre 1978 et 1987 (la « première période »), H.L. n'a pu conserver un emploi convenable. Il buvait beaucoup et se retrouvait souvent derrière les barreaux. Il avait recours à l'aide sociale pour subvenir à ses besoins. De 1988 à 2000 (la « seconde période »), il a travaillé sporadiquement.

30 H.L. a témoigné qu'il n'avait pu conserver un emploi à cause de sa consommation excessive d'alcool, qui se manifestait par de longues et nombreuses cuites.

31 Les experts se sont aussi prononcés sur l'incidence des abus sexuels sur la capacité de H.L. de conserver un emploi. Le D^r^ Arnold, par exemple,

testified to the "chain of events" set into motion by the sexual abuse perpetrated by Mr. Starr. He stated that this "triggering event" led to alcohol and school problems, a loss of confidence in the school system, and a diminished "work ethic", which Dr. Arnold defined as H.L.'s "ability to hold work and be able to regularly show up and those kinds of things". Dr. Arnold explained that sexual abuse by an authority figure, both generally and in H.L.'s specific circumstances, could lead to distrust of authority figures, including teachers, police, employers, judges, doctors, and medical care workers.

a fait état de la « suite d'événements » qui avait suivi l'agression. Il a déclaré que cet « événement déclencheur » avait mené à l'alcool et aux problèmes à l'école, à la perte de confiance dans le système scolaire et à l'affaiblissement de la « morale du travail », qu'il a définie comme la [TRADUCTION] « capacité à conserver un emploi et à se présenter régulièrement au travail, et ce genre de chose ». Le Dr Arnold a expliqué que l'abus sexuel perpétré par une personne en situation d'autorité, tant en général que dans la situation particulière de H.L., pouvait entraîner une perte de confiance dans les figures d'autorité, notamment les professeurs, les policiers, les employeurs, les juges, les médecins et le personnel soignant.

32 Similarly, Mr. Stewart testified that the sexual abuse would cause H.L. to have negative self-esteem, a poor self-image and a lack of confidence. These personality traits, he added, detrimentally affect one's ability to secure and maintain employment.

Dans la même veine, M. Stewart a témoigné que l'abus sexuel entraîne une perte d'estime de soi, une image de soi négative et un manque de confiance en soi qui nuisent à la capacité de trouver et de conserver un emploi.

33 The evidence given by H.L. and the experts satisfied Klebuc J. that H.L.'s poor employment record during the "first period" was attributable to his alcoholism, emotional difficulties, and criminality, which were in turn attributable to the sexual abuse perpetrated by Mr. Starr. He found as well that H.L.'s sporadic work record during the "second period" was consistent with the emotional difficulties described by the experts in their psychological assessments.

Les témoignages de H.L. et des experts ont convaincu le juge Klebuc que si H.L. avait peu travaillé pendant la « première période » c'était à cause de son alcoolisme, de ses difficultés émotionnelles et de sa criminalité, qui eux étaient attribuables aux abus sexuels commis par M. Starr. Il a également conclu que les emplois occupés sporadiquement par H.L. pendant la « seconde période » s'inscrivaient dans la suite logique des difficultés émotionnelles décrites par les experts dans leurs évaluations psychologiques.

34 In the result, Klebuc J. maintained H.L.'s action against Mr. Starr and the Government of Canada. He found that the criteria for the imposition of vicarious liability on Canada had been met, and awarded H.L. a total of $80,000 in non-pecuniary damages, $296,527.09 in pecuniary damages and $30,665 in estimated pre-judgment interest.

Le juge Klebuc a donc accueilli l'action de H.L. contre M. Starr et le gouvernement du Canada. Il a jugé réunies les conditions auxquelles l'État pouvait être tenu responsable du fait d'autrui. Il a accordé 80 000 $ au total à titre de dommages-intérêts non pécuniaires, 296 527,09 $ à titre de dommages-intérêts pécuniaires et 30 665 $ à titre d'intérêt avant jugement.

35 The non-pecuniary damages included $60,000 for the losses and injuries, including emotional distress, that H.L. had suffered — and would continue to suffer — as a consequence of Mr. Starr's abuse, and aggravated damages of $20,000.

Les dommages-intérêts non pécuniaires se composaient de 60 000 $ pour les pertes et le préjudice, y compris la détresse émotionnelle, que H.L. avait subis — et qu'il continuerait de subir — à cause des actes répréhensibles de M. Starr, ainsi que de dommages-intérêts majorés de 20 000 $.

The pecuniary damages were determined as follows. Klebuc J. was satisfied that the appellant would have been able and willing to work, but for his emotional difficulties and resulting dependence on alcohol. Relying on Statistics Canada data submitted on consent, Klebuc J. estimated that H.L. would have worked as a construction or agricultural labourer 25 weeks annually, during the "first period" (1978-87), earning a total of $27,150.

Klebuc J. found that H.L. would have maintained full-time employment in automotive repair during the "second period" (1988-2000). Relying here again on Statistics Canada data, he applied the median rate of $330 per week for all persons engaged in the repair and overhaul of motor vehicles. He discounted this amount by a 20 percent contingency factor to reflect H.L.'s vulnerability to job loss due to his limited education and cut off this branch of the award at the date of a back injury suffered by H.L. After deducting the income actually earned by H.L., Klebuc J. estimated a residual loss in earnings of $90,187.09 for the period.

Klebuc J. then considered H.L.'s claim for loss of future earnings and, in the absence of specific evidence in this regard, relied inferentially on the evidence relating to H.L.'s past earning capacity. He estimated H.L.'s future income, but for Mr. Starr's misconduct, at no less than $17,160 annually, and deducted H.L.'s average earnings in the past to arrive at an annual income loss of $12,533 for the remainder of H.L.'s projected working life.

IV. The Court of Appeal

The Court of Appeal dismissed Canada's appeal as it related to vicarious liability and to the $80,000 award for non-pecuniary damages, but allowed the appeal in relation to the pecuniary damages and pre-judgment interest. H.L.'s cross-appeal was dismissed except as it related to $6,500 in damages for future care: (2002), 227 Sask. R. 165, 2002 SKCA 131.

Writing for the court, Cameron J.A. noted that the appeal and cross-appeal were based on s. 7(2)(a)

36 Voici comment le montant des dommages-intérêts pécuniaires a été arrêté. Le juge Klebuc s'est dit convaincu que l'appelant aurait été en mesure et désireux de travailler n'eût été ses difficultés émotionnelles et la dépendance à l'alcool qui en résultait. Se fondant sur des données de Statistique Canada produites sur consentement, il a supposé que H.L. aurait été ouvrier de ferme ou du bâtiment 25 semaines par année et aurait gagné au total 27 150 $ au cours de la « première période » (1978 à 1987).

37 Le juge Klebuc a conclu que, pendant la deuxième période (1988 à 2000), H.L. aurait occupé un emploi à temps plein dans le domaine de la réparation d'automobiles. Dans les données de Statistique Canada, le salaire hebdomadaire moyen d'une personne travaillant dans le domaine de la réparation et de la révision de véhicules moteur était de 330 $. Il a retranché 20 p. 100 pour tenir compte du risque de perte d'emploi imputable au faible niveau d'instruction de H.L. et il a arrêté le calcul le jour où ce dernier s'était blessé au dos. Après avoir soustrait le revenu effectivement gagné par H.L., il a estimé à 90 187,09 $ la perte de revenus pendant la période.

38 Le juge Klebuc s'est ensuite penché sur la perte de revenus ultérieure alléguée et, vu l'absence d'éléments de preuve précis à cet égard, il s'est fondé, par inférence, sur la preuve relative à la capacité de gain antérieure de H.L. Il a estimé que n'eût été les actes répréhensibles de M. Starr, H.L. aurait gagné pas moins de 17 160 $ par année. Après avoir soustrait le revenu moyen antérieur de H.L., il est arrivé à une perte de revenus annuelle de 12 533 $ pour le reste de la vie active projetée.

IV. La Cour d'appel

39 La Cour d'appel a rejeté l'appel du procureur général du Canada quant à la responsabilité du fait d'autrui et aux dommages-intérêts non pécuniaires de 80 000 $, mais elle l'a accueilli relativement aux dommages-intérêts pécuniaires et à l'intérêt avant jugement. Elle a rejeté l'appel incident de H.L., sauf quant à l'indemnité de 6 500 $ pour soins futurs : (2002), 227 Sask. R. 165, 2002 SKCA 131.

40 Se prononçant au nom de la Cour d'appel, le juge Cameron a signalé que l'appel et l'appel incident

and s. 13 of the *2000 Act*. In his view, these provisions embody a legislative choice for an unlimited right of appeal, embracing every component of the decision at trial that engages s. 13 of the *2000 Act*.

étaient fondés sur l'al. 7(2)a) et l'art. 13 de la *Loi de 2000*. Selon lui, ces dispositions traduisaient la volonté du législateur d'accorder un droit d'appel non restreint à l'égard de chacun des éléments de la décision de première instance faisant jouer l'art. 13 de la *Loi de 2000*.

41 Cameron J.A. accepted the binding authority of *Lensen*, which was based on s. 8 of *The Court of Appeal Act*, R.S.S. 1978, c. C-42 ("*1978 Act*"). Cameron J.A. acknowledged that s. 14 of the *2000 Act*, which replaced s. 8, differed in syntax but not in substance from its predecessor. He noted that *Lensen* had been applied by the Saskatchewan Court of Appeal on innumerable occasions to limit the broad power of appellate review under s. 14 and its predecessor on issues of credibility. A trial judge's assessment of credibility, he said, cannot be interfered with on appeal in the absence of palpable and overriding error.

Le juge Cameron a reconnu être lié par l'arrêt *Lensen* rendu sur le fondement de l'art. 8 de la *Court of Appeal Act*, R.S.S. 1978, ch. C-42 (« *Loi de 1978* »). Il a convenu que l'art. 14 de la *Loi de 2000*, qui a remplacé l'art. 8, était différent sur le plan de la syntaxe, mais non sur le fond. Il a signalé que la Cour d'appel de la Saskatchewan avait appliqué l'arrêt *Lensen* à d'innombrables occasions pour limiter, en matière de crédibilité, le vaste pouvoir de révision en appel que conféraient l'art. 14 et la disposition qu'il avait remplacée. Il a ajouté que l'appréciation de la crédibilité par un juge de première instance ne pouvait être modifiée en appel à défaut d'une erreur manifeste et dominante.

42 Cameron J.A. was of the opinion, however, that no such limit governs inferences of fact and questions of mixed fact and law. This, he said, was the traditional view adopted by the Saskatchewan Court of Appeal, as evidenced by *Markling v. Ewaniuk*, [1968] S.C.R. 776, applied in *Kosinski v. Snaith* (1983), 25 Sask. R. 73 (C.A.).

Le juge Cameron a cependant estimé que pareille restriction ne s'appliquait ni aux inférences de fait ni aux questions mixtes de fait et de droit. Tel était le point de vue adopté jusqu'alors par la Cour d'appel de la Saskatchewan, comme l'atteste l'application de l'arrêt *Markling c. Ewaniuk*, [1968] R.C.S. 776, dans *Kosinski c. Snaith* (1983), 25 Sask. R. 73 (C.A.).

43 Cameron J.A. acknowledged that a set of uniform national standards governing appellate review has evolved in Canada for inferences of fact and questions of mixed fact and law, but considered that *Housen* had extended the measure of appellate deference traditionally associated with findings of credibility to other components of the decision at trial. In his view, this trend toward increased deference required reconsideration, especially for Saskatchewan, where the right of appeal and the powers of the court to act on that right are set out in the *2000 Act*.

Le juge Cameron a reconnu qu'un ensemble de normes nationales uniformes s'était constitué au Canada à l'égard de la révision en appel des inférences de fait et des questions mixtes de fait et de droit. Il a toutefois estimé que l'arrêt *Housen* avait étendu la déférence dont faisaient traditionnellement l'objet en appel les conclusions relatives à la crédibilité aux autres éléments de la décision de première instance. Selon lui, il y avait lieu de reconsidérer cette tendance à une déférence accrue, surtout en Saskatchewan où la *Loi de 2000* définissait le droit d'appel et les pouvoirs de la Cour d'appel.

44 Cameron J.A. regretted that the general standard of appellate review had shifted from appeal by way of rehearing, which he viewed as traditional in Saskatchewan, to the more deferential standard of review for error.

Le juge Cameron a dit regretter que l'on soit passé de l'appel par voie de nouvelle audition, qu'il jugeait traditionnel en Saskatchewan, à l'appel par voie de contrôle d'erreur, qui commande une plus grande déférence.

Cameron J.A. suggested that *Housen* underscores the divide between the current standards of judicially limited appellate review and the broad appellate power granted by the Saskatchewan legislature.

On the merits of the appeal, Cameron J.A. concluded that the award for pecuniary damages lacked an evidentiary foundation and therefore could not stand. He found the following errors in the trial judge's awards of $117,337.09 for loss of past earning capacity and $179,190 for loss of future earning capacity:

1. The trial judge erred in failing to consider the plaintiff's duty to mitigate.

2. The trial judge did not take into account the extent to which the defendant Mr. Starr's wrongful acts contributed to the loss of earnings. He ought to have had regard for the possibility that H.L. would have been unable to cope with his alcohol-related problems irrespective of the sexual assault by Mr. Starr.

3. The trial judge awarded H.L. damages for loss of earning capacity while H.L. was incarcerated. In this regard, Cameron J.A. found that the trial judge had erred in attributing the plaintiff's criminal behaviour to the wrongdoing of Mr. Starr.

4. The trial judge did not address the issue of whether the social assistance benefits received by H.L. constituted offsetting collateral benefits.

Acting on its own view of the evidence, the Court of Appeal held that H.L. had not established that he was wholly or largely unable to work because of the sexual abuse by Mr. Starr. In its view, the evidence simply proved that H.L. did not work during the first period (1978 to 1987) and worked only sporadically during the second period (1988 to 2000). An inference that Mr. Starr's abuse caused H.L.'s reduced earning capacity would require more convincing evidence than was adduced in this case. The court

Il a fait observer que l'arrêt *Housen* mettait en évidence l'écart entre les normes de révision actuellement applicables en appel donnant lieu à un pouvoir de contrôle judiciairement limité et le vaste pouvoir conféré par la législature de la Saskatchewan. 45

Sur le fond, le juge Cameron a conclu que l'octroi de dommages-intérêts pécuniaires n'était fondé sur aucun élément de preuve et ne pouvait donc pas être maintenu. Voici les erreurs qu'il a relevées dans la décision du juge de première instance d'accorder la somme de 117 337,09 $ pour la perte de capacité de gain antérieure et de 179 190 $ pour la perte de capacité de gain ultérieure : 46

1. Le juge de première instance a omis à tort de prendre en considération l'obligation du demandeur de limiter le préjudice.

2. Il n'a pas tenu compte de la mesure dans laquelle les actes fautifs du défendeur, M. Starr, avaient contribué à la perte de revenus. Il aurait dû considérer la possibilité que H.L. n'ait pas réussi à surmonter ses problèmes d'alcool indépendamment de l'agression sexuelle perpétrée par M. Starr.

3. Il a accordé des dommages-intérêts pour la perte de capacité de gain pendant l'incarcération de H.L. À cet égard, le juge Cameron a conclu qu'il avait eu tort d'attribuer le comportement criminel du demandeur aux actes répréhensibles de M. Starr.

4. Il ne s'est pas demandé si les prestations d'aide sociale touchées par H.L. constituaient des prestations parallèles déductibles.

S'appuyant sur sa propre appréciation de la preuve, la Cour d'appel a conclu que H.L. n'avait pas établi que les abus sexuels l'avaient rendu totalement ou en grande partie incapable de travailler. À son avis, la preuve établissait simplement que H.L. n'avait pas travaillé pendant la première période (1978 à 1987) et n'avait travaillé que sporadiquement pendant la seconde (1988 à 2000). Une inférence selon laquelle la capacité de gain réduite était imputable à l'agression devait, selon elle, s'appuyer sur une preuve plus 47

found that H.L.'s sporadic work record was, in itself, as consistent with choice as with disability.

48 Finally, the court recalled that expert witnesses can provide opinion evidence only on matters within their recognized field of expertise. Beyond that, their opinion evidence is inadmissible and, if admitted, entitled to no weight. According to the Court of Appeal, the two expert witnesses in this case were allowed to "roam at large" and to express opinions that they were not qualified to give.

49 The Court of Appeal thus set aside the award of pecuniary damages on the ground that, on its assessment, the evidence fell short of proving the loss.

50 H.L. now appeals to this Court from the decision of the Court of Appeal.

V. Discussion

51 The appeal raises two main issues:

1. What is the correct standard of review by provincial appellate courts on questions of fact, and is that standard different for the Court of Appeal for Saskatchewan?

2. Did the Saskatchewan Court of Appeal misapply the governing standard to the trial judge's findings of fact in this case?

A. *The Applicable Standard of Review: Introduction*

52 Fact finding in the litigation context involves a series of cerebral operations, some simple, others complex, some sequential, others simultaneous. The entire process is generally reserved in Canada to courts of first instance. In the absence of a clear statutory mandate to the contrary, appellate courts do not "rehear" or "retry" cases. They review for error.

53 The standard of review for error has been variously described. In recent years, the phrase "palpable and overriding error" resonates throughout the

convaincante que celle offerte en l'espèce. Elle a conclu que si H.L. avait travaillé sporadiquement, ce pouvait être tant par choix qu'à cause d'une incapacité.

Enfin, la Cour d'appel a rappelé qu'un témoin expert ne pouvait donner son opinion que sur des sujets relevant de son domaine d'expertise. Son opinion était par ailleurs inadmissible et, si elle était admise, elle n'a aucune valeur. Dans la présente affaire, les deux témoins experts avaient pu [TRADUCTION] « s'écarter du sujet » et exprimer des opinions qui outrepassaient leur compétence.

La Cour d'appel a donc annulé les dommages-intérêts pécuniaires au motif que, suivant son évaluation, la perte n'était pas étayée par la preuve.

H.L. en appelle aujourd'hui devant notre Cour de la décision de la Cour d'appel.

V. Analyse

Le pourvoi soulève deux questions principales :

1. Quelle norme de révision une cour d'appel provinciale doit-elle appliquer à l'égard d'une question de fait, et cette norme est-elle différente pour la Cour d'appel de la Saskatchewan?

2. La Cour d'appel de la Saskatchewan a-t-elle mal appliqué la norme appropriée aux conclusions de fait tirées en l'espèce par le juge de première instance?

A. *La norme de révision applicable : Introduction*

L'appréciation des faits dans le contexte d'un litige suppose une série d'opérations mentales qui peuvent être simples ou complexes, successives ou simultanées. Au Canada, elle est généralement du seul ressort des tribunaux de première instance. À moins que le législateur ne lui confère clairement le pouvoir de le faire, une cour d'appel ne « réentend » pas une affaire ni ne l'« instruit à nouveau ». Elle vérifie si la décision est exempte d'erreur.

Le contrôle d'erreur a été décrit de différentes façons. Ces dernières années, l'expression « erreur manifeste et dominante » trouve un écho dans toute

cases. Its application to all findings of fact — findings as to "what happened" — has been universally recognized; its applicability has not been made to depend on whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence.

Nor has the standard been said to vary according to whether we are concerned with what Hohfeld long ago described as "evidential" or "constitutive" facts (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923), at p. 32). Nor, put differently, has the standard been said to vary according to whether our concern is with direct proof of a fact in issue, or indirect proof of facts from which a fact in issue has been inferred.

"Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that

la jurisprudence. L'application de cette norme à toutes les conclusions de fait — celles portant sur « ce qui s'est passé » — est universellement reconnue; elle n'est pas subordonnée à ce que la décision contestée du juge de première instance touche à la crédibilité, à des faits prouvés directement, à des faits « inférés » ou à l'appréciation globale de la preuve.

54 Nul n'a prétendu non plus que la norme variait selon que l'on se trouve ou non en présence de faits que Hohfeld a qualifiés, il y a longtemps, de « probatoires » ou de « constitutifs » (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923), p. 32). L'on n'a pas dit non plus, en d'autres termes, que la norme variait selon que l'on avait affaire ou non à la preuve directe d'un fait en litige ou à la preuve indirecte de faits à partir desquels un fait en litige a été inféré.

55 L'expression « erreur manifeste et dominante » décrit de manière à la fois élégante et colorée la norme bien établie et généralement applicable en appel à l'égard d'une conclusion de fait tirée lors du procès. Elle ne supplante cependant pas les autres formulations de la norme applicable. Par exemple, dans l'arrêt *Housen*, les juges majoritaires (au par. 22) et les juges minoritaires (au par. 103) ont convenu que les inférences de fait « manifestement erronée[s] » tirées au procès pouvaient être annulées en appel. Les deux expressions consacrent le même principe : une cour d'appel modifiera les conclusions de fait du juge de première instance seulement si elle peut relever clairement l'erreur alléguée et s'il est établi que cette erreur a joué dans la décision.

56 À mon humble avis, le critère est également rempli lorsque les conclusions de fait du juge de première instance peuvent véritablement être qualifiées de « déraisonnables » ou de « non étayées par la preuve ». Dans l'arrêt *R. c. W. (R.)*, [1992] 2 R.C.S. 122, la juge McLachlin (maintenant Juge en chef) a expliqué pourquoi, en matière de crédibilité, une cour d'appel doit faire preuve d'une déférence particulière envers un tribunal de première instance. Elle a toutefois fait observer (aux p. 131-132) que

it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.

57 I find it helpful, in concluding on this point, to reproduce Professor Zuckerman's summary of the governing principles in England:

> As a general principle, an appeal court must not interfere with findings of fact made by the lower court for the simple reason that the judge who saw and heard the witnesses is better placed to assess their reliability and draw inferences from their testimony. An appeal court will interfere only if it concludes that no reasonable court could have reached such conclusions, or if the lower court failed to take crucial factors into consideration. . . .
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> . . .
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> . . . It follows that, if the appeal court cannot conclude that the lower court's inference from the primary facts was wrong, in the sense that it fell outside the range of inferences that a reasonable court could make, the appeal court should allow the lower court's decision to stand. The nature of the appellate evaluation of the lower court's decision will vary in accordance with the type of judgment that the lower court was called upon to make. But whatever the nature of the issues and however wide or narrow is the room for disagreement, the test remains the same: was the lower court's decision wrong. . . .
>
> A decision will be wrong if it was founded on an incorrect interpretation of statute, or if it wrongly applied

la cour d'appel conserve le pouvoir d'écarter un verdict fondé sur des conclusions relatives à la crédibilité dans les cas où, après avoir étudié l'ensemble de la preuve et tenu compte des avantages du juge de première instance, elle conclut que le verdict est déraisonnable.

Évidemment, en matière criminelle, le cadre législatif diffère à certains égards. Mais, en principe, il semble que les conclusions de fait déraisonnables — touchant à la crédibilité, à des faits « probatoires » prouvés directement ou inférés ou à des faits en litige — peuvent être modifiées en appel parce qu'elles sont « manifestement » ou « clairement » erronées. Il en va de même des conclusions non étayées par la preuve. Toutefois, faut-il le répéter, l'intervention en appel ne sera justifiée que si la cour d'appel peut préciser pour quel motif ou en quoi la conclusion de fait contestée est déraisonnable ou non étayée par la preuve. Et le tribunal de révision doit évidemment être convaincu que cette conclusion a vraisemblablement joué dans la décision.

Pour conclure sur le sujet, voici comment le professeur Zuckerman résume les principes applicables en Angleterre :

> [TRADUCTION] En principe, une cour d'appel ne doit pas modifier les conclusions de fait du tribunal inférieur pour la simple raison que le juge qui a vu et entendu les témoins est mieux placé pour apprécier la fiabilité de leur témoignage et en tirer des inférences. Une cour d'appel n'interviendra que si elle estime qu'aucun tribunal raisonnable n'aurait pu arriver à de telles conclusions, ou que le tribunal inférieur n'a pas tenu compte de facteurs cruciaux. . .
>
> . . .
>
> . . . Partant, si la cour d'appel n'est pas en mesure de conclure que l'inférence tirée par le tribunal inférieur à partir des faits prouvés directement était erronée, en ce sens qu'elle ne figurait pas parmi les inférences qu'un tribunal raisonnable pouvait tirer, la décision du tribunal inférieur doit être maintenue. La nature de l'appréciation de la décision du tribunal inférieur varie selon le type de jugement que celui-ci était appelé à rendre. Mais quelle que soit la nature des questions en litige, et peu importe qu'il y ait peu ou amplement matière à désaccord, le critère demeure le même : la décision du tribunal inférieur était-elle erronée? . . .
>
> Une décision est erronée si elle est fondée sur une interprétation incorrecte d'une loi, sur l'application

a legal principle, or if it was based on a plainly erroneous factual conclusion. . . . Put another way, as long as the lower court's conclusions represent a reasonable inference from the facts, the appeal court must not interfere with its decision.

(A. A. S. Zuckerman, *Civil Procedure* (2003), at pp. 765-68)

Moreover, procedural changes governing civil appeals in England that took effect in May of 2000 do not appear from subsequent decisions of the Court of Appeal to have altered substantially the previous approach to appellate review:

When the Court of Appeal heard appeals on questions of fact [under the old procedure] the court was essentially conducting a review of the findings made by the judge below . . . . Our task [under the new regime] is essentially no different from what it was — we consider the judgment testing it against the evidence available to the judge and we ask, as we used to ask, whether it was wrong.

(*Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), *per* Ward L.J., at para. 195)

In determining whether or not the judgment appealed from was so "wrong", whether under the new or the old regime,

the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used — "clearly", "plainly", "blatantly", "palpably" wrong, is . . . whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible.

(*Assicurazioni*, *per* Ward L.J., at para. 197)

For present purposes, I find it unnecessary to consider in detail how the standard of appellate review has been applied in England either before or since the reforms that took effect in May of 2000. I am content with two observations.

erronée d'un principe juridique ou sur une conclusion factuelle clairement erronée. [. . .] Autrement dit, tant que les conclusions du tribunal inférieur constituent une inférence raisonnable tirée des faits, la cour d'appel ne doit pas modifier la décision.

(A. A. S. Zuckerman, *Civil Procedure* (2003), p. 765-768)

58 De plus, entrées en vigueur en mai 2000, les modifications apportées à la procédure applicable à l'appel civil en Angleterre ne semblent pas, au vu des décisions rendues depuis par la Cour d'appel, avoir modifié sensiblement la conception antérieure de l'appel :

[TRADUCTION] Lorsque [suivant l'ancienne procédure] la Cour d'appel entendait un appel portant sur une question de fait, elle se livrait essentiellement au contrôle des conclusions du juge de première instance [. . .] Notre rôle [sous le nouveau régime] demeure essentiellement le même — nous examinons le jugement au regard de la preuve présentée au juge et nous nous demandons, tout comme avant, s'il était erroné.

(*Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), le lord juge Ward, par. 195)

Pour déterminer si le jugement porté en appel était « erroné », tant sous le nouveau régime que sous l'ancien,

[TRADUCTION] la cour d'appel ne doit pas conclure que le jugement de première instance est erroné simplement parce qu'il diffère de celui qu'elle aurait rendu. Il faut davantage qu'une réticence personnelle et moins qu'une iniquité. Situé entre les deux, le critère applicable est celui de la conclusion « clairement », « simplement », « nettement » ou « manifestement » erronée. Il faut donc se demander si la conclusion tirée de la preuve par le juge de première instance s'inscrit ou non dans le cadre, très large, à l'intérieur duquel elle peut raisonnablement faire l'objet d'un désaccord.

(*Assicurazioni*, le lord juge Ward, par. 197)

59 Pour les besoins du présent pourvoi, je juge inutile d'examiner en détail la manière dont la norme de révision en appel a été appliquée en Angleterre avant ou depuis les modifications entrées en vigueur en mai 2000. Je ne formulerai que deux remarques.

60 First, the passages I have quoted describe the standard of appellate review in England in terms that are fully compatible with both the majority and the minority reasons in *Housen*.

61 Second, on any view of the matter, English precedent provides no support for reading into Saskatchewan legislation, past or present, an appellate jurisdiction to "rehear" — in any sense of that term — determinations of fact made at trial. The English *Rules of the Supreme Court, 1883* expressly provided that "[a]ll appeals to the Court of Appeal shall be by way of rehearing." The governing statutes in Saskatchewan have never included equivalent or similar language.

B. *Housen v. Nikolaisen*

62 The rules governing appellate intervention in Canada on matters of fact have been set out and reaffirmed in an unbroken line of cases over nearly three decades: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen*; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; and *Housen*.

63 *Housen*, like the present case, was an appeal from Saskatchewan where the Court of Appeal had reversed the trial judge. At issue was the trial judge's finding that a regional municipality was liable for a portion of the damages caused to the plaintiff in a traffic accident on a rural road. The Court was divided as to the standard of review applicable to the trial judge's findings of negligence (a finding of mixed law and fact) and causation (a finding of fact). In this case, we are concerned only with the standard of review on findings of fact.

Premièrement, les extraits précités décrivent la norme anglaise en des termes parfaitement compatibles avec les motifs des juges majoritaires et ceux des juges minoritaires dans *Housen*.

Deuxièmement, quel que soit l'angle sous lequel on l'aborde, la jurisprudence anglaise ne permet aucunement d'interpréter les dispositions pertinentes de la Saskatchewan, actuellement ou anciennement en vigueur, comme conférant à la Cour d'appel le pouvoir de « réentendre » — quel que soit le sens donné à ce terme — une décision rendue en première instance relativement aux faits. Les *Rules of the Supreme Court, 1883* d'Angleterre disposaient expressément que [TRADUCTION] « [t]out appel interjeté devant la Cour d'appel était instruit par voie de nouvelle audition. » Les dispositions législatives pertinentes de la province n'ont jamais eu un libellé équivalent ou semblable.

B. *Housen c. Nikolaisen*

Les règles régissant au Canada la modification en appel d'une conclusion de fait font l'objet d'une jurisprudence constante depuis près de trois décennies : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Lensen*; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen*.

Dans *Housen*, comme en l'espèce, le pourvoi provenait de la Saskatchewan, et la Cour d'appel avait infirmé la décision de première instance. Le litige portait sur la conclusion du juge de première instance selon laquelle la municipalité régionale était en partie responsable du préjudice subi par le demandeur lors d'un accident automobile sur une route rurale. Notre Cour était divisée quant à la norme de révision applicable aux conclusions relatives à la négligence (question mixte de fait et de droit) et à la causalité (question de fait). En l'espèce, seule nous intéresse la norme de révision applicable à une question de fait.

All nine justices agreed in *Housen* that an appellate court ought never to retry a case. They agreed as well that deference is owed to all findings of fact made by the trial judge, whether those findings are based on direct evidence or on inferences drawn from facts proved directly.

Speaking for the majority, Iacobucci and Major JJ. stated, for example, that "to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact" (para. 19). Likewise, speaking for the minority, Bastarache J. agreed that "the standard of review is identical for both findings of fact and inferences of fact" (para. 103 (emphasis added)).

It was in the application of this shared view as to the governing principle that the Court divided.

Speaking for the majority, Iacobucci and Major JJ. held that all findings of fact, whether based on direct or circumstantial evidence, are only reviewable on a standard of palpable and overriding error. In their view, a panoply of policy reasons command appellate deference. These include the need to limit the cost of litigation and to promote the autonomy of trial proceedings, two reasons that are unrelated to the superior vantage point of the trial judge in hearing *viva voce* evidence.

Bastarache J. did not dilute, still less abandon, the principle of deference with respect to findings of fact based on inferences. In his view, however, an inference was reviewable if it was not "reasonably . . . supported by the findings of fact that the trial judge reached":

> While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is

64 Les neuf juges ont convenu qu'une cour d'appel ne doit jamais instruire l'affaire à nouveau. Ils ont également reconnu que la déférence s'impose à l'égard de toutes les conclusions de fait du juge de première instance, qu'elles s'appuient sur une preuve directe ou sur des inférences tirées de faits établis directement.

65 Au nom des juges majoritaires, les juges Iacobucci et Major ont affirmé, par exemple, que « l'application d'une [. . .] norme [moins exigeante] romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait » (par. 19). De même, s'exprimant au nom des juges minoritaires, le juge Bastarache a reconnu que « la norme de contrôle [était] la même et pour les conclusions de fait et pour les inférences de fait » (par. 103 (je souligne)).

66 C'est la mise en pratique de ce consensus quant au principe applicable qui a divisé notre Cour.

67 Au nom des juges majoritaires, les juges Iacobucci et Major ont conclu que toutes les conclusions de fait, qu'elles s'appuient sur une preuve directe ou circonstancielle, n'étaient susceptibles de révision que selon la norme de l'erreur manifeste et dominante. À leur avis, un ensemble de raisons de principe commandaient la déférence en appel, dont la nécessité de réduire le coût de l'instance et de favoriser l'autonomie du procès, sans compter l'avantage dont bénéficie le juge de première instance du fait qu'il entend les témoignages de vive voix.

68 Le juge Bastarache n'a pas édulcoré, et encore moins abandonné, le principe de la déférence à l'égard des conclusions de fait fondées sur des inférences. À son avis, cependant, une inférence pouvait être écartée si elle n'était pas « raisonnablement [. . .] étayée par les conclusions de fait tirées par le juge de première instance » :

> Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve

entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added; para. 103.]

69 As I have already mentioned, there is no meaningful difference between a standard of "clearly wrong" and a standard of "palpable and overriding error". As Iacobucci and Major JJ. noted in *Housen*, at para. 5, the *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337 (emphasis added)). Moreover, no error could lead to a reversal unless it was "overriding" in the sense that it discredits the result.

70 The "palpable and overriding error" standard, apart from its resonance, nevertheless helps to emphasize that one must be able to "put one's finger on" the crucial flaw, fallacy or mistake. In the words of Vancise J.A., "[t]he appellate court must be certain that the trial judge erred and must be able to identify with certainty the critical error" (*Tanel*, at p. 223, dissenting, though not on this issue).

71 And yet, again as indicated earlier, I agree with Bastarache J. that there is no meaningful difference between

> concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts.

(*Housen*, at para. 104)

72 I have not overlooked that, according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is "not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts" which, in its view, implied a stricter standard (para. 21 (emphasis in original)). The apparent concern of the majority was that, in drawing an analytical

étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Je souligne; par. 103.]

Je le répète, il n'y a pas de différence marquée entre la norme du « manifestement erroné » et celle de l'« erreur manifeste et dominante ». Dans *Housen*, les juges Iacobucci et Major ont fait observer au par. 5 de leurs motifs que le *Trésor de la langue française* (1985), t. 11, définissait comme suit le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317 (je souligne)). En outre, seule une erreur « dominante » — qui discrédite la décision rendue — pouvait mener à une infirmation.

Cependant, en plus de sa résonance, l'expression « erreur manifeste et dominante » contribue à faire ressortir la nécessité de pouvoir « montrer du doigt » la faille ou l'erreur fondamentale. Pour reprendre les termes employés par le juge Vancise, [TRADUCTION] « [l]a cour d'appel doit être certaine que le juge de première instance a commis une erreur et elle doit être en mesure de déterminer avec certitude l'erreur fatale » (*Tanel*, p. 223, motifs dissidents, mais pas sur ce point).

Pourtant, je l'ai signalé précédemment, je conviens avec le juge Bastarache qu'il n'y a aucune différence notable entre

> le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits.

(*Housen*, par. 104)

Je n'oublie pas que, de l'avis des juges majoritaires dans *Housen*, la révision d'une inférence de fait « ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis », ce qui, selon eux, suppose l'application d'une norme plus stricte (par. 21 (souligné dans l'original)). Ils craignaient apparemment que, en

distinction between factual findings and factual inferences, the minority position might lead appellate courts to involve themselves in reweighing the evidence (para. 22). As well, the majority stated:

> If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. [Emphasis in original; para. 23.]

These passages from the majority reasons in *Housen* should not be taken to have decided that inferences of fact drawn by a trial judge are impervious to review though unsupported by the evidence. Nor should they be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached.

I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

In short, appellate courts not only may — but must — set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of "primary" facts, or facts proved by direct evidence.

Courts of appeal across Canada, despite their understandable concern over these passages, have well understood the central message of three decades of jurisprudence in this Court, culminating in *Housen*. They have generally applied the palpable and overriding error standard to all findings of fact made at trial — albeit with varying degrees of enthusiasm.

faisant une distinction analytique entre les conclusions de fait et les inférences factuelles, les juges minoritaires n'incitent les cours d'appel à soupeser à nouveau la preuve (par. 22). Ils ont ajouté :

> Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. [Souligné dans l'original; par. 23.]

73 Il ne faut pas conclure de ces passages des motifs majoritaires dans *Housen* que les inférences de fait tirées par le premier juge échappent à la révision même lorsqu'elles ne sont pas étayées par la preuve. Il ne faut pas non plus en déduire que leur révision en appel se limite à un examen des conclusions relatives à des faits prouvés directement sur lesquelles elles sont fondées et du raisonnement à l'issue duquel elles ont été tirées.

74 Je m'explique. Il n'est pas rare que des inférences différentes puissent raisonnablement être tirées des faits que le juge de première instance a tenus pour directement établis. L'examen en appel consiste à déterminer si les inférences du juge sont « raisonnablement étayées par la preuve ». Si elles le sont, le tribunal de révision ne peut soupeser la preuve à nouveau en substituant à l'inférence raisonnable retenue par le juge sa propre inférence tout aussi convaincante, sinon plus. Là encore, cette règle fondamentale est parfaitement compatible avec les motifs majoritaires et ceux de la minorité dans *Housen*.

75 En résumé, non seulement une cour d'appel peut écarter toute erreur de fait manifeste et dominante commise au procès, mais elle doit le faire. Cela vaut pour les inférences comme pour les conclusions relatives à des faits établis par preuve directe.

76 Malgré l'inquiétude compréhensible qu'ont suscité chez elles les passages précités, les cours d'appel du Canada ont bien saisi le principal message qui se dégageait de trois décennies d'arrêts de notre Cour, le dernier en date étant l'arrêt *Housen*. Elles ont généralement appliqué — quoique avec un enthousiasme variable — la norme de l'erreur manifeste et dominante à toutes les conclusions de fait tirées au procès.

C. *The Applicability of Housen in Saskatchewan*

77 We are urged to find on this appeal that the rule governing appellate intervention on matters of fact differs in Saskatchewan from the rest of Canada.

78 *Housen* was an appeal from the Court of Appeal for Saskatchewan, but did not refer to the *2000 Act* or its predecessors. On the strength of this "omission", it is now argued that the Court in *Housen* misapprehended the scope of appellate review in Saskatchewan.

79 This contention rests on three propositions. First, it is suggested that the *2000 Act*, like its predecessors, vests in the Court of Appeal for Saskatchewan a broader jurisdiction than is conferred by corresponding legislation on appellate courts elsewhere in Canada. Second, it is argued that the Court of Appeal for Saskatchewan, at least prior to *Housen*, had consistently interpreted its governing statute as granting a larger scope of review than *Housen* permits. Finally, it is contended that it was the intention of the Saskatchewan legislature in 2000, when it amended *The Court of Appeal Act*, to clarify that appellate review in that province was to proceed by way of rehearing.

80 None of these propositions is firmly rooted in fact or in law. An examination of both the former and present Acts, their legislative history, and their judicial interpretation in this Court and by the Saskatchewan Court of Appeal itself all lead to the same conclusion: appellate review in Saskatchewan has for a long time proceeded, and continues to proceed, on essentially the same basis as appellate review elsewhere in Canada. The appeal is a review for error, and not a review by rehearing.

D. *The Saskatchewan Court of Appeal Act*

81 These are the provisions of the *2000 Act* that set out the powers of the Court of Appeal for Saskatchewan:

12(1) On an appeal, the court may:

C. *L'applicabilité de l'arrêt Housen en Saskatchewan*

On nous exhorte à conclure en l'espèce que l'appel d'une conclusion de fait n'est pas soumis à la même règle en Saskatchewan et ailleurs au Canada.

Dans *Housen*, le pourvoi visait une décision de la Cour d'appel de la Saskatchewan, mais ne renvoyait ni à la *Loi de 2000* ni aux lois qui l'ont précédée. Faisant fond sur cette « omission », l'on soutient aujourd'hui que notre Cour s'est méprise sur l'étendue du pouvoir de la Cour d'appel dans cette province.

Cette prétention repose sur trois affirmations. Premièrement, la *Loi de 2000*, comme les lois qui l'ont précédée, conférerait à la Cour d'appel de la Saskatchewan un pouvoir plus grand que celui accordé aux autres cours d'appel du Canada par leurs lois constitutives. Deuxièmement, la Cour d'appel de la Saskatchewan, du moins avant l'arrêt *Housen*, aurait toujours considéré que sa loi constitutive lui conférait un pouvoir de révision plus grand que celui défini dans cet arrêt. Enfin, en modifiant la *Court of Appeal Act* en 2000, la législature de la Saskatchewan aurait voulu préciser que, dans cette province, l'appel était instruit par voie de nouvelle audition.

Aucune de ces affirmations n'a d'assise factuelle ou juridique solide. Le libellé de l'ancienne loi et celui de la loi actuelle, l'historique législatif de chacune d'elles et leur interprétation par notre Cour et par la Cour d'appel de la Saskatchewan mènent à la même conclusion : en Saskatchewan, l'appel est instruit depuis longtemps et encore de nos jours suivant les mêmes critères, essentiellement, qu'ailleurs au Canada. Il s'agit donc d'un contrôle d'erreur, et non d'un appel instruit par voie de nouvelle audition.

D. *La Loi sur la Cour d'appel de la Saskatchewan*

Les dispositions suivantes de la *Loi de 2000* établissent les pouvoirs de la Cour d'appel de la Saskatchewan :

12(1) Sur appel, la Cour peut :

(a) allow the appeal in whole or in part;

(b) dismiss the appeal;

(c) order a new trial;

(d) make any decision that could have been made by the court or tribunal appealed from;

(e) impose reasonable terms and conditions in a decision; and

(f) make any additional decision that it considers just.

(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

13 Where issues of fact have been tried, or damages have been assessed, by a trial judge without a jury, any party is entitled to move against the decision of the trial judge, by motion for a new trial or otherwise:

. . .

(b) on the same grounds, including objections against the sufficiency of the evidence, or the view of the evidence taken by the trial judge, that are allowed in cases of trial or assessment of damages by a jury.

14 On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

Section 14 is of particular interest on this appeal. Cameron J.A. was of the view that it frees the Court of Appeal from the view of the evidence taken by the trial judge, and entitles it to draw its own inferences of fact.

While s. 14 refers to a "rehearing", it is clear from the context of the Act that this does not confer on the Court of Appeal the power to "rehear" trials. It simply provides that the powers available to the court on an appeal are available on the rehearing of an appeal. The term "rehearing" is

a) accueillir l'appel en tout ou en partie;

b) rejeter l'appel;

c) ordonner la tenue d'un nouveau procès;

d) rendre toute décision qui aurait pu être rendue par la Cour ou le tribunal qui a prononcé la décision frappée d'appel;

e) assortir une décision de modalités et de conditions raisonnables;

f) rendre toute autre décision qu'elle estime juste.

(2) Lorsqu'elle annule des dommages-intérêts adjugés par un jury, la Cour peut évaluer tous dommages-intérêts que le jury aurait pu évaluer.

13 Lorsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts, une partie peut attaquer la décision, notamment par voie de motion visant la tenue d'un nouveau procès :

. . .

b) pour les mêmes moyens, y compris pour insuffisance de preuve ou en raison des conclusions qu'en a tirées le juge, que ceux qui sont autorisés dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury.

14 Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

L'article 14 revêt une importance particulière en l'espèce. Le juge Cameron a estimé qu'il soustrayait la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et l'autorisait à tirer ses propres inférences de fait.

Il ressort de la *Loi de 2000* dans son ensemble que même s'il fait mention d'une « nouvelle audience », l'art. 14 n'investit pas la Cour d'appel du pouvoir de « réentendre » une affaire. Il dit simplement que ses pouvoirs en appel peuvent être exercés lors de la nouvelle audition d'un appel.

82

used in the *2000 Act* in s. 16, which states that the court shall rehear an appeal in certain circumstances, for example, where this is made necessary by the death or resignation of two or more of the judges who heard the initial appeal. As the then Minister of Justice of Saskatchewan explained on second reading, the *2000 Act* (then Bill 80) "clarifies the procedure respecting rehearings", which are to take place if a rehearing of the appeal is required for reasons mentioned below (*Saskatchewan Hansard*, at p. 1626).

L'expression « nouvelle audience » est employée à l'art. 16, qui dispose que la Cour d'appel réentend un appel dans certaines circonstances, notamment lorsque l'exigent le décès ou la démission d'au moins deux des juges ayant entendu l'appel initial. Comme l'a expliqué en deuxième lecture le ministre de la Justice de la Saskatchewan de l'époque, la *Loi de 2000* (le projet de loi 80) [TRADUCTION] « clarifie la procédure relative à la tenue d'une nouvelle audience », qui aura lieu si la nouvelle audition d'un appel s'impose pour les motifs prévus expressément (*Saskatchewan Hansard*, p. 1626).

83 Though the statute uses more specific language, it is similar in effect to the corresponding statutes in other provinces and territories as regards the issue that concerns us here — authority to review primary findings of fact and inferences.

Même si elle est rédigée de façon plus précise, la *Loi de 2000* ressemble dans ses effets aux lois équivalentes des autres provinces et des territoires pour ce qui est de la question qui nous intéresse en l'espèce : le pouvoir de réviser les conclusions relatives à des faits prouvés directement et les inférences.

84 Thus, for example, a review of other provincial statutes reveals that British Columbia, Alberta, Manitoba, Ontario, and Prince Edward Island all explicitly allow their courts of appeal to "draw inferences of fact": *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 518(c); *The Court of Appeal Act*, R.S.M. 1987, c. C240, s. 26(2); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(a); *Supreme Court Act*, R.S.P.E.I. 1987, c. 66, s. 56(4)(a).

Par exemple, la Colombie-Britannique, l'Alberta, le Manitoba, l'Ontario et l'Île-du-Prince-Édouard autorisent tous expressément leurs cours d'appel à « tirer des inférences de fait » ou à « faire des déductions factuelles » : *Court of Appeal Act*, R.S.B.C. 1996, ch. 77, par. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, règle 518c); *Loi sur la Cour d'appel*, L.R.M. 1987, ch. C240, par. 26(2); *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, al. 134(4)a); *Supreme Court Act*, R.S.P.E.I. 1987, ch. 66, al. 56(4)a).

85 Alberta, Manitoba, Prince Edward Island and Ontario also grant their respective courts of appeal the power to arrive at the decision the trial judge "ought" to have made: *Alberta Rules of Court*, r. 518(e); *The Court of Appeal Act* (Man.), s. 26(1); *Supreme Court Act* (P.E.I.), s. 56(1)(a); *Courts of Justice Act* (Ont.), s. 134(1)(a).

L'Alberta, le Manitoba, l'Île-du-Prince-Édouard et l'Ontario accordent également à leurs cours d'appel respectives le pouvoir de rendre la décision que le juge de première instance « aurait dû » rendre : *Alberta Rules of Court*, règle 518e); *Loi sur la Cour d'appel* (Man.), par. 26(1); *Supreme Court Act* (Î.-P.-É.), al. 56(1)a); *Loi sur les tribunaux judiciaires* (Ont.), al. 134(1)a).

86 Quebec confers on its Court of Appeal "all powers necessary" to the exercise of its jurisdiction (*Courts of Justice Act*, R.S.Q., c. T-16, s. 10) — a general power that could hardly have been expressed in broader terms — while the Atlantic provinces, the Northwest Territories, and Nunavut grant jurisdiction consistent with

Le Québec confère à sa cour d'appel « tous les pouvoirs nécessaires » pour donner effet à sa compétence (*Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16, art. 10) — un pouvoir général qu'il aurait été difficile de formuler plus largement —, alors que les provinces de l'Atlantique, les Territoires du Nord-Ouest et le Nunavut accordent à leurs cours

dates prior to the passing of their respective Acts.

In this light, I think it evident that the jurisdiction of the Saskatchewan Court of Appeal to review inferences of fact drawn by the trial judge is hardly exceptional, let alone unique. Other provincial or territorial courts of appeal are granted similar powers, expressly or implicitly, by their governing statutes. The *2000 Act* simply sets out those powers in more detail than some. A detailed enunciation of the powers conferred does not signify a legislative intent that they be more expansively exercised.

The Saskatchewan Court of Appeal is explicitly empowered to take its own view of what the evidence proves, to draw inferences of fact and to pronounce any decision that the trial judge ought to have pronounced. I do not think it open to question that other provincial appellate courts are endowed with these very same powers. But the scope of the powers conferred must not be confused with the manner in which they are to be exercised. In *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, Morden J.A., speaking for the court in a different context but on this very point, stated:

> The purpose of s. 17(2)(*b*)(i) of the *Divorce Act*, which enables us to "pronounce the judgment that ought to have been pronounced" is to prescribe the general kind of disposition open to us, on allowing an appeal, as an alternative to ordering a new trial . . . and is not intended, in my view, to provide the rule governing *when* we will interfere with the challenged judgment, *i.e.*, it does not set forth the standard for determining whether or not the challenged judgment should be set aside. [Emphasis in original; pp. 154-55.]

Harrington was expressly endorsed by this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 824.

Neither in Saskatchewan nor elsewhere in Canada may courts of appeal, absent an express legislative instruction to the contrary, disregard the governing principle of appellate intervention

d'appel une compétence compatible avec celle qu'elles exerçaient à une date antérieure à l'adoption de leurs lois respectives.

87 Il me paraît donc évident que le pouvoir de la Cour d'appel de la Saskatchewan de réviser les inférences de fait tirées par le juge de première instance est loin d'être exceptionnel, encore moins unique. D'autres cours d'appel provinciales ou territoriales sont expressément ou implicitement investies de pouvoirs similaires par leurs lois constitutives. La *Loi de 2000* énonce simplement ces pouvoirs plus en détail, ce qui ne signifie pas que le législateur a voulu qu'ils soient exercés de manière plus expansive.

88 La Cour d'appel de la Saskatchewan est expressément autorisée à apprécier la preuve, à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. Je ne crois pas que l'on puisse mettre en doute le fait que d'autres cours d'appel provinciales ont les mêmes pouvoirs. Or, l'étendue des pouvoirs accordés ne doit pas être confondue avec la manière dont il convient de les exercer. Dans *Harrington c. Harrington* (1981), 33 O.R. (2d) 150, s'exprimant au nom de la Cour d'appel dans un contexte différent, mais sur le même sujet, le juge Morden a dit ce qui suit :

> [TRADUCTION] L'alinéa 17(2)*b*)(i) de la *Loi sur le divorce*, qui nous permet de « rendre le jugement qui aurait dû être rendu » a pour objet de prescrire le type général de décision que nous pouvons rendre quand nous accueillons l'appel, au lieu d'ordonner un nouveau procès [. . .]; il n'a pas pour but, à mon avis, d'énoncer une règle régissant les cas *où* nous pouvons modifier le jugement attaqué, c.-à-d., il n'établit pas la norme applicable pour déterminer si le jugement attaqué doit ou non être annulé. [En italique dans l'original; p. 154-155.]

Notre Cour a expressément approuvé cet arrêt dans *Pelech c. Pelech*, [1987] 1 R.C.S. 801, p. 824.

89 À défaut d'une prescription expresse contraire de la loi, une cour d'appel ne peut, ni en Saskatchewan ni ailleurs au Canada, faire fi du principe régissant l'appel d'une conclusion de fait. Elle peut

on questions of fact. They may indeed make their own findings and draw their own inferences, but only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence.

90 As I stated at the outset, the *2000 Act* neither bestows on the Court of Appeal for Saskatchewan unique powers of appellate intervention on questions of fact nor ordains their exercise in a manner that, within Canada, is exclusive to Saskatchewan.

E. *The Judicial Treatment of The Court of Appeal Act in Saskatchewan*

91 Prior to any intervention by this Court as to the appropriate standard of appellate review on questions of fact in Saskatchewan, the Court of Appeal's own case law under the *1978 Act*, the predecessor to the *2000 Act* that concerns us here, was entirely consistent with the principles elaborated in *Lensen* and *Housen*.

92 The leading case in the province was *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244, where the Court of Appeal found that a standard of palpable and overriding error applied to a trial judge's findings of fact. Sherstobitoff J.A., for himself and for Tallis J.A., provided an extensive, detailed and definitive analysis of the Court of Appeal's decisions concerning its jurisdiction to review findings of fact. Dealing specifically with s. 8 of the *1978 Act*, Sherstobitoff J.A. stated, at p. 248:

> While, on its face, s. 8 appears to confer not only the power, but a duty to "rehear" or "retry" a case, simple fairness and justice require a court of appeal to recognize that a trial judge has an immense advantage in assessing evidence and arriving at findings of fact as opposed to a court of appeal which is confined to an examination of a cold black and white record of a trial proceeding, completely devoid of the tension, emotion, colour, and atmosphere of a trial, all of which factors are immeasureably important in assisting a trial judge in arriving at his conclusions. It is for these reasons that a court of appeal must extend very substantial deference to the finding of facts of a trial judge. The issue has been considered on many occasions by the Supreme

effectivement tirer ses propres conclusions et inférences, mais seulement s'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou qu'il a tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve.

Comme je l'ai dit au début des présents motifs, la *Loi de 2000* ne confère pas à la Cour d'appel de la Saskatchewan un pouvoir d'intervention unique à l'égard d'une question de fait ni ne prescrit l'exercice de ce pouvoir selon des modalités qui, au Canada, sont propres à la Saskatchewan.

E. *L'interprétation de sa loi constitutive par la Cour d'appel de la Saskatchewan*

Avant même que notre Cour ne se prononce sur la norme de révision en appel applicable à l'égard d'une conclusion de fait en Saskatchewan, la Cour d'appel a elle-même appliqué la *Loi de 1978*, remplacée par la *Loi de 2000* visée en l'espèce, d'une manière en tous points conforme aux principes issus de *Lensen* et *Housen*.

L'arrêt de principe dans la province est *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244, où la Cour d'appel a conclu que la norme de l'erreur manifeste et dominante s'appliquait aux conclusions de fait du juge de première instance. S'exprimant également au nom du juge Tallis, le juge Sherstobitoff a procédé à l'analyse complète, détaillée et définitive des décisions de la Cour d'appel relatives à son pouvoir de réviser une conclusion de fait. Voici ce qu'il a dit au sujet de l'art. 8 de la *Loi de 1978*, à la p. 248 :

> [TRADUCTION] Si, à première vue, l'art. 8 paraît conférer non seulement le pouvoir, mais aussi l'obligation de « réentendre » une affaire ou de l'« instruire à nouveau », la simple équité et la justice la plus élémentaire requièrent d'un tribunal d'appel qu'il reconnaisse que le juge de première instance a l'immense avantage de pouvoir apprécier les témoignages et de constater les faits, par opposition à un tribunal d'appel, confiné à l'étude froide, sans nuance, du dossier de première instance, dénué de la tension, de l'émotion, du pittoresque et de l'atmosphère qui ont imprégné le procès et qui sont tous des facteurs incommensurablement importants et si utiles au juge de première instance pour arriver à ses conclusions. C'est pour ces raisons qu'un

Court of Canada and its decisions bear these principles out. [Emphasis added.]

The Court of Appeal in *Long Lake School Division* expressly adopted the jurisprudence of this Court setting out general standards of appellate review applicable to questions of fact, in particular citing *Stein v. The Ship "Kathy K"*, a classic enunciation of the principle of appellate deference to the findings of fact at trial.

Nor can it be contended, as Cameron J.A. suggested in the present case, that the Court of Appeal had traditionally distinguished, in considering its powers of review, between primary findings and inferences. On the contrary, in *Long Lake School Division*, Sherstobitoff J.A. did not restrict his guidelines for appellate deference to matters of credibility or to the review of primary findings. He set out instead a general guideline: "[w]here there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error" (p. 251).

Similarly, in *Tanel*, Bayda C.J.S. set out the test for appellate review of findings of fact in these terms: "first, is there evidence to support the trial judge's findings of fact; and second, is there an absence of palpable or demonstrable error?" (p. 218). Later, Bayda C.J.S. referred to the "'task of great and almost insuperable difficulty' (*per* Lord Sumner [in *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37 (H.L.)]) that any appellant faces in trying to convince an appellate court to overturn a trial judge's finding of fact" (p. 220). In the same case, Vancise J.A. summarized the standard of review aptly, at p. 223:

For an appellate court to intervene in respect to findings of fact by a trial judge and to modify or substitute those findings of fact there must be palpable and overriding error. The appellate court must be certain that

tribunal d'appel doit traiter avec une grande déférence les conclusions de fait du juge de première instance. La Cour suprême du Canada a examiné la question à de nombreuses occasions et ces principes ressortent de ses arrêts. [Je souligne.]

Citant plus particulièrement l'arrêt *Stein c. Le navire « Kathy K »*, un énoncé classique du principe de la déférence manifestée en appel à l'égard des conclusions de fait tirées en première instance, la Cour d'appel s'est expressément conformée à la jurisprudence de notre Cour établissant les normes générales de révision en appel applicables à l'égard d'une conclusion de fait.

93 L'on ne saurait prétendre non plus, comme le juge Cameron l'a laissé entendre dans la présente affaire, que dans l'examen de son pouvoir de révision, la Cour d'appel a traditionnellement distingué la conclusion relative à un fait prouvé directement de l'inférence. Au contraire, dans l'arrêt *Long Lake School Division*, le juge Sherstobitoff n'a pas limité la déférence en appel aux seules conclusions relatives à la crédibilité ou à des faits prouvés directement. Il a plutôt énoncé la règle générale suivante : [TRADUCTION] « [l]orsqu'un élément de preuve étaye une conclusion de fait, la cour d'appel s'abstient de la modifier, sauf erreur manifeste ou apparente » (p. 251).

94 De même, dans *Tanel*, le juge en chef Bayda a énoncé comme suit le critère applicable à l'appel d'une conclusion de fait : [TRADUCTION] « premièrement, un élément de preuve étaye-t-il la conclusion de fait du juge de première instance; deuxièmement, y a-t-il absence d'erreur manifeste ou apparente? » (p. 218). Plus loin, il a fait état de la [TRADUCTION] « "tâche difficile, voire insurmontable" (lord Sumner [dans *S.S. Hontestroom c. S.S. Sagaporack*, [1927] A.C. 37 (H.L.)]) de tout appelant qui tente d'amener une cour d'appel à infirmer une conclusion de fait tirée par un juge de première instance » (p. 220). Dans la même affaire, le juge Vancise a bien résumé la norme de révision applicable, à la p. 223 :

[TRADUCTION] Pour qu'une cour d'appel modifie les conclusions de fait d'un juge de première instance, une erreur manifeste et dominante doit les entacher. La cour d'appel doit être certaine que le juge de

the trial judge erred and must be able to identify with certainty the critical error.

95 Yet again, and still prior to this Court's decision in *Lensen*, Cameron J.A., for the court, applied a palpable and overriding error standard to the trial judge's conclusion that the plaintiffs had not relied on the defendant's misrepresentation, as it was "open to him on the evidence": see *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232, at p. 235.

96 Speaking for the Court in *Lensen*, Dickson C.J. thus adopted the Court of Appeal's own synthesis of its jurisprudence in *Long Lake School Division*, when he stated (at pp. 683-84):

> It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts" . . . . While section 8 of the Saskatchewan *Court of Appeal Act* authorizes the Court of Appeal to "draw inferences of fact", this task must be performed in relation to facts as found by the trial judge. Unless the trial judge has made some "palpable and overriding error" in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings.

97 In short, far from proceeding by way of rehearing, the Court of Appeal for Saskatchewan appears to have for many decades prior to both *Lensen* and *Housen* understood its legislative mandate as a power of review for error. The court consistently and repeatedly held that it was authorized to intervene in a trial judge's findings of fact only where palpable and overriding error was shown.

98 No decision has been drawn to our attention where the court has asserted a power of review by rehearing.

première instance a commis une erreur et être en mesure de déterminer avec certitude l'erreur fatale.

Toujours avant l'arrêt *Lensen* de notre Cour, le juge Cameron a une fois de plus appliqué, au nom de la Cour d'appel, la norme de l'erreur manifeste et dominante à la conclusion du juge de première instance selon laquelle les demandeurs ne s'étaient pas fiés à la déclaration trompeuse de la défenderesse, [TRADUCTION] « la preuve lui permettant de tirer pareille conclusion » : voir *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232, p. 235.

Dans *Lensen*, s'exprimant au nom de notre Cour, le juge en chef Dickson a donc fait sienne la synthèse de sa propre jurisprudence à laquelle s'était livrée la Cour d'appel dans *Long Lake School Division*, aux p. 683-684 :

> C'est un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne puisse être établi que le juge de première instance « a commis une erreur manifeste et dominante qui a faussé son appréciation des faits » [. . .] Certes, l'art. 8 de la *Court of Appeal Act* de la Saskatchewan autorise la Cour d'appel à [TRADUCTION] « faire des déductions de fait », mais cela doit être accompli en fonction des faits constatés par le juge de première instance. À moins que le juge de première instance n'ait commis quelque « erreur manifeste et dominante » à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle joué traditionnellement par la Cour d'appel en ce qui concerne ces constatations.

En somme, loin d'avoir privilégié la nouvelle audition, la Cour d'appel de la Saskatchewan semble avoir vu dans son mandat légal le pouvoir de vérifier si la décision est exempte d'erreur, et ce, bien des décennies avant les arrêts *Lensen* et *Housen*. Elle a conclu à maintes reprises et avec constance qu'elle n'était autorisée à modifier les conclusions de fait du juge de première instance que si l'existence d'une erreur manifeste et dominante était établie.

Nulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention.

F. *The Effect of the 2000 Amendments to The Court of Appeal Act*

It was argued by the Attorney General for Saskatchewan that amendments made to *The Court of Appeal Act* in 2000 call for a reconsideration of the principles of appellate review applicable in Saskatchewan.

Prior to those amendments, as we have just seen, a standard of palpable and overriding error had been applied with relative consistency to appellate review of findings of fact made at trial. Neither a plain reading of the *2000 Act*, nor the legislative history of the amendments, indicate a legislative intention to change that standard.

As we shall see, moreover, the Court of Appeal itself did not view the *2000 Act*, after its adoption, as warranting a departure from *Lensen*, or from its own case law prior to the decision of our Court in that case.

Section 14 of the current *2000 Act* is the successor to s. 8 of the *1978 Act*. The two provisions are best viewed together:

14 [Powers of court re evidence] On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

8. [Court not bound by view of evidence taken by trial judge] Upon appeal from, or motion against, the order, decision, verdict or decree of a trial judge, or on the rehearing of any cause, application or matter, it shall not be obligatory on the court to grant a new trial, or to adopt the view of the evidence taken by the trial judge, but the court shall act upon its own view of what the evidence in its judgment proves, and the court may draw inferences of fact and pronounce the verdict, decision or order that, in its judgment, the judge who tried the case ought to have pronounced.

F. *L'effet des modifications apportées en 2000 à la loi sur la Cour d'appel*

Le procureur général de la Saskatchewan a fait valoir que les modifications apportées à la loi sur la Cour d'appel en 2000 rendaient nécessaire le réexamen des principes régissant l'appel dans la province. 99

Avant ces modifications, nous venons de le voir, la norme de l'erreur manifeste et dominante avait été appliquée assez uniformément à l'appel d'une conclusion de fait tirée au procès. Ni la simple lecture de la *Loi de 2000* ni l'historique législatif des modifications n'indiquent l'intention du législateur d'établir une nouvelle norme. 100

De plus, nous le verrons, la Cour d'appel elle-même n'a pas jugé que la *Loi de 2000*, une fois adoptée, la justifiait de déroger à l'arrêt *Lensen* ou à sa propre jurisprudence antérieure à cet arrêt. 101

L'article 14 de la *Loi de 2000*, actuellement en vigueur, a remplacé l'art. 8 de la *Loi de 1978*. Pour les besoins de la présente analyse, les deux dispositions sont reproduites l'une à la suite de l'autre : 102

14 [La Cour n'est pas liée par les conclusions du juge du procès] Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

[TRADUCTION]

8. [La Cour n'est pas liée par les conclusions que le juge du procès a tirées de la preuve] Lorsque la décision, l'ordonnance ou la conclusion d'un juge du procès est portée en appel ou qu'une motion est présentée à son égard, ou lors de la nouvelle audition d'une affaire ou d'une demande, la Cour n'a pas à ordonner la tenue d'un nouveau procès ni à accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur son interprétation de la preuve et elle peut tirer les inférences factuelles et rendre la décision, l'ordonnance ou la conclusion qu'aurait dû rendre, à son avis, le juge qui a instruit le procès.

103 Section 14, which came into effect on November 1, 2000, is identical in substance to the former s. 8, though the drafting of the provision has been modernized. While s. 14 refers only to a "decision" (rather than to an "order, decision, verdict or decree"), "decision" is defined in the *2000 Act* to include an order, verdict or decree. Even in this regard, s. 14 thus corresponds in substance to the former provision.

104 In other respects, the two provisions are indistinguishable. Section 14 of the *2000 Act* merely rephrases its predecessor in plainer English. This should cause no surprise, given the legislative history of the amendments.

105 On second reading of the *2000 Act*, Mr. Axworthy emphasized that the amendments were primarily intended to restate the historical jurisdiction of the court in modern language, and to facilitate its translation into French:

> **Hon. Mr. Axworthy**: — Thank you, Mr. Speaker. I rise today to move second reading of The Court of Appeal Act, 2000. Mr. Speaker, The Court of Appeal Act was first passed when the court was created in 1915, and a number of provisions in the Act have remained unchanged since that time. Therefore, Mr. Speaker, there's a need to update and clarify some of these provisions.
>
> The present section of the Act relating to jurisdiction is incomprehensible to anyone other than a legal historian. The Bill before the House doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.
>
> The legislature will be asked to approve the re-enactment of The Court of Appeal Act in both French and English . . . .
>
> Mr. Speaker, the English version of this Bill required revision for clarification purposes before the French translation could go forward. As well as adopting gender-neutral language, this update of The Court of Appeal Act substantially improves the law by making it clear and more understandable, even to my own colleagues, Mr. Speaker.
>
> And finally:

Entré en vigueur le 1er novembre 2000, l'art. 14 est identique sur le fond à l'ancien art. 8, même si son libellé a été modernisé. Il ne renvoie plus qu'à la « décision », mais ce terme est défini dans la *Loi de 2000* comme s'entendant également d'une ordonnance ou d'une conclusion. Même sous ce rapport, sa teneur correspond donc à celle de l'ancienne disposition.

Les deux dispositions ne peuvent par ailleurs être distinguées l'une de l'autre. L'article 14 ne fait que reformuler plus simplement l'art. 8, ce qui n'est pas étonnant au vu de l'historique législatif des modifications.

Lors de la deuxième lecture de la *Loi de 2000*, M. Axworthy a insisté sur le fait que les modifications visaient surtout à réaffirmer la compétence historique de la Cour d'appel dans une langue moderne, et à en faciliter la traduction en français :

> [TRADUCTION] **L'hon. M. Axworthy** : — Merci, Monsieur le Président. Je prends la parole aujourd'hui pour proposer l'adoption en deuxième lecture de la Loi de 2000 sur la Cour d'appel. Monsieur le Président, la Loi sur la Cour d'appel a initialement été adoptée lors de la création de la Cour en 1915, et un certain nombre de ses dispositions sont demeurées inchangées depuis. Par conséquent, Monsieur le Président, il est nécessaire d'actualiser et de clarifier certaines de ces dispositions.
>
> La disposition actuelle sur la compétence est incompréhensible pour quiconque n'est pas un historien du droit. Le projet de loi dont la Chambre est saisie ne modifie en rien la compétence de la Cour d'appel. Il ne fait que reformuler sa compétence historique afin que la Loi puisse être comprise par ses « utilisateurs ».
>
> L'Assemblée sera appelée à approuver la réadoption de la Loi sur la Cour d'appel en français et en anglais . . .
>
> Monsieur le Président, la version anglaise de ce projet de loi devait être révisée à des fins de clarification avant que la traduction en français ne puisse être entreprise. En plus de supprimer toute distinction fondée sur le sexe, cette actualisation de la Loi sur la Cour d'appel améliore sensiblement la loi en la rendant plus claire et plus compréhensible, même pour mes propres collègues, Monsieur le Président.
>
> Et enfin :

. . . the Bill clarifies the procedure respecting rehearings. It states that the court shall rehear an appeal if due to death or resignation, only one judge who heard the appeal remains. As well, if the number of judges is reduced to an even number that is deeply divided on a matter, a party to the appeal may apply for a rehearing.

(*Saskatchewan Hansard*, at pp. 1625-26 (emphasis added))

Though of limited weight, *Hansard* evidence can assist in determining the background and purpose of legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35. In this case, it is particularly apposite, since it was contended by the Attorney General for Saskatchewan, an intervener in this Court, that the legislature's purpose in revising *The Court of Appeal Act* was to "clarify" that the Court of Appeal was to be placed "in a position of conducting an appeal by rehearing".

Here, too, I find instructive the Saskatchewan Court of Appeal's own interpretation of its constituent statute. It does not appear, even prior to this Court's judgment in *Housen*, to have understood the *2000 Act* as an enlargement of its powers of review on questions of fact under the previous Act, as interpreted by the court itself. In *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, at para. 28, Sherstobitoff J.A., speaking for the court, applied the palpable and overriding error standard to findings of credibility made and inferences of fact drawn by the trial judge:

In this case, much of the trial judge's finding of fact depended primarily upon assessments of the relative credibility of the witnesses. To that extent, his findings cannot be interfered with unless the appellants can show that there was a palpable and overriding error. Further, to the extent that his findings depended upon drawing inferences of fact, the appellants must show that there was no evidence from which those conclusions could reasonably be drawn. [Emphasis added.]

Knight was heard by the Saskatchewan Court of Appeal in May of 2001, some six months after the

. . . le projet de loi clarifie la procédure relative à la tenue d'une nouvelle audience. Il prévoit que la cour réentend un appel si, en raison d'un décès ou d'une démission, il ne reste plus qu'un seul des juges l'ayant entendu. Aussi, lorsque le nombre de juges est réduit à un nombre pair et qu'il y a partage égal entre eux, une partie peut demander une nouvelle audience.

(*Saskatchewan Hansard*, p. 1625-1626 (je souligne))

106 Bien que sa valeur probante soit restreinte, la transcription des débats parlementaires peut servir à déterminer le contexte et l'objet d'un texte législatif : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 35. Cet élément est particulièrement pertinent en l'espèce, car le procureur général de la Saskatchewan, partie intervenante au présent pourvoi, a fait valoir que l'intention du législateur, en révisant la loi sur la Cour d'appel, était de « préciser » que la Cour d'appel était mise [TRADUCTION] « en position d'instruire un appel par voie de nouvelle audition ».

107 L'interprétation de sa propre loi constitutive par la Cour d'appel de la Saskatchewan me paraît aussi digne d'intérêt. Même avant l'arrêt *Housen*, la Cour d'appel ne semble pas avoir vu dans la *Loi de 2000* un élargissement de son pouvoir d'intervention à l'égard d'une question de fait, compte tenu de sa propre interprétation de l'ancienne loi. Dans *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, par. 28, s'exprimant au nom de la Cour d'appel, le juge Sherstobitoff a appliqué la norme de l'erreur manifeste et dominante aux conclusions sur la crédibilité et aux inférences de fait tirées par le juge de première instance :

[TRADUCTION] En l'espèce, une bonne partie des conclusions de fait du juge de première instance tenait essentiellement à l'appréciation de la crédibilité relative des témoins. Par conséquent, ses conclusions ne peuvent être modifiées que si les appelants établissent qu'une erreur manifeste et dominante a été commise. De plus, dans la mesure où ses conclusions tenaient à des inférences de fait, les appelants doivent démontrer qu'aucun élément de preuve ne permettait raisonnablement de tirer ces conclusions. [Je souligne.]

La Cour d'appel de la Saskatchewan a instruit cette affaire en mai 2001, soit environ six mois après

2000 Act had come into force. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), states the "common law presumption that procedural legislation applies immediately and generally to both pending and future facts" (p. 582). This common law rule has been codified by Saskatchewan's *Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s. 35 (am. S.S. 1998, c. 47, s. 6).

108 Similarly, in *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, Gerwing J.A., in oral reasons for the court, applied a palpable and overriding error standard to a finding of causation made by the trial judge. The appeal was heard more than three months after the *2000 Act* came into effect. In *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, decided almost a year later, Tallis J.A. applied the same standard, again for a unanimous court.

109 In none of these decisions was there any suggestion that the *2000 Act* had enlarged the scope of appellate review of findings of fact in Saskatchewan. Nor was the *2000 Act* mentioned at all.

G. *The Standard of Appellate Review: Conclusion*

110 With respect, I do not find persuasive any of the arguments advanced in support of the contention that the rules governing appellate intervention in Saskatchewan differ from those set out in *Housen*. On the contrary, I am satisfied for the reasons given that the standard of review for inferences of fact, in Saskatchewan as elsewhere in Canada, is that of palpable and overriding error and its functional equivalents, including "clearly wrong", "unreasonable" and "not reasonably supported by the evidence".

H. *Application of the Standard of Review*

111 The Court of Appeal reversed the trial judge on six points that are at issue in this appeal: (1) qualification of the experts, (2) causation, (3) mitigation,

l'entrée en vigueur de la *Loi de 2000*. Dans *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), R. Sullivan fait état de la [TRADUCTION] « présomption de common law voulant que les dispositions relatives à la procédure s'appliquent immédiatement et généralement aux affaires en instance et aux affaires à venir » (p. 582). Cette règle de common law a été codifiée dans la *Loi d'interprétation de 1995* de la Saskatchewan, L.S. 1995, ch. I-11,2, art. 35 (mod. L.S. 1998, ch. 47, art. 6).

De même, dans l'affaire *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, la juge Gerwing, s'exprimant de vive voix au nom de la Cour d'appel, a appliqué la norme de l'erreur manifeste et dominante à une conclusion sur la causalité tirée par le juge de première instance, et ce, plus de trois mois après l'entrée en vigueur de la *Loi de 2000*. Dans l'arrêt *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, rendu presque un an plus tard, le juge Tallis a appliqué la même norme, toujours avec l'assentiment de ses collègues.

Dans aucune de ces décisions la Cour d'appel de la Saskatchewan n'a laissé entendre que la *Loi de 2000* avait accru la portée de son pouvoir de réviser en appel une conclusion de fait. Elle n'a même pas fait mention de cette loi.

G. *La norme de révision applicable : Conclusion*

En toute déférence, je ne trouve pas convaincants les arguments avancés à l'appui de la thèse selon laquelle, en Saskatchewan, les règles régissant l'appel diffèrent de celles énoncées dans *Housen*. Je crois plutôt, pour les motifs exposés, que la norme de révision applicable aux inférences de fait, en Saskatchewan comme ailleurs au Canada, est celle de l'erreur manifeste et dominante et ses équivalents fonctionnels — « manifestement erroné », « déraisonnable » et « non étayé par la preuve ».

H. *L'application de la norme de révision*

La Cour d'appel a infirmé la décision de première instance au regard de six points qui sont en litige dans le présent pourvoi : (1) la compétence des

(4) incarceration, (5) collateral benefits, and (6) loss of future earnings. In my respectful view, the Court of Appeal erred in interfering with the trial judge's findings on the first three issues. I agree, however, that the trial judge erred in awarding H.L. damages for lost earnings for the time he spent in prison, in failing to deduct the social assistance received by H.L. from the award for loss of past earnings, and in granting an award for loss of future earnings.

(1) The Expert Evidence

The trial judge based his conclusion that Mr. Starr's sexual abuse of H.L. caused H.L.'s alcoholism on the evidence adduced before him, including that of the experts called by the parties. The Court of Appeal, in my view, erred in substituting its own opinion of that evidence for that of the trial judge and in interfering with the judge's conclusion on this issue.

Cameron J.A. found that "the two witnesses [the experts] were pretty much allowed to roam at large, expressing all manner of opinion in relation to which they were not formally qualified" (para. 255). Specifically, Cameron J.A. felt that the experts should not have been allowed to speak to the cause of H.L.'s alcoholism (para. 256). He then concluded that, in the absence of this expert evidence, there was no basis for an inference that Mr. Starr's abuse had caused H.L.'s alcoholism and consequent loss (para. 258).

I am unable to share this view. Both experts testified that H.L.'s sexual abuse by Mr. Starr had caused his alcoholism. Both were qualified to speak to the long-term psychological effects of that sexual abuse. Both had extensive clinical and professional experience in that area, and both had tested H.L. and interviewed him extensively. Characterizing the testimony of the experts as evidence concerning the etiology of alcoholism in general ignores its real content and true import: rather than appreciating the experts' testimony for its relevance, purpose and significance as evidence of the effects of Mr. Starr's

experts, (2) la causalité, (3) la limitation du préjudice, (4) l'incarcération, (5) les prestations parallèles et (6) la perte de revenus ultérieure. À mon humble avis, elle a eu tort de modifier les conclusions du juge de première instance quant aux trois premiers. Je conviens cependant que ce dernier a eu tort d'accorder des dommages-intérêts pour la perte de revenus pendant l'incarcération, de ne pas déduire les prestations d'aide sociale de l'indemnité accordée pour la perte de revenus antérieure et d'accorder des dommages-intérêts pour la perte de revenus ultérieure.

(1) La preuve d'expert

112 Le juge de première instance a fondé sur les témoignages entendus, dont ceux des experts des parties, sa conclusion que les abus sexuels de M. Starr avaient causé l'alcoolisme de H.L. Selon moi, la Cour d'appel a eu tort de substituer sa propre appréciation de ces éléments de preuve à celle du juge de première instance et de modifier la conclusion que ce dernier en avait tirée.

113 Le juge Cameron a conclu que [TRADUCTION] « les deux témoins [experts] avaient pu en quelque sorte s'écarter du sujet et exprimer leur opinion sur toutes sortes de questions qui ne relevaient pas de leur compétence » (par. 255). Plus particulièrement, il a estimé que les experts n'auraient pas dû être admis à se prononcer sur la cause de l'alcoolisme de H.L. (par. 256). Il a ensuite conclu que, en l'absence d'une preuve d'expert à l'appui, rien ne permettait d'inférer que les abus commis par M. Starr avaient causé l'alcoolisme de H.L. et le préjudice qui en avait résulté (par. 258).

114 Je ne puis être d'accord. Les deux experts ont témoigné que les abus sexuels dont H.L. avait été victime étaient à l'origine de son alcoolisme. Tous deux étaient qualifiés pour se prononcer sur les effets psychologiques à long terme de ces abus. Tous deux avaient une vaste expérience clinique et professionnelle dans le domaine; ils avaient soumis H.L. à des tests et l'avaient interrogé longuement. Considérer ces témoignages comme une preuve relative à l'étiologie de l'alcoolisme en général fait abstraction de leur véritable teneur et de leur portée réelle : au lieu de les apprécier en fonction de leur pertinence, de

tortious conduct on H.L. himself, Cameron J.A. misapprehended it as testimony about the causes of alcoholism generally.

115 Both experts were psychologists with extensive knowledge and experience concerning sexual abuse. They were qualified to speak to the effects of such abuse, including substance abuse. Both testified that Mr. Starr's abuse bore a causal relationship to H.L.'s substance abuse; the difference in their respective opinions related only to the extent of that causal relationship in the circumstances of this case.

116 Moreover, the difference in their opinions had no bearing on the liability of Mr. Starr or Canada for the damages found by the trial judge to have been suffered by H.L.: Dr. Arnold stated that H.L.'s family life enhanced his vulnerability to alcoholism, but nonetheless described the abuse as the "specific triggering event", without which H.L.'s pre-existing vulnerability may not have caused him harm. In Dr. Arnold's opinion, we just "don't know" what would have happened to H.L. had he not suffered abuse at the hands of Mr. Starr, because, in fact, he did.

117 With respect, it is neither accurate nor helpful to say that the trial judge allowed the experts to "roam at large". On the contrary, they were "reigned in" by the trial judge upon proper objections by counsel, for example on the issue of H.L.'s "earning capacity".

118 To sum up, then, both experts testified on direct examination that the abuse H.L. experienced bore a causal relationship to his substance abuse. The respondent's position on that issue is therefore unacceptable: In effect, the respondent seeks to disavow in this Court the evidence he himself adduced at trial on the ground that his own witness, Dr. Arnold, was not qualified to answer the questions he himself put to the witness without objection by opposing counsel.

leur objet et de leur importance comme une preuve des effets du comportement répréhensible de M. Starr à l'endroit de H.L., le juge Cameron y voit à tort une preuve relative aux causes de l'alcoolisme en général.

Les deux experts étaient psychologues et avaient une connaissance approfondie de l'abus sexuel et une vaste expérience en la matière. Ils avaient la compétence voulue pour se prononcer sur les effets de l'abus sexuel, dont la consommation excessive de substances intoxicantes. Tous deux ont vu un lien de causalité entre les actes de M. Starr et la consommation excessive de substances intoxicantes par H.L.; seule les a opposés l'importance de ce lien dans les circonstances de l'espèce.

De plus, la divergence d'opinion ne portait aucunement sur la responsabilité de M. Starr ou de l'État pour le préjudice que H.L. avait subi selon le juge de première instance : le D^r^ Arnold a affirmé que les antécédents familiaux de H.L. l'avaient rendu plus vulnérable à l'alcoolisme, mais il a néanmoins considéré l'abus comme l'« événement déclencheur » sans lequel la vulnérabilité préexistante de H.L. aurait pu ne lui être aucunement préjudiciable. À son avis, nul ne pouvait dire ce qu'il serait advenu de H.L. s'il n'avait pas été victime d'abus de la part de M. Starr parce que, justement, il l'avait été.

En toute déférence, il n'est ni exact ni utile de dire que le juge de première instance a laissé les experts « s'écarter du sujet ». Au contraire, il les a rappelés à l'ordre à la suite d'objections justifiées, notamment au sujet de la « capacité de gain » de H.L.

Les deux experts ont donc conclu, en interrogatoire principal, à l'existence d'un lien de causalité entre les abus sexuels subis par H.L. et sa consommation excessive de substances intoxicantes. La thèse contraire défendue devant notre Cour est donc inacceptable. L'intimé cherche en effet à récuser le témoignage qu'il a lui-même présenté en première instance, alléguant que son témoin, le D^r^ Arnold, n'était pas qualifié pour répondre aux questions qu'il lui a lui-même posées sans que l'avocat de la partie adverse ne formule d'objection.

Dr. Arnold's answers were indeed detrimental to the respondent's case. But it is too late in the day to contend that Dr. Arnold was not qualified to speak to the relationship between the sexual abuse inflicted on H.L. and his ensuing problems — the very issue upon which he was examined deliberately by counsel who called him.

I would therefore allow the appeal on this branch of the matter, since the trial judge did not err in qualifying the witnesses, in making findings on their relative credibility or in relying on their expert opinions.

(2) Causation

In my respectful view, the Court of Appeal erred in setting aside the trial judge's findings on causation.

Causation is a factual inference: *Housen*, at paras. 70 and 75 of the majority reasons and paras. 111 and 159 of the minority reasons.

This Court explained the test for causation in *Athey*, at paras. 13-19:

> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.
>
> . . .
>
> The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm . . . . It is

Les réponses du Dr Arnold ont certes nui à la thèse défendue par l'intimé, mais il est maintenant trop tard pour prétendre que le témoin n'était pas qualifié pour se prononcer sur l'existence d'un lien entre les abus sexuels et les problèmes subséquents de H.L., ce sur quoi l'avocat qui l'avait appelé à la barre l'a délibérément interrogé. 119

J'accueillerais donc ce volet du pourvoi, le juge de première instance n'ayant commis aucune erreur en tenant les témoins pour compétents, en tirant des conclusions sur leur crédibilité relative ou en se fondant sur leurs avis d'experts. 120

(2) La causalité

En toute déférence, la Cour d'appel a eu tort d'écarter les conclusions du juge de première instance sur le lien de causalité. 121

Conclure à l'existence d'un lien de causalité est une inférence factuelle : *Housen*, par. 70 et 75 (motifs majoritaires), par. 111 et 159 (motifs minoritaires). 122

Dans *Athey*, notre Cour a exposé le critère applicable en la matière, aux par. 13-19 : 123

> La causalité est établie si le demandeur prouve, selon la norme applicable en matière civile, c'est-à-dire suivant la prépondérance des probabilités, que le défendeur a causé le préjudice ou y a contribué : *Snell c. Farrell*, [1990] 2 R.C.S. 311; *McGhee c. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> Le critère général, quoique non décisif, en matière de causalité est celui du « facteur déterminant » (« *but for test* »), selon lequel le demandeur est tenu de prouver que le préjudice ne serait pas survenu sans la négligence du défendeur : *Horsley c. MacLaren*, [1972] R.C.S. 441.
>
> Comme le critère du facteur déterminant n'est pas applicable dans certaines circonstances, les tribunaux ont reconnu que la causalité était établie si la négligence du défendeur avait « contribué de façon appréciable » au préjudice.
>
> . . .
>
> En droit, la responsabilité du défendeur n'est pas écartée du seul fait que d'autres facteurs qui ne lui sont pas imputables ont contribué au préjudice [. . .] Il suffit que

sufficient if the defendant's negligence was a cause of the harm. . . . [Emphasis in original.]

124 The causal question at issue here is whether Mr. Starr's sexual abuse of H.L. reduced H.L.'s employment income during the first and second periods. The trial judge answered that question in the affirmative (para. 65). He drew this inference from both experts' opinions that H.L.'s alcoholism was caused by the sexual abuse; from their opinions that sexual abuse results in a loss of self-esteem and self-confidence which, in turn, affect employability or "work ethic"; and from the evidence of H.L. himself.

125 The trial judge based his assessment of damages on the finding that the sexual abuse by Mr. Starr caused H.L.'s emotional difficulties and alcoholism, which in turn caused his inability to secure and maintain full-time employment. Ultimately, then, the question is whether this was a reasonable inference on the facts as found by the trial judge.

126 The experts in this case gave their evidence regarding (1) the link between H.L.'s sexual abuse and his emotional problems and alcoholism, and (2) the link between H.L.'s low self-esteem and self-confidence and his reduced employability. The opinion of an expert was not necessary to make the link between H.L.'s alcoholism and his reduced ability to sustain remunerative employment. That link, which might appear to be a matter of common experience to many, was nonetheless provided by H.L. himself.

127 The first inference drawn by the trial judge was that the sexual abuse caused H.L.'s emotional problems and alcoholism. Both experts testified that sexual abuse would cause a victim to have a negative self-image and a lack of self-confidence. As we saw earlier, H.L. also testified that the abuse made him feel humiliated and ashamed, caused him to lose concentration, and led to his withdrawal from schooling at an early stage.

la négligence du défendeur ait été une cause du préjudice. . . [Souligné dans l'original.]

Dans la présente affaire, la question en litige au chapitre de la causalité est la suivante : les abus sexuels ont-ils eu pour effet de diminuer le revenu d'emploi de H.L. pendant la première période et la seconde? Le juge de première instance a répondu par l'affirmative (par. 65). Il a tiré cette inférence des avis des deux experts selon lesquels les abus sexuels étaient à l'origine de l'alcoolisme de H.L. et avaient causé une perte d'estime de soi et de confiance en soi qui, elle, avait influé sur l'aptitude au travail ou sur la « morale du travail », ainsi que du témoignage de H.L. lui-même.

Le juge de première instance a fondé son évaluation du préjudice sur la conclusion que les abus sexuels étaient à l'origine des difficultés émotionnelles et de l'alcoolisme de H.L. qui, eux, avaient empêché l'appelant d'obtenir et de conserver un emploi à temps plein. Il faut donc se demander, en fin de compte, s'il s'agissait d'une inférence raisonnable compte tenu des faits constatés par le juge de première instance.

Les experts ont donné leur avis sur (1) le lien entre les abus sexuels, d'une part, et les difficultés émotionnelles et l'alcoolisme de H.L., d'autre part, ainsi que sur (2) le lien entre le manque d'estime de soi et de confiance en soi de H.L. et son aptitude réduite au travail. L'opinion d'un expert n'était pas nécessaire pour établir un lien entre l'alcoolisme de H.L. et sa capacité réduite de conserver un emploi rémunérateur. Ce lien a été établi par le témoignage de H.L. même s'il pouvait paraître évident à bon nombre de personnes.

Suivant la première inférence tirée par le juge de première instance, les abus sexuels avaient causé les difficultés émotionnelles et l'alcoolisme de H.L. Les deux experts ont témoigné que la victime d'abus sexuel a une image négative d'elle-même et manque de confiance en elle. Rappelons que H.L. a dit s'être senti humilié et honteux et avoir eu du mal à se concentrer par suite des agressions, ce qui l'avait amené à quitter l'école précocement.

Both experts also identified the abuse as having triggered H.L.'s excessive drinking and addiction to alcohol. As I have already suggested, on either expert's testimony, the test in *Athey* was met.

The second inference drawn by the trial judge was that H.L.'s emotional problems and alcohol abuse reduced his capacity to secure and retain employment. On this point, Dr. Arnold, the defendant Canada's expert, testified on cross-examination by counsel for H.L. that sexual abuse would affect a victim's "work ethic":

Q: Would you think it likely that [sexual abuse by someone associated with the school system] would have affected [a victim's] work ethic?

A: Work ethic as in — perhaps to define that, I think what you're saying is his ability to hold work and be able to regularly show up and those kinds of things?

Q: Yes.

A: Yes, and I would refer to the chain of events I just referred to. You have an event, then — sorry, an event — I better be clear here — event of abuse, you have alcohol and, yes, indeed that chain of events would logically go there and —

No objection was taken to this testimony.

Mr. Stewart was asked on direct examination by counsel for H.L. whether self-esteem and self-confidence affected employability, and answered that he was "sure it would, yes". This testimony was allowed by the court, despite the objection taken by counsel for Canada, on the basis that it was within the realm of Mr. Stewart's (and Dr. Arnold's) expertise.

Canada's earlier objection to questions put in chief to Mr. Stewart regarding H.L.'s earning capacity had been sustained on the basis that Mr. Stewart was not a vocational expert. Without endorsing that finding, I find it sufficient to mention that both experts were allowed to express their opinions whether the emotional problems caused by Mr. Starr's abuse affected H.L.'s ability to find and keep a job, but not

Les deux experts ont également opiné que les abus sexuels avaient déclenché la consommation excessive d'alcool et la dépendance à cette substance intoxicante. Comme je l'ai déjà laissé entendre, sur la foi du témoignage de l'un ou l'autre des experts, le critère de l'arrêt *Athey* était respecté. 128

Suivant la deuxième inférence du juge de première instance, les difficultés émotionnelles de H.L. et sa consommation excessive d'alcool avaient réduit son aptitude au travail. Contre-interrogé à ce sujet par l'avocat de H.L., l'expert du procureur général du Canada, le D^r^ Arnold, a témoigné que l'abus sexuel nuisait à la « morale du travail » de la victime : 129

[TRADUCTION]

Q: Estimez-vous probable que [l'abus sexuel par une personne associé au système scolaire] nuise à la morale du travail [de la victime]?

R: La morale du travail, comme dans — peut-être pour la définir, je pense que vous parlez de sa capacité à conserver un emploi et à se présenter régulièrement au travail, et ce genre de chose?

Q: Oui.

R: Oui, et je me reporte à la suite des événements dont je viens de parler. Un événement se produit, puis — désolé, un événement — il vaut mieux préciser — un abus, il y a l'alcool et, oui, effectivement, la suite des événements aboutirait logiquement à cela et —

Ce témoignage n'a suscité aucune objection.

En interrogatoire principal, l'avocat de H.L. a demandé à M. Stewart si l'estime de soi et la confiance en soi avaient une incidence sur l'aptitude au travail. Sa réponse a été : [TRADUCTION] « bien sûr que oui ». Malgré l'objection formulée par l'avocat du procureur général du Canada, ce témoignage a été admis en preuve au motif qu'il relevait du domaine d'expertise de M. Stewart (et du D^r^ Arnold). 130

L'objection soulevée auparavant par le procureur général du Canada à l'égard des questions posées à M. Stewart en interrogatoire principal au sujet de la capacité de gain de H.L. avait été maintenue au motif que le témoin n'était pas un expert du domaine de l'emploi. Sans approuver cette conclusion, je me contente de faire remarquer que les deux experts ont pu exprimer leur opinion quant à savoir si les 131

whether they reduced his earning capacity when he did secure employment.

132 In addition, as already mentioned, there was an evidentiary basis for the trial judge's finding that alcoholism had affected H.L.'s earning capacity. H.L. himself testified that he was unable to sustain employment for more than five or six months due to his drinking problem, and that his lack of education, criminal record and alcoholism deterred employers from hiring him. This was, of course, a matter within H.L.'s personal experience, and the trial judge was entitled to give it appropriate weight.

133 There was thus sufficient evidence on the record to support the trial judge's findings that the sexual abuse of H.L. by Mr. Starr caused emotional problems and alcoholism, which in turn hindered H.L.'s efforts to hold down a job. On this evidence, a reasonable trier of fact could draw a causal inference. The trial judge therefore committed no reviewable error in awarding damages for loss of past earnings, and the Court of Appeal erred in setting aside that award.

(3) Loss of Past Earnings: Mitigation

134 The onus rests on the defendant to prove that the plaintiff failed to mitigate his loss: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163. Here, the trial judge concluded that the Crown led no evidence on the issue of mitigation. The Court of Appeal pointed to H.L.'s failure to upgrade his education and training as well as his failure to enter rehabilitation as evidence that he failed to mitigate his loss (para. 232).

135 H.L. testified that he failed to upgrade his education because he had a poor memory and dropped out of an auto mechanics course after two months. This is consistent with the trial judge's finding that H.L.'s alcoholism, poor self-image and lack of confidence affected his ability to learn a trade and his ability to find and keep a job. This does not point to

problèmes émotionnels causés par les actes de M. Starr avaient nui à la capacité de H.L. de trouver et de conserver un emploi, et non s'ils avaient réduit sa capacité de gain lorsqu'il obtenait un emploi.

De plus, je le répète, la preuve étayait la conclusion du juge de première instance que l'alcoolisme de H.L. avait nui à sa capacité de gain. L'appelant a lui-même témoigné que son problème d'alcool l'empêchait de conserver un emploi plus de cinq ou six mois et que sa faible scolarité, son casier judiciaire et son alcoolisme rebutaient les employeurs. Ce témoignage relevait évidemment de l'expérience personnelle de H.L., et le juge de première instance pouvait à bon droit lui accorder l'importance voulue.

Le dossier renfermait suffisamment d'éléments de preuve pour étayer la conclusion que les abus sexuels étaient à l'origine des problèmes émotionnels et de l'alcoolisme de H.L., lesquels avaient nui à ses efforts pour garder un emploi. Un juge des faits raisonnable pouvait, en se fondant sur ces éléments de preuve, tirer une inférence de causalité. Le juge de première instance n'a donc pas commis d'erreur susceptible de révision en accordant des dommages-intérêts pour la perte de revenus antérieure, et la Cour d'appel a eu tort d'annuler cet octroi.

(3) La perte de revenus antérieure : Limitation du préjudice

Il incombe au défendeur de prouver que le demandeur a omis de limiter le préjudice : *Janiak c. Ippolito*, [1985] 1 R.C.S. 146, p. 163. Dans la présente affaire, le juge de première instance a conclu que le procureur général du Canada n'avait présenté aucune preuve à cet égard. La Cour d'appel a opiné que l'omission de H.L. de parfaire son éducation et sa formation et de participer à un programme de réadaptation établissait l'absence de limitation du préjudice (par. 232).

H.L. a témoigné qu'il n'avait pas élevé son niveau d'instruction à cause de son peu de mémoire et qu'il avait abandonné un cours de mécanique automobile après deux mois. Cela concorde avec la conclusion du juge de première instance que l'alcoolisme, l'image négative de soi et le manque de confiance avaient empêché H.L. d'apprendre un métier, de

a failure to mitigate. And though the record is essentially silent regarding H.L.'s efforts at rehabilitation, it appears from his evidence at trial that he was at least then making an effort to abstain from any further consumption of alcohol.

Since the evidence as to H.L.'s mitigation of his damages was inconclusive at best, Canada's burden had not been discharged. The Court of Appeal therefore erred in reversing the trial judge's finding on this issue.

(4) Loss of Past Earnings: Incarceration

In calculating H.L.'s loss of past earnings, the trial judge did not reduce the damages awarded to reflect the time H.L. spent in prison. The Court of Appeal intervened in this respect — quite properly, in my view. As Cameron J.A. noted, to compensate an individual for loss of earnings arising from criminal conduct undermines the very purpose of our criminal justice system (paras. 240-41); an award of this type, if available in any circumstances, must be justified by exceptional considerations of a compelling nature and supported by clear and cogent evidence of causation.

The trial judge inferred that H.L.'s alcohol abuse, which was caused by the sexual abuse, "led to [his] numerous convictions on alcohol and theft related offences" (para. 29). As already noted, the inference that sexual abuse caused H.L.'s alcoholism is supported by the evidence. It is the relationship between H.L.'s alcoholism and his loss of earnings due to imprisonment that is the focus of my concern here: The question before the trial judge was not whether H.L. had committed certain crimes while drunk, but whether his ensuing incarceration was caused by his addiction to alcohol.

In examination-in-chief by H.L.'s counsel, Mr. Stewart testified that there is a relationship between sexual abuse and criminal conduct, in "that a number of individuals — in fact a wide number of

trouver un emploi et de le garder. On ne saurait y voir une omission de limiter le préjudice. Même si le dossier ne révèle essentiellement rien au sujet de ses efforts de réadaptation, le témoignage de H.L. au procès permettait de conclure qu'il avait tenté à tout le moins de mettre fin à sa consommation d'alcool.

136 La preuve s'étant révélée au mieux équivoque concernant la limitation du préjudice, le procureur général du Canada ne s'est pas acquitté de son fardeau de preuve. La Cour d'appel a donc eu tort d'écarter la conclusion qu'en avait tirée le juge de première instance.

(4) La perte de revenus antérieure : Incarcération

137 Dans son calcul de la perte de revenus antérieure, le juge de première instance n'a pas retranché de la période considérée le temps où H.L. avait été incarcéré. La Cour d'appel a eu tout à fait raison, à mon avis, d'intervenir à cet égard. Comme l'a fait remarquer le juge Cameron, indemniser une personne de la perte de revenus résultant d'un comportement criminel va à l'encontre de l'objet même de notre système de justice pénale (par. 240-241). Une telle indemnisation, lorsqu'elle peut être accordée, doit se fonder sur des motifs exceptionnels pressants et s'appuyer sur une preuve de causalité claire et convaincante.

138 Le juge de première instance a inféré que la consommation excessive d'alcool, imputable aux abus sexuels, [TRADUCTION] « avait amené » H.L. à commettre « de nombreuses infractions liées à l'alcool et au vol » (par. 29). Comme je l'ai déjà dit, l'inférence que les abus sexuels ont causé l'alcoolisme de H.L. est étayée par la preuve. C'est le lien entre l'alcoolisme de H.L. et la perte de revenus due à son incarcération qui m'intéresse en l'occurrence. Le juge de première instance n'avait pas à décider si H.L. avait commis certains crimes en état d'ébriété, mais bien si l'incarcération subséquente avait été causée par sa dépendance à l'alcool.

139 Lors de son interrogatoire principal par l'avocat de H.L., M. Stewart a témoigné qu'il y avait un lien entre l'abus sexuel et le comportement criminel, c'est-à-dire [TRADUCTION] « qu'un certain nombre

individuals, I don't have the exact number, who have been either physically or sexually abused in childhood, a great proportion of those end up being abusers themselves once they reach adulthood".

140 In cross-examination, Mr. Stewart explained that his statement concerned the likelihood that a child who is sexually abused will become an abuser as an adult. None of H.L.'s periods of incarceration related to charges of sexual abuse.

141 The expert evidence did not disclose a more general link between sexual abuse and criminality. Nor did the materials before the trial judge entitle him to conclude that those suffering from alcoholism were more inclined to commit crimes.

142 In any event, the chain of causation linking H.L.'s sexual abuse to his loss of income while incarcerated was interrupted by his intervening criminal conduct. During these periods, his lack of gainful employment was caused by his imprisonment, not by his alcoholism; and his imprisonment resulted from his criminal conduct, not from his abuse by Mr. Starr nor from the alcoholism which it was found to have induced.

143 Thus, on any view of the matter, the trial judge's finding that Mr. Starr's sexual abuse of H.L. caused his loss of income due to imprisonment is both contrary to judicial policy and unsupported by the evidence.

144 I would therefore dismiss H.L.'s appeal under this head.

(5) Loss of Past Earnings: Social Assistance

145 The Court of Appeal found, again correctly in my view, that the trial judge had erred in not deducting from H.L.'s award for loss of past earnings the social assistance payments he had received during the relevant period.

146 Klebuc J. found that H.L. "generally relied on social assistance to meet his needs" during the first

de personnes — en fait, un grand nombre de personnes, je n'ai pas les chiffres exacts, qui ont été victimes d'agressions physiques ou sexuelles dans leur enfance, une grande proportion de ces personnes deviennent elles-mêmes des agresseurs lorsqu'elles atteignent l'âge adulte ».

En contre-interrogatoire, M. Stewart a expliqué qu'il avait voulu parler de la probabilité qu'un enfant victime d'agression sexuelle devienne agresseur à l'âge adulte. Aucune des périodes d'incarcération de H.L. ne faisait suite à une accusation d'agression sexuelle.

La preuve d'expert ne révélait aucun lien plus général entre l'abus sexuel et la criminalité. Les éléments présentés au juge de première instance ne lui permettaient pas non plus de conclure qu'une personne alcoolique était plus encline à la criminalité.

Quoi qu'il en soit, le lien de causalité entre les abus sexuels et la perte de revenus pendant l'incarcération a été rompu par le comportement criminel de H.L. Durant les périodes en cause, l'absence d'emploi rémunérateur était due à l'emprisonnement, et non à l'alcoolisme, et cet emprisonnement résultait du comportement criminel de H.L., et non des actes de M. Starr ni de l'alcoolisme de H.L. qui avait découlé de ces actes selon la preuve.

Par conséquent, quel que soit le point de vue adopté, la conclusion du juge de première instance que les abus sexuels ont causé la perte de revenus due à l'incarcération n'est ni conforme aux principes judiciaires ni étayée par la preuve.

Je rejetterais donc ce volet du pourvoi.

(5) La perte de revenus antérieure : Aide sociale

Encore une fois, j'estime que la Cour d'appel a eu raison de conclure que le juge de première instance avait commis une erreur en ne déduisant pas des dommages-intérêts accordés pour la perte de revenus antérieure les prestations d'aide sociale touchées par H.L. pendant la période considérée.

Le juge Klebuc a conclu que, pendant la première période, H.L. [TRADUCTION] « avait

period for which he assessed damages for lost earnings, but did not account for those or any other social assistance payments in fixing his award (para. 64). With respect to the second period for which Klebuc J. assessed damages for lost earnings, he did, however, deduct the income earned by H.L.

This Court recently had occasion to consider whether social assistance payments are to be deducted from damage awards for lost earnings in *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53. In that case, McLachlin C.J. affirmed the "common sense proposition that social assistance benefits are a form of wage replacement" and deductible at common law to avoid double recovery (para. 28).

Klebuc J. did not have the benefit of this Court's decision in *M.B.* His understandable — but nonetheless erroneous — failure to deduct social assistance benefits constitutes a severable error of principle: see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Housen*.

Unfortunately, the amount of social assistance received by H.L. during the first and second periods is not available on the record. In the absence of agreement between the parties, this calculation must therefore be left to the trial court for proof and determination.

(6) Loss of Future Earnings

Finally, the trial judge awarded H.L. $179,190 for loss of future earnings. The Court of Appeal set this award aside on the basis of what it found to be factual errors by the trial judge. With respect, I do not share the Court of Appeal's findings of factual error, but I do agree that the trial judge's disposition on this branch of the award lacked an evidentiary basis — quite unlike his award for loss of past earnings, which was supported by the evidence of H.L. and the expert witnesses called by H.L. and Canada.

généralement compté sur l'aide sociale pour subvenir à ses besoins »; il l'a indemnisé pour la perte de revenus sans déduire de la somme accordée le montant de ces prestations ou de toute autre aide obtenue (par. 64). En ce qui concerne la seconde période, il a déduit de l'indemnité accordée à ce chapitre le revenu gagné par H.L.

147 Récemment, dans *M.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 477, 2003 CSC 53, notre Cour a eu l'occasion d'examiner la question de savoir si les prestations d'aide sociale devaient être déduites de dommages-intérêts accordés pour la perte de revenus. La juge en chef McLachlin a fait sienne « la proposition sensée selon laquelle les prestations d'aide sociale constituent une forme de remplacement du revenu » et sont déductibles en common law pour qu'il n'y ait pas double indemnisation (par. 28).

148 Cet arrêt n'avait pas encore été rendu lorsque le juge Klebuc s'est prononcé en première instance. Compréhensible, mais néanmoins fautive, l'omission de déduire les prestations d'aide sociale constitue une erreur de principe dissociable : voir *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, et *Housen*.

149 Malheureusement, le montant de l'aide sociale touchée par H.L. au cours de la première période et de la seconde ne figure pas au dossier. Faute d'entente entre les parties, il appartiendra donc au tribunal de première instance d'examiner la preuve et de déterminer ce montant.

(6) La perte de revenus ultérieure

150 Enfin, le juge de première instance a accordé à H.L. des dommages-intérêts de 179 190 $ pour la perte de revenus ultérieure. La Cour d'appel a annulé sa décision sur le fondement d'erreurs qualifiées de factuelles. En toute déférence, je ne partage pas cet avis concernant l'existence d'erreurs factuelles, mais je conviens que ce volet de la décision n'était pas étayé par la preuve, contrairement à l'indemnité accordée pour la perte de revenus antérieure appuyée, elle, par le témoignage de H.L. et des experts des deux parties.

151 In quantifying the damages for loss of future earnings, the trial judge acknowledged explicitly that the parties had presented no evidence regarding H.L.'s future earning capacity (para. 70).

152 The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely. To assume, without additional evidence, that H.L. will continue to suffer from substance abuse and emotional problems, will not upgrade his education or enter into rehabilitation, and will continue to have a reduced earning capacity, would be to do him an unnecessary and unwarranted disservice — particularly in the light of his own evidence that he had already at the time of trial taken steps to end his addiction to alcohol.

VI. Disposition

153 For all of these reasons, I would allow the appeal in part, with costs.

154 I would confirm the trial judge's award of pecuniary damages for loss of past earnings, but order that they be reduced to reflect the time the appellant spent in prison and the social assistance he received during the period covered by the award. In the absence of an agreement between the parties as to the amounts involved, they are to be fixed on an application by either party to the trial court.

155 Finally, I would dismiss the appeal with respect to the trial judge's award of damages for loss of future earnings.

The reasons of Bastarache, LeBel and Deschamps JJ. were delivered by

BASTARACHE J. (dissenting in part) —

I. Overview

156 Appeals are creatures of statute; therefore, legislative — not judicial — policy choice must be

En évaluant le préjudice subi à ce chapitre, le juge de première instance a reconnu expressément que les parties n'avaient présenté aucun élément de preuve concernant la capacité de gain ultérieure de H.L. (par. 70).

Le fait qu'une personne a connu des problèmes émotionnels et de toxicomanie qui ont nui à sa capacité de gain ne permet pas à lui seul de conclure, selon la prépondérance des probabilités, qu'il en sera toujours ainsi. Tenir pour acquis, sans autre élément de preuve, que H.L. continuera de souffrir de toxicomanie et de difficultés émotionnelles, qu'il ne parfera pas son éducation ni ne surmontera son alcoolisme, et que sa capacité de gain demeurera réduite, lui rendrait inutilement et injustement un bien mauvais service, surtout à la lumière de son témoignage selon lequel, au moment du procès, il avait déjà pris des mesures pour venir à bout de sa dépendance à l'alcool.

VI. Dispositif

Pour tous ces motifs, je suis d'avis d'accueillir en partie le pourvoi, avec dépens.

Je confirmerais donc les dommages-intérêts pécuniaires accordés par le juge de première instance pour la perte de revenus antérieure, mais j'ordonnerais leur réduction pour tenir compte du temps que l'appelant a passé en prison et des prestations d'aide sociale qu'il a touchées au cours de la période considérée. À défaut d'une entente entre les parties, les montants en cause devront être fixés sur demande présentée au tribunal de première instance par l'une ou l'autre des parties.

Enfin, je rejetterais le pourvoi en ce qui concerne les dommages-intérêts accordés par le juge de première instance pour la perte de revenus ultérieure.

Version française des motifs des juges Bastarache, LeBel et Deschamps rendus par

LE JUGE BASTARACHE (dissident en partie) —

I. Vue d'ensemble

L'appel est une création de la loi; le choix de politique législative, et non judiciaire, doit donc

considered paramount. Moreover, because appeals in civil cases are founded on provincial legislation which may vary from one province to another, the rights of appeal and the powers of an appellate court to act on those rights will not necessarily be uniform across the country.

Among all of the statutes governing the powers of appellate courts in Canada, Saskatchewan's *Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1, is the only one that relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves. This must "mean something". In my view, it means that in Saskatchewan, the nature of appellate review is by way of rehearing and not review for error.

In this appeal, we are particularly concerned with the conditions under which, in the context of an appeal by way of rehearing, the Court of Appeal will overrule a trial judge's factual inference. I contend that the court will overrule such an inference when it is not reasonable. While it can therefore be said that the standard of review in Saskatchewan for factual inferences is reasonableness, as I will demonstrate more fully in these reasons, it is awkward to speak in terms of a "standard of review" in that regard, given the fact that, in Saskatchewan, the Court of Appeal is not limited to a "review" of the lower court's decision but is, instead, directed to take its own view of the evidence. Nevertheless, for the purposes of my analysis in this context and to promote clarity, I will accept the use of "standard of review" language and agree that the standard applicable to factual inferences is indeed reasonableness.

On the facts of this case, I am of the view that the Court of Appeal did not misapply this standard when it set aside the trial judge's award of pecuniary damages. On the contrary, it correctly interfered in this regard because the factual inferences on which the damages award was based were unreasonable, as they were unsupported by the evidence. As will be further demonstrated, even if the more stringent standard adopted in *Housen v. Nikolaisen*, [2002] 2

primer. En outre, étant donné que l'appel civil a ses assises dans les lois provinciales et que celles-ci peuvent varier d'une province à l'autre, le droit d'appel et le pouvoir de la cour d'appel de donner suite à l'exercice de ce droit ne seront pas nécessairement les mêmes dans tout le pays.

157 Parmi toutes les lois régissant les pouvoirs des cours d'appel au Canada, la *Loi de 2000 sur la Cour d'appel* de la Saskatchewan, L.S. 2000, ch. C-42,1, est la seule à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de se déterminer en se fondant sur sa propre appréciation de la preuve. Cela doit « signifier quelque chose ». À mon avis, cela signifie que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur (« *review for error* »).

158 Dans le présent pourvoi, nous nous intéressons particulièrement aux conditions auxquelles, dans le contexte d'un appel par voie de nouvelle audition, la Cour d'appel infirmera une inférence factuelle du juge de première instance. Je soutiens qu'elle le fera si l'inférence n'est pas raisonnable. Bien que l'on puisse donc affirmer que la norme de contrôle qui s'applique aux inférences factuelles en Saskatchewan est celle de la raisonnabilité, comme je l'explique plus en détail dans les présents motifs, il est incongru d'employer l'expression « norme de contrôle », car en Saskatchewan, la Cour d'appel n'a pas à s'en tenir au « contrôle » de la décision du tribunal inférieur, mais doit plutôt se livrer à sa propre appréciation de la preuve. Néanmoins, pour les besoins de mon analyse dans ce contexte et par souci de clarté, je consens à l'emploi de la terminologie des « normes de contrôle » et conviens que la norme applicable à l'inférence factuelle est bien celle de la raisonnabilité.

159 Vu les faits de l'espèce, j'estime que la Cour d'appel n'a pas mal appliqué cette norme en annulant les dommages-intérêts pécuniaires accordés par le juge de première instance. Au contraire, elle a eu raison de le faire, car les inférences factuelles qui sous-tendaient leur octroi étaient déraisonnables parce que non étayées par la preuve. Comme nous le verrons, même au regard de la norme plus stricte établie dans l'arrêt *Housen c. Nikolaisen*, [2002] 2

S.C.R. 235, 2002 SCC 33, applied here, I would still uphold the decision of the Court of Appeal.

II. Facts

160 The following facts, as found by the trial judge, are not in dispute.

161 H.L. is a status Indian within the meaning of the *Indian Act*, S.C. 1951, c. 29, and is a member of the Gordon First Nation Reserve. When he was six months old, his father died, leaving his mother as the sole caregiver for 10 children of whom he was the youngest. His mother subsequently entered into a relationship with S.W. This relationship was punctuated with frequent physical abuse of H.L.'s mother by S.W. and excessive use of alcohol by both of them. During the first 12 years of his life, H.L.'s mother frequently moved her family between the Gordon First Nation Reserve and the Moscowegan First Nation Reserve of which S.W. was a member. These relocations were often precipitated by acts of violence on the part of S.W.

162 When H.L. resided at the Gordon First Nation Reserve, he attended a public school in Punnichy. At no time did he attend Gordon's Day School or reside at the Gordon Student Residence (formerly known as the Gordon Indian Residential School). However, in 1974 or 1975, he joined a boxing club on the Reserve that was operated by the Department of Indian and Northern Affairs and administered by William Starr. Starr was also the administrator of the Student Residence. During this period of time, Starr sexually assaulted the appellant by subjecting him to two acts of masturbation.

163 H.L. brought an action against Starr and the Government of Canada for damages suffered as a consequence of the abuse.

III. Judicial History

A. *Saskatchewan Court of Queen's Bench*

164 The trial judge, Klebuc J., found that the injuries and losses complained of by H.L. were attributable to Starr's assaults. Specifically, he stated that:

R.C.S. 235, 2002 CSC 33, appliquée en l'espèce, je serais quand même d'avis de confirmer la décision de la Cour d'appel.

II. Faits

Constatés par le juge de première instance, les faits suivants ne sont pas contestés.

Indien inscrit au sens de la *Loi sur les Indiens*, S.C. 1951, ch. 29, H.L. est membre de la Première nation de Gordon. Il était âgé de six mois lorsque son père est décédé et que sa mère a dû s'occuper seule de dix enfants dont il était le cadet. Sa mère s'est par la suite engagée avec S.W. dans une relation marquée d'abus physiques fréquents à son endroit et de consommation excessive d'alcool par eux deux. Les douze premières années de la vie de H.L. ont été ponctuées de fréquents allers-retours de la famille entre la réserve de la Première nation de Gordon et celle de la Première nation de Moscowegan, dont S.W. était membre. Décidés par la mère de H.L., ces déplacements faisaient souvent suite à des actes de violence de la part de S.W.

Lorsqu'il habitait la réserve de la Première nation de Gordon, H.L. allait à l'école publique de Punnichy. Il n'a jamais fréquenté l'école de jour de Gordon ni habité la résidence d'élèves de Gordon (l'ancien pensionnat indien). Cependant, en 1974 ou en 1975, il s'est inscrit à un club de boxe de la réserve dont le fonctionnement était assuré par le ministère des Affaires indiennes et du Nord Canada, et la gestion par William Starr. Ce dernier était également l'administrateur de la résidence d'élèves. C'est à l'occasion de la participation de H.L. aux activités du club que M. Starr l'a agressé sexuellement en le soumettant à deux actes de masturbation.

H.L. a intenté contre M. Starr et le gouvernement du Canada une action en indemnisation du préjudice subi par suite des abus sexuels.

III. Historique des procédures judiciaires

A. *Cour du Banc de la Reine de la Saskatchewan*

En première instance, le juge Klebuc a conclu que le préjudice allégué par H.L. était attribuable aux agressions commises par M. Starr. Plus précisément, il a affirmé :

[H.]L. unquestionably suffered enormous humiliation, self-blame and loss of self-worth as a consequence of Starr's sexual abuse and such emotional problems in turn caused him to lose interest in pursuing an education, due in part to his inability to concentrate. Immediately after the second assault, he commenced excessive alcohol consumption which in turn led to numerous convictions on alcohol and theft related offences, including convictions between 1978 and 2000 for driving while disqualified and driving while impaired. These difficulties, as well as his difficulty with being "emotionally close" with women, in my view are attributable to Starr's sexual abuse of him. To the extent his dysfunctional family or [S.]W.'s misconduct may be viewed as a cause, I am of the opinion that Starr's abuse is such an extraordinary occurrence that it constitutes a novus actus interveniens which severed any chain of causation that may have existed between the aforementioned causes and the damages ultimately experienced by [H.]L.

(*H.L. v. Canada (Attorney General)* (2001), 208 Sask. R. 183, 2001 SKQB 233, at para. 29)

Consequently, Klebuc J. granted the appellant judgment against Starr, as well as the Government of Canada, since he found that the criteria for the imposition of vicarious liability on the Government of Canada had been met.

As for H.L.'s entitlement to damages, the trial judge concluded that H.L. was entitled to non-pecuniary damages of $60,000 for the emotional distress he suffered and will continue to suffer as a consequence of Starr's abuse and aggravated damages of $20,000 for the humiliation and indignation he suffered as a result of Starr's conduct. Klebuc J. also concluded that H.L. was willing and able to work but for his emotional and alcohol-related problems, which were attributable to Starr's sexual abuse. Therefore, the trial judge awarded the appellant $117,337.09 for the past loss of income earning capacity and $179,190 for future loss. This latter amount was based solely on the evidence relating to H.L.'s past earning capacity. Finally, Klebuc J. awarded H.L. punitive damages against Starr in the amount of $20,000.

In supplemental reasons, Klebuc J. held that H.L. was entitled to claim pre-judgment interest against

[TRADUCTION] Il ne fait aucun doute que [H.]L. a ressenti une grande humiliation, s'en est pris à lui-même et a perdu son estime de soi par suite des abus sexuels commis par M. Starr, et ces difficultés émotionnelles l'ont amené à se désintéresser de ses études, en partie à cause de son incapacité à se concentrer. Dès après la deuxième agression, il s'est mis à consommer de l'alcool de façon abusive, ce qui l'a amené à commettre de nombreuses infractions liées à l'alcool et au vol. Entre 1978 et 2000, par exemple, il a été reconnu coupable de conduite sans permis et de conduite avec facultés affaiblies. Ces ennuis, ainsi que sa difficulté à « établir des liens affectifs » avec une femme, sont attribuables, selon moi, aux abus sexuels. Dans la mesure où sa famille dysfonctionnelle ou le comportement répréhensible de [S.]W. peuvent être considérés comme une cause du préjudice, j'estime que les actes de M. Starr ont été un événement si extraordinaire qu'ils constituent un novus actus interveniens rompant tout lien de causalité entre cette cause et le préjudice ultime de [H.]L.

(*H.L. c. Canada (Attorney General)* (2001), 208 Sask. R. 183, 2001 SKQB 233, par. 29)

Estimant remplies les conditions auxquelles une personne peut être tenue responsable du fait d'autrui au Canada, le juge Klebuc a donc donné gain de cause à l'appelant contre M. Starr et le gouvernement du Canada.

165 Pour ce qui est de l'indemnité, le juge de première instance a conclu que H.L. avait droit à des dommages-intérêts non pécuniaires de 60 000 $ pour la détresse émotionnelle dont il avait souffert, et dont il continuerait de souffrir, à cause des abus sexuels, ainsi qu'à des dommages-intérêts majorés de 20 000 $ pour l'humiliation et l'indignation causées par ces actes. Le juge Klebuc a également conclu que H.L. aurait été désireux et en mesure de travailler n'eût été ses difficultés émotionnelles et ses problèmes liés à l'alcool depuis les abus sexuels. Il a donc accordé à l'appelant 117 337,09 $ pour la perte de capacité de gain antérieure et de 179 190 $ pour la perte de capacité de gain ultérieure. Ce dernier octroi reposait uniquement sur la preuve relative à la capacité de gain antérieure de H.L. Enfin, il a condamné M. Starr à des dommages-intérêts punitifs de 20 000 $.

166 Dans des motifs complémentaires, le juge Klebuc a statué que H.L. pouvait exiger de chacun des

each defendant from the date he served his statement of claim: see *H.L. v. Canada (Attorney General)* (2001), 210 Sask. R. 114, 2001 SKQB 233.

B. *Saskatchewan Court of Appeal*

167 The Attorney General of Canada appealed to the Court of Appeal on the ground that the trial judge erred in holding the Government of Canada vicariously liable for Starr's acts. The Attorney General of Canada also made the following alternative submissions: (i) the award of damages for emotional distress was excessive; (ii) the award of damages for loss of earning capacity, past and future, was ill-founded; and (iii) the award of pre-judgment interest was contrary to law. H.L. cross-appealed, taking issue with the trial judge's assessment of damages and claiming that, together with pre-judgment interest, he was entitled to damages in the amount of $527,000.

168 Cameron J.A., writing for the Court of Appeal, began his reasons for judgment with a review of the statutory framework for appeals and their adjudication in the province of Saskatchewan, and he came to the following conclusion:

> On appeal from a decision of a judge of the Court of Queen's Bench sitting without a jury, taken pursuant to sections 7(2)(a) and 13 of the *Court of Appeal Act, 2000*, it is the duty of the court acting under section 14 of the *Act* to rehear the case in the context of the grounds of appeal and make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly . . . .

(*H.L. v. Canada (Attorney General)* (2002), 227 Sask. R. 165, 2002 SKCA 131, at para. 77) ("*H.L.* (C.A.)")

In coming to this conclusion, Cameron J.A. was cognizant of the divide that is setting in between the adjudicative framework suggested by the general standards of appellate review and that provided by *The Court of Appeal Act, 2000*; however, he

défendeurs de l'intérêt avant jugement à compter de la signification de sa déclaration : voir *H.L. c. Canada (Attorney General)* (2001), 210 Sask. R. 114, 2001 SKQB 233.

B. *Cour d'appel de la Saskatchewan*

Le procureur général du Canada a interjeté appel devant la Cour d'appel au motif que le juge de première instance avait eu tort de conclure à la responsabilité du gouvernement du Canada pour les actes de M. Starr. Il a également présenté les arguments subsidiaires suivants : (i) les dommages-intérêts accordés pour la détresse émotionnelle étaient exorbitants; (ii) l'indemnisation des pertes de capacité de gain antérieure et ultérieure était sans fondement; (iii) l'octroi de l'intérêt avant jugement était contraire à la loi. Contestant l'évaluation du préjudice par le juge de première instance et alléguant que, avec l'intérêt avant jugement, il avait droit à des dommages-intérêts de 527 000 $, H.L. a formé un pourvoi incident.

Dans ses motifs rendus au nom de la Cour d'appel, après un examen des dispositions applicables aux appels et à leur règlement dans la province de la Saskatchewan, le juge Cameron est arrivé à la conclusion suivante :

> [TRADUCTION] Lorsque la décision d'un juge de la Cour du Banc de la Reine siégeant sans jury est portée en appel sur le fondement de l'al. 7(2)a) et de l'art. 13 de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel doit, suivant l'art. 14 de cette loi, réentendre l'affaire en fonction des motifs d'appel et se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et rendre une décision en conséquence . . .

(*H.L. c. Canada (Attorney General)* (2002), 227 Sask. R. 165, 2002 SKCA 131, par. 77) (« *H.L.* (C.A.) »)

En tirant cette conclusion, le juge Cameron était conscient du fossé qui se creusait entre les paramètres découlant des normes générales de révision en appel et ceux prévus par la *Loi de 2000 sur la Cour d'appel* pour le règlement d'un appel. Il a néanmoins

maintained that while, in other provinces, appeal may be by way of review for error, in Saskatchewan, appeals have traditionally been and today still are by way of rehearing.

Turning to the grounds of appeal advanced by the parties, Cameron J.A. dismissed the Attorney General of Canada's appeal as it related to the trial judge's conclusion that the Government of Canada was vicariously liable, entitling H.L. to $80,000 in non-pecuniary damages. However, Cameron J.A. allowed the Attorney General of Canada's appeal in relation to the trial judge's awards of pecuniary damages for past and future loss of earning capacity and pre-judgment interest. As to the pecuniary damages award, Cameron J.A., taking his own view of the evidence, concluded that the basic evidentiary foundation for the award was lacking. In addition to this fundamental error, Cameron J.A. also found that the trial judge erred in four respects in his calculation of the award: (i) the trial judge failed to consider the plaintiff's duty to mitigate; (ii) he unreasonably concluded that the plaintiff did not have a "crumbling skull" and therefore attributed too much to Starr's wrongful acts in his assessment of pecuniary damages; (iii) he did not reduce the damages award to reflect the time H.L. was incarcerated; and (iv) he failed to account for the social assistance payments H.L. received during the relevant period.

As for H.L.'s cross-appeal, Cameron J.A. dismissed it except as it related to H.L.'s claim of damages for the cost of future care. The court allowed H.L.'s appeal in this regard, and awarded him $6,500.

H.L. applied to the Court of Appeal pursuant to s. 37 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, for leave to appeal to this Court on the following grounds:

(1) What is the correct standard of review of the appellate court of a province, and is that standard different for the appellate court of Saskatchewan?

opiné que même si, dans les autres provinces, il peut donner lieu à un contrôle d'erreur, en Saskatchewan, le règlement d'un appel s'effectue encore et toujours par voie de nouvelle audition.

169 Le juge Cameron a ensuite examiné les motifs d'appel invoqués par les parties. Il a rejeté l'appel du procureur général du Canada visant la conclusion du juge de première instance selon laquelle le gouvernement du Canada était responsable des actes de M. Starr et H.L. avait droit à des dommages-intérêts non pécuniaires de 80 000 $. Il a cependant accueilli l'appel quant aux dommages-intérêts pécuniaires accordés pour les pertes de capacité de gain antérieure et ultérieure, et à l'intérêt avant jugement. En ce qui concerne les dommages-intérêts pécuniaires, le juge Cameron, se fondant sur sa propre appréciation de la preuve, a conclu que leur montant ne s'appuyait sur aucun élément de preuve. Outre cette erreur fondamentale, il a estimé que le juge de première instance avait commis quatre erreurs dans le calcul de la somme accordée : (i) il n'avait pas pris en considération l'obligation du demandeur de limiter le préjudice; (ii) il avait conclu, de manière déraisonnable, que la vulnérabilité du demandeur n'était pas déjà active, de sorte qu'il avait accordé trop d'importance aux actes répréhensibles de M. Starr en établissant les dommages-intérêts pécuniaires; (iii) il n'avait pas retranché de la période considérée le temps que H.L. avait passé en prison; (iv) il n'avait pas tenu compte des prestations d'aide sociale touchées par H.L. pendant cette période.

170 Quant à l'appel incident de H.L., le juge Cameron l'a rejeté sauf en ce qui concerne les soins futurs, pour lesquels il lui a accordé 6 500 $ à titre de dommages-intérêts.

171 Sur le fondement de l'art. 37 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, H.L. a demandé à la Cour d'appel l'autorisation de se pourvoir devant notre Cour relativement aux questions suivantes :

(1) Quelle norme de révision la cour d'appel d'une province doit-elle appliquer, et cette norme est-elle différente pour la Cour d'appel de la Saskatchewan?

(2) Did the Saskatchewan Court of Appeal misapply that standard regarding:

a) expert witnesses;

b) pecuniary damages?

172 In his reasons for judgment on the application, Bayda C.J.S. noted that the scope of the Court of Appeal's powers was uncertain at present and that this controversy must be resolved: (2003), 238 Sask. R. 167, 2003 SKCA 78. Therefore, he granted H.L. leave to appeal to this Court on the grounds stipulated. He also granted the Attorney General of Canada leave to cross-appeal on the ground that the court erred in its determination that the Government of Canada was vicariously liable for Starr's acts; however, the Attorney General of Canada discontinued the cross-appeal, and it was not argued before us.

IV. Analysis

A. *The Nature and Standard of Appellate Review in Saskatchewan for Questions of Fact*

(1) Introduction

173 Before beginning my analysis regarding my view of the applicable standard of appellate review in Saskatchewan for questions of fact, it is necessary to clarify what I respectfully perceive to be some confusion unfortunately apparent regarding the meaning of the term "appeal by way of rehearing".

174 Because the word "rehearing" can be used in a number of different senses, to avoid confusion three situations need to be identified and explained: (1) appeal by way of review (for error); (2) appeal by way of rehearing; and (3) a rehearing which is a new trial or occasionally a new appeal, also known as a *de novo* hearing: see A. A. S. Zuckerman, *Civil Procedure* (2003), at pp. 761-62. On an appeal by way of review, the appeal court's duty is limited to a review of the lower court's decision, and it may only interfere in limited circumstances identified by reference to the standard of review applicable to the particular type of question before the court (i.e., questions of fact, law or mixed fact and law):

(2) La Cour d'appel de la Saskatchewan a-t-elle mal appliqué cette norme à l'égard :

a) des témoins experts;

b) des dommages-intérêts pécuniaires?

Dans ses motifs afférents à la demande d'autorisation, le juge en chef Bayda a fait observer que l'étendue des pouvoirs de la Cour d'appel était alors incertaine et que la question devait être résolue : (2003), 238 Sask. R. 167, 2003 SKCA 78. Il a donc accueilli la demande d'autorisation de pourvoi de H.L. pour les motifs indiqués. Il a également autorisé le procureur général du Canada à former un pourvoi incident au motif que la Cour d'appel aurait eu tort de conclure à la responsabilité du gouvernement du Canada pour les actes de M. Starr; abandonné, l'appel incident n'a toutefois pas été plaidé devant nous.

IV. Analyse

A. *La nature de la révision en appel et la norme de révision en appel applicable à l'égard d'une question de fait en Saskatchewan*

(1) Introduction

Avant d'entreprendre l'analyse de la norme de révision en appel applicable à l'égard d'une question de fait en Saskatchewan, quelques éclaircissements s'imposent pour dissiper la confusion que semble malheureusement créer l'expression « appel par voie de nouvelle audition ».

Étant donné que l'expression « nouvelle audition » ou « nouvelle audience » (« *rehearing* ») peut être employée dans plusieurs sens différents, afin d'éviter toute confusion, des précisions s'imposent sur les trois procédures d'appel : (1) le contrôle d'erreur; (2) la nouvelle audition; (3) la nouvelle audition consistant à instruire l'affaire à nouveau ou, à l'occasion, à reprendre l'appel, également appelée audition *de novo* : voir A. A. S. Zuckerman, *Civil Procedure* (2003), p. 761-762. Dans le cadre d'un appel par voie de contrôle, la cour d'appel doit s'en tenir à l'examen de la décision du tribunal inférieur et ne peut intervenir qu'à certaines conditions, selon la norme de contrôle applicable au type de question dont elle

Zuckerman, at p. 762. In general, in Canada appeals are conducted by way of review: see, e.g., *Housen*.

In contrast, on an appeal by way of rehearing, the court is not limited to a scrutiny of the lower court's decision but is expected to form its own judgment on the issues: Zuckerman, at p. 769. In the case at bar, the Saskatchewan Court of Appeal held that this is the type of appeal that is available for civil matters tried by a judge alone in that province. In its reasons for judgment, the Court of Appeal described the difference between an appeal by way of rehearing and an appeal by way of review for error as follows:

> Rehearing is oriented to the decision upon the merits of the case. Review for error is oriented to the process by which the decision is made.

(*H.L.* (C.A.), at para. 86)

Finally, an appeal by way of rehearing must be distinguished from the last category of appeal types — an appeal by way of a hearing *de novo*. As recently noted by the Australian High Court, an appeal by way of rehearing does not involve a completely fresh hearing by the appellate court of all the evidence: see *Fox v. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22, at para. 22. Instead, the court "proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits".

It is especially important not to conflate the concept of an appeal by way of rehearing with an actual rehearing or a "retrial" (a.k.a. an appeal by way of a hearing *de novo*); however, with respect, it appears to me that in certain passages in his reasons for judgment in this case, my colleague Fish J. may have done so. For instance, at para. 15 of his reasons, Fish J. states that "[n]othing in the record before us, in the relevant provisions of the Act, nor in the Court of Appeal's own earlier appreciation of its proper role suggests to me that it has now been invested with a general jurisdiction to 'rehear' trials — that is, to apply a 'rehearing' standard when it reviews judgments at trial." As explained above, it is my view that there is a significant difference between "rehearing" trials (i.e., conducting a *de novo* hearing) and

est saisie (question de fait, de droit ou mixte de fait et de droit) : Zuckerman, p. 762. Au Canada, l'appel est généralement instruit par voie de contrôle : voir p. ex. l'arrêt *Housen*.

175 Par contre, lorsqu'elle procède par voie de nouvelle audition, la cour d'appel n'est pas confinée à l'examen de la décision du tribunal inférieur, mais doit se former sa propre opinion sur les questions en litige : Zuckerman, p. 769. En l'espèce, la Cour d'appel de la Saskatchewan a statué que telle était la procédure d'appel applicable à une affaire civile instruite par un juge seul dans cette province. Dans ses motifs, la Cour d'appel a distingué l'appel par voie de nouvelle audition de l'appel par voie de contrôle d'erreur :

> [TRADUCTION] La nouvelle audition vise la décision au fond. Le contrôle d'erreur vise la procédure à l'issue de laquelle la décision est rendue.

(*H.L.* (C.A.), par. 86)

176 Enfin, l'appel par voie de nouvelle audition doit être distingué d'avec l'appel par voie d'audition *de novo*. Comme l'a récemment indiqué la Haute Cour d'Australie, l'appel par voie de nouvelle audition ne suppose pas que l'on réentende l'ensemble de la preuve : voir *Fox c. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22, par. 22. En fait, la cour d'appel [TRADUCTION] « se fonde sur le dossier et sur tout nouvel élément qu'il lui arrive, exceptionnellement, d'admettre en preuve ».

177 Il est particulièrement important de ne pas confondre l'appel par voie de nouvelle audition avec le fait de réentendre l'affaire ou de l'instruire à nouveau (appel par voie d'audition *de novo*); cependant, en toute déférence, il me semble que mon collègue le juge Fish a pu le faire dans certains passages de ses motifs. Au paragraphe 15, par exemple, il dit que « [n]i le dossier qui nous a été présenté ni les dispositions pertinentes de la Loi ni l'appréciation de son rôle par la Cour d'appel elle-même ne me permettent de conclure que cette dernière est désormais investie du pouvoir général de "réentendre" une affaire, c'est-à-dire de se prononcer sur un jugement de première instance à l'issue d'une "nouvelle audition". » Comme je l'explique précédemment, je crois qu'il existe une grande différence entre « réentendre »

applying a "rehearing" standard when reviewing judgments at trial (i.e., conducting an appeal by way of "rehearing").

178 Similarly, at para. 52 of his reasons, Fish J. notes that "[i]n the absence of a clear statutory mandate to the contrary, appellate courts do not 'rehear' or 'retry' cases." As briefly noted above, in the case at bar, the Court of Appeal concluded that, in Saskatchewan, on an appeal from a decision of a trial judge without a jury, the appeal is by way of rehearing, the Court of Appeal being directed to "make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly": *H.L.* (C.A.), at para. 77 (emphasis added). In my opinion, in *H.L.* (C.A.), it is clear that when the Court of Appeal asserted that appeals in Saskatchewan are heard by way of rehearing, it was not claiming it has the power to conduct retrials or *de novo* hearings; rather, it was saying that it was not limited to a review of the lower court's decision but could instead direct its attention to the merits of the case (para. 86). I would immediately note that this language can be somewhat confusing because, as I shall explain later, a Court of Appeal will only interfere where it finds that the trial judge committed some error. There is always a degree of deference to trial judges in an appeal by way of rehearing.

179 With this semantic issue hopefully clarified, I will proceed with my analysis of the applicable standard of appellate review in Saskatchewan for questions of fact. I will begin with a review of the provisions of *The Court of Appeal Act, 2000* at issue in this appeal — namely ss. 7(2)(a) and 13, which pertain to the right of appeal, and ss. 12 and 14, which pertain to the powers of the Court of Appeal to act on that right — and I will apply the modern interpretation rule set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, to ss. 13 and 14

une affaire (tenue d'une audition *de novo*) et réviser un jugement de première instance au regard de la norme de la « nouvelle audition » (instruction d'un appel par voie de « nouvelle audition »).

De même, au par. 52 de ses motifs, le juge Fish signale que, « [à] moins que le législateur ne lui confère clairement le pouvoir de le faire, une cour d'appel ne "réentend" pas une affaire ni ne l'"instruit à nouveau". » Comme je l'ai déjà expliqué brièvement, la Cour d'appel a conclu en l'espèce que, en Saskatchewan, l'appel de la décision d'un juge de première instance siégeant sans jury était instruit par voie de nouvelle audition. Il lui incombait alors de [TRADUCTION] « se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et [de] rendre une décision en conséquence » : *H.L.* (C.A.), par. 77 (je souligne). Il me paraît clair qu'en affirmant ainsi que l'appel était instruit par voie de nouvelle audition en Saskatchewan, la Cour d'appel ne prétendait pas pouvoir reprendre le procès ou procéder à une audition *de novo*. Elle disait plutôt que son rôle n'était pas limité au contrôle de la décision du tribunal inférieur, mais qu'elle pouvait au contraire se pencher sur le fond de l'affaire (par. 86). Je signale d'emblée que ces propos peuvent quelque peu prêter à confusion parce que, comme je l'explique plus loin, une cour d'appel n'intervient que si elle estime que le juge de première instance a commis une erreur. Un certain degré de déférence envers le juge de première instance s'impose toujours dans un appel par voie de nouvelle audition.

Ce problème de sémantique étant, je l'espère, résolu, je me penche maintenant sur la norme de révision en appel applicable à une question de fait dans la province en cause. J'examinerai tout d'abord les dispositions de la *Loi de 2000 sur la Cour d'appel* visées en l'espèce — soit l'al. 7(2)a) et l'art. 13, relatifs au droit d'appel, et les art. 12 et 14, portant sur le pouvoir de la Cour d'appel de donner suite à l'exercice de ce droit —, puis j'appliquerai aux art. 13 et 14 la règle d'interprétation moderne énoncée par E. A. Driedger dans *Construction of Statutes*

in particular in order to determine if they vest the Saskatchewan Court of Appeal with the jurisdiction to conduct appeals by way of rehearing or by way of review for error. After identifying the nature of appellate review in Saskatchewan, I will consider the effect of judicial policy concerns in relation to the court's exercise of its review powers in certain circumstances. I will then offer my conclusion regarding the standard of appellate review in Saskatchewan for questions of fact, and I will endeavour to reconcile past jurisprudence with this conclusion.

(2) Statutory Framework

(a) *Background*

Before commencing my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, it is necessary to make note of two background points that will influence my reasoning in this regard.

First, as noted by La Forest J. in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 69-70:

> Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

(See also *Fox v. Percy*, at para. 20.)

Because appeals are creatures of statute, legislative — not judicial — policy choice must be considered paramount: see, e.g., *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100, at para. 34. Moreover, because appeals in civil cases are founded on provincial legislation, which may vary from one province to another, it must be accepted that the rights of appeal and the powers of the court to act on those rights will not necessarily be uniform across

(2e éd. 1983), p. 87, afin de déterminer s'ils confèrent à la Cour d'appel de la Saskatchewan le pouvoir d'instruire un appel par voie de nouvelle audition ou par voie de contrôle d'erreur. Une fois déterminée la nature de la révision en appel en Saskatchewan, j'examinerai l'incidence des considérations de politique judiciaire sur l'exercice du pouvoir de révision de la Cour d'appel dans certaines circonstances. J'exposerai ensuite ma conclusion sur la norme de révision en appel applicable à une question de fait en Saskatchewan, puis je m'efforcerai de la concilier avec la jurisprudence existante.

(2) Cadre législatif

a) *Contexte*

Avant de me pencher sur la juste interprétation des dispositions législatives en cause, deux éléments de contexte qui influenceront mon raisonnement doivent être signalés. 180

Premièrement, comme l'a fait observer le juge La Forest dans l'arrêt *Kourtessis c. M.R.N.*, [1993] 2 R.C.S. 53, p. 69-70 : 181

> Les appels ne sont qu'une création de la loi écrite; voir l'arrêt *R. c. Meltzer*, [1989] 1 R.C.S. 1764, à la p. 1773. Une cour d'appel ne possède pas de compétence inhérente. De nos jours toutefois, on a parfois tendance à oublier ce principe fondamental. Les appels devant les cours d'appel et la Cour suprême du Canada sont devenus si courants que l'on s'attend généralement à ce qu'il existe un moyen quelconque d'en appeler de la décision d'un tribunal de première instance. Toutefois, il demeure qu'il n'existe pas de droit d'appel sur une question sauf si le législateur compétent l'a prévu.

(Voir également *Fox c. Percy*, par. 20.)

L'appel étant une création de la loi, le choix de politique législative, et non judiciaire, doit primer : voir, p. ex., *Farm Credit Corp. c. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100, par. 34. En outre, étant donné que l'appel civil a ses assises dans les lois provinciales et que celles-ci peuvent varier d'une province à l'autre, il faut accepter que le droit d'appel et le pouvoir de la cour d'appel de donner suite à l'exercice de ce droit ne seront pas nécessairement les mêmes dans tout

the country. Thus, when considering the appropriate interpretation of statutory appeal provisions, such as those at issue in this case, it is necessary to have regard for such statutory variations and differences in appeal traditions as may exist between provinces: *Valley Beef Producers Co-operative*, at para. 36.

182 Second, s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, reads as follows:

> Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

As noted by the Court of Appeal in *Valley Beef Producers Co-operative*, s. 10 of *The Interpretation Act* tells us that the provisions of *The Court of Appeal Act, 2000*, including those pertaining to both the right of appeal and the powers of the court, must be "construed and interpreted liberally to the end of fulfilling their legislative objectives or, to put it another way, to the ultimate end of implementing the legislative policy they reflect": *Valley Beef Producers Co-operative*, at para. 43; see also *H.L.* (C.A.), at para. 14.

(b) *Statutory Provisions at Issue*

183 The following provisions of *The Court of Appeal Act, 2000* are at issue in this appeal:

> 7 . . .
>
> (2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court;
>
> 12(1) On an appeal, the court may:
>
> (a) allow the appeal in whole or in part;
>
> (b) dismiss the appeal;
>
> (c) order a new trial;
>
> (d) make any decision that could have been made by the court or tribunal appealed from;

le pays. Ainsi, pour dégager la juste interprétation de dispositions législatives en la matière, comme celles visées en l'espèce, il faut tenir compte des variations et des différences existant d'une province à l'autre au chapitre des dispositions et des usages en matière d'appel : *Valley Beef Producers Co-operative*, par. 36.

Deuxièmement, l'art. 10 de la *Loi d'interprétation de 1995*, L.S. 1995, ch. I-11,2, est libellé comme suit :

> Chaque texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large et libérale qui soit compatible avec la réalisation de son objet.

Comme l'a fait remarquer la Cour d'appel dans *Valley Beef Producers Co-operative*, suivant l'art. 10 de la *Loi d'interprétation*, les dispositions de la *Loi de 2000 sur la Cour d'appel*, notamment celles se rapportant au droit d'appel et aux pouvoirs de la Cour d'appel, doivent être [TRADUCTION] « interprétées largement afin de favoriser la réalisation de l'objectif législatif, c'est-à-dire la mise en œuvre ultime de la politique législative qui les sous-tend » : *Valley Beef Producers Co-operative*, par. 43; voir aussi *H.L.* (C.A.), par. 14.

b) *Dispositions législatives en cause*

Les dispositions suivantes de la *Loi de 2000 sur la Cour d'appel* sont en cause dans le présent pourvoi :

> 7 . . .
>
> (2) Sous réserve du paragraphe (3) et de l'article 8, appel peut être interjeté à la Cour d'une décision :
>
> a) de la Cour du Banc de la Reine ou d'un juge de cette cour;
>
> 12(1) Sur appel, la Cour peut :
>
> a) accueillir l'appel en tout ou en partie;
>
> b) rejeter l'appel;
>
> c) ordonner la tenue d'un nouveau procès;
>
> d) rendre toute décision qui aurait pu être rendue par la Cour ou le tribunal qui a prononcé la décision frappée d'appel;

(e) impose reasonable terms and conditions in a decision; and

(f) make any additional decision that it considers just.

(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

13 Where issues of fact have been tried, or damages have been assessed, by a trial judge without a jury, any party is entitled to move against the decision of the trial judge, by motion for a new trial or otherwise:

(a) within the same time that is allowed in cases of trial or assessment of damages by a jury; and

(b) on the same grounds, including objections against the sufficiency of the evidence, or the view of the evidence taken by the trial judge, that are allowed in cases of trial or assessment of damages by a jury.

14 On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

Sections 7(2)(a) and 13 pertain to the right of appeal and ss. 12 and 14 pertain to the powers of the court. In the course of my analysis of the statutory provisions at issue, I will focus on s. 13 of the Act, given that it specifically pertains to the right of appeal when issues of fact have been tried by a judge alone and that the particular issue in this appeal is the standard of appellate review for questions of fact, and s. 14, given that it provides the remedy associated with the right conferred by s. 13.

(c) *Did the Province Act Within Its Authority When It Enacted The Court of Appeal Act, 2000?*

Before commencing the substantive portion of my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, as a preliminary point, it is important to note that the Saskatchewan legislature acted within its authority

e) assortir une décision de modalités et de conditions raisonnables;

f) rendre toute autre décision qu'elle estime juste.

(2) Lorsqu'elle annule des dommages-intérêts adjugés par un jury, la Cour peut évaluer tous dommages-intérêts que le jury aurait pu évaluer.

13 Lorsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts, une partie peut attaquer la décision, notamment par voie de motion visant la tenue d'un nouveau procès :

a) dans le même délai que celui qui est prévu dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury;

b) pour les mêmes moyens, y compris pour insuffisance de preuve ou en raison des conclusions qu'en a tirées le juge, que ceux qui sont autorisés dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury.

14 Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

184 L'alinéa 7(2)a) et l'art. 13 touchent au droit d'appel, et les art. 12 et 14, aux pouvoirs de la Cour d'appel. Je mettrai l'accent sur l'art. 13, étant donné qu'il établit précisément le droit d'appel conféré lorsqu'un juge seul s'est prononcé sur une question de fait et que le litige porte en l'espèce sur la norme de révision en appel applicable à une question de fait, ainsi que sur l'art. 14, qui prévoit les mesures à prendre relativement au droit conféré à l'art. 13.

c) *La province avait-elle compétence pour adopter la Loi de 2000 sur la Cour d'appel?*

185 Avant d'aborder la question substantielle de la juste interprétation des dispositions législatives en cause dans le présent pourvoi, il importe de préciser que le législateur de la Saskatchewan avait le pouvoir d'adopter la *Loi de 2000 sur la Cour*

when it enacted *The Court of Appeal Act, 2000*. Specifically, the constitutional authority for this Act is founded on the exclusive provincial jurisdiction over property and civil rights and the administration of justice: see *Constitution Act, 1867*, ss. 92(13) and 92(14). Although I made note of this point earlier, in my view it is also important to reiterate here that, because appeal rights and powers for civil matters are generally a matter of provincial jurisdiction, the different common law jurisdictions across Canada need not have the same nature or standards of appellate review. As noted by the Attorney General of Canada in his written submissions, just as it is with all of the heads of provincial power under s. 92 of the *Constitution Act, 1867*, the exercise of the power over property and civil rights and the administration of justice is destined to result in different approaches to similar issues. One need only look to the various provincial statutes pertaining to limitation of actions, contributory negligence, juries and no-fault accident insurance schemes as examples of this. Therefore, in my view it is clear that inter-provincial variation in the nature and standards of appellate review is both possible and acceptable in our federal system.

(d) *Statutory Interpretation*

186 A determination of the standard of appellate review in Saskatchewan for questions of fact turns on the interpretation given to the provisions of *The Court of Appeal Act, 2000* quoted above. On numerous occasions, this Court has confirmed that the preferred approach to statutory interpretation is that set out by Driedger, at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

187 Despite this Court's adherence to this approach to statutory interpretation, as noted by this Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 28, the interpretive factors enumerated by

d'appel. En fait, son fondement constitutionnel résidait dans la compétence exclusive des provinces en matière de propriété et de droits civils et d'administration de la justice : voir la *Loi constitutionnelle de 1867*, par. 92(13) et (14). Il m'apparaît aussi important de rappeler, dans la mesure où les droits et les pouvoirs en matière civile relèvent généralement de la compétence provinciale, que ni la nature de la révision en appel ni les normes de révision en appel n'ont à être les mêmes dans les différents ressorts de common law du Canada. Le procureur général du Canada l'a également signalé dans son mémoire, l'exercice des pouvoirs en matière de propriété et de droits civils et d'administration de la justice, comme de tous ceux qui sont énumérés à l'art. 92 de la *Loi constitutionnelle de 1867*, apporte nécessairement des solutions différentes à des problèmes semblables. Il suffit pour s'en convaincre de consulter les lois provinciales sur la prescription, la négligence contributive, les jurys et l'assurance-accidents sans égard à la responsabilité. À mon avis, il est donc clair que la variation, d'une province à l'autre, de la nature de la révision en appel et des normes de révision en appel est possible et acceptable dans notre système fédéral.

d) *Interprétation législative*

La norme de révision applicable en appel à l'égard d'une question de fait en Saskatchewan dépend de la manière dont on interprète les dispositions précitées de la *Loi de 2000 sur la Cour d'appel*. Notre Cour a dit maintes fois que la méthode d'interprétation à privilégier est celle qu'énonce Driedger, à la p. 87 :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Notre Cour adhère certes à cette méthode, mais point n'est besoin d'appliquer à la lettre les facteurs d'interprétation énumérés par Driedger, d'autant qu'ils sont étroitement liés et interdépendants : *Chieu c. Canada (Ministre de la*

Driedger need not be applied in a formulaic fashion, particularly because they are closely related and interdependent.

As explained earlier, in the course of my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, I will focus on ss. 13 and 14 the Act. I will first consider the grammatical and ordinary sense of the words used in these two sections. I will then proceed to read these sections in their broader context. This inquiry will include an examination of (i) the object of the Act, (ii) the object of the specific legislative provisions that form the statutory framework for the business of appeal, and (iii) the historical foundations of the Act.

(i) Grammatical and Ordinary Sense

1. *Section 13*

Section 13 augments the right of appeal conferred by s. 7(2)(a), "[w]here issues of fact have been tried, or damages have been assessed, by a trial judge without a jury." In particular, s. 13(b) sets out the grounds upon which a party can object to the decision of the trial judge. On an ordinary and grammatical reading of this paragraph, it is clear that it sets out two distinct grounds. First, s. 13(b) incorporates by reference the same grounds of objection that are allowed in cases of trial or assessment of damages by a jury, including the sufficiency of the evidence. Second, para. (b) expands the scope of an appeal from a decision of a judge alone beyond the scope of an application for a new trial following a trial by jury by entitling a party to object to the view of the evidence taken by the trial judge. The fact that s. 13(b) provides a party with two discrete grounds for objection is supported by the legislature's use of the word "or" between "the sufficiency of the evidence" and "the view of the evidence taken by the trial judge". As noted by the Court of Appeal, because the two grounds for objection are expressed in the alternative, given the presumption against tautology, they are presumed not to be saying the same thing: *H.L.* (C.A.), at para. 22; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 158-62.

Citoyenneté et de l'Immigration), [2002] 1 R.C.S. 84, 2002 CSC 3, par. 28.

188 Je l'ai déjà dit, mon analyse de la juste interprétation des dispositions législatives en cause porte essentiellement sur les art. 13 et 14 de la Loi. J'examinerai d'abord le sens grammatical et ordinaire des mots qui y sont employés, puis j'interpréterai ces dispositions dans leur contexte général. L'examen portera sur (i) l'objet de la Loi, (ii) l'objet des dispositions établissant le cadre législatif de l'appel et (iii) les fondements historiques de la Loi.

(i) Sens grammatical et ordinaire

1. *Article 13*

189 L'article 13 ajoute au droit d'appel que confère l'al. 7(2)a) « [l]orsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts. » Plus particulièrement, l'al. 13b) précise les moyens pour lesquels une partie peut attaquer la décision du juge de première instance. Selon le sens ordinaire et grammatical des mots qui y sont employés, deux moyens se dessinent clairement. Premièrement, l'al. 13b) intègre par renvoi les moyens de contestation autorisés lorsque le procès a eu lieu devant un jury ou que les dommages-intérêts ont été évalués par un jury, y compris l'insuffisance de la preuve. Deuxièmement, il confère à l'appel formé contre la décision d'un juge seul une portée plus grande que celle de la demande d'un nouveau procès après le verdict d'un jury en permettant à une partie de contester les conclusions que le juge de première instance a tirées de la preuve. La conclusion que l'al. 13b) confère deux moyens distincts s'appuie sur l'emploi de la conjonction « ou » entre « pour insuffisance de preuve » et « en raison des conclusions qu'en a tirées le juge ». Comme l'a signalé la Cour d'appel, les deux moyens étant énoncés dans une alternative et l'absence de tautologie étant présumée, les deux motifs ne sont pas censés être synonymes : *H.L.* (C.A.), par. 22; voir aussi R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 158-162.

2. *Section 14*

190 On an ordinary reading of s. 14, it is clear that it relieves the court of any obligation "to adopt the view of the evidence taken by the trial judge" and directs the court in imperative terms to "act on its own view of what, in its judgment, the evidence proves". The section then goes on to empower the court in permissive terms to "draw inferences of fact" and to "pronounce the decision that, in its judgment, the trial judge ought to have pronounced": see also *H.L.* (C.A.), at paras. 28 and 63.

191 For reasons that will be more fully explained below, I agree with the Court of Appeal that the nature of powers conferred on the court by s. 14, in light of the right of appeal established by s. 13, are associated with appeal by way of rehearing and not retrial or review for error as generally understood. Not only do I agree with the Court of Appeal's understanding of the nature of the powers conferred on the court by s. 14, I also respectfully disagree with Fish J.'s reading of this section in two respects.

192 First, at para. 82 of his reasons, Fish J. focuses on the use of the word "rehearing" in s. 14 and concludes that, given the context of the Act and especially s. 16(1), it is clear that this does not confer on the Court of Appeal the power to "rehear" trials; it simply provides that the powers available to the court on an appeal are available on the rehearing of an appeal, which would occur in the event of the resignation of two or more judges who heard the initial appeal, for example.

193 As a preliminary point, and with respect, I wish to re-emphasize that, contrary to Fish J.'s assertion in para. 82 and elsewhere, the Court of Appeal did not claim it had the power to "rehear" trials; it claimed it had the power to conduct an appeal by way of rehearing rather than review for error. Semantic issues aside, I agree with Fish J. that s. 14 does provide that the powers available to the court on an appeal are available on the rehearing of an appeal. However, I do not agree that the use of the word "rehearing" in s. 14 assists in determining the nature of appellate review in Saskatchewan. In my

2. *Article 14*

Selon le sens ordinaire des mots qui y sont employés, l'art. 14 soustrait manifestement la Cour d'appel à l'obligation « d'accepter les conclusions que le juge du procès a tirées de la preuve » et lui enjoint impérativement de « se détermine[r] en se fondant sur sa propre appréciation de la preuve ». L'article prévoit ensuite que la Cour d'appel peut « tirer [d]es inférences factuelles » et « rendre la décision qu'aurait dû rendre, à son avis, le juge du procès » : voir aussi *H.L.* (C.A.), par. 28 et 63.

Pour les plus amples motifs exposés ci-après, je conviens avec la Cour d'appel que les pouvoirs qui lui sont conférés à l'art. 14, compte tenu du droit d'appel prévu à l'art. 13, sont propres à l'appel par voie de nouvelle audition, et non à la reprise de l'instruction ni au contrôle d'erreur au sens où on l'entend généralement. Non seulement je partage l'avis de la Cour d'appel sur la nature des pouvoirs que lui accorde l'art. 14, mais, en toute déférence, je ne peux souscrire à l'interprétation de cette disposition que préconise le juge Fish, et ce, pour deux raisons.

Premièrement, au par. 82 de ses motifs, le juge Fish relève l'emploi de l'expression « nouvelle audience » à l'art. 14 et conclut, au vu de l'ensemble de la Loi et du par. 16(1) en particulier, que la Cour d'appel n'a manifestement pas le pouvoir de « réentendre » une affaire. Selon lui, l'art. 14 dit simplement que les pouvoirs dont elle dispose en appel peuvent être exercés lors de la nouvelle audition d'un appel devenue nécessaire, par exemple, après la démission d'au moins deux des juges qui ont entendu l'appel initial.

À titre préliminaire et malgré tout le respect que je dois au juge Fish, je rappelle que, contrairement à ce qu'il dit dans ses motifs, au par. 82 notamment, la Cour d'appel n'a pas prétendu avoir le pouvoir de « réentendre » une affaire; elle a dit pouvoir instruire un appel par voie de nouvelle audition plutôt que par voie de contrôle d'erreur. Abstraction faite des questions de sémantique, je partage l'opinion du juge Fish selon laquelle l'art. 14 prévoit effectivement que les pouvoirs dont dispose la Cour d'appel lors d'un appel peuvent être exercés lors de la nouvelle audition d'un appel. Cependant, je ne pense pas que

respectful view, the use of the word "rehearing" in s. 14 is a "red herring", so to speak, in that it is not relevant to an inquiry into the nature of appellate review in Saskatchewan. In order to determine the nature of appellate review in Saskatchewan (i.e., whether appeals are conducted by way of rehearing or review for error), one must examine the powers conferred on the court by s. 14 from a functional perspective. As I will explain later, when viewed functionally, it is clear that the powers conferred by s. 14 vest the court with the power to conduct an appeal by way of rehearing.

I also respectfully take issue with Fish J.'s use of other provincial statutes to read down *The Court of Appeal Act, 2000*. For instance, at para. 87, Fish J. states:

> ... I think it evident that the jurisdiction of the Saskatchewan Court of Appeal to review inferences of fact drawn by the trial judge is hardly exceptional, let alone unique. Other provincial or territorial courts of appeal are granted similar powers, expressly or implicitly, by their governing statutes. The *2000 Act* simply sets out those powers in more detail than some.

As noted previously, interprovincial variation in the nature and standards of appellate review is acceptable in our federal system, and I agree with the Court of Appeal's reasoning in this regard:

> The provinces, of course, constitute discrete jurisdictions for the purpose at hand. Hence, the nature of appeal may differ from one jurisdiction to the next. So, too, may the right of appeal, which may be more or less limited, and the powers of the appeal courts, which may be more or less extensive. It is well to bear this in mind so as not to inadvertently import something from another jurisdiction which, however apt in that jurisdiction, may be inapt in this one.
>
> (*H.L.* (C.A.), at para. 31)

On an ordinary reading of s. 14 of the Act, this section frees the Court of Appeal from the view of the evidence taken by the trial judge and empowers it to draw its own inferences of fact. In my view, the powers conferred on the court by s. 14 are associated with an appeal by way of rehearing, and this makes the Saskatchewan Act unique. In

l'emploi de l'expression « nouvelle audience » à l'art. 14 doive être pris en considération pour déterminer la nature de la révision en appel en Saskatchewan. À mon humble avis, il s'agit en quelque sorte d'un leurre, cette expression n'étant pas pertinente à cet égard. Pour déterminer si les appels sont réglés par voie de nouvelle audition ou de contrôle d'erreur, il faut examiner d'un point de vue fonctionnel les pouvoirs conférés à l'art. 14. Comme je l'explique plus loin, de ce point de vue, il ne fait aucun doute que l'art. 14 confère à la Cour d'appel le pouvoir d'instruire un appel par voie de nouvelle audition.

194 En toute déférence, je ne suis pas d'accord non plus avec l'utilisation, par le juge Fish, des lois d'autres provinces pour interpréter la *Loi de 2000 sur la Cour d'appel*. Il dit par exemple au par. 87 :

> Il me paraît donc évident que le pouvoir de la Cour d'appel de la Saskatchewan de réviser les inférences de fait tirées par le juge de première instance est loin d'être exceptionnel, encore moins unique. D'autres cours d'appel provinciales ou territoriales sont expressément ou implicitement investies de pouvoirs similaires par leurs lois constitutives. La *Loi de 2000* énonce simplement ces pouvoirs plus en détail . . .

195 Comme je l'ai déjà mentionné, notre système fédéral admet que la nature de la révision en appel et les normes de révision en appel diffèrent d'une province à l'autre, et je fais mien le raisonnement de la Cour d'appel à cet égard :

> [TRADUCTION] Il va de soi que les provinces constituent des ressorts distincts quant à la question qui nous intéresse. La nature de la révision en appel peut ainsi varier de l'une à l'autre. Il en va de même du droit d'appel, qui peut être plus ou moins limité, et des pouvoirs des cours d'appel, qui peuvent être plus ou moins étendus. Il faut se le rappeler afin de ne pas importer par inadvertance un élément qui n'est approprié que dans un autre ressort.
>
> (*H.L.* (C.A.), par. 31)

196 Suivant le sens ordinaire de l'art. 14 de la Loi, la Cour d'appel n'a pas à faire siennes les conclusions tirées de la preuve par le juge de première instance et peut tirer ses propres inférences de fait. Selon moi, les pouvoirs que cet article confère à la Cour d'appel participent de la nature d'un appel par voie de nouvelle audition, ce qui rend unique le régime de

fact, these powers were once described by Gordon J.A. in *Hallberg v. Canadian National Railway Co.* (1955), 16 W.W.R. 538 (Sask. C.A.), at p. 544, as "the widest powers given an appellate court in Canada". Moreover, I agree with the intervener Attorney General for Saskatchewan that a review of the statutes governing the powers of other appellate courts in Canada today confirms that no other jurisdiction in Canada has a provision equivalent to s. 14. For instance, while British Columbia, Alberta, Manitoba, Ontario and Prince Edward Island do allow their courts of appeal to draw inferences of fact, except for the British Columbia and Alberta courts of appeal, the circumstances in which they are permitted to do so are limited, and, more importantly, only the Saskatchewan legislation relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves: see *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 518(c); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(a); *The Court of Appeal Act*, R.S.M. 1987, c. C240, s. 26(2); *Supreme Court Act*, R.S.P.E.I. 1987, c. 66, s. 56(4)(a). This does not mean that the Court of Appeal can ignore the findings of the trial judge; I will deal with this issue later.

197 Because the unique nature of appellate review in Saskatchewan is apparent on an ordinary reading of s. 14, and interprovincial variation in the nature and standards of appellate review is acceptable in our federal system, it is inappropriate to rely upon other provincial statutes to read down *The Court of Appeal Act, 2000.*

(ii) Broader Context

198 I will now proceed to examine ss. 13 and 14 of *The Court of Appeal Act, 2000* in their broader context. In order to do so, I will explore the following contextual factors: (i) the object of the Act, (ii) the object of the specific legislative provisions that form the statutory framework for appeals, and (iii) the historical foundations of the Act and ss. 13 and 14

la Saskatchewan. En fait, ces pouvoirs ont déjà été qualifiés des [TRADUCTION] « plus étendus jamais accordés à une juridiction d'appel au Canada » : *Hallberg c. Canadian National Railway Co.* (1955), 16 W.W.R. 538 (C.A. Sask.), p. 544, le juge Gordon. De plus, je conviens avec le procureur général de la Saskatchewan que l'examen des lois régissant à l'heure actuelle les pouvoirs des autres cours d'appel confirme qu'il n'existe au pays aucune disposition équivalente à l'art. 14. Par exemple, la Colombie-Britannique, l'Alberta, le Manitoba, l'Ontario et l'Île-du-Prince-Édouard autorisent bien leurs cours d'appel à tirer des inférences de fait, mais à l'exception des cours d'appel de la Colombie-Britannique et de l'Alberta, les circonstances dans lesquelles elles peuvent le faire sont limitées et, ce qui importe davantage, seule la loi de la Saskatchewan soustrait la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et lui enjoint de se déterminer en se fondant sur sa propre appréciation de la preuve : voir *Court of Appeal Act*, R.S.B.C. 1996, ch. 77, par. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, règle 518c); *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, al. 134(4)a); *Loi sur la Cour d'appel*, L.R.M. 1987, ch. C240, par. 26(2); *Supreme Court Act*, R.S.P.E.I. 1987, ch. 66, al. 56(4)a). La Cour d'appel ne peut cependant pas faire fi des conclusions du juge de première instance. J'y reviendrai.

Le sens ordinaire des mots employés à l'art. 14 faisant ressortir la singularité de l'appel en Saskatchewan et notre système fédéral admettant les différences entre les provinces en ce qui concerne la nature de la révision en appel et les normes de révision en appel, on ne peut se fonder sur les lois des autres provinces pour interpréter restrictivement la *Loi de 2000 sur la Cour d'appel.*

(ii) Contexte général

Je passe maintenant à l'examen des art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel* dans leur contexte général. Pour ce faire, j'analyserai les facteurs contextuels suivants : (i) l'objet de la Loi, (ii) l'objet des dispositions établissant le cadre législatif de l'appel et (iii) les fondements historiques de la Loi et des art. 13 et 14 en particulier. J'en conclurai que, en

in particular. I will conclude that this contextual examination confirms that the nature of appellate review in Saskatchewan is by way of rehearing and not review for error.

1. *The Object of The Court of Appeal Act, 2000*

I agree with the Court of Appeal that the principal object of *The Court of Appeal Act, 2000*, "aside from continuing the Court of Appeal for Saskatchewan, is to confer rights of appeal, as in sections 7 and 13, and to empower the court to act on those rights, as in sections 12 and 14": *H.L.* (C.A.), at para. 11. I also agree that rights of appeal are substantive rights of major importance to persons who find themselves before the courts and tribunals, and that the fullness of a right to appeal depends on the fullness of the powers of the court to act on it (para. 13). Thus, in this context, in determining the scope of powers conferred on the Court of Appeal by the Act, it is necessary to keep in mind the object of the right of the appeal: *Valley Beef Producers Co-operative*, at para. 45.

With this in mind, I will now turn to an examination of the object of the specific legislative provisions that form the statutory framework for appeals in Saskatchewan.

2. *The Object of the Specific Legislative Provisions That Form the Statutory Framework for Appeals in Saskatchewan*

a. Section 7(2)(a)

As noted by the Court of Appeal in this case, the right of appeal conferred by s. 7(2)(a) is expressed to be subject to ss. 7(3) and 8; however, in this instance, because neither of these sections apply, s. 7(2)(a) confers an unlimited right of appeal upon a party proceeding in the Court of Queen's Bench: *H.L.* (C.A.), at para. 15; *Valley Beef Producers Co-operative*, at para. 49.

In *Valley Beef Producers Co-operative*, the Court of Appeal noted that although they are highly trained and competent, judges of the Court of Queen's Bench may on occasion fail in relation to one or more

Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non par voie de contrôle d'erreur.

1. *L'objet de la Loi de 2000 sur la Cour d'appel*

199 Je conviens avec la Cour d'appel que le principal objet de la *Loi de 2000 sur la Cour d'appel*, [TRADUCTION] « outre le maintien de la Cour d'appel de la Saskatchewan, est de conférer des droits d'appel (p. ex. aux art. 7 et 13) et d'investir la Cour d'appel du pouvoir de donner suite à leur exercice (p. ex. aux art. 12 et 14) » : *H.L.* (C.A.), par. 11. Je suis aussi d'avis que le droit d'appel est un droit substantiel de grande importance pour la personne qui se retrouve devant une cour de justice ou un tribunal et que son étendue dépend de celle du pouvoir de la cour d'appel d'y donner suite (par. 13). Dans ce contexte, pour déterminer la portée du pouvoir que la Loi confère à la Cour d'appel, il faut donc se rappeler l'objet du droit d'appel : *Valley Beef Producers Co-operative*, par. 45.

200 Cela dit, je passe à l'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan.

2. *L'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan*

a. Alinéa 7(2)a)

201 Comme l'a signalé la Cour d'appel dans la présente affaire, le libellé de l'al. 7(2)a) prévoit que le droit d'appel conféré est assujetti au par. 7(3) et à l'art. 8. En l'espèce, toutefois, aucune de ces deux dispositions ne s'applique, de sorte que l'al. 7(2)a) confère un droit d'appel illimité à la personne qui est partie à une instance devant la Cour du Banc de la Reine : *H.L.* (C.A.), par. 15; *Valley Beef Producers Co-operative*, par. 49.

202 Dans *Valley Beef Producers Co-operative*, la Cour d'appel a fait remarquer que, même s'ils sont chevronnés et compétents, les juges de la Cour du Banc de la Reine peuvent parfois commettre une

components of judicial decision making, or fail on the whole to pronounce such judgment or make such order as the dispute requires: *Valley Beef Producers Co-operative*, at para. 50. In this context, the legislature created the right of appeal found in s. 7(2)(a), the object of which is "[t]o provide parties to proceedings in the Court of Queen's Bench with the most comprehensive and effective means of redress possible in relation to such failures."

b. Section 13

203 As explained previously, s. 13 augments the right of appeal conferred by s. 7(2)(a), "[w]here issues of fact have been tried, or damages have been assessed, by a trial judge without a jury." In particular, s. 13(b) sets out two distinct grounds upon which a party can object to the decision of the trial judge: (1) the same grounds of objection that are allowed in cases of trial or assessment of damages by a jury, including the sufficiency of evidence; and (2) the view of the evidence taken by the trial judge.

204 I agree with the Court of Appeal in *Valley Beef Producers Co-operative*, at para. 63, that "the object of [this] section may be seen to lie in expanding the scope of the grounds upon which a party is entitled to object in relation to issues of fact tried by judge alone". This strongly suggests that decisions of judges are not to be treated as the equivalent of jury verdicts in terms of the nature and standard of appellate review.

205 In sum, I agree with the Court of Appeal that in cases such as the one at bar, ss. 7(2)(a) and 13 provide parties with a facially unlimited right of appeal, which has first and foremost to do with relief from error: *Valley Beef Producers Co-operative*, at para. 65.

c. Section 12(1)

206 As noted by the Court of Appeal in *Valley Beef Producers Co-operative*, "[t]he legislature, in empowering the Court of Appeal for Saskatchewan

erreur à l'une ou à plusieurs des étapes du processus décisionnel judiciaire ou, globalement, ne pas rendre le jugement ou l'ordonnance qu'exige le règlement du litige : *Valley Beef Producers Co-operative*, par. 50. C'est dans ce contexte que le législateur a établi le droit d'appel prévu à l'al. 7(2)a), dont l'objet est [TRADUCTION] « [d]'offrir aux parties à une instance devant la Cour du Banc de la Reine les voies de recours les plus complètes et les plus efficaces possible à l'égard de telles erreurs. »

b. Article 13

Comme je l'ai expliqué précédemment, l'art. 13 ajoute au droit d'appel conféré à l'al. 7(2)a), « [l]orsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts. » Plus particulièrement, l'al. 13b) dispose qu'une partie peut attaquer la décision du juge de première instance : (1) pour les moyens de contestation autorisés lorsque le procès a eu lieu devant un jury ou que les dommages-intérêts ont été évalués par un jury, y compris l'insuffisance de preuve, et (2) en raison des conclusions que le juge de première instance a tirées de la preuve.

Je partage l'opinion de la Cour d'appel dans *Valley Beef Producers Co-operative* : [TRADUCTION] « l'on peut conclure que [cet] article vise à accroître la portée des moyens pour lesquels une partie peut contester la décision d'un juge seul portant sur une question de fait » (par. 63). Ce qui laisse clairement entendre que la décision d'un juge ne doit pas être tenue pour équivalente au verdict d'un jury en ce qui concerne la nature de la révision en appel et la norme de révision en appel.

Je conviens donc avec la Cour d'appel que dans un cas comme celui considéré en l'espèce, l'al. 7(2)a) et l'art. 13 accordent aux parties un droit d'appel à première vue illimité visant avant tout la réparation d'une erreur : *Valley Beef Producers Co-operative*, par. 65.

c. Paragraphe 12(1)

Comme l'a fait observer la Cour d'appel dans *Valley Beef Producers Co-operative*, [TRADUCTION] « [e]n investissant la Cour d'appel de la Saskatchewan

as it did in s. 12(1) could hardly have expressed itself in broader terms": para. 70. In the case at bar, the Court of Appeal noted in particular the scope of clauses (d) and (f), which empower the court, in turn, to "make any decision that could have been made by the court . . . appealed from" and "make any additional decision that it considers just". Given the nature of all judicial decision making, the Court of Appeal concluded, and I agree, that the exercise of these particular powers "entails ascertaining the material facts by one method or another, identifying the governing law, and applying the law to the facts as in the judgment of the court seems right": *H.L.* (C.A.), at para. 27. Besides their breadth, the powers conferred on the court by s. 12(1) are also generally remedial in nature, in that their object is to empower the court "to redress error or deficiency in relation to the resolution of the controversy in the first instance with a view to setting matters right": *Valley Beef Producers Co-operative*, at para. 70.

d. Section 14

As I have mentioned previously, s. 14 frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to act on its own view of what the evidence proves. In the course of so doing, the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced. In light of the clear conferral of these broad powers, I am of the view that the object of s. 14 is to relieve the Court of Appeal from the strictures pertaining to a motion for a new trial following a jury verdict: *Valley Beef Producers Co-operative*, at para. 78. As noted by the Court of Appeal in the case at bar, a party can object to a jury verdict on the grounds of misdirection, the improper reception or rejection of evidence, unfairness in the proceedings and insufficiency of the evidence relative to the verdict: *H.L.* (C.A.), at para. 19. However, it may not object to the view of the evidence taken by the jury. As explained by Culliton J.A. (as he then was) in *Taylor v. University of Saskatchewan* (1955), 15 W.W.R. 459 (Sask. C.A.), at p. 463, when objecting to a jury verdict, "[t]he issue . . . is not whether

des pouvoirs prévus au par. 12(1), le législateur aurait pu difficilement s'exprimer de manière plus générale » : par. 70. En l'espèce, la Cour d'appel a insisté tout particulièrement sur la portée des al. d) et f) qui, pour leur part, lui permettent de « rendre toute décision qui aurait pu être rendue par la Cour [. . .] qui a prononcé la décision frappée d'appel » et de « rendre toute autre décision qu'elle estime juste ». Vu la nature de tout processus décisionnel judiciaire, la Cour d'appel a conclu, et je suis d'accord avec elle, que l'exercice de ces pouvoirs particuliers [TRADUCTION] « comprend l'établissement des faits pertinents à l'aide d'une méthode ou d'une autre, la détermination du droit applicable et l'application du droit aux faits de la manière qu'elle estime juste » : *H.L.* (C.A.), par. 27. Outre leur étendue, les pouvoirs conférés au par. 12(1) ont généralement une vocation réparatrice, leur objet étant d'habiliter la Cour d'appel [TRADUCTION] « à réparer une erreur ou une lacune entachant le règlement du litige en première instance, et ce, en vue de rétablir les choses » : *Valley Beef Producers Co-operative*, par. 70.

d. Article 14

207 Je le répète, l'art. 14 soustrait la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et lui enjoint de se déterminer en se fondant sur sa propre appréciation de la preuve. Ce faisant, la Cour d'appel peut tirer des inférences de fait et rendre la décision qu'aurait dû rendre, à son avis, le juge de première instance. Étant donné l'attribution non équivoque de ces larges pouvoirs, j'estime que l'art. 14 vise à libérer la Cour d'appel des contraintes applicables à la demande d'un nouveau procès après le verdict d'un jury : *Valley Beef Producers Co-operative*, par. 78. Comme l'a signalé la Cour d'appel en l'espèce, une partie peut contester le verdict d'un jury en alléguant le caractère erroné des directives, l'irrégularité de l'acceptation ou du refus d'un élément de preuve, l'iniquité de la procédure ou l'insuffisance de la preuve appuyant le verdict : *H.L.* (C.A.), par. 19. Elle ne peut toutefois pas contester les conclusions que le jury a tirées de la preuve. Comme l'a expliqué le juge Culliton (plus tard Juge en chef) dans *Taylor c. University of Saskatchewan* (1955),

the court agrees with the finding of the jury, but whether the jury, if acting judicially, might properly reach the decision which it did."

e. Conclusion

208 After examining the object of the specific legislative provisions that form the statutory framework for appeals in Saskatchewan, in my view it is clear that the legislature intended to provide parties to proceedings in the Court of Queen's Bench with the most comprehensive and effective means to address error in any component of a trial decision, including the view of the evidence taken by the trial judge. As will become clearer after an examination of the historical foundations of the Act, this particular type of appellate review is consistent with an appeal by way of rehearing — not merely by way of review for error. For instance, in the context of a case involving a trial judge's exercise of discretion, Jonathan Parker L.J. noted that "a decision by the appeal court to proceed by way of rehearing frees it from such constraints [involved in an appeal by way of review] and allows it to exercise the discretion afresh in circumstances where it would have been unable to do so had the appeal proceeded in the normal way, by way of review": *Audergon v. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10, at para. 85. Nevertheless, the powers granted must be exercised in a manner consistent with applicable and proper judicial policy. This is addressed later.

3. *Historical Foundations*

209 In my opinion, an examination of the historical foundations of *The Court of Appeal Act, 2000* and ss. 13 and 14 in particular confirms that the nature of appellate review in Saskatchewan is by way of rehearing, not review for error.

a. Historical Foundations of the Act

210 In *Valley Beef Producers Co-operative*, the Court of Appeal had occasion to describe the

15 W.W.R. 459 (C.A. Sask.), p. 463, lorsqu'une partie conteste le verdict d'un jury, [TRADUCTION] « [l]a question [. . .] n'est pas de savoir si la cour est d'accord avec la conclusion du jury, mais bien si le jury, agissant judiciairement, pouvait à bon droit arriver à une telle conclusion. »

e. Conclusion

Après avoir examiné l'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan, il me paraît clair que le législateur a voulu offrir aux parties à une instance devant la Cour du Banc de la Reine les voies de recours les plus complètes et les plus efficaces possible pour réparer toute erreur entachant un élément ou un autre de la décision de première instance, y compris les conclusions tirées de la preuve. Comme le montrera l'examen des fondements historiques de la Loi, ce type particulier d'appel est compatible avec l'instruction par voie de nouvelle audition, et non le simple contrôle d'erreur. Dans une affaire portant sur l'exercice du pouvoir discrétionnaire du juge de première instance, le lord juge Jonathan Parker a d'ailleurs affirmé que [TRADUCTION] « la décision de la cour d'appel de procéder par voie de nouvelle audition la libère de telles contraintes [celles d'un appel par voie de contrôle] et lui permet d'exercer le pouvoir discrétionnaire à nouveau dans des circonstances où elle n'aurait pu le faire si l'appel avait été instruit de la manière habituelle, soit par voie de contrôle » : *Audergon c. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10, par. 85. Les pouvoirs conférés doivent toutefois être exercés conformément aux principes judiciaires applicables et appropriés. J'y reviendrai.

3. *Fondements historiques*

À mon avis, l'examen des fondements historiques de la *Loi de 2000 sur la Cour d'appel*, et de ses art. 13 et 14 en particulier, confirme qu'en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non par voie de contrôle d'erreur.

a. Fondements historiques de la Loi

Dans *Valley Beef Producers Co-operative*, la Cour d'appel a eu l'occasion de préciser les

historical foundations of *The Court of Appeal Act, 2000*:

> The *Court of Appeal Act, 2000* is the latest in a series of such enactments, the original of which was enacted in 1915, when the Court of Appeal for Saskatchewan was created [see *The Court of Appeal Act*, S.S. 1915, c. 9].
>
> . . .
>
> The original was founded in turn and in significant part on the *Judicature Act*, S.S. 1909, c. 52 (ss. 24 to 29); The *Supreme Court of Judicature Act, 1873* (36 and 37 Vict., c. 66, ss. 4, 18 and 19) as amended from time to time to January 1, 1889; and the *Rules* of The Supreme Court, 1883, Order 58. The *Supreme Court of Judicature Act, 1873* created the Court of Appeal in England and provided generally for its jurisdiction and powers. Order 58 of the Rules of the Supreme Court, which had the force of law, clothed the court with more specific powers in relation to appeal. The Saskatchewan Court of Appeal was created and empowered along these lines, and the *Court of Appeal Act, 2000* still reflects these historical foundations, as did its predecessors. Indeed, these foundations constitute an important part of the external context in which the *Act* was passed and serve as guiding lights, as it were, when it comes to understanding several of its provisions, especially those concerning the right of appeal and the powers of the court. [paras. 37-38]

b. Historical Foundations of Sections 13 and 14

Order 58 of the English *Rules of the Supreme Court, 1883* contained two rules of particular significance, namely, rr. 1 and 4. Rule 1 stated that "[a]ll appeals to the Court of Appeal shall be by way of rehearing", and r. 4 provided that, among other things, the court "shall have the power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require". Order 58 applied only to appeals, which, as noted previously, are creatures of statute; applications for a new trial following a trial by jury were governed by different rules, including the rules found in Order 39: see *Valley Beef Producers Co-operative*, at para. 40.

fondements historiques de la *Loi de 2000 sur la Cour d'appel* :

> [TRADUCTION] La *Loi de 2000 sur la Cour d'appel* est le texte législatif le plus récent en la matière, le premier ayant été adopté en 1915 lors de la création de la Cour d'appel de la Saskatchewan [voir *The Court of Appeal Act*, S.S. 1915, ch. 9].
>
> . . .
>
> Pour sa part, la loi initiale était fondée en grande partie sur la *Judicature Act*, S.S. 1909, ch. 52 (art. 24 à 29), la *Supreme Court of Judicature Act, 1873* (36 & 37 Vict., ch. 66, art. 4, 18 et 19), et ses modifications en date du 1er janvier 1889, et l'ordonnance 58 des Rules of the Supreme Court, 1883. La *Supreme Court of Judicature Act, 1873* a institué la Cour d'appel d'Angleterre et établi, de façon générale, sa compétence et ses pouvoirs. L'ordonnance 58 des Rules of the Supreme Court, qui avait force de loi, a investi la Cour d'appel de pouvoirs plus précis pour le règlement d'un appel. La Cour d'appel de la Saskatchewan a été créée et investie de pouvoirs suivant ce modèle, et la *Loi de 2000 sur la Cour d'appel*, à l'instar des lois qu'elle a remplacées, reflète encore ces fondements historiques. Ces fondements constituent en effet un élément important du contexte externe dans lequel la *Loi* a été adoptée et tiennent encore lieu de repères lorsqu'il s'agit de comprendre certaines de ses dispositions, notamment celles relatives au droit d'appel et aux pouvoirs de la Cour d'appel. [par. 37-38]

b. Fondements historiques des art. 13 et 14

211 Les règles 1 et 4 de l'ordonnance 58 des *Rules of the Supreme Court, 1883* (R.-U.) étaient particulièrement importantes. La première prévoyait que [TRADUCTION] « [t]out appel interjeté devant la Cour d'appel est instruit par voie de nouvelle audition », et la règle 4 précisait entre autres que la Cour d'appel [TRADUCTION] « peut tirer des inférences de fait et rendre le jugement ou l'ordonnance qui aurait dû être rendu, et rendre toute autre ordonnance qui s'impose ». L'ordonnance 58 s'appliquait seulement à l'appel, qui, faut-il le rappeler, est une création de la loi; la demande d'un nouveau procès après le verdict d'un jury était régie par d'autres règles, dont celles figurant dans l'ordonnance 39 : voir *Valley Beef Producers Co-operative*, par. 40.

212 As noted by the Court of Appeal in the case at bar, the powers conferred on the court by r. 4 were picked up, first, by the Supreme Court of Saskatchewan *en banc* and then, later, by s. 9 of *The Court of Appeal Act*, S.S. 1915, c. 9. In fact, s. 9 was made even more explicit than r. 4 of Order 58, in that, in addition to empowering the Court of Appeal to draw inferences of fact and pronounce the decision that, in its judgment, ought to have been pronounced, it also stated that "it shall not be obligatory on the court to grant a new trial, or to adopt the view of the evidence taken by the trial judge, but the court shall act upon its own view of what the evidence in its judgment proves . . . ."

213 As noted by the Court of Appeal in the case at bar, rr. 1 and 4 of Order 58 and s. 9 of *The Court of Appeal Act* of 1915 were enacted in the midst of controversy regarding the right of appeal as it pertained to issues of fact tried by a judge alone and the extent of the powers of the Court of Appeal to act on that right. The court explained that "[a]t the heart of the matter lay the question of whether a decision of a judge without a jury should be treated as the equivalent of a jury verdict, especially for the purpose of an appeal engaging issues of fact" (para. 36). Specifically, some appellate judges, most notably Lord Chelmsford in *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53 (H.L.), so regretted that trial judges' findings of fact seemed subject to appeal, especially when made in the face of conflicting evidence, that they placed a heavy burden of persuasion on an appellant, which virtually foreclosed appeal on the ground of the view of the evidence taken by the trial judge. Others, such as James L.J. in *Bigsby v. Dickinson* (1876), 4 Ch. D. 24 (C.A.), leaned against this and adopted a more generous approach: see *H.L.* (C.A.), at para. 37.

214 In the two sections that follow, I will briefly review how this controversy was resolved first in England, and second in Saskatchewan, in order to better place what are now ss. 13 and 14 of *The Court of Appeal Act, 2000* in their proper historical context.

Comme l'a dit la Cour d'appel dans la présente affaire, les pouvoirs conférés par la règle 4 ont d'abord été repris par la Cour suprême de la Saskatchewan *in banco*, puis à l'art. 9 de la *Court of Appeal Act*, S.S. 1915, ch. 9. En fait, l'art. 9 était encore plus explicite que la règle 4 de l'ordonnance 58. En plus d'habiliter la Cour d'appel à tirer des inférences de fait et à rendre la décision qui, à son avis, aurait dû être rendue, il prévoyait que [TRADUCTION] « la Cour d'appel n'est pas tenue d'ordonner un nouveau procès ni d'accepter les conclusions tirées de la preuve par le juge de première instance; elle se fonde sur sa propre appréciation de la preuve . . . »

Comme la Cour d'appel l'a signalé en l'espèce, les règles 1 et 4 de l'ordonnance 58 et l'art. 9 de la *Court of Appeal Act* de 1915 ont été adoptées au beau milieu d'une controverse concernant le droit d'en appeler d'une question de fait tranchée par un juge seul et l'étendue du pouvoir de la Cour d'appel de donner suite à l'exercice de ce droit. Elle a expliqué que [TRADUCTION] « [l]a question de savoir si la décision d'un juge seul devait être tenue pour équivalente au verdict d'un jury, surtout lorsque l'appel porte sur une question de fait, était au cœur du débat » (par. 36). Plus particulièrement, certains juges d'appel, en particulier lord Chelmsford dans *Gray c. Turnbull* (1870), L.R. 2 Sc. & Div. 53 (H.L.), ont trouvé si regrettable que les conclusions de fait du juge de première instance semblent susceptibles d'appel, surtout celles tirées à partir d'éléments de preuve contradictoires, qu'ils ont imposé un lourd fardeau de persuasion à l'appelant, ce qui a pour ainsi dire exclu la possibilité d'en appeler des conclusions tirées de la preuve par le juge de première instance. D'autres juges, comme le lord juge James dans *Bigsby c. Dickinson* (1876), 4 Ch. D. 24 (C.A.), ont opté pour une approche plus généreuse : voir *H.L.* (C.A.), par. 37.

Je ferai brièvement état du règlement de la controverse en Angleterre, puis en Saskatchewan, afin de mieux situer dans leur juste contexte historique les actuels art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*.

c. Resolution of Controversy in England

In England, this controversy was largely laid to rest by the adoption of Order 58, which provided for appeal by way of rehearing and expressly empowered the Court of Appeal to draw inferences of fact and give any judgment which ought to have been given, and by the subsequent decision of the Court of Appeal in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, which proved to be a seminal case in both England and Saskatchewan.

In *Coghlan v. Cumberland*, Lindley M.R. discussed the nature of appellate review of a decision of a judge alone as follows:

> The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. [pp. 704-5]

Although a court is under a duty to make up its own mind, Lindley M.R. noted that it must nevertheless be cognizant of the inherent difficulty of doing so in respect of findings of fact that rest on the trial judge's assessments of credibility:

> When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the

c. Règlement de la controverse en Angleterre

215 En Angleterre, l'adoption de l'ordonnance 58 établissant l'appel par voie de nouvelle audition et habilitant expressément la Cour d'appel à tirer des inférences de fait et à rendre tout jugement qui aurait dû l'être, et l'arrêt *Coghlan c. Cumberland*, [1898] 1 Ch. 704, rendu subséquemment par la Cour d'appel et qui a fait école tant en Angleterre qu'en Saskatchewan, ont en grande partie mis fin au débat.

216 Dans *Coghlan c. Cumberland*, le maître des rôles Lindley s'est penché sur la nature de la révision en appel de la décision d'un juge seul :

> [TRADUCTION] L'instance n'a pas été instruite devant jury, et l'appel interjeté contre la décision du juge n'est pas régi par les règles applicables à la tenue d'un nouveau procès après le verdict d'un jury. Même dans les cas où, comme en l'espèce, l'appel porte sur une question de fait, la Cour d'appel doit se rappeler qu'elle a le devoir de réentendre l'affaire, et elle doit réexaminer les documents présentés au juge de pair avec ceux qu'elle décide d'admettre en preuve. Elle doit ensuite former sa propre opinion, non pas en faisant abstraction du jugement porté en appel, mais en le soupesant et en l'examinant soigneusement; elle ne doit pas s'abstenir d'infirmer le jugement si, après un examen minutieux, elle arrive à la conclusion qu'il est erroné. [p. 704-705]

Le maître des rôles Lindley a précisé que, même si la Cour d'appel a l'obligation de se faire sa propre opinion, elle doit néanmoins être consciente de la difficulté de le faire à l'égard des conclusions de fait fondées sur l'appréciation de la crédibilité des témoins par le juge de première instance :

> [TRADUCTION] Lorsque l'issue dépend en grande partie de la crédibilité relative des témoins qui ont été interrogés et contre-interrogés devant le juge — et c'est souvent le cas —, la Cour d'appel a conscience de l'énorme avantage découlant du fait d'avoir vu et entendu les témoins. Il est souvent très difficile d'apprécier correctement la crédibilité relative des témoins à partir de déclarations écrites, et lorsqu'il s'agit d'ajouter foi à un témoignage plutôt qu'à un autre, et que la décision tient à l'attitude et au comportement des témoins, la Cour d'appel doit se fier et se fie toujours aux impressions du juge de première instance. D'autres facteurs n'ayant rien à voir avec l'attitude et le comportement peuvent évidemment permettre de déterminer si une déclaration est digne de foi ou non. Ces facteurs peuvent justifier la Cour d'appel de différer

credibility of witnesses whom the Court has not seen. [p. 705]

217 Similarly, in *Montgomerie & Co. v. Wallace-James*, [1904] A.C. 73 (H.L.), Earl of Halsbury L.C. stated that, if called upon to take up an issue of fact on appeal, an appellate tribunal must do so to the best of its ability, including its ability to draw inferences:

> My Lords, I think this appeal should be allowed. It is simply a question of fact, and doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court. [Emphasis added; p. 75.]

218 Despite the clear language of Order 58 that an appeal of a decision of a judge alone shall be by way of rehearing, some appellate judges continued to espouse the view that, for the purposes of appeal, such a decision was to be treated as the equivalent of a jury verdict. This prompted the House of Lords to revisit this issue in both *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, and *Benmax v. Austin Motor Co.*, [1955] A.C. 370.

219 In *Mersey Docks and Harbour Board v. Procter*, Viscount Cave L.C. adopted the principles articulated by Lindley M.R. in *Coghlan v. Cumberland* and by Earl of Halsbury L.C. in *Montgomerie & Co. v. Wallace-James* in his discussion of the duty of a court hearing an appeal from the decision of a judge alone:

> My Lords, it was contended on behalf of the appellants that the finding of Branson J., being a finding of a trial judge on a question of fact, should not have been disturbed by the Court of Appeal. In my opinion there is no ground for such a contention. The duty of a Court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley M.R. in *Coghlan v. Cumberland*, and by Lord Halsbury in *Montgomerie & Co. v. Wallace-James*, and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by

d'opinion, même à l'égard d'une question de fait touchant à la crédibilité de témoins qu'elle n'a pas vus. [p. 705]

De même, dans *Montgomerie & Co. c. Wallace-James*, [1904] A.C. 73 (H.L.), le comte Halsbury, lord chancelier, a dit que le tribunal appelé à examiner une question de fait en appel doit le faire au mieux de sa capacité, y compris celle de tirer des inférences :

> [TRADUCTION] Vos Seigneuries, je suis d'avis d'accueillir l'appel. Il ne s'agit que d'une question de fait, et il ne fait aucun doute que lorsqu'une question de fait a été tranchée par un tribunal qui a vu et entendu les témoins, il faut accorder la plus grande importance à la conclusion tirée par ce tribunal. Celui-ci a pu observer le comportement des témoins et juger de la véracité et de l'exactitude de leurs témoignages mieux que n'importe quel tribunal d'appel. Mais lorsque la question de la sincérité ne se pose pas, et qu'il s'agit de savoir quelles déductions doivent être tirées de témoignages sincères, alors le premier tribunal n'est pas en meilleure position pour décider que les juges de la cour d'appel. [Je souligne; p. 75.]

Même si l'ordonnance 58 disposait clairement que l'appel de la décision d'un juge seul était instruit par voie de nouvelle audition, certains juges d'appel ont continué de penser que cette décision devait, pour les besoins de l'appel, être tenue pour équivalente au verdict d'un jury. La Chambre des lords a donc réexaminé la question dans *Mersey Docks and Harbour Board c. Procter*, [1923] A.C. 253, et *Benmax c. Austin Motor Co.*, [1955] A.C. 370.

Dans *Mersey Docks and Harbour Board c. Procter*, le vicomte Cave, lord chancelier, a adopté les principes énoncés par le maître des rôles Lindley dans *Coghlan c. Cumberland* et par le comte Halsbury, lord chancelier, dans *Montgomerie & Co. c. Wallace-James*, où il analyse l'obligation de la cour saisie de l'appel de la décision d'un juge seul :

> [TRADUCTION] Vos Seigneuries, on a prétendu au nom des appelants que la conclusion du juge Branson, une conclusion tirée par un juge de première instance à l'égard d'une question de fait, n'aurait pas dû être modifiée par la Cour d'appel. À mon avis, cette prétention est sans fondement. L'obligation de la cour saisie de l'appel de la décision d'un juge siégeant sans jury a été clairement définie par sir Nathaniel Lindley, maître des rôles, dans *Coghlan c. Cumberland*, et par lord Halsbury dans *Montgomerie & Co. c. Wallace-James*, et plus aucun doute ne subsiste. L'appel de la décision

the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. . . . The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them. [Footnotes omitted; pp. 258-59.]

Likewise, in *Benmax v. Austin Motor Co.*, the House of Lords upheld the decision of the Court of Appeal on the ground that, while the ability of the Court of Appeal to overrule a trial judge's decision that is based on assessments of credibility may be limited, its ability to address the trial judge's inference from the evidence as a whole is not. Specifically, Lord Morton, who delivered the judgment of the House, stated that

> in the present case it would appear that the learned judge did not doubt the credibility of any witness, and formed his views by inference from the evidence as a whole. The Court of Appeal formed the opposite view by the same method and I agree with that court. [p. 374]

Viscount Simonds, who delivered concurring but more extensive reasons in *Benmax v. Austin Motor Co.*, addressed what he perceived to be a source of confusion: the distinction between "the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts" (p. 373). As for inferences from facts, Viscount Simonds stated that "an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge" (p. 374).

These decisions effectively settled the controversy regarding the nature of appellate review in England for questions of fact; that is, until May 2, 2000, when Parliament introduced a new system of civil appeals: *H.L.* (C.A.), at para. 48. As will be discussed below, this new appeal regime appears

d'un juge siégeant sans jury n'est pas régi par les règles applicables à la demande d'un nouveau procès après le verdict d'un jury. Il incombe à la Cour d'appel de se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et de rendre une décision en conséquence. [. . .] Les faits pertinents connus ne sont pas contestés; la Cour d'appel pouvait, et même devait, en tirer ses propres inférences. [Citations omises; p. 258-259.]

220 Aussi, dans *Benmax c. Austin Motor Co.*, la Chambre des lords a confirmé la décision de la Cour d'appel au motif que, même si la capacité de la Cour d'appel d'infirmer une décision fondée sur l'appréciation de la crédibilité des témoins par le juge de première instance est limitée, sa capacité de juger de l'inférence que le juge de première instance a tirée de la preuve dans son ensemble ne l'est pas. Lord Morton, qui a rendu le jugement au nom de la Chambre, a précisé :

> [TRADUCTION] Dans la présente affaire, le juge semble n'avoir mis en doute la crédibilité d'aucun témoin et s'être formé sa propre opinion en tirant l'inférence de la preuve dans son ensemble. La Cour d'appel s'est formé l'opinion contraire en suivant la même méthode, et je partage cette opinion. [p. 374]

221 Dans la même affaire, le vicomte Simonds, qui a rendu des motifs concourants mais plus détaillés, s'est penché sur ce qui lui paraissait être une source de confusion, soit la distinction entre [TRADUCTION] « une conclusion relative à un fait précis et une conclusion relative à un fait qui est en réalité une inférence tirée à partir de faits établis ou, comme on l'a dit parfois, entre la perception des faits et leur appréciation » (p. 373). Au sujet des inférences tirées de faits, il a dit : [TRADUCTION] « la cour d'appel doit se former une opinion indépendante, mais elle accordera naturellement de l'importance au jugement de première instance » (p. 374).

222 Ces décisions ont effectivement mis fin à la controverse sur la nature de la révision en appel d'une conclusion de fait en Angleterre, et ce, jusqu'à l'adoption par le Parlement, le 2 mai 2000, d'un nouveau régime d'appel civil : *H.L.* (C.A.), par. 48. Comme nous le verrons, ce nouveau régime semble

to have changed the nature of appellate review in England.

d. Resolution of Controversy in Saskatchewan

223 In order to explain how the controversy was laid to rest in Saskatchewan, it is necessary to begin with the years preceding the enactment of *The Court of Appeal Act* of 1915.

224 In *Coventry v. Annable* (1911), 19 W.L.R. 400, the Supreme Court of Saskatchewan *en banc* heard an appeal from a decision of a judge alone on the question, among others, of whether the judge was wrong in finding no fraud on the part of the defendant. Wetmore C.J. adopted and applied Lindley M.R.'s statement of principle in *Coghlan v. Cumberland*, finding fraud and deciding the case accordingly. The appeal to the Supreme Court of Canada was dismissed, with three of the six judges filing individual reasons. Anglin J., in particular, agreed with Wetmore C.J. and adopted the essence of the principle put forward by Lindley M.R. in *Coghlan v. Cumberland* that is quoted above: see *Annable v. Coventry* (1912), 46 S.C.R. 573, at p. 587.

225 Anglin J. also referred to the decision in *Coghlan v. Cumberland* in *Greene, Swift & Co. v. Lawrence* (1912), 2 W.W.R. 932 (S.C.C.), at p. 944, adding:

> However loath we may be to reverse the decision of a trial judge on the question of fact, "it is our duty to do so if the evidence coerces our judgment so to do." The Gairloch, 1899, 2 Ir. 1, 13; *Coghlan v. Cumberland*, 1898, 1 Ch. 704, 67 L.J. Ch. 402.

226 In 1918, *The Court of Appeal Act* of 1915 was proclaimed and thereafter appeals went to the Court of Appeal for Saskatchewan where they were governed by ss. 8 and 9 (now ss. 13 and 14), "the purpose of which lay in putting to rest the controversy in Saskatchewan along the lines it had been put to rest in England, though along even more explicit and decisive lines": *H.L.* (C.A.), at para. 56. In paragraphs 57 to 59 of its reasons in the case at bar, the Court of Appeal succinctly sets out how, since

avoir modifié la nature de la révision en appel dans ce pays.

d. Règlement de la controverse en Saskatchewan

Pour expliquer comment la controverse a pris fin en Saskatchewan, il faut remonter aux années ayant précédé l'adoption de la *Court of Appeal Act* de 1915.

Dans *Coventry c. Annable* (1911), 19 W.L.R. 400, la Cour suprême de la Saskatchewan a entendu *in banco* l'appel de la décision d'un juge seul et s'est entre autres demandé si ce dernier avait eu tort de conclure à l'absence de fraude de la part du défendeur. Le juge en chef Wetmore a appliqué le principe énoncé par le maître des rôles Lindley dans *Coghlan c. Cumberland*, a conclu à la fraude et a tranché en conséquence. La Cour suprême du Canada a rejeté le pourvoi formé contre ce dernier arrêt, trois des six juges rédigeant des motifs individuels. Le juge Anglin, en particulier, s'est dit d'accord avec le juge en chef Wetmore et a repris pour l'essentiel le principe énoncé par le maître des rôles Lindley dans *Coghlan c. Cumberland* et cité précédemment : voir *Annable c. Coventry* (1912), 46 R.C.S. 573, p. 587.

Le juge Anglin a également cité la décision *Coghlan c. Cumberland* dans l'arrêt *Greene, Swift & Co. c. Lawrence* (1912), 2 W.W.R. 932 (C.S.C.), p. 944, en ajoutant :

> [TRADUCTION] Quelle que soit notre réticence à infirmer la décision du juge de première instance à l'égard d'une question de fait, « il nous incombe de le faire lorsque nous estimons y être contraints par la preuve ». The Gairloch, 1899, 2 Ir. 1, 13; *Coghlan c. Cumberland*, 1898, 1 Ch. 704, 67 L.J. Ch. 402.

Après la promulgation de la *Court of Appeal Act* de 1915 en 1918, les appels ont été soumis à la Cour d'appel de la Saskatchewan et régis dès lors par les art. 8 et 9 (devenus les art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*), [TRADUCTION] « qui avaient pour but de mettre fin à la controverse en Saskatchewan, mais de façon encore plus explicite et décisive que ce n'avait été le cas en Angleterre » : *H.L.* (C.A.), par. 56. Dans la présente affaire, la Cour d'appel explique brièvement aux par. 57 à 59 de ses

The Court of Appeal Act of 1915 was enacted, it has adopted the "rehearing" approach to appellate review that was first laid out in *Coghlan v. Cumberland* and approved by Anglin J. in *Annable v. Coventry* and *Greene, Swift & Co. v. Lawrence*: see, e.g., *Miller v. Foley & Sons* (1921), 59 D.L.R. 664; *Messer v. Messer* (1922), 66 D.L.R. 833; *Monaghan v. Monaghan*, [1931] 2 W.W.R. 1; *Kowalski v. Sharpe* (1953), 10 W.W.R. (N.S.) 604; *Tarasoff v. Zielinsky*, [1921] 2 W.W.R. 135; *Matthewson v. Thompson*, [1925] 2 D.L.R. 1211; *French v. French*, [1939] 2 W.W.R. 435, at p. 443; and *Wilson v. Erbach* (1966), 56 W.W.R. 659, at p. 666.

In conclusion, the court notes that "the controversy that had prevailed in Saskatchewan prior to the enactment of the *Court of Appeal Act* of 1915 was laid to rest here following the enactment of sections 8 and 9 of that *Act*": *H.L.* (C.A.), at para. 60. In my view, this brief discussion of the historical foundations of *The Court of Appeal Act, 2000* and ss. 13 and 14 in particular confirms that in Saskatchewan, for the purpose of appeal, a decision of a judge alone is not to be taken as the equivalent of a jury verdict, and that the nature of appellate review of such a decision is by way of rehearing.

e. Legislative History

Although the section numbering may have changed and the language may have been modernized over time, the Acts' historical foundations remain relevant today because the Saskatchewan legislature has faithfully adhered to the content of what are now ss. 13 and 14 throughout the years: *H.L.* (C.A.), at para. 61. Therefore, I share the view of the Court of Appeal that the 2000 legislative amendments to *The Court of Appeal Act* did not have any substantive effect on the nature of appellate review in Saskatchewan and the scope of the powers of the Court of Appeal; rather, these amendments to *The Court of Appeal Act*

served to maintain and augment at least 85 years of appellate practice in Saskatchewan, where appeal in relation to an unlimited right of appeal from a decision of a trial judge without a jury has traditionally been by way of "rehearing", with the Court of Appeal being directed to

motifs comment, depuis l'adoption de la *Court of Appeal Act* de 1915, elle a opté pour l'instruction de l'appel par voie de « nouvelle audition » préconisée initialement dans *Coghlan c. Cumberland*, puis approuvée par le juge Anglin dans *Annable c. Coventry* et *Greene, Swift & Co. c. Lawrence* : voir, p. ex., *Miller c. Foley & Sons* (1921), 59 D.L.R. 664; *Messer c. Messer* (1922), 66 D.L.R. 833; *Monaghan c. Monaghan*, [1931] 2 W.W.R. 1; *Kowalski c. Sharpe* (1953), 10 W.W.R. (N.S.) 604; *Tarasoff c. Zielinsky*, [1921] 2 W.W.R. 135; *Matthewson c. Thompson*, [1925] 2 D.L.R. 1211; *French c. French*, [1939] 2 W.W.R. 435, p. 443; *Wilson c. Erbach* (1966), 56 W.W.R. 659, p. 666.

227 En conclusion, la Cour d'appel a fait observer que [TRADUCTION] « les art. 8 et 9 de la *Court of Appeal Act* de 1915 ont mis fin à la controverse qui existait jusqu'alors en Saskatchewan » : *H.L.* (C.A.), par. 60. Selon moi, ce bref examen des fondements historiques de la *Loi de 2000 sur la Cour d'appel*, et des art. 13 et 14 en particulier, confirme que, en Saskatchewan, la décision d'un juge seul ne doit pas être assimilée, en appel, au verdict d'un jury et que l'appel d'une telle décision est instruit par voie de nouvelle audition.

e. Historique législatif

228 La numérotation des articles a changé et le libellé a bien été modernisé avec le temps, mais les fondements historiques de ces lois sont toujours pertinents, le législateur de la Saskatchewan étant resté fidèle au fil des ans à la teneur des actuels art. 13 et 14 : *H.L.* (C.A.), par. 61. Je conviens donc avec la Cour d'appel que les modifications apportées à la *Court of Appeal Act* en 2000 n'ont pas modifié sensiblement la nature de la révision en appel en Saskatchewan ni l'étendue des pouvoirs de la Cour d'appel, mais qu'elles ont plutôt

[TRADUCTION] consacré et développé une procédure d'appel datant d'au moins 85 ans en Saskatchewan, où l'exercice d'un droit d'appel illimité à l'encontre de la décision d'un juge de première instance siégeant sans jury a toujours été instruit par voie de « nouvelle

take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge. [para. 62]

229 In contrast, a major English legislative initiative in 2000 appears to have had a much more marked effect on the nature of appellate review in that country. On May 2, 2000, a new system of civil appeals took effect in England, and the new rules appear mostly in Part 52 of the *Civil Procedure Rules 1998*, S.I. 1998 No. 3132: see Great Britain, *Civil Procedure* (2002), vol. 1, at pp. 1182ff. These new rules seek to restrict resort to the appeal process to cases that really justify its use and to ensure that appeals, when they are warranted, are conducted in an efficient and effective manner: Zuckerman, at p. 719. In *Tanfern Ltd. v. Cameron-MacDonald*, [2000] 1 W.L.R. 1311 (C.A.), at para. 50, Brooke L.J. described the changes imposed by this new appeal regime as "the most significant changes in the arrangements for appeals in civil proceedings in this country for over 125 years". These changes were welcomed by N. H. Andrews in "A New System of Civil Appeals and a New Set of Problems", [2000] *Cambridge L.J.* 464, at p. 465, since they would "reduce the delay, expense, and uncertainty of civil proceedings" and "increase the incentive for litigants to 'get it right first time round'". Nevertheless, Andrews also noted that "the same changes will reduce the chances of rectifying defective decisions", and that "[t]his is the price paid for achieving the impressive benefits of the new system of appeals."

230 It is of particular relevance to the issues that arise in this case that under this new appeal regime in England, as a general rule, appeals to the Court of Appeal are no longer by way of rehearing but, rather, are limited to a review of the lower court's decision: see *Civil Procedure Rules*, r. 52.11(1). This obvious change in terminology from "rehearing" to "review" would suggest, at first blush at least, that the English Parliament intended that the nature of appellate review in that country be changed, specifically from a more robust appeal by way of rehearing to a more limited review of the lower court's decision. However, it appears that there is currently some controversy in England regarding the

audition », la Cour d'appel étant tenue de se fonder sur sa propre appréciation de la preuve et habilitée à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. [par. 62]

En Angleterre, par contre, une importante mesure législative adoptée en 2000 semble avoir eu une incidence beaucoup plus marquée sur la nature de la révision en appel dans ce pays. Le 2 mai 2000, un nouveau régime d'appel civil y est entré en vigueur, et la partie 52 des *Civil Procedure Rules 1998*, S.I. 1998 No. 3132, renferme la plupart des nouvelles règles : voir Grande-Bretagne, *Civil Procedure* (2002), vol. 1, p. 1182 et suiv. Ces nouvelles règles visent à faire en sorte qu'il ne soit interjeté appel que dans les cas qui le justifient vraiment et que, lorsqu'il est justifié, l'appel soit instruit avec efficacité et efficience : Zuckerman, p. 719. Dans *Tanfern Ltd. c. Cameron-MacDonald*, [2000] 1 W.L.R. 1311 (C.A.), par. 50, le lord juge Brooke a dit qu'il s'agissait [TRADUCTION] « des modifications les plus importantes apportées au régime d'appel civil dans ce pays depuis plus de 125 ans ». La réforme a été bien accueillie par N. H. Andrews dans « A New System of Civil Appeals and a New Set of Problems », [2000] *Cambridge L.J.* 464, p. 465, puisqu'elle allait [TRADUCTION] « réduire l'attente, le coût et l'incertitude associés à une instance civile » et « inciter davantage les parties à "bien faire les choses du premier coup" ». Andrews a néanmoins signalé que [TRADUCTION] « ces mêmes modifications allaient réduire la possibilité de corriger une décision irrégulière [. . .] [m]ais que c'était le prix à payer pour bénéficier des énormes avantages du nouveau régime d'appel. »

Le fait que, suivant le nouveau régime d'appel en Angleterre, les appels interjetés devant la Cour d'appel ne sont plus instruits, en règle générale, par voie de nouvelle audition, mais donnent plutôt lieu à un contrôle de la décision du tribunal inférieur revêt une importance particulière pour le règlement des questions soulevées en l'espèce : voir *Civil Procedure Rules*, règle 52.11(1). Ce changement patent de terminologie — « contrôle » au lieu de « nouvelle audition » — donne à penser, du moins de prime abord, que le législateur britannique a voulu modifier la nature de la révision en appel, c'est-à-dire passer d'un appel relativement musclé par voie de nouvelle audition à un examen plus limité de la décision du

difference between appeal by way of rehearing and appeal by way of review, and what effect the terminology change in the new rules had on the nature of appellate review in that country.

For instance, in *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), Ward L.J., in a separate opinion, stated that prior to the reform of civil appeals in 2000, "interlocutory appeals in the Court of Appeal were treated as reviews of the lower court's decision", even though they were "nominally by way of rehearing" (para. 194). Therefore, despite the change in language from "rehearing" to "review", Ward L.J. concluded that an appellate court's task is essentially no different from what it was before the new rules came into effect; that is, "[t]he Court of Appeal can only interfere if the decision of the lower court was wrong and in deciding whether or not findings of fact were wrong, we take a retrospective look at the case and do not decide it afresh untrammelled by the judge's conclusion" (para. 195). Similarly, in his reasons for judgment on behalf of the court in *Assicurazioni*, Clarke L.J. acknowledged that there is plainly force in the submission that the nature of appellate review changed with the change in language, but he nonetheless concluded that although the previous rule expressly referred to a rehearing, "the exercise upon which the court was engaged was essentially one of review" (para. 13).

Conversely, Jolowicz argues that under the former *Rules of the Supreme Court* appeals to the Court of Appeal were by way of rehearing, and this "meant that appellate judges were most unlikely to interfere with the trial judge's findings of fact in so far as they depended on his assessment of the credibility of witnesses, but it did not mean that they were judges only of law": J. A. Jolowicz, "The New Appeal: rehearing or revision or what?" (2001), 20 *C.J.Q.* 7, at p. 7. Specifically, Jolowicz argues that the provisions in the former *Rules of the Supreme Court* were enough to ensure that the English Court of Appeal was indeed a "court of appeal", before which issues

tribunal inférieur. Cependant, il appert que la différence entre ces deux types d'appel et l'effet du changement de terminologie dans les nouvelles règles sur la nature de la révision en appel dans ce pays suscitent actuellement une certaine polémique dans ce pays.

231 Par exemple, dans l'arrêt *Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), le lord juge Ward a dit dans des motifs distincts qu'avant la réforme du régime d'appel civil en 2000, [TRADUCTION] « l'appel interlocutoire interjeté devant la Cour d'appel était instruit par voie de contrôle de la décision du tribunal inférieur », même s'il l'était « théoriquement par voie de nouvelle audition » (par. 194). Par conséquent, même si les nouvelles règles ne parlaient plus de « nouvelle audition », mais de « contrôle », le lord juge Ward a conclu que le rôle d'une cour d'appel était demeuré essentiellement le même : [TRADUCTION] « [e]lle ne peut intervenir que si la décision du tribunal inférieur était erronée et, pour déterminer si une conclusion de fait était erronée ou non, nous examinons l'affaire rétrospectivement et nous nous abstenons de statuer à nouveau sans égard à l'opinion du juge » (par. 195). De même, le lord juge Clarke, s'exprimant au nom de la Cour d'appel dans cette affaire, a reconnu la valeur manifeste de la prétention selon laquelle la nouvelle terminologie avait modifié la nature de la révision en appel. Il a néanmoins conclu que malgré le renvoi exprès des règles antérieures à une nouvelle audition [TRADUCTION] « le rôle de la cour d'appel en était essentiellement un de contrôle » (par. 13).

232 À l'opposé, Jolowicz soutient que l'appel interjeté devant la Cour d'appel en application des anciennes *Rules of the Supreme Court* était instruit par voie de nouvelle audition et qu'[TRADUCTION] « il arrivait rarement que les juges d'appel modifient une conclusion de fait du juge de première instance lorsqu'elle s'appuyait sur son appréciation de la crédibilité d'un témoin, mais cela ne veut pas dire qu'ils n'étaient que les juges du droit » : J. A. Jolowicz, « The New Appeal : re-hearing or revision or what? » (2001), 20 *C.J.Q.* 7, p. 7. Plus précisément, Jolowicz fait valoir que les dispositions des anciennes *Rules of the Supreme Court* suffisaient pour que la Cour

are to be decided afresh in fact and in law, and not what is called elsewhere a "[c]ourt of cassation", before which only the conformity of the lower court judgment to the rules of law is argued (pp. 7-8).

233 Similarly, Lord Sumner stated in *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37 (H.L.), at p. 47, that "[o]f course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute": see also J. A. Jolowicz, "Court of Appeal or Court of Error?", [1991] *Cambridge L.J.* 54. Nonetheless, like Jolowicz, Lord Sumner also noted that "not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge"; therefore, he opined that "[i]f [the trial judge's] estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone" (p. 47).

234 Not only does Jolowicz argue that, under the former rules, appeals to the Court of Appeal were by way of rehearing, in the sense that the Court of Appeal was empowered to "retry the case on the shorthand note", he is also of the view that because an appeal court conducting a "review" of the decision of the lower court under the new rules may take account of the evidence given at trial and may exercise all the powers conferred on it by the rules (including the power to draw inferences of fact), the new "review" provided for by Part 52 of the *Civil Procedure Rules* "differs little, if at all, from the procedure formerly used in the Court of Appeal": see Jolowicz, "The New Appeal: re-hearing or revision or what?", p. 11.

235 Of course, it is not this Court's place to resolve this controversy in English law. Whatever the change in language in the new English appeal rules may mean, as noted above, it is clear that over the years Saskatchewan has not substantively changed

d'appel d'Angleterre soit une véritable « cour d'appel » appelée à réexaminer des questions de fait et de droit, et non ce qu'on appelle ailleurs une « [c]our de cassation » où l'argumentation ne porte que sur l'observation des règles de droit par le tribunal inférieur (p. 7-8).

Aussi, dans l'arrêt *S.S. Hontestroom c. S.S. Sagaporack*, [1927] A.C. 37 (H.L.), p. 47, lord Sumner a affirmé : [TRADUCTION] « [b]ien sûr, nous avons compétence pour instruire l'affaire de nouveau à partir des notes sténographiques, ce qui comprend l'appréciation de la crédibilité relative des témoins, puisque des règles ayant force de loi assimilent l'appel à une nouvelle audition ». Voir aussi J. A. Jolowicz, « Court of Appeal or Court of Error? », [1991] *Cambridge L.J.* 54. Toutefois, à l'instar de Jolowicz, lord Sumner a signalé que [TRADUCTION] « le fait de ne pas avoir vu les témoins place les juges d'appel dans une situation toujours désavantageuse par rapport au juge de première instance », de sorte que « [l]orsque son appréciation de l'homme forme une partie substantielle de ses motifs de jugement, le juge de première instance a droit, si j'interprète bien les décisions, au respect de ses conclusions de fait » (p. 47).

Jolowicz soutient non seulement que, suivant les anciennes règles, l'appel interjeté devant la Cour d'appel était instruit par voie de nouvelle audition, en ce sens que la Cour d'appel était habilitée à « instruire l'affaire de nouveau à partir des notes sténographiques », mais aussi que le nouveau « contrôle » prévu à la partie 52 des *Civil Procedure Rules* [TRADUCTION] « diffère peu, ou ne diffère pas du tout, de la procédure antérieure » en ce que la Cour d'appel, lorsqu'elle « contrôle » la décision du tribunal inférieur en application des nouvelles règles, peut tenir compte de la preuve présentée au procès et exercer tous les pouvoirs que lui confèrent les règles (notamment celui de tirer des inférences de fait) : voir Jolowicz, « The New Appeal : re-hearing or revision or what? », p. 11.

Il n'appartient évidemment pas à notre Cour de trancher. Quel que soit l'effet du nouveau libellé des règles régissant l'appel en Angleterre, en Saskatchewan, le texte de la loi sur la Cour d'appel n'a manifestement pas beaucoup changé au fil des

the language in its *Court of Appeal Act*. Therefore, this supports the argument that the nature of appellate review in Saskatchewan has not deviated from its historical roots. In other words, in Saskatchewan, appeals were and continue to be by way of rehearing.

Moreover, if one accepts that an appeal by way of rehearing is different from a review of the lower court decision and that the change in language in the new English appeal rules from "rehearing" to "review" signified a shift to a more restricted form of appellate review in that country (as a plain reading of the new rule would seem to suggest at least), then it can be argued that the Saskatchewan legislature was not willing to pay the price to which Andrews refers — i.e., unlike the English Parliament, the Saskatchewan legislature was not willing to reduce the chances of rectifying defective decisions in order to reduce the delay, expense and uncertainty of civil proceedings. It saw no need for it. Moreover, because an appeal is a statutory creature, legislative policy choices in this area must be seen to be paramount. It appears that, in enacting *The Court of Appeal Act, 2000*, the Saskatchewan legislature re-affirmed its policy choice to have its Court of Appeal proceed with appeals by way of rehearing. If the legislature is now concerned or becomes concerned in the future about the nature of appellate review in Saskatchewan, it is open to the legislature to amend *The Court of Appeal Act, 2000*: see *Chieu v. Canada (Minister of Citizenship and Immigration)*, at para. 66. For now, the statute is clear: in Saskatchewan, the nature of appellate review is by way of rehearing.

However, even if one subscribes to the view professed by the Lord Justices in *Assicurazioni* that appellate review in England was and still is by way of review, unlike my colleague Fish J., I contend that the English understanding of appeal by way of "review" is different from the Canadian understanding of this concept, which was recently articulated by this Court in *Housen*. Moreover, the English understanding of appeal by way of review is actually more closely in line with the nature of appellate review in Saskatchewan, which, as I understand it, is by way of rehearing.

ans, en sorte que la révision en appel y serait demeurée fidèle à ses racines historiques. Autrement dit, dans cette province, l'appel était et est toujours instruit par voie de nouvelle audition.

236 De plus, si l'on accepte qu'un appel par voie de nouvelle audition diffère d'un contrôle de la décision du tribunal inférieur et que le nouveau libellé des règles régissant l'appel en Angleterre, où la « nouvelle audition » est remplacée par le « contrôle », traduit une évolution vers un appel plus restreint dans ce pays (comme semble l'indiquer du moins leur simple lecture), on peut soutenir que, contrairement au Parlement britannique, le législateur de la Saskatchewan n'était pas disposé à payer le prix dont fait mention Andrews, c'est-à-dire réduire la possibilité de corriger une décision irrégulière afin de diminuer l'attente, le coût et l'incertitude associés à une instance civile. Il n'en voyait pas la nécessité. De plus, l'appel étant une création de la loi, les choix de politique législative en la matière doivent primer. Il semble que par l'adoption de la *Loi de 2000 sur la Cour d'appel*, le législateur de la Saskatchewan a réaffirmé son choix politique de faire en sorte que la Cour d'appel instruise les appels par voie de nouvelle audition. Si la nature de la révision en appel en Saskatchewan le préoccupe ou venait à le préoccuper, il lui serait loisible de modifier la *Loi de 2000 sur la Cour d'appel* : voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, par. 66. Pour le moment, la loi est claire : en Saskatchewan, l'appel est instruit par voie de nouvelle audition.

237 Cependant, même si l'on convient avec les lords juges dans *Assicurazioni* que, en Angleterre, l'appel s'entendait et s'entend toujours d'un contrôle, contrairement à mon collègue le juge Fish, j'estime que la notion anglaise d'appel par voie de « contrôle » diffère de la canadienne, que notre Cour a récemment circonscrite dans *Housen*. Qui plus est, la notion anglaise d'appel par voie de contrôle se rapproche davantage de l'appel prévu en Saskatchewan qui, selon moi, est instruit par voie de nouvelle audition.

238 For example, Zuckerman notes that one of the general principles underlying an appeal by way of review in England is that an appeal court should not interfere with findings of fact made by the lower court because the judge who saw and heard the witnesses is better placed to assess their reliability and draw inferences from their testimony. Zuckerman states that this principle led to a distinction in the English case law "between conclusions concerning primary facts which followed entirely from the assessment of the reliability of witnesses, and conclusions based on a combination of testimonial assessment and analysis of documents and surrounding circumstances, with which the appeal court would more readily interfere" (p. 766). Zuckerman explains that the reason for this distinction is that "an appeal court is just as well placed as the trial judge to determine the proper inferences to be drawn from circumstantial or documentary evidence": see also *Whitehouse v. Jordan*, [1981] 1 All E.R. 267 (H.L.), *per* Lord Fraser.

239 Similarly, in *Assicurazioni*, although Clarke and Ward L.JJ. both stated that, despite the change in language from "rehearing" to "review", the Court of Appeal's task has always been and still is to review the lower court's judgment for error, it is clear from their judgments that they accept that, in the course of such a review, the greater the advantage the trial judge has over the appellate court (e.g., with respect to credibility assessments), the more reluctant the appellate court should be to interfere. However, when the relative advantage of the trial judge is not engaged, such as when the issue is with respect to the drawing of inferences, then the appellate court may more readily interfere. This proposition was specifically recognized by Ward L.J. as follows:

> Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. [para. 197]

240 From my perspective, it appears that the type of "review" to which Zuckerman and the Lord Justices

À titre d'exemple, Zuckerman fait observer que l'un des principes généraux sous-jacents à un appel par voie de contrôle en Angleterre est qu'une cour d'appel ne doit pas modifier les conclusions de fait du tribunal inférieur parce que le juge qui a vu et entendu les témoins était mieux placé pour apprécier leur fiabilité et tirer des inférences de leurs témoignages. Il ajoute que ce principe est à l'origine d'une distinction dans la jurisprudence anglaise [TRADUCTION] « entre les conclusions sur des faits essentiels qui découlent entièrement de l'appréciation de la fiabilité des témoins et celles qui sont fondées à la fois sur l'appréciation des témoignages et sur l'analyse des documents et des circonstances, que la cour d'appel serait plus encline à modifier » (p. 766). Zuckerman explique cette distinction par le fait qu'[TRADUCTION] « une cour d'appel est aussi bien placée que le juge de première instance pour décider des inférences que commandent les éléments de preuve circonstancielle ou documentaire » : voir aussi *Whitehouse c. Jordan*, [1981] 1 All E.R. 267 (H.L.), lord Fraser.

De même, dans l'arrêt *Assicurazioni*, les lords juges Clarke et Ward ont tous deux affirmé que, malgré le remplacement du terme « nouvelle audition » par celui de « contrôle », le rôle de la Cour d'appel avait toujours été et était toujours de contrôler le jugement du tribunal inférieur pour déterminer si une erreur a été commise, mais ils ont clairement reconnu que, dans le cadre d'un tel contrôle, plus le juge du procès bénéficie d'un avantage par rapport à elle (p. ex. en ce qui concerne l'appréciation de la crédibilité), moins la cour d'appel doit être encline à intervenir. Cependant, lorsque le juge de première instance ne jouit pas d'un avantage relatif, notamment pour tirer des inférences, la cour d'appel interviendra plus volontiers. Le lord juge Ward l'a reconnu expressément :

> [TRADUCTION] Lorsque les faits essentiels ne sont pas contestés et que le jugement a été rendu sur le fondement des inférences que le juge a tirées de la preuve présentée, la Cour d'appel, qui a le pouvoir de tirer toute inférence de fait qu'elle estime justifiée, interviendra volontiers relativement à l'appréciation de ces faits. [par. 197]

De mon point de vue, le type de « contrôle » auquel renvoient Zuckerman et les lords juges dans

in *Assicurazioni* are referring is not the same as the general "review for error" concept subscribed to in Canada. In *Housen*, all nine justices agreed in principle that, in the course of a review for error, the standard of review should be identical for both findings of fact and inferences of fact, although, as will be explained below, the majority and minority disagreed on the articulation of the standard of review for the latter. In his reasons in this case, Fish J. confirms that the same standard of review should apply to findings of fact as well as to inferences of fact: see, e.g., at paras. 52-55. In contrast, as explained above, in England there is authority for the proposition that, in the course of an appeal by way of review in that country, there is a distinction to be made between findings of fact that engage the special advantage of the trial judge (e.g., those that involve assessments of credibility) and inferences of fact that do not. The appellate court will more readily interfere in the latter case, and, in my view, this implies that, contrary to the Canadian position, the same standard of review cannot be applied to both circumstances.

Not only is the type of appeal by way of "review" described by Zuckerman and the Lord Justices in *Assicurazioni* different from the Canadian understanding of this concept, I also suggest that in some respects it is actually more in line with the nature of appellate review in Saskatchewan. In these reasons, I will go on to explain that in Saskatchewan, where the nature of appellate review is by way of rehearing, when the trial judge's factual findings engage the special advantage he or she has over an appellate tribunal, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding. In contrast, because the trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, I will contend that the Court of Appeal will more readily interfere when inferences are at issue. Specifically, it is my view that the Saskatchewan Court of Appeal will overrule a trial judge's inference of fact and draw its own when it concludes that the inference is not reasonable. It is apparent that this approach to factual findings and

l'arrêt *Assicurazioni* ne paraît pas correspondre à la notion générale de « contrôle d'erreur » que l'on connaît au Canada. Dans *Housen*, les neuf juges ont convenu en principe que, dans le cadre d'un contrôle d'erreur, la norme applicable devait être la même pour les conclusions de fait et les inférences de fait, même si, comme je l'explique plus loin, les juges majoritaires et les juges minoritaires ne s'entendaient pas sur la mise en pratique de la norme dans le cas des secondes. Dans ses motifs, le juge Fish confirme que la même norme doit s'appliquer aux conclusions de fait comme aux inférences de fait : voir, p. ex., les par. 52-55. Comme nous l'avons vu, la jurisprudence anglaise dit au contraire que lors d'un tel appel par voie de contrôle, il faut distinguer entre les conclusions de fait, pour lesquelles le juge de première instance bénéficie d'un avantage particulier (p. ex. pour l'appréciation de la crédibilité), et les inférences de fait, pour lesquelles il ne jouit d'aucun avantage. La cour d'appel interviendra plus volontiers dans ce dernier cas, et il s'ensuit selon moi, contrairement au point de vue canadien, que la même norme de révision ne saurait s'appliquer dans les deux cas.

241 Non seulement l'appel par voie de « contrôle » dont font état Zuckerman et les lords juges dans l'arrêt *Assicurazioni* diffère de ce qu'on entend par ce type d'appel au Canada, mais à certains égards, il s'apparente en fait davantage à l'appel propre à la Saskatchewan. Comme je l'explique dans les présents motifs, en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, lorsque le juge de première instance bénéficie d'un avantage particulier par rapport au tribunal d'appel relativement aux conclusions de fait, la Cour d'appel n'interviendra et ne substituera sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits. Par contre, le juge de première instance n'étant pas mieux placé que la Cour d'appel pour tirer des inférences de fait à partir de faits dûment établis, je soutiens que la Cour d'appel interviendra plus volontiers lorsqu'une inférence sera en cause. Plus précisément, je suis d'avis que la Cour d'appel de la Saskatchewan écartera une inférence de fait déraisonnable pour y substituer la sienne. Cette démarche à l'égard des conclusions et des

inferences of fact, which I will explain more fully below, is quite similar to that followed in England (where appeals are now by way of "review"), in that both approaches differentiate between the two and grant more deference to the trial judge in the former case, when his or her special advantage is engaged.

242 All of this merely demonstrates that terminology (i.e., "rehearing" versus "review") can be misleading. Therefore, in these circumstances, and particularly because appeals are statutory creations, it is best to focus upon the statute that sets out the appellate court's jurisdiction and powers, in order to determine the nature of appellate review. As I have explained in these reasons, the statute in this case is clear: in Saskatchewan, the nature of appellate review is by way of rehearing.

(iii) Conclusion Regarding the Nature of Appellate Review in Saskatchewan

243 After examining the grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for appeals, and the Act's historical foundations, to me it is clear that the nature of appellate review in Saskatchewan is by way of rehearing, with the Court of Appeal being directed to take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge. In light of this conclusion, one question remains: although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, in what circumstances will the Court of Appeal apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced? In particular, in this appeal, we are concerned with when the Court of Appeal will do so in relation to questions of fact. The issue then is to determine what judicial policy mandates in the particular context of *The Court of Appeal Act, 2000*.

inférences de fait, sur laquelle je reviendrai plus en détail, semble être sensiblement la même que celle adoptée en Angleterre (où l'appel s'entend désormais d'un « contrôle »), en ce sens qu'elle fait également une distinction entre conclusions et inférences de fait et préconise une plus grande déférence à l'égard des premières lorsque le juge bénéficie d'un avantage particulier.

Il s'ensuit donc que les termes employés (« nouvelle audition » ou « contrôle ») peuvent être trompeurs. Dans ces circonstances, et en particulier parce que l'appel est une création législative, il est préférable d'axer l'analyse sur la loi qui confère à la cour d'appel sa compétence et ses pouvoirs pour déterminer la nature de la révision en appel. Je le répète, la loi est claire en l'espèce : en Saskatchewan, l'appel est instruit par voie de nouvelle audition.

(iii) Conclusion sur la nature de la révision en appel en Saskatchewan

Après avoir examiné le sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, ainsi que l'objet de la Loi, l'objet des dispositions établissant le cadre législatif de l'appel et les fondements historiques de la Loi, il me semble clair que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, la Cour d'appel étant tenue de se fonder sur sa propre appréciation de la preuve et habilitée à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. Vu cette conclusion, et même si la Cour d'appel n'est pas liée par les conclusions tirées de la preuve en première instance, une question demeure : dans quelles circonstances la Cour d'appel se fondera-t-elle sur sa propre appréciation de la preuve et rendra-t-elle, au besoin, la décision qui aurait dû l'être? Dans le présent pourvoi, la question qui nous intéresse particulièrement est celle de savoir dans quels cas la Cour d'appel pourra le faire à l'égard d'une question de fait. Il nous faut donc déterminer ce que commande la politique judiciaire dans le contexte particulier de la *Loi de 2000 sur la Cour d'appel*.

(3) Judicial Policy Concerns

Contrary to the Saskatchewan Court of Appeal, I believe that the direction contained in s. 14 of the Act to the Court of Appeal to take its own view of what the evidence proves is subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, in that they hear the testimony of witnesses *viva voce* and are exposed to the case as a whole. This is also the view of most authors, for instance J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 324. The trial judge's special advantage has been recognized by this Court on a number of occasions: see, e.g., *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794, *per* L'Heureux-Dubé J.; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at para. 36. Of particular relevance to this appeal, the trial judge's special advantage was recently described by the High Court of Australia in the context of an appeal by way of rehearing as follows:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

(*Fox v. Percy*, at para. 23 (footnotes omitted))

The special advantage of the trial judge calls for a measure of deference on the part of the Saskatchewan Court of Appeal when, pursuant to the direction in s. 14 of the Act, it is considering what the evidence proves: see *Valley Beef Producers Co-operative*, at para. 87. Specifically, when the trial

(3) Considérations de politique judiciaire

244 Contrairement à la Cour d'appel de la Saskatchewan, j'estime que l'obligation que lui fait l'art. 14 de la Loi de se fonder sur sa propre appréciation de la preuve est subordonnée au principe judiciaire voulant que le juge de première instance ait un avantage particulier sur elle du fait qu'il entend les témoignages de vive voix et assiste à toute l'instruction. C'est aussi l'opinion de la plupart des auteurs, dont J.-C. Royer, *La preuve civile* (3e éd. 2003), p. 324. Notre Cour a reconnu à maintes reprises la situation privilégiée du juge de première instance : voir, p. ex., *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, p. 794, la juge L'Heureux-Dubé; *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 36. Voici comment, dans le contexte d'un appel par voie de nouvelle audition, la Haute Cour d'Australie a récemment décrit l'avantage dont jouit le juge de première instance, une description particulièrement pertinente en l'espèce :

> [TRADUCTION] D'une part, la cour d'appel est tenue de « rendre le jugement qui, à son avis, aurait dû être rendu en première instance ». D'autre part, elle doit nécessairement respecter les « limites normales » auxquelles se heurte toute cour d'appel agissant entièrement ou dans une large mesure sur la foi du dossier. Au nombre de ces limites, mentionnons sa situation désavantageuse par rapport au juge de première instance en ce qui touche à la crédibilité des témoins et à l'« impression » qui se dégage de l'affaire et qu'une cour d'appel, à la lecture de la transcription, n'est pas toujours en mesure de partager pleinement. En outre, généralement, la cour d'appel n'est pas saisie de tous les éléments de preuve présentés au procès, ou n'en prend pas connaissance. Dans la plupart des cas, le juge de première instance jouit donc d'avantages découlant de l'obligation de recevoir et d'examiner tous les éléments de preuve et de la possibilité, sur une plus longue période en général, de soupeser la preuve dans son ensemble et d'en tirer des conclusions.

(*Fox c. Percy*, par. 23 (citations omises))

245 L'avantage particulier du juge de première instance exige de la Cour d'appel de la Saskatchewan qu'elle fasse preuve d'une certaine déférence lorsqu'elle apprécie la preuve conformément à la prescription de l'art. 14 de la Loi : voir *Valley Beef Producers Co-operative*, par. 87. Plus précisément,

judge's decision is based upon issues that engage this special advantage (most notably, factual findings based on credibility assessments), the Court of Appeal should make due allowance in this respect: see *Fox v. Percy*, at para. 25. Nevertheless, it must be kept in mind that the Court of Appeal is charged with the statutory mandate to conduct appeals by way of rehearing, and, as noted by the High Court of Australia:

> [T]he mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings. [para. 28]

246 Furthermore, although it is my view that the Court of Appeal should accord some deference to decisions that are based upon issues that engage the special advantage of the trial judge, the same deferential stance does not extend to drawing inferences of fact or to evaluating a body of fact against a legal standard: see *H.L.* (C.A.), at para. 68. As noted by the Court of Appeal in the case at bar and confirmed in several other cases, the Court of Appeal "is in as good a position as the trial judge to draw inferences of fact from a base of fact proven or admitted": see *Montgomerie & Co. v. Wallace-James*, at p. 75; *Mersey Docks and Harbour Board v. Procter*, at pp. 258-59; *Warren v. Coombes* (1979), 142 C.L.R. 531 (H.C. Austl.), at p. 551, cited with approval in *Fox v. Percy*, at para. 25. This point was, in fact, confirmed by this Court in *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347, at pp. 357-58, where, after quoting from the aforementioned House of Lords' decision in *Montgomerie & Co. v. Wallace-James*, it stated that

> the practice of this Court, which reflects a reluctance to interfere with concurrent findings of fact in two provincial courts, does not apply with the same force to inferences drawn from conflicting professional opinions as it does to findings based on direct factual evidence.

lorsque la décision de première instance se fonde sur un élément faisant jouer cet avantage particulier (au premier chef, la conclusion de fait fondée sur une appréciation de la crédibilité), la Cour d'appel doit en tenir dûment compte : voir *Fox c. Percy*, par. 25. Il ne faut néanmoins pas perdre de vue que la Cour d'appel a l'obligation légale d'instruire l'appel par voie de nouvelle audition, et comme l'a fait remarquer la Haute Cour d'Australie :

> [TRADUCTION] [L]e simple fait que le juge de première instance a tiré une conclusion favorable aux témoins d'une partie et défavorable à ceux d'une autre n'empêche pas et ne doit pas empêcher la cour d'appel de s'acquitter des fonctions que lui confère la loi. Il arrive parfois que des faits irréfutables ou un témoignage non contredit démontrent que les conclusions du juge de première instance sont erronées même si elles paraissent fondées sur une appréciation de la crédibilité ou sont présentées comme telles. [par. 28]

En outre, bien que je sois d'avis que la Cour d'appel doit faire preuve de déférence à l'égard d'une décision fondée sur un élément faisant jouer l'avantage particulier du juge de première instance, la même obligation de déférence ne s'applique pas à l'inférence de fait ni à l'appréciation d'un ensemble de faits en fonction d'une norme juridique : voir *H.L.* (C.A.), par. 68. Comme la Cour d'appel l'a signalé en l'espèce et confirmé dans plusieurs autres affaires, elle [TRADUCTION] « est aussi bien placée que le juge de première instance pour tirer des inférences de fait d'un ensemble de faits prouvés ou reconnus » : voir *Montgomerie & Co. c. Wallace-James*, p. 75; *Mersey Docks and Harbour Board c. Procter*, p. 258-259; *Warren c. Coombes* (1979), 142 C.L.R. 531 (H.C. Austr.), p. 551, cité avec approbation dans *Fox c. Percy*, par. 25. Notre Cour l'a en fait également confirmé dans l'arrêt *Workmen's Compensation Board c. Greer*, [1975] 1 R.C.S. 347, p. 357-358, où elle a dit ce qui suit après avoir cité l'arrêt *Montgomerie & Co. c. Wallace-James* de la Chambre des lords :

> . . . la pratique de cette Cour, qui témoigne d'une répugnance à modifier des conclusions de fait concordantes de deux cours provinciales, ne s'applique pas avec la même vigueur à des déductions tirées d'opinions contradictoires de spécialistes qu'à des conclusions fondées sur la preuve directe de certains faits.

In *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 122, McLachlin J. (as she then was) agreed with this Court's decision in *Greer*, but also elaborated on it as follows:

I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

My conclusion that the same appellate deference does not extend to the drawing of inferences is strengthened by the fact that s. 14 of the Act expressly empowers the Court of Appeal to draw inferences of fact and pronounce the decision that, in its judgment, ought to have been pronounced, a power that necessarily entails drawing evaluative inferences: *H.L.* (C.A.), at para. 68.

(4) When Faced With a Question of Fact, in What Circumstances Will the Court of Appeal Apply Its Own View of the Evidence and, if Necessary, Pronounce the Decision that Ought to Have Been Pronounced?

In light of my consideration of the impact of judicial policy concerns regarding the special advantage of the trial judge, especially with regard to factual findings based on assessments of credibility, I will now address the question: when faced with a question of fact, in what circumstances will the Court of Appeal apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced?

In general, I agree with the Court of Appeal's statement:

On appeal from a decision of a judge of the Court of Queen's Bench sitting without a jury, taken pursuant to sections 7(2)(a) and 13 of the *Court of Appeal Act, 2000*, it is the duty of the court acting under section 14 of the *Act* to rehear the case in the context of the grounds of appeal and make up its own mind, not disregarding

Dans l'arrêt *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 122, la juge McLachlin (maintenant Juge en chef) a souscrit à l'arrêt *Greer* de notre Cour, mais a développé sa pensée comme suit :

Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve.

247 Ma conclusion selon laquelle l'inférence ne commande pas la même déférence en appel est étayée par le fait que l'art. 14 de la Loi confère expressément à la Cour d'appel le pouvoir de tirer des inférences de fait et de rendre la décision qui aurait dû l'être à son avis, un pouvoir qui comporte nécessairement celui de tirer des inférences appréciatives : *H.L.* (C.A.), par. 68.

(4) Lorsqu'elle doit se prononcer sur une question de fait, dans quelles circonstances la Cour d'appel peut-elle se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être?

248 Après l'examen de l'incidence des considérations de politique judiciaire concernant l'avantage particulier dont jouit le juge de première instance à l'égard, notamment, d'une conclusion de fait fondée sur une appréciation de la crédibilité, je me penche maintenant sur la question suivante. Lorsqu'elle doit se prononcer sur une question de fait, dans quelles circonstances la Cour d'appel peut-elle se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être?

249 Dans l'ensemble, je suis d'accord avec la conclusion de la Cour d'appel :

[TRADUCTION] Lorsque la décision d'un juge de la Cour du Banc de la Reine siégeant sans jury est portée en appel sur le fondement de l'al. 7(2)a) et de l'art. 13 de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel doit, suivant l'art. 14 de cette loi, réentendre l'affaire en fonction des motifs d'appel et se former sa propre opinion

the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly . . . .

(*H.L.* (C.A.), at para. 77)

250 To this general statement, I would add the following two points. First, I would note that deference should not only be accorded to trial decisions where the credibility of witnesses comes into question, but also to all such decisions where the special advantage of the trial judge is engaged. This would include cases where the trial judge's conclusion on an issue is dependent on his or her holistic assessment of the evidence presented at trial (all of which may not be available to the Court of Appeal), also described as his or her "feeling" of the case: see *Fox v. Percy*, at para. 23. Second, as I mentioned above, an appropriate interpretation of *The Court of Appeal Act, 2000* indicates that the primary function of the Court of Appeal is to correct error or deficiency in the particular case. In light of its role as a "court of error", I would emphasize that "[i]f, making proper allowance for the advantages of the trial judge, [the Court of Appeal concludes] that an error has been shown, [it is] authorised, and obliged, to discharge [its] appellate duties in accordance with the statute": *Fox v. Percy*, at para. 27. Here again I must note that the language used is awkward because of the word "error". But in the context I have discussed, one will understand that even though the palpable error threshold is not applicable, the Court of Appeal will only substitute its view of the facts if it finds some error in the reasoning of the trial judge.

251 In my view, contrary to the submissions of the Attorney General for Saskatchewan, this general statement of when the Saskatchewan Court of Appeal will interfere with the decision of a trial judge does not imply that factual findings that do not engage the special advantage of the trial judge and inferences of fact are to be reviewed on the basis of the correctness standard. As a preliminary point, in Saskatchewan, the nature of appellate review is, as earlier demonstrated, by way of rehearing, not

en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et rendre une décision en conséquence . . .

(*H.L.* (C.A.), par. 77)

Je me permets d'apporter deux précisions. Premièrement, la déférence s'impose à l'égard non seulement d'une décision de première instance où la crédibilité des témoins est en jeu, mais aussi de toute décision faisant jouer l'avantage particulier du juge de première instance, notamment lorsqu'une conclusion de ce dernier repose sur son appréciation globale des éléments de preuve présentés au procès (lesquels ne sont pas nécessairement tous mis à la disposition de la Cour d'appel), également qualifiée d'« impression » se dégageant de l'affaire : voir *Fox c. Percy*, par. 23. Deuxièmement, comme je l'ai déjà mentionné, selon la juste interprétation de la *Loi de 2000 sur la Cour d'appel*, la principale fonction de la Cour d'appel consiste à réparer l'erreur ou la lacune qui entache une décision. Vu ce rôle confié à la « cour de révision », je souligne que [TRADUCTION] « [s]i, après avoir dûment tenu compte de la situation privilégiée du juge de première instance, elle conclut qu'une erreur a été commise, la Cour d'appel peut et doit s'acquitter de ses obligations en appel conformément à la loi » : *Fox c. Percy*, par. 27. Là encore, je dois faire observer que la formulation est boiteuse à cause de l'emploi du mot « erreur ». Mais dans le contexte considéré, l'on comprendra que même si le critère de l'erreur manifeste ne s'applique pas, la Cour d'appel ne substituera sa propre appréciation des faits à celle du juge de première instance que si elle découvre une faille dans le raisonnement de ce dernier.

Selon moi, contrairement aux prétentions du procureur général de la Saskatchewan, cet énoncé général des circonstances dans lesquelles la Cour d'appel de la Saskatchewan peut modifier la décision de première instance ne signifie pas que la conclusion factuelle ne faisant pas jouer l'avantage particulier du juge de première instance et l'inférence de fait doivent être révisées selon la norme de la décision correcte. D'abord, en Saskatchewan l'appel est instruit, je le répète, par voie de nouvelle audition, et

review for error; therefore, the notion of "reviewing" a decision on any standard, let alone the correctness standard, is not applicable in these circumstances. Moreover, the correctness standard implies that the reviewing court will accord no deference to the decision of the lower court, but it is clear from the general statement of the Court of Appeal in *H.L.* (C.A.) that I quoted above that even though it is the duty of the court acting under s. 14 of the Act to rehear the case in the context of the grounds of appeal and make up its own mind, it will not disregard the judgment appealed from. The office of a trial judge is deserving of respect, and the decisions of such judges will be presupposed (and not presumed) to be free from error: see *Valley Beef Producers Co-operative*, at paras. 117 and 120.

non de contrôle d'erreur. Par conséquent, la notion de « contrôle » de la décision en fonction de quelque norme, à plus forte raison celle de la décision correcte, ne saurait s'appliquer dans les circonstances de l'espèce. Ensuite, la norme de la décision correcte implique que le tribunal de révision ne fait preuve d'aucune déférence à l'égard de la décision du tribunal inférieur, alors qu'il ressort de l'affirmation générale de la Cour d'appel dans *H.L.* (C.A.), citée précédemment, que même si l'art. 14 de la Loi lui fait obligation de réentendre l'affaire en fonction des motifs d'appel et de se former sa propre opinion, elle doit tenir compte du jugement porté en appel. La charge d'un juge de première instance commande le respect, et l'on présupposera (et non présumera) que la décision d'un tel juge est exempte d'erreur : voir *Valley Beef Producers Co-operative*, par. 117 et 120.

Turning now to specifically address the circumstances in which the Court of Appeal, when faced with questions of fact, will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced, I will distinguish between three types of questions of fact: (i) factual findings that engage the special advantage of the trial judge; (ii) factual findings that do not; and (iii) inferences based on findings of fact. I distinguish between factual findings that engage the special advantage of the trial judge and factual findings that do not because, as noted above, more deference is called for with regard to the former. I distinguish between factual findings generally and inferences of fact because there is an analytical difference between the two: see *Housen*, at para. 103 (for the minority). Inferences involve logical deductions that rely upon findings of fact in order to come to either legal or factual conclusions. In this case, we are only concerned with factual inferences.

252 En ce qui concerne maintenant les circonstances dans lesquelles, lorsqu'il lui faut se prononcer sur une question de fait, la Cour d'appel peut se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être, je distingue entre trois types de questions de fait : (i) la conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance; (ii) celle qui ne le fait pas; (iii) l'inférence fondée sur une conclusion de fait. Je distingue entre la conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance et celle qui ne le fait pas parce que, comme je l'ai dit, la première commande une plus grande déférence. Je fais une distinction entre la conclusion factuelle en général et l'inférence de fait, les deux étant différentes sur le plan analytique : voir *Housen*, par. 103 (opinion de la minorité). L'inférence suppose une déduction logique fondée sur une conclusion de fait en vue d'arriver à une conclusion sur le plan du droit ou des faits. En l'espèce, nous nous intéressons uniquement à l'inférence factuelle.

(a) *Factual Findings That Engage the Special Advantage of the Trial Judge*

a) *Conclusion factuelle faisant jouer l'avantage particulier du juge de première instance*

As noted previously, factual findings that engage the special advantage of the trial judge will be accorded some deference by the Court of Appeal. To the extent that "standards of review" language is

253 Je le répète, la Cour d'appel doit faire preuve d'une certaine déférence vis-à-vis des conclusions factuelles qui font jouer l'avantage particulier du juge de première instance. Dans la mesure où la

useful in the context of appellate review by way of rehearing, if only for clarity's sake, it can be argued that, although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, when the trial judge's factual findings engage the special advantage he or she has over an appellate tribunal, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding: *H.L.* (C.A.), at para. 77. That being said, it must be borne in mind that the primary function of the Saskatchewan Court of Appeal is to correct "error or deficiency" in the particular case, and it is not relieved of this function "by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses": *Fox v. Percy*, at para. 29. In such a case, "making all due allowances for the advantages available to the trial judge", the Court of Appeal must not shrink from applying its own view of the evidence if it concludes that the trial judge's view is tainted by a palpable and overriding error.

(b) *Factual Findings That Do Not Engage the Special Advantage of the Trial Judge*

254 Factual findings that do not engage the special advantage of the trial judge are not entitled to the same level of deference as those that do. Therefore, while the Court of Appeal will presuppose that such factual findings are free from error, given the respect that is to be accorded to the office of a trial judge, if the Court of Appeal concludes that some error has indeed been made, it will apply its own view of the evidence: see *Valley Beef Producers Co-operative*, at para. 117. As above, to the extent that "standards of review" language is helpful, it can be argued that, although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, it will only interfere and apply its own view of the evidence if the trial judge has committed a simple error in his or her fact finding.

terminologie propre aux « normes de contrôle » est utile dans le contexte d'un appel par voie de nouvelle audition, ne serait-ce que par souci de clarté, on peut soutenir que, même si elle n'est pas liée par les conclusions que le juge de première instance a tirées de la preuve, lorsque ces conclusions font jouer l'avantage particulier du juge de première instance, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits : *H.L.* (C.A.), par. 77. Cela dit, il faut se rappeler que la principale fonction de la Cour d'appel de la Saskatchewan est de réparer l'erreur ou la lacune qui entache la décision et qu'elle doit s'en acquitter même lorsque [TRADUCTION] « le juge de première instance est expressément ou implicitement arrivé à une conclusion influencée par son opinion sur la crédibilité des témoins » : *Fox c. Percy*, par. 29. En pareil cas, [TRADUCTION] « après avoir dûment tenu compte des avantages dont bénéficie le juge de première instance », la Cour d'appel ne doit pas craindre de se fonder sur sa propre appréciation de la preuve si elle estime que celle du juge de première instance est entachée d'une erreur manifeste et dominante.

b) *Conclusion factuelle ne faisant pas jouer l'avantage particulier du juge de première instance*

La conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance ne commande pas la même déférence. Aussi, même si elle présupposera qu'une conclusion factuelle est exempte d'erreur, étant donné le respect dû à la charge d'un juge de première instance, lorsqu'elle estimera qu'une erreur a bel et bien été commise, la Cour d'appel se fondera sur sa propre appréciation de la preuve : voir *Valley Beef Producers Co-operative*, par. 117. Par analogie avec ce qui précède, dans la mesure où la terminologie propre aux « normes de contrôle » est utile, l'on peut soutenir que, même si elle n'est pas liée par les conclusions que le juge de première instance a tirées de la preuve, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une simple erreur en appréciant les faits.

The distinction between simple error and palpable and overriding error should be noted. Because the trial judge is typically in no better position than the Court of Appeal to make factual findings that are not dependent on hearing the testimony of witnesses *viva voce* or being exposed to the case as a whole, no greater measure of deference is called for than presupposing (though not presuming) that the trial judge's fact finding is free from error: see *Valley Beef Producers Co-operative*, at para. 117; *H.L.* (C.A.), at para. 73. If a simple error in this type of fact finding is detected — it need not be palpable and overriding —, the Court of Appeal must interfere and apply its own view of the evidence. This approach is supported by my position that an appropriate interpretation of *The Court of Appeal Act, 2000* indicates that the primary function of the Court of Appeal is to correct error or deficiency in the particular case.

(c) *Inferences of Fact*

In the case at bar, we are particularly concerned with conditions under which, in the context of an appeal by way of rehearing, the Court of Appeal will overrule a trial judge's inference of fact and instead draw its own. Once again, I reiterate that a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, either in the first instance or on appeal: see *Valley Beef Producers Co-operative*, at para. 86; *H.L.* (C.A.), at para. 68. Furthermore, it must be remembered that the primary function of the Court of Appeal is to correct error or deficiency in the particular case. Because inferences are matters of logic and their accuracy can never be conclusively established, it is awkward to speak in terms of "error" with respect to these inferences; instead, I favour the use of the concept of reasonableness. Because s. 14 of the Act states in part that "the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact . . . .", it can be argued that the Court of Appeal "may" draw its own inference of fact when, after considering what, in its own view, the evidence proves and, comparing that with the inference of fact made by the trial judge, it concludes that the trial judge's inference of fact was not

255 La simple erreur doit être distinguée de l'erreur manifeste et dominante. Le juge de première instance n'étant généralement pas mieux placé que la Cour d'appel pour tirer des conclusions factuelles n'exigeant pas d'avoir entendu les témoignages de vive voix ni d'avoir assisté à toute l'instruction, la seule déférence qui s'impose consiste à présupposer (et non à présumer) que l'appréciation des faits par le juge de première instance n'est entachée d'aucune erreur : voir *Valley Beef Producers Co-operative*, par. 117; *H.L.* (C.A.), par. 73. Lorsqu'elle y décèle une simple erreur — point n'est besoin qu'il s'agisse d'une erreur manifeste et dominante —, la Cour d'appel doit intervenir et se fonder sur sa propre appréciation de la preuve. J'ajoute que, suivant la juste interprétation de la *Loi de 2000 sur la Cour d'appel*, la principale fonction de la Cour d'appel est de réparer l'erreur ou la lacune qui entache la décision.

c) *Inférence de fait*

256 En l'espèce, nous nous attachons particulièrement aux conditions auxquelles, dans le contexte d'un appel par voie de nouvelle audition, la Cour d'appel infirmera une inférence de fait du juge de première instance et lui substituera la sienne. Encore une fois, je le répète, le juge de première instance n'est pas mieux placé que la Cour d'appel pour tirer une inférence de fait d'un ensemble de faits dûment établis, que ce soit en première instance ou en appel : voir *Valley Beef Producers Co-operative*, par. 86; *H.L.* (C.A.), par. 68. De plus, il faut se rappeler que la fonction première de la Cour d'appel est de réparer l'erreur ou la lacune qui entache la décision. L'inférence étant affaire de logique et sa justesse ne pouvant jamais être établie avec certitude, l'emploi du mot « erreur » est inopportun à son égard; je privilégie la notion de « raisonnabilité ». Comme l'art. 14 de la Loi dit entre autres que « [l]a Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles . . . », on peut faire valoir que la Cour d'appel « peut » tirer sa propre inférence de fait lorsque, après avoir apprécié elle-même la preuve et comparé cette appréciation avec l'inférence de fait tirée par le juge de première instance, elle arrive à la conclusion que celle-ci n'était pas raisonnable. En d'autres termes, dans le

reasonable. In other words, in the context of an appeal by way of rehearing, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. Nevertheless, as was the case with findings of fact that do not engage the special advantage of the trial judge, out of respect for the office of the trial judge, the Court of Appeal will presuppose that he or she has drawn reasonable inferences of fact: see *Valley Beef Producers Co-operative*, at para. 120. The Court of Appeal in *Valley Beef Producers Co-operative* aptly summarized this concept as follows:

> Should the court, having determined what inferences may properly be drawn, conclude that those of the chambers judge were reasonable, as presupposed, it will not interfere. Should it reach the opposite conclusion, or be left in serious doubt, it will take its own view of what the evidence warrants in the way of inference and establish the secondary facts as it sees fit in the exercise of its faculty of judgment. [para. 120]

(5) Previous Jurisprudence Regarding Standards of Appellate Review

257 In light of my conclusion regarding the nature of appellate review in Saskatchewan and the circumstances in which the Court of Appeal will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced, in this final section, I will endeavour to reconcile past jurisprudence on this topic with my conclusion.

258 Earlier, I explained why the nature of appellate review in Saskatchewan is by way of rehearing and not review for error, such that the Court of Appeal is relieved of any obligation to adopt the view of the evidence taken by the trial judge and is directed instead to act on its own view of what, in its judgment, the evidence proves. Moreover, I noted that the Saskatchewan Act, which gives the Court of Appeal its mandate to conduct appeals in this manner, is unique. In this context, I contend that when examining previous jurisprudence on appellate review with a view to reconciling it with my conclusion about the nature and (so-called) standards of appellate review in Saskatchewan, the focus should be on Saskatchewan-specific cases, and in particular

contexte d'un appel par voie de nouvelle audition, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à celle du juge de première instance est celui de la raisonnabilité. Néanmoins, vu le respect que commande la charge de juge de première instance, la Cour d'appel doit, comme dans le cas d'une conclusion de fait qui ne fait pas jouer l'avantage particulier du juge de première instance, présupposer que ce dernier a tiré une inférence de fait raisonnable : voir *Valley Beef Producers Co-operative*, par. 120. Dans cet arrêt, la Cour d'appel a bien résumé cette notion :

> [TRADUCTION] Lorsque, après avoir déterminé quelles inférences pouvaient être tirées à juste titre, la Cour d'appel conclut que celles du juge en chambre étaient raisonnables, comme on le présuppose, elle ne doit pas intervenir. Lorsqu'elle arrive à la conclusion contraire, ou qu'elle a un doute sérieux, elle doit se fonder sur sa propre appréciation de ce que la preuve permet d'inférer et établir les faits secondaires comme elle le juge indiqué dans l'exercice de sa faculté de discernement. [par. 120]

(5) Jurisprudence relative aux normes de révision en appel

En dernier lieu, je m'appliquerai à concilier avec la jurisprudence pertinente ma conclusion sur la nature de la révision en appel en Saskatchewan et sur les circonstances dans lesquelles la Cour d'appel se fondera sur sa propre appréciation de la preuve et, au besoin, rendra la décision qui aurait dû l'être.

J'ai expliqué précédemment pourquoi, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur, de sorte que la Cour d'appel n'a pas à accepter les conclusions que le juge de première instance a tirées de la preuve, mais doit plutôt se déterminer en fonction de sa propre appréciation de la preuve. De plus, j'ai souligné le caractère unique de la Loi de la Saskatchewan, qui habilite la Cour d'appel à procéder ainsi. Dans ce contexte, j'estime que l'examen de la jurisprudence sur la révision en appel en vue de la concilier avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables dans la province doit mettre l'accent sur les décisions relatives à la Saskatchewan et,

those from this Court and the Saskatchewan Court of Appeal. This is particularly so when the general standards of appellate review seem to be drifting away from appeal by way of rehearing and toward appeal by way of review for error: *H.L.* (C.A.), at para. 86. Additionally, as noted by the Court of Appeal, these general standards "have evolved not so much on the basis of statutory provision as on the basis of judicial policy concerns — concerns having to do with finality in litigation, with cost and delay occasioned by appeal, with taxing scarce judicial resources, and so on" (para. 81). However, because appeals are creatures of statute, these judicial policy concerns must be assessed in light of the statutory mandate conferred on the Court of Appeal. In this case, the Saskatchewan legislature, through *The Court of Appeal Act, 2000*, has instructed its Court of Appeal to conduct appeals by way of rehearing rather than review for error, with the overall aim of redressing error and setting matters right: *Valley Beef Producers Co-operative*, at para. 70. In this light, the judicial policy concerns noted above lose their relevance and should not be used to limit the facially unlimited right of appeal and the broad powers of the appellate court to act on that right that are provided by statute in the province of Saskatchewan. Instead, other policies apply.

Examining the judicial interpretation by this Court and the Saskatchewan Court of Appeal of the nature and (so-called) standards of appellate review in Saskatchewan, in contrast with Fish J.'s assertion at para. 98 that "[n]o decision has been drawn to our attention where the [Saskatchewan Court of Appeal] has asserted a power of review by rehearing", I have found that there are a number of Saskatchewan Court of Appeal cases that support my conclusion that the nature of appellate review in Saskatchewan is by way of rehearing and not review for error. Moreover, to the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with my conclusion, in my view, they can be reconciled in one of three ways. First, a number of these cases hold that findings of fact made at trial based on the credibility of

plus particulièrement, sur celles de notre Cour et de la Cour d'appel de la Saskatchewan. D'autant plus que les normes générales applicables en appel semblent s'éloigner de l'appel par voie de nouvelle audition et se rapprocher de l'appel par voie de contrôle d'erreur : *H.L.* (C.A.), par. 86. En outre, comme l'a signalé la Cour d'appel, ces normes générales [TRADUCTION] « n'ont pas tant évolué en fonction de dispositions législatives que de considérations de politique judiciaire — irrévocabilité des jugements, coût et attente associés à l'appel, affectation de ressources judiciaires limitées, etc. » (par. 81). Cependant, l'appel étant une création législative, ces considérations de politique judiciaire doivent être appréciées à la lumière de la mission dont la Cour d'appel est légalement investie. En l'espèce, l'assemblée législative de la Saskatchewan, en adoptant la *Loi de 2000 sur la Cour d'appel*, a enjoint à sa cour d'appel de statuer à l'issue d'une nouvelle audition, et non d'un contrôle d'erreur, avec l'objectif général de réparer une erreur et de rétablir les choses : *Valley Beef Producers Co-operative*, par. 70. Les considérations de politique judiciaire susmentionnées perdent donc leur pertinence et ne doivent pas être invoquées pour limiter le droit d'appel à première vue illimité et les vastes pouvoirs de la cour d'appel — prévus par la loi dans la province de la Saskatchewan — de donner suite à l'exercice de ce droit. Ce sont plutôt d'autres politiques qui s'appliquent.

259 En me penchant sur l'interprétation, par notre Cour et la Cour d'appel de la Saskatchewan, de la nature de la révision en appel et des « normes de contrôle » en appel applicables en Saskatchewan, malgré l'affirmation du juge Fish au par. 98 de ses motifs selon laquelle « [n]ulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention », j'ai constaté qu'un certain nombre de décisions de la Cour d'appel de la Saskatchewan appuient ma conclusion que, dans cette province, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur. De plus, si des arrêts de notre Cour et de la Cour d'appel de la Saskatchewan semblent contredire ma conclusion, ils peuvent, à mon avis, être conciliés avec elle de trois façons. Premièrement, un certain nombre de ces

witnesses are not to be reversed on appeal unless the trial judge made some palpable and overriding error which affected his or her assessment of the facts. This specific holding is not at odds with my conclusion regarding the nature of appellate review in Saskatchewan and the circumstances in which the Saskatchewan Court of Appeal, when faced with factual findings that engage the special advantage of the trial judge, will interfere and apply its own view of the evidence. Therefore, these cases can be reconciled by restricting their impact to their specific *rationes decidendi*. Second, some of these cases do not refer to the Saskatchewan Act at all, despite the fact that it is the only statute in Canada that frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to take its own view of the evidence. Therefore, I contend that these cases are better understood as applying to appellate review in general, the nature of which has drifted toward appeal by way of review, rather than appellate review in Saskatchewan under *The Court of Appeal Act, 2000*, which continues to be by way of rehearing. Finally, some cases, or at least aspects of them, may simply require reconsideration in light of the above analysis regarding the nature of appellate review in Saskatchewan. This Court is not bound by the particular decisions of lower courts, particularly when there is conflict within the case law.

arrêts établissent que la conclusion de fait tirée au procès sur le fondement de la crédibilité d'un témoin ne doit être infirmée en appel que si le juge de première instance a commis une erreur manifeste et dominante ayant entaché son appréciation des faits. Cela ne va pas à l'encontre de ma conclusion sur la nature de la révision en appel en Saskatchewan et les circonstances dans lesquelles la Cour d'appel, lorsqu'elle doit se prononcer sur une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance, peut intervenir et se fonder sur sa propre appréciation de la preuve. Il est donc possible de concilier ces arrêts avec ma conclusion en ne retenant que leur *ratio decidendi*. Deuxièmement, certains de ces arrêts ne font aucune mention de la Loi de la Saskatchewan, même si elle est la seule au Canada à soustraire la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et à lui enjoindre de se fonder sur sa propre appréciation de la preuve. Par conséquent, j'estime préférable de considérer qu'ils s'appliquent à l'appel en général, qui se rapproche désormais davantage du contrôle judiciaire que de l'appel instruit en Saskatchewan à l'issue d'une nouvelle audition sous le régime de la *Loi de 2000 sur la Cour d'appel*. Enfin, certains arrêts ou, du moins, certains de leurs aspects, pourraient simplement nécessiter un réexamen à la lumière de l'analyse qui précède concernant la nature de la révision en appel en Saskatchewan. Notre Cour n'est pas liée par les décisions des tribunaux inférieurs, surtout lorsque la jurisprudence est contradictoire.

(a) *Saskatchewan Court of Appeal Cases in Support of My Conclusion That the Nature of Appellate Review in Saskatchewan Is by Way of Rehearing*

a) *Arrêts de la Cour d'appel de la Saskatchewan étayant ma conclusion selon laquelle, en Saskatchewan, l'appel est instruit par voie de nouvelle audition*

260 At para. 97 of his reasons, Fish J. states that "the Court of Appeal for Saskatchewan appears to have for many decades prior to both *Lensen* and *Housen* understood its legislative mandate as a power of review for error". With respect, I must disagree with this statement because, as noted previously, since *The Court of Appeal Act* of 1915 was enacted, the Saskatchewan Court of Appeal has adopted the rehearing approach to appellate review that was first laid out in *Coghlan v.*

Le juge Fish affirme, au par. 97 de ses motifs, que « la Cour d'appel de la Saskatchewan semble avoir vu dans son mandat légal le pouvoir de vérifier si la décision est exempte d'erreur, et ce, bien des décennies avant les arrêts *Lensen* et *Housen* ». En toute déférence, je ne peux être d'accord, car, je le répète, depuis l'adoption de la *Court of Appeal Act* de 1915, la Cour d'appel de la Saskatchewan a opté pour l'appel par voie de nouvelle audition préconisé initialement dans *Coghlan c. Cumberland*,

Cumberland and approved by Anglin J. in *Annable v. Coventry* and *Greene, Swift & Co. v. Lawrence*: see, e.g., *Miller v. Foley & Sons*; *Messer v. Messer*; *Monaghan v. Monaghan*; *Kowalski v. Sharpe*; *Tarasoff v. Zielinsky*; *Matthewson v. Thompson*; *French v. French*, at p. 443; and *Wilson v. Erbach*, at p. 666.

For example, in *Miller v. Foley & Sons*, the appeal turned entirely upon a finding of fact by the trial judge, and the Court of Appeal held that "[t]he rule no doubt is that, in cases of this kind, it is the duty of this Court to re-hear the case and to overrule it when on full consideration the Court is convinced that the judgment appealed from is wrong" (p. 665). Similarly, in *Monaghan v. Monaghan*, the Court of Appeal confirmed that, pursuant to (then) s. 8 of *The Court of Appeal Act*, R.S.S. 1930, c. 48, it was duty-bound to reconsider the evidence:

> We are dealing with an appeal from a decision of a Judge sitting without a jury, and it is therefore our duty to reconsider the evidence. This is especially true in this Court, where we are bound to give due effect to sec. 8 of *The Court of Appeal Act*, R.S.S., 1930, ch. 48. This case does not turn upon the relative credibility of witnesses, and the question of which witness is to be believed rather than another does not arise; if it did, different considerations would, of course, apply. [p. 5]

Moreover, in *Tarasoff v. Zielinsky*, at p. 138, the Court of Appeal confirmed that it was in as good a position as the trial judge to draw inferences of fact, which, in this case, was that the deceased was killed by the defendant's bull. Likewise, in *French v. French*, at p. 443, the Court of Appeal noted that it is required to act on its own view of what the evidence proves when it cannot agree with the inferences the trial judge drew from the facts:

> In the result, I can only say, with great deference, that I cannot agree with the inferences which [the trial judge] draws from the facts and, such being the case, it is my duty to act upon my own view of what the evidence proves: *The Court of Appeal Act*, R.S.S. 1930, ch. 48, sec. 8; *Lysnar v. National Bank of N.Z.*, [1935] 1 W.W.R. 625.

(See also *Wilson v. Erbach*, at p. 666.)

puis approuvé par le juge Anglin dans *Annable c. Coventry* et *Greene, Swift & Co. c. Lawrence* : voir, p. ex., *Miller c. Foley & Sons*; *Messer c. Messer*; *Monaghan c. Monaghan*; *Kowalski c. Sharpe*; *Tarasoff c. Zielinsky*; *Matthewson c. Thompson*; *French c. French*, p. 443; *Wilson c. Erbach*, p. 666.

261 Par exemple, dans l'affaire *Miller c. Foley & Sons*, où l'appel visait uniquement une conclusion de fait tirée par le juge de première instance, la Cour d'appel a conclu que, [TRADUCTION] « [d]ans une affaire de ce genre, la règle veut sans aucun doute que la Cour réentende l'affaire et infirme la décision lorsque, après un examen minutieux, elle est convaincue de son caractère erroné » (p. 665). De même, dans *Monaghan c. Monaghan*, la Cour d'appel a confirmé que, suivant l'art. 8 de la *Court of Appeal Act*, R.S.S. 1930, ch. 48, elle avait l'obligation de réexaminer la preuve :

> [TRADUCTION] Nous sommes saisis de l'appel de la décision d'un juge siégeant sans jury, et il est donc de notre devoir de réexaminer la preuve, d'autant plus qu'il nous incombe d'assurer l'application de l'art. 8 de la *Court of Appeal Act*, R.S.S. 1930, ch. 48. Le règlement du litige ne tient pas à la crédibilité relative des témoins, et il ne s'agit pas d'ajouter foi à un témoin plutôt qu'à un autre; évidemment, si tel était le cas, des considérations différentes s'appliqueraient. [p. 5]

262 En outre, dans l'affaire *Tarasoff c. Zielinsky*, la Cour d'appel a confirmé à la p. 138 qu'elle était aussi bien placée que le juge de première instance pour tirer une inférence de fait et conclure, en l'espèce, que le défunt avait été tué par le taureau du défendeur. Aussi, dans *French c. French*, p. 443, elle a indiqué qu'elle devait statuer en fonction de sa propre appréciation de la preuve lorsqu'elle ne pouvait faire siennes les inférences que le juge de première instance avait tirées des faits :

> [TRADUCTION] Par conséquent, je peux seulement dire, en toute déférence, que je ne peux être d'accord avec les inférences que [le juge de première instance] tire des faits. Je dois donc statuer en me fondant sur ma propre appréciation de la preuve : *The Court of Appeal Act*, R.S.S. 1930, ch. 48, art. 8; *Lysnar c. National Bank of N.Z.*, [1935] 1 W.W.R. 625.

(Voir également *Wilson c. Erbach*, p. 666.)

263 Not only did the Saskatchewan Court of Appeal adopt the rehearing approach to appellate review in cases decided long before the decisions of this Court in *Lensen v. Lensen*, [1987] 2 S.C.R. 672, and *Housen* (discussed below), following these two decisions, the Court of Appeal also appears to have maintained its adherence to this form of appellate review.

Non seulement la Cour d'appel de la Saskatchewan a adopté l'appel par voie de nouvelle audition bien avant les arrêts *Lensen c. Lensen*, [1987] 2 R.C.S. 672, et *Housen* de notre Cour (sur lesquels je reviendrai), mais elle semble avoir continué depuis de privilégier cette forme de révision en appel.

264 For instance, in *Valley Beef Producers Co-operative*, the Court of Appeal took occasion to examine in detail the provisions of *The Court of Appeal Act, 2000*, given its newness at the time and the concern among members of the bar of the Province that the role of the court is on the wane, in that it will not or cannot address appeals as robustly as it once did. The court explained this concern in the following manner:

> The concern, which seems to have been mounting over the last several years, stems from what are nowadays referred to in increasingly comprehensive terms as the "standards of appellate review", a continually evolving set of uniform, national standards governing the determination of issues of fact and questions of law raised before the court on appeal. It behoves us to recognize this concern and to address it. [para. 32]

À titre d'exemple, dans l'arrêt *Valley Beef Producers Co-operative*, la Cour d'appel a saisi l'occasion d'examiner en détail la *Loi de 2000 sur la Cour d'appel*, étant donné sa nouveauté à l'époque et la crainte des avocats de la province que la Cour d'appel ne connaisse un déclin du fait qu'elle ne voudrait ou ne pourrait plus instruire les appels avec la vigueur d'autrefois. Voici comment la Cour d'appel a expliqué cette appréhension :

> [TRADUCTION] La crainte, qui semble s'être accrue ces dernières années, est due aux « normes de révision en appel » — expression de plus en plus générale aujourd'hui consacrée —, un ensemble de normes nationales uniformes en constante évolution régissant le règlement des questions de fait et de droit soulevées devant la Cour d'appel. Il nous faut reconnaître cette crainte et en tenir compte. [par. 32]

265 In its interpretation of *The Court of Appeal Act, 2000*, the court noted that the right of appeal conferred by s. 7(2)(a), and augmented by s. 13 when unlimited, is "a right of the person which has first and foremost to do with relief from error or deficiency, if such be found, in the decision affecting that person" (para. 65). With regard to s. 12(1), the court stated that the legislature "could hardly have expressed itself in broader terms, evincing an intention to fully empower the court to take such steps in respect of the decision under appeal as occasion requires" (para. 70). Although full consideration of ss. 13 and 14 was not needed to decide the case, which essentially involved the trial judge's identification and application of the governing law, the court nevertheless went on to state that "[s]ection 14 is concerned with issues of fact, as is s. 13, but it extends beyond this, inasmuch as it goes on to empower the court to pronounce judgment, which entails the application of law to fact once properly established" (para. 73). The court concluded that

Dans son analyse de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel a signalé que le droit d'appel conféré par l'al. 7(2)a), et accru par l'art. 13 lorsque aucune restriction ne s'applique, est [TRADUCTION] « un droit permettant d'abord et avant tout à son titulaire d'obtenir la réparation de toute erreur ou lacune décelée dans la décision qui le touche » (par. 65). En ce qui concerne le par. 12(1), elle a affirmé que le législateur [TRADUCTION] « aurait pu difficilement s'exprimer de manière plus générale, ce qui traduit l'intention d'investir véritablement la Cour d'appel du pouvoir de prendre les mesures qui s'imposent à l'égard de la décision portée en appel » (par. 70). Même s'il n'était pas nécessaire d'analyser les art. 13 et 14 pour statuer dans cette affaire, qui portait essentiellement sur la définition et l'application du droit applicable par le juge de première instance, la Cour d'appel a néanmoins ajouté que [TRADUCTION] « [l]'art. 14, à l'instar de l'art. 13, vise les questions de fait, mais va plus loin et habilite la Cour d'appel à rendre jugement, ce qui suppose l'application du

"[a]ll of this, of course, dovetails with the notion of appeal by way of re-hearing."

As for the central issue in the appeal — in what circumstances will the Court of Appeal exercise its remedial powers conferred on it by s. 12(1) and take issue with a chambers judge's decision on the grounds of (i) the judge's identification of the governing law and (ii) the judge's application of that law to the facts of the case — the court held that the court will exercise these powers "if satisfied of material error of law or material deficiency in respect of the decision under appeal" (para. 92). Moreover, although the court was of the view that appeal by way of rehearing remains the case in Saskatchewan, to the extent the basis for the exercise of the powers conferred on the court is expressed in terms of "standards of review", it went on to offer its opinion as to the standards in Saskatchewan (paras. 95-96).

First, with regard to questions of law, which, in the court's view, include both the judge's identification of the law as well as the judge's application of the law to the facts, the court stated that the standard in Saskatchewan was correctness (paras. 96 and 111). On this point, the court acknowledged that its decision was in contrast with the majority opinion in *Housen*; it attempted to justify this conflict in a number of ways, including by noting that the decision in *Housen* did not address the Saskatchewan Act (para. 108). Second, with regard to questions of fact, the court held that, for so-called primary and secondary facts (i.e., what I term "factual findings" and "inferences of fact") that are not dependent on hearing *viva voce* evidence or assessments of credibility, "no greater measure of deference is called for than that pertaining to the office of the judge, who being a superior court judge may be presupposed to have made reasonable findings of fact" (para. 117). In contrast, for findings of fact that do arise out of *viva voce* evidence and assessments of credibility, the court held that "again the court will address the issue on the standard of 'reasonableness', determined on the same basis and to the same extent as otherwise, but accompanied by an

droit aux faits dûment établis » (par. 73). La Cour d'appel a conclu que [TRADUCTION] « [t]out cela, évidemment, cadre bien avec la notion d'appel par voie de nouvelle audition. »

266 En ce qui a trait à la principale question en litige dans le présent pourvoi — dans quelles circonstances la Cour d'appel exercera les pouvoirs de réparation que lui confère le par. 12(1) et marquera son désaccord avec la décision du juge en chambre quant (i) à la définition du droit applicable et (ii) à l'application de ce droit aux faits de l'espèce —, la Cour d'appel a conclu qu'elle exercera ces pouvoirs [TRADUCTION] « si elle est convaincue qu'une erreur de droit ou une lacune importantes entache la décision portée en appel » (par. 92). De plus, même si elle était d'avis que l'appel par voie de nouvelle audition s'appliquait toujours en Saskatchewan, dans la mesure où le fondement de l'exercice de ses pouvoirs reprenait la terminologie des « normes de contrôle », la Cour d'appel s'est aussi prononcée sur les normes applicables en Saskatchewan (par. 95-96).

267 Premièrement, en ce qui concerne les questions de droit, qui, selon elle, comprennent tant la définition du droit que son application aux faits, la Cour d'appel a dit que la norme applicable en Saskatchewan était celle de la décision correcte (par. 96 et 111). Sur ce point, elle a reconnu que sa décision allait à l'encontre de l'opinion majoritaire dans l'arrêt *Housen*; elle a tenté de justifier cette contradiction de nombreuses façons, notamment en signalant que l'arrêt *Housen* ne faisait pas mention de la loi sur la Cour d'appel de la Saskatchewan (par. 108). Deuxièmement, au chapitre des questions de fait, elle a conclu que les conclusions relatives à des faits dits essentiels et secondaires (que j'appelle « conclusions factuelles » et « inférences de fait ») qui ne tiennent pas à l'audition des témoignages de vive voix ni à l'appréciation de la crédibilité, [TRADUCTION] « ne commandent pas une plus grande déférence que la charge du juge, dont on peut présupposer, s'agissant d'un juge d'une cour supérieure, qu'il a tiré des conclusions de fait raisonnables » (par. 117). À l'opposé, dans le cas des conclusions de fait découlant de témoignages entendus de vive voix et de l'appréciation de la crédibilité, la Cour d'appel a statué que, [TRADUCTION] « encore

appreciably higher measure of deference by reason of the judge's advantage, denied this court, of having seen and heard the witnesses" (para. 119).

268 While it is apparent that there is some divergence between my conclusion and that of the Court of Appeal in *Valley Beef Producers Co-operative* regarding the circumstances in which the Court of Appeal will interfere with the trial judge's decision and instead apply its own view of the evidence, this is of secondary importance. If necessary, the conflict can be reconciled by this Court. What is of primary importance is the fact that in *Valley Beef Producers Co-operative*, a decision that was rendered after *The Court of Appeal Act, 2000* was enacted and post-*Housen*, the Court of Appeal confirmed that in Saskatchewan, at least, "appeal by way of rehearing remains the case" (para. 95).

269 This understanding of the nature of appellate review in Saskatchewan was repeated by the Court of Appeal in the case at bar: see *H.L.* (C.A.), at para. 77.

(b) *Reconciliation of Cases That Appear to Conflict With Conclusion That the Nature of Appellate Review in Saskatchewan Is by Way of Rehearing*

270 To the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with my conclusion regarding the nature and (so-called) standards of review in Saskatchewan, in my view, they can be reconciled in one of three ways: (i) they can be limited to their specific *rationes decidendi*; (ii) they can be distinguished because they do not refer to *The Court of Appeal Act, 2000* or its predecessors or (iii) they may simply require reconsideration in light of the above analysis regarding the nature of appellate review in Saskatchewan. In this section, I will discuss in turn each of the cases cited by Fish J. that appear to conflict with my understanding that the nature of appellate review in Saskatchewan is by way of rehearing.

une fois, elle appliquera la norme de la "raisonnabilité", de la même manière et dans la même mesure, mais en faisant preuve d'une déférence sensiblement plus grande en raison de l'avantage que confère au juge, à l'exclusion de la Cour d'appel, le fait d'avoir vu et entendu les témoins » (par. 119).

Il semble y avoir une certaine divergence entre ma conclusion et celle de la Cour d'appel dans *Valley Beef Producers Co-operative* quant aux circonstances dans lesquelles la Cour d'appel peut modifier la décision du juge de première instance en se fondant plutôt sur sa propre appréciation de la preuve, mais elle a peu d'importance. Notre Cour peut au besoin concilier les deux points de vue. Il importe surtout que, dans *Valley Beef Producers Co-operative*, une décision rendue après l'adoption de la *Loi de 2000 sur la Cour d'appel* et après l'arrêt *Housen*, la Cour d'appel a confirmé que [TRADUCTION] « l'appel par voie de nouvelle audition s'applique toujours », du moins en Saskatchewan (par. 95).

Dans la présente affaire, la Cour d'appel a de nouveau adopté cette position sur la nature de la révision en appel dans la province : voir *H.L.* (C.A.), par. 77.

b) *Conciliation avec les arrêts qui semblent contredire ma conclusion selon laquelle, en Saskatchewan, l'appel est instruit par voie de nouvelle audition*

Les arrêts de notre Cour et de la Cour d'appel de la Saskatchewan qui semblent contredire ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables dans la province peuvent, à mon avis, être conciliés avec elle de trois façons : (i) en ne retenant que leur *ratio decidendi*, (ii) en les distinguant parce qu'ils ne font mention ni de la *Loi de 2000 sur la Cour d'appel* ni des lois qu'elle a remplacées, ou (iii) en les réexaminant simplement à la lumière de l'analyse qui précède concernant la nature de la révision en appel en Saskatchewan. J'examinerai ci-après chacun des arrêts cités par le juge Fish qui semblent aller à l'encontre de ma conclusion selon laquelle l'appel est instruit par voie de nouvelle audition en Saskatchewan.

(i) *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz*

Prior to *Lensen* (discussed below), the leading case in Saskatchewan regarding appellate review was *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244. In this case, Sherstobitoff J.A., for himself and for Tallis J.A., held that "palpable and overriding error" is the proper standard to apply to intervention by a Court of Appeal in respect of findings of fact by a trial judge. Although Sherstobitoff J.A. acknowledged that a "rehearing" is similar to what s. 8 (now s. 14) of *The Court of Appeal Act* requires of the court, he also stated:

> While, on its face, s. 8 appears to confer not only the power, but a duty to "rehear" or "retry" a case, simple fairness and justice require a court of appeal to recognize that a trial judge has an immense advantage in assessing evidence and arriving at findings of fact as opposed to a court of appeal which is confined to an examination of a cold black and white record of a trial proceeding, completely devoid of the tension, emotion, colour, and atmosphere of a trial, all of which factors are immeasurably important in assisting a trial judge in arriving at his conclusions. It is for these reasons that a court of appeal must extend very substantial deference to the finding of facts of a trial judge. The issue has been considered on many occasions by the Supreme Court of Canada and its decisions bear these principles out. [p. 248]

After canvassing the case law to date regarding an appellate court's jurisdiction to review findings of fact, Sherstobitoff J.A. summarized the generally accepted principles that emerged from the authorities as follows:

> 1. This court is obliged under s. 8 of the *Court of Appeal Act* to review the impugned findings of fact of a trial judge and if it finds error, to make its own findings of

(i) L'arrêt *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz*

271 Avant l'arrêt *Lensen* (que j'examine plus loin), en Saskatchewan, l'arrêt de principe en matière de révision en appel était *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244. Dans cet arrêt, s'exprimant également au nom du juge Tallis, le juge Sherstobitoff a conclu que la norme applicable à l'intervention de la Cour d'appel à l'égard d'une conclusion de fait du juge de première instance était celle de « l'erreur manifeste et dominante ». Même s'il a reconnu que ce que l'art. 8 de la *Court of Appeal Act* (devenu l'art. 14 de la *Loi de 2000 sur la Cour d'appel*) exigeait de la Cour d'appel s'apparentait à une « nouvelle audition », le juge Sherstobitoff a dit par ailleurs :

> [TRADUCTION] Si, à première vue, l'art. 8 paraît conférer non seulement le pouvoir, mais aussi l'obligation de « réentendre » l'affaire ou de l'« instruire à nouveau », la simple équité et la justice la plus élémentaire requièrent d'un tribunal d'appel qu'il reconnaisse que le juge de première instance a l'immense avantage de pouvoir apprécier les témoignages et de constater les faits, par opposition à un tribunal d'appel, confiné à l'étude froide, sans nuance, du dossier de première instance, dénué de la tension, de l'émotion, du pittoresque et de l'atmosphère qui ont imprégné le procès et qui sont tous des facteurs incommensurablement importants et si utiles au juge de première instance pour arriver à ses conclusions. C'est pour ces raisons qu'un tribunal d'appel doit traiter avec une grande déférence les constatations de fait du juge de première instance. La Cour suprême du Canada a examiné la question à de nombreuses occasions et ces principes ressortent de ses arrêts. [p. 248]

272 Après un examen approfondi de la jurisprudence relative au pouvoir d'une cour d'appel de réviser une conclusion de fait, le juge Sherstobitoff a résumé ainsi les principes généralement reconnus qui s'en dégageaient :

> [TRADUCTION]
>
> 1. La Cour d'appel doit, suivant l'art. 8 de la *Court of Appeal Act*, examiner les conclusions de fait contestées du juge de première instance et, si elle décèle une erreur,

fact where possible in substitution for those of the trial judge.

2. In a review of the findings of fact of a trial judge, the proper starting point is deference to a trial judge's findings in recognition of the great advantage which a trial judge has in assessing the evidence.

3. With respect to determinations of credibility and findings of fact based thereon, a court of appeal should not intervene unless it is certain that the trial judge erred and can identify the critical error.

4. Where the issue is the trial judge's view of the evidence as a whole, a court of appeal should not interfere unless there has been a palpable or overriding error. It must be shown that the trial judge has failed to use or has palpably misused his advantage.

5. Where there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error. [Emphasis in original; p. 251.]

273 Although this does not dispose of all the points of conflict between the decision in *Long Lake School Division* and my conclusion in these reasons, it must be noted that in his reasons Sherstobitoff J.A. accepted that a "rehearing" is similar to what s. 8 of *The Court of Appeal Act* requires of the Court of Appeal, and he acknowledged that "[t]his court is obliged under s. 8 of the *Court of Appeal Act* to review the impugned findings of fact of a trial judge and if it finds error, to make its own findings of fact where possible in substitution for those of the trial judge" (p. 251). These comments regarding the court's power to conduct an appeal by way of (or at least similar to) rehearing are in contrast with Fish J.'s assertion at para. 98 of his reasons that "[n]o decision has been drawn to our attention where the court has asserted a power of review by rehearing."

274 Furthermore, and contrary to Fish J.'s assertion in his reasons at para. 93, it is arguable that Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings ought to be

tirer ses propres conclusions de fait et les substituer, dans la mesure du possible, à celles du juge de première instance.

2. Lors de leur examen, les conclusions de fait du juge de première instance commandent de prime abord une grande déférence étant donné l'énorme avantage dont jouit le juge du procès pour apprécier la preuve.

3. En ce qui concerne l'appréciation de la crédibilité et les conclusions de fait fondées sur celle-ci, une cour d'appel ne doit intervenir que si elle est convaincue que le juge de première instance a commis une erreur et que si l'erreur fatale peut être déterminée.

4. Lorsque le litige porte sur des conclusions que le juge de première instance a tirées de la preuve dans son ensemble, une cour d'appel ne doit intervenir qu'en cas d'erreur manifeste ou dominante. Il doit être démontré que le juge de première instance n'a pas mis son avantage à profit ou que, de toute évidence, il l'a fait à mauvais escient.

5. Lorsqu'une conclusion de fait est étayée par un élément de preuve, une cour d'appel ne doit pas intervenir en l'absence d'une erreur manifeste ou démontrable. [Souligné dans l'original; p. 251.]

Même si cela ne règle pas tous les points de divergence entre l'arrêt *Long Lake School Division* et ma conclusion en l'espèce, il faut noter que, dans ses motifs, le juge Sherstobitoff a reconnu que la « nouvelle audition » s'apparente à ce que l'art. 8 de la *Court of Appeal Act* exige de la Cour d'appel et que celle-ci [TRADUCTION] « [d]oit, suivant l'art. 8 de la *Court of Appeal Act*, examiner les conclusions de fait contestées du juge de première instance et, si elle décèle une erreur, tirer ses propres conclusions de fait et les substituer, dans la mesure du possible, à celles du juge de première instance » (p. 251). Ces propos concernant le pouvoir de la Cour d'appel d'instruire l'appel par voie de nouvelle audition (ou, à tout le moins, d'une manière qui s'y apparente) vont à l'encontre de ceux du juge Fish, au par. 98 de ses motifs, selon lesquels « [n]ulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention. »

En outre, et contrairement à ce qu'affirme le juge Fish au par. 93 de ses motifs, on peut soutenir que les propos du juge Sherstobitoff sur la nécessité de faire preuve de déférence en appel à l'égard des

restricted to matters that engage the special advantage of the trial judge, which include but are not limited to assessments of credibility. For instance, although Sherstobitoff J.A. refers simply to a "finding of fact" when he states in his fifth numbered point quoted above that "[w]here there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error", in the three previous points, he makes reference to the special advantage of the trial judge and circumstances that engage it, namely, determinations of credibility and viewing the evidence as a whole. Thus, it can be argued that, in light of his discussion of the special advantage of the trial judge immediately preceding it, Sherstobitoff J.A.'s reference to a "finding of fact" in his fifth point (and the appellate deference it is owed) ought to be read as pertaining to only those findings that engage the special advantage of the trial judge. This argument is strengthened by Sherstobitoff J.A.'s conclusion on this point in the appeal that "[t]he matter reduces itself to whether the trial judge erred in accepting the evidence of Schatz as to intent. This is a matter of credibility where an appeal court should not interfere" (p. 252). Reading down Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings in this manner would accord with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

To the extent that it remains unclear whether Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings can be restricted to matters that engage the special advantage of the trial judge or whether they are to apply to

conclusions factuelles ne s'appliquent qu'aux questions qui font jouer l'avantage particulier du juge de première instance, dont l'appréciation de la crédibilité. Par exemple, alors qu'il ne renvoie qu'à une « conclusion de fait » en affirmant au point 5 que, [TRADUCTION] « [l]orsqu'une conclusion de fait est étayée par un élément de preuve, une cour d'appel ne doit pas intervenir en l'absence d'une erreur manifeste ou démontrable », le juge Sherstobitoff renvoie, aux trois points précédents, à l'avantage particulier du juge de première instance et aux circonstances dans lesquelles joue cet avantage, soit dans l'appréciation de la crédibilité et de la preuve dans son ensemble. Compte tenu de son analyse précédente de l'avantage dont jouit le juge de première instance, il faut donc conclure que lorsqu'il renvoie à une « conclusion de fait » au cinquième point (et à la déférence qu'elle commande en appel), le juge Sherstobitoff ne vise que la conclusion faisant jouer l'avantage particulier du juge de première instance. Cette prétention est étayée par sa conclusion selon laquelle [TRADUCTION] « [l]a question fondamentale dans cette affaire est de savoir si le juge de première instance a commis une erreur en admettant le témoignage de M. Schatz relatif à l'intention. Il s'agit d'une question de crédibilité à l'égard de laquelle une cour d'appel ne devrait pas intervenir » (p. 252). Cette interprétation atténuée des propos du juge Sherstobitoff concernant la déférence que commande en appel une conclusion factuelle se concilie avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel, de sorte que lorsque les conclusions factuelles du juge de première instance feront jouer cet avantage particulier, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits.

275 Dans la mesure où l'on ne peut affirmer avec certitude que les propos du juge Sherstobitoff sur la déférence que commandent en appel les conclusions factuelles ne s'appliquent qu'aux questions faisant jouer l'avantage particulier du juge de première

all factual findings and inferences, I would simply say that the reasoning in this case may be in need of reconsideration in light of my analysis regarding the nature and (so-called) standards of appellate review in Saskatchewan. In *H.L.* (C.A.), the Court of Appeal acknowledged that this might be the case and stated that:

> In *Board of Education of Long Lake School Division No. 30 v. Schatz et al.*, we made some effort to reconcile the general standards of review as they were then emerging with what was then section 8, and is now section 14, of the *Act*. However, we did not then appreciate where the continuing evolution of these standards would ultimately lead. The appeal in that case centred on a finding of fact based on the trial judge's assessment of the credibility and reliability of the testimony of one of the parties, whose intention was in issue. That, of course, made it unnecessary, strictly speaking, to do more than accommodate the test of "palpable and overriding error" to what is now section 14. In any event, given the way all of this has played out, we may have to reconsider some of what we had to say in *Schatz* in light of what a closer examination of sections 13 and 14 reveals. [para. 91]

276 Moreover, it must be noted that Wakeling J.A. dissented in *Long Lake School Division*. His comments support my position that the court's decision in this case may be in need of reconsideration. In particular, Wakeling J.A. noted that the appellate process is based upon the generally accepted view that three or more heads are better than one and that this was probably the reason for the broad language employed in s. 8 of *The Court of Appeal Act* (1978): *Long Lake School Division*, at p. 254. In this regard, Wakeling J.A. stated:

> There can be little doubt as to the extent of the legal mandate that has been given this court, and if review on appeal is to be as meaningful as the legislators clearly intended, I see no reason for limiting this right of appellate review to the point where the conclusion reached by the trial judge is completely unsupportable, or misses the mark so widely as to call into question whether the mark was ever a point of aim. I make this point for I am of the opinion that it is possible to so focus on the restrictions on appellate review that one useful aspect of the appeal process relating to factual considerations becomes largely emasculated. The party suffering from a judicial error of

instance, et non à toutes les conclusions et inférences factuelles, je me contenterai de dire qu'il pourrait être nécessaire de réexaminer le raisonnement suivi dans cet arrêt à la lumière de mon analyse de la nature de la révision en appel et des « normes de contrôle » en appel applicables en Saskatchewan. Dans *H.L.* (C.A.), la Cour d'appel en a convenu et a affirmé :

> [TRADUCTION] Dans *Board of Education of Long Lake School Division No. 30 c. Schatz et al.*, nous avons tenté de concilier les normes générales de révision qui se dessinaient à l'époque avec l'ancien art. 8, devenu l'art. 14, de la *Loi*. Cependant, nous ne nous rendions pas compte alors des répercussions qu'aurait ultimement la constante évolution de ces normes. Dans cette affaire, l'appel visait une conclusion de fait fondée sur l'appréciation, par le juge de première instance, de la crédibilité et de la fiabilité du témoignage de l'une des parties, dont l'intention était en cause. Ce qui a pour ainsi dire rendu inutile, à proprement parler, de faire plus qu'adapter le critère de l'« erreur manifeste et dominante » à l'actuel art. 14. Quoi qu'il en soit, étant donné la façon dont les choses ont évolué, nous devrons peut-être réexaminer certaines de nos affirmations dans *Schatz* à la lumière de ce que révélera un examen plus approfondi des art. 13 et 14. [par. 91]

Signalons en outre la dissidence du juge Wakeling, qui étaye ma thèse qu'il pourrait être nécessaire de réexaminer l'arrêt *Long Lake School Division* de la Cour d'appel. Plus particulièrement, le juge Wakeling a dit que le processus d'appel reposait sur le principe bien connu que trois têtes ou plus valent mieux qu'une, et que cela expliquait probablement l'emploi de termes généraux à l'art. 8 de la *Court of Appeal Act* (1978) : *Long Lake School Division*, p. 254. Il a ajouté :

> [TRADUCTION] L'étendue du mandat légal de notre Cour ne fait aucun doute, et si la révision en appel doit avoir toute l'importance que le législateur a clairement voulu lui donner, je ne vois aucune raison de limiter l'application de ce droit d'appel aux seuls cas où la conclusion tirée par le juge de première instance est totalement insoutenable ou rate tellement la cible qu'on peut se demander si elle a jamais été visée. J'insiste sur ce point car, à mon avis, il est possible de mettre l'accent sur les limitations de la révision en appel au point d'affaiblir considérablement un aspect utile du processus d'appel ayant trait aux considérations factuelles. La victime d'une opinion

opinion has only the slightest opportunity for correction, even though such party suffers an injustice which in my view must be as hard to accept as that arising from an error of law. [pp. 254-55]

Wakeling J.A. concluded his reasons in this case by stating that it would be a strange anomaly if

in a province which apparently grants this court the broadest powers of review of any appellate court in Canada (*Hallberg v. Canadian National Railway Company* (1955), 16 W.W.R. (N.S.) 539, at 544), we are nonetheless as restrictive as any such court in our ability to review evidence given at trial (where such evidence is not subject to degrees of credibility) and to differ from a trial judge's conclusions of fact drawn from such evidence. [p. 259]

(ii) *Tanel v. Rose Beverages (1964) Ltd.* and *Sisson v. Pak Enterprises Ltd.*

In *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), both Bayda C.J.S., for himself and Wakeling J.A., and Vancise J.A. in dissent followed and applied the principles regarding the review of a trial judge's findings of fact that were set out by Sherstobitoff J.A. in *Long Lake School Division*. Cameron J.A., for himself, Gerwing and Sherstobitoff JJ.A., in *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232 (C.A.), did likewise. Therefore, I do not consider it necessary to analyse these cases separately. To the extent that the decision in *Long Lake School Division* can be reconciled with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan, so too then can the decisions in these two cases. If it needs to be reconsidered, so do these other cases.

(iii) *Lensen*

In *Lensen*, this Court addressed whether it is proper for the Court of Appeal to reverse a finding of fact made by a judge at first instance. In his reasons for the Court, Dickson C.J. made explicit reference to s. 8 of *The Court of Appeal Act* (1978), and noted that "[d]espite its apparently broad language, s. 8 has been given a relatively narrow interpretation": p. 682, citing the Court of Appeal's decision

judiciaire erronée n'a qu'une infime possibilité d'obtenir réparation, et ce, même si elle subit une injustice qui, à mon sens, doit être aussi difficile à accepter que celle résultant d'une erreur de droit. [p. 254-255]

277 Le juge Wakeling a conclu en affirmant qu'il serait vraiment illogique que :

[TRADUCTION] dans une province qui accorde apparemment à la Cour d'appel les pouvoirs de révision les plus larges jamais conférés à une cour d'appel au Canada (*Hallberg c. Canadian National Railway Company* (1955), 16 W.W.R. (N.S.) 539, p. 544), nous restreignions néanmoins comme les autres cours d'appel notre capacité d'examiner la preuve présentée au procès (lorsque le degré de vraisemblance de cette preuve ne varie pas) et de nous dissocier des conclusions de fait que le juge de première instance a tirées de cette preuve. [p. 259]

(ii) Les arrêts *Tanel c. Rose Beverages (1964) Ltd.* et *Sisson c. Pak Enterprises Ltd.*

278 Dans l'arrêt *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), tant le juge en chef Bayda, s'exprimant également au nom du juge Wakeling, que le juge Vancise, dissident, ont suivi et appliqué les principes énoncés par le juge Sherstobitoff dans *Long Lake School Division* pour la révision des conclusions de fait du juge de première instance. Dans l'arrêt *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232 (C.A.), le juge Cameron a fait de même, les juges Gerwing et Sherstobitoff souscrivant à ses motifs. Il n'est donc pas nécessaire d'analyser séparément ces décisions. Si l'arrêt *Long Lake School Division* peut être concilié avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan, ces deux arrêts peuvent l'être aussi. Si l'arrêt *Long Lake School Division* doit être réexaminé, ces deux-là aussi.

(iii) L'arrêt *Lensen*

279 Dans l'arrêt *Lensen*, notre Cour s'est demandé si la Cour d'appel pouvait à bon droit infirmer une conclusion de fait du juge de première instance. Dans les motifs qu'il a rédigés au nom de notre Cour, le juge en chef Dickson a renvoyé expressément à l'art. 8 de la *Court of Appeal Act* (1978) et a affirmé que « [m]algré sa formulation apparemment générale, l'art. 8 a reçu une interprétation

in *Long Lake School Division* in support. In this regard, Dickson C.J. stated:

> It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts": . . . . While section 8 of the Saskatchewan *Court of Appeal Act* authorizes the Court of Appeal to "draw inferences of fact", this task must be performed in relation to facts as found by the trial judge. Unless the trial judge has made some "palpable and overriding error" in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings. [Emphasis added; pp. 683-84.]

280 In terms of reconciling the decision of this Court in *Lensen* with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan, two points must be made. First, to the extent that the decision in *Lensen* relies upon the Court of Appeal's decision in *Long Lake School Division*, I simply refer to my earlier comments regarding that case. Second, the specific issue in *Lensen* was "whether the trial judge found as a fact that no oral agreement existed between the parties and, if so, whether the Court of Appeal erred by substituting its version of the facts" (p. 679). Dickson C.J. held that it was clear that the trial judge had made a finding that there was no agreement as alleged between the parties. Moreover, he held that "the trial judge was entitled to believe the defendant father's evidence and the evidence of his witnesses and reject the son's testimony and the testimony of his witnesses as to the existence of an oral contract between the parties": p. 684. Thus, Dickson C.J. concluded that because the trial judge did not make any palpable and overriding error in his assessment of the facts, the Court of Appeal exceeded its role as set out in s. 8 of the Act when it substituted its version of the facts for that given by the trial judge.

relativement étroite » : p. 682, citant à l'appui l'arrêt *Long Lake School Division* de la Cour d'appel. Il a ajouté :

> C'est un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne puisse être établi que le juge de première instance « a commis une erreur manifeste et dominante qui a faussé son appréciation des faits » : [. . .] Certes, l'art. 8 de la *Court of Appeal Act* de la Saskatchewan autorise la Cour d'appel à [TRADUCTION] « faire des déductions de fait », mais cela doit être accompli en fonction des faits constatés par le juge de première instance. À moins que le juge de première instance n'ait commis quelque « erreur manifeste et dominante » à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle joué traditionnellement par la Cour d'appel en ce qui concerne ces constatations. [Je souligne; p. 683-684.]

Pour ce qui est de concilier l'arrêt *Lensen* de notre Cour avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan, deux remarques s'imposent. Premièrement, dans la mesure où cet arrêt se fonde sur l'arrêt *Long Lake School Division* de la Cour d'appel, je renvoie tout simplement à mes observations précédentes sur celui-ci. Deuxièmement, dans *Lensen*, la question en litige était de « savoir si le juge de première instance a effectivement constaté qu'il n'existait aucun contrat verbal entre les parties et, dans l'affirmative, si la Cour d'appel a commis une erreur en substituant sa propre version des faits » (p. 679). Pour le juge en chef Dickson, il était clair que le juge de première instance avait conclu, contrairement à ce qui était allégué, qu'aucune convention n'était intervenue entre les parties. Il a ajouté : « le juge de première instance était en droit d'ajouter foi aux dépositions du père défendeur et de ses témoins, et de rejeter celles du fils et des siens, concernant l'existence d'un contrat verbal entre les parties » (p. 684). Le juge de première instance n'ayant commis aucune erreur manifeste et dominante dans son appréciation des faits, le juge en chef Dickson a donc conclu que la Cour d'appel avait outrepassé le pouvoir conféré à l'art. 8 de la *Court of Appeal Act* en substituant sa version des faits à celle du juge de première instance.

From this brief review, it is clear that the factual finding at issue in *Lensen* (i.e., whether an oral contract existed between the parties) was dependent on the trial judge's assessments of credibility; therefore, I conclude that this Court's decision in *Lensen* must be limited to its specific *ratio decidendi*, which, in my view, is the following: findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts" (p. 684). If this Court's decision in *Lensen* is limited in this way, it accords with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage (e.g., when based on credibility), the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

Il ressort de ce bref examen que la conclusion factuelle contestée dans l'affaire *Lensen* (celle relative à l'existence d'un contrat verbal entre les parties) tenait à l'appréciation de la crédibilité par le juge de première instance. J'arrive donc à la conclusion que seule la *ratio decidendi* de cet arrêt vaut en l'espèce et, selon moi, cette *ratio decidendi* est la suivante : les conclusions de fait tirées en première instance sur le fondement de la crédibilité des témoins ne peuvent être infirmées en appel que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante qui a faussé son appréciation des faits » (p. 684). Sa portée ainsi limitée, l'arrêt *Lensen* se concilie avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel, de sorte que lorsque la conclusion factuelle du juge fait jouer cet avantage particulier (c'est-à-dire lorsqu'elle se fonde sur la crédibilité), la Cour d'appel n'intervient et ne substitue sa propre appréciation de la preuve à celle du juge de première instance que si ce dernier a commis une erreur manifeste et dominante d'appréciation des faits. 281

Nevertheless, I do acknowledge that in the excerpt from *Lensen* quoted above, Dickson C.J. states that while s. 8 of the Act authorizes the Court of Appeal to draw inferences of fact, this task (inference drawing) must be performed in relation to facts as found by the trial judge, and, unless the trial judge has made some palpable and overriding error in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings. I also acknowledge that, at first blush, this statement may appear to suggest that a palpable and overriding error standard should also apply to inferences. However, a closer reading of this statement reveals that Dickson C.J. is merely restating the principle he articulated immediately prior to this statement. In other words, he is stating that while the Act permits the Court of Appeal to draw inferences and inferences are logical conclusions based on established facts, this inference-drawing power does not change the fact that the

Je conviens néanmoins que dans l'extrait précité de l'arrêt *Lensen*, le juge en chef Dickson affirme que l'art. 8 de la *Court of Appeal Act* autorise la Cour d'appel à tirer des inférences de fait, mais que cette tâche (tirer des inférences) doit être accomplie en fonction des faits constatés par le juge de première instance. Il ajoute que, sauf erreur manifeste et dominante commise par ce dernier à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle traditionnel de la Cour d'appel en ce qui concerne ces constatations. Je conviens également que, de prime abord, cette affirmation peut donner à penser que la norme de l'erreur manifeste et dominante devrait également s'appliquer aux inférences. Or, une lecture plus attentive de l'extrait révèle que le juge en chef Dickson réaffirme seulement le principe énoncé juste auparavant. Autrement dit, selon lui, même si la loi autorise la Cour d'appel à tirer des inférences et que les inférences constituent des conclusions logiques tirées à partir de faits établis, ce pouvoir de tirer 282

court may only intervene and reverse factual findings based on the credibility of witnesses when the trial judge has made some palpable and overriding error which affected his assessment of the facts. As noted above, when the decision in *Lensen* is limited to this specific *ratio decidendi*, it is consistent with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage (e.g., when based on credibility), the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

des inférences ne change rien au fait que la Cour d'appel ne peut intervenir et infirmer des conclusions factuelles tirées sur le fondement de la crédibilité des témoins que lorsque le juge de première instance a commis une erreur manifeste et dominante ayant faussé son appréciation des faits. Comme je l'ai déjà dit, si l'on ne considère que sa *ratio decidendi*, l'arrêt *Lensen* est compatible avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel. Ainsi, lorsque les conclusions factuelles du juge de première instance font jouer cet avantage particulier (parce qu'elles sont fondées sur l'appréciation de la crédibilité), la Cour d'appel n'intervient et ne se fonde sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits.

(iv) *Bogdanoff v. Saskatchewan Government Insurance*; *Knight v. Huntington*; and *Brown v. Zaitsoff Estate*

(iv) Les arrêts *Bogdanoff c. Saskatchewan Government Insurance*, *Knight c. Huntington* et *Brown c. Zaitsoff Estate*

283 The Court of Appeal's recent decisions in *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, and *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, all deal with the issue of the conditions under which the Court of Appeal can interfere with a trial judge's decision on a question of fact. Because all of these cases explicitly rely upon this Court's decision in *Lensen*, comments regarding that case, as well as my comments regarding *Long Lake School Division*, the decision upon which *Lensen* relies, should be kept in mind when reviewing them.

Les récents arrêts *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, et *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, de la Cour d'appel, portent tous sur les conditions auxquelles elle peut modifier la décision du juge de première instance relative à une question de fait. Comme ils s'appuient tous clairement sur l'arrêt *Lensen* de notre Cour, il faut les considérer en tenant compte de mes observations sur ce dernier arrêt, ainsi que sur l'arrêt *Long Lake School Division*, dont *Lensen* s'inspire.

284 Moreover, in none of these cases was there any mention of *The Court of Appeal Act, 2000*. As I will more fully explain with regard to this Court's decision in *Housen*, this omission is indicative of a need to reconsider the precedential value of these three cases, given the uniqueness of the Saskatchewan Act.

En outre, aucun de ces arrêts ne fait mention de la *Loi de 2000 sur la Cour d'appel*. Comme je l'expliquerai plus en détail en examinant l'arrêt *Housen* de notre Cour, cette omission met en évidence la nécessité de reconsidérer la valeur jurisprudentielle de ces trois arrêts, étant donné la singularité de la Loi de la Saskatchewan.

Finally, to the extent that the Court of Appeal in these three cases applied the palpable and overriding error standard to findings of fact in which the special advantage of the trial judge is not engaged or to inferences of fact, the court's reasoning in this regard may be in need of reconsideration in light of my analysis regarding the nature and (so-called) standards of appellate review in Saskatchewan. For example (and as noted by Fish J. at para. 108 of his reasons), in *Bogdanoff v. Saskatchewan Government Insurance*, Gerwing J.A., in oral reasons for the court, applied a palpable and overriding error standard to a finding of causation. In *Brown v. Zaitsoff Estate*, Tallis J.A. applied the same standard to a finding that the respondent had not exerted undue influence on his mother. Similarly, in *Knight v. Huntington*, Sherstobitoff J.A. stated that "to the extent that [the trial judge's] findings depended upon drawing inferences of fact, the appellants must show that there was no evidence from which those conclusions could reasonably be drawn" (para. 28). In contrast, as I mentioned earlier, in Saskatchewan, where the nature of appellate review is by way of rehearing, the Court of Appeal will interfere with findings of fact that do not engage the special advantage of the trial judge when there is a simple error, and for inferences of fact, the threshold for appellate intervention is reasonableness.

285 Enfin, dans la mesure où, dans ces trois arrêts, la Cour d'appel a appliqué la norme de l'erreur manifeste et dominante à des conclusions de fait ne faisant pas jouer l'avantage particulier du juge de première instance ou à des inférences de fait, il pourrait être nécessaire de reconsidérer le raisonnement de la Cour d'appel à la lumière de mon analyse concernant la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan. Ainsi, et le juge Fish le signale au par. 108 de ses motifs, dans *Bodganoff c. Saskatchewan Government Insurance*, le juge Gerwing, s'exprimant de vive voix au nom de la Cour d'appel, a appliqué la norme de l'erreur manifeste et dominante à une conclusion sur la causalité. Dans *Brown c. Zaitsoff Estate*, le juge Tallis a appliqué la même norme à la conclusion que l'intimé n'avait exercé aucune influence indue sur sa mère. De même, dans *Knight c. Huntington*, le juge Sherstobitoff a affirmé que, [TRADUCTION] « dans la mesure où les conclusions [du juge de première instance] tenaient à des inférences de fait, les appelants doivent démontrer qu'aucun élément de preuve ne permettait raisonnablement de les tirer » (par. 28). Par contre, je le répète, en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, la Cour d'appel peut infirmer une conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance si elle est entachée d'une simple erreur; quant aux inférences de fait, la norme applicable est celle de la raisonnabilité.

(v) *Housen v. Nikolaisen*

The appeal in *Housen* arose out of a motor vehicle accident which occurred on a rural road in the Municipality of Shellbrook, Saskatchewan. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling the rural road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the municipality was negligent. At issue in the appeal to this

(v) L'arrêt *Housen c. Nikolaisen*

286 Dans l'affaire *Housen*, le pourvoi découlait d'un accident automobile survenu sur une route rurale dans la municipalité de Shellbrook, en Saskatchewan. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur une route rurale et en conduisant son véhicule en état d'ébriété. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation que lui faisait l'art. 192 de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1, de tenir le chemin dans un état raisonnable d'entretien. La Cour d'appel a infirmé sa

Court was whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. In *Housen*, the Court was divided as to the proper standard of review for questions of mixed law and fact, as well as for inferences drawn from findings of fact. In the case at bar, we are concerned only with the latter issue; that is, when the Saskatchewan Court of Appeal will interfere with a trial judge's decision regarding inferences drawn from findings of fact.

conclusion selon laquelle il y avait eu négligence de la part de la municipalité intimée. La question en litige que devait trancher notre Cour était de savoir si la Cour d'appel avait eu des motifs suffisants de modifier la décision du tribunal inférieur. La question de la norme de contrôle applicable à une question mixte de droit et de fait, ainsi qu'à une inférence tirée d'une conclusion de fait, a divisé notre Cour. Dans la présente espèce, seul ce dernier cas nous intéresse : dans quelles circonstances la Cour d'appel de la Saskatchewan peut-elle modifier la décision du juge de première instance concernant une inférence tirée d'une conclusion de fait?

287 In his reasons, Fish J. states that the majority and the minority in *Housen* shared the same view as to the standard of review for questions of fact, which include findings of fact and inferences of fact. In his opinion, "[i]t was in the application of this shared view as to the governing principle that the Court divided": para. 66 (emphasis in original). In this regard, Fish J. states that, "according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is 'not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts' which, in its view, implied a stricter standard" (para. 72, citing *Housen*, at para. 21 (emphasis in *Housen*)). Fish J. notes that the majority was concerned that drawing an analytical distinction between factual findings and factual inferences, as advocated by the minority, might lead appellate courts to involve themselves in unjustified reweighing of evidence. He also notes that the majority stated that "[i]f there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion" (para. 72, citing *Housen*, at para. 23 (emphasis in *Housen*)).

Dans ses motifs, le juge Fish dit que, dans *Housen*, les juges majoritaires et les juges minoritaires partageaient le même avis sur la norme de contrôle applicable à une question de fait, ce qui comprend la conclusion de fait et l'inférence de fait. À son avis, « [c]'est la mise en pratique de ce consensus quant au principe applicable qui a divisé notre Cour » : par. 66 (souligné dans l'original). Il ajoute que « de l'avis des juges majoritaires dans *Housen*, la révision d'une inférence de fait "ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis", ce qui, selon eux, suppose l'application d'une norme plus stricte » (par. 72, citant l'arrêt *Housen*, par. 21 (souligné dans *Housen*)). Selon le juge Fish, la majorité craignait que l'établissement d'une distinction analytique entre les conclusions factuelles et les inférences factuelles, comme le proposait la minorité, n'incite les cours d'appel à soupeser la preuve à nouveau et sans raison. Il fait également remarquer que, pour les juges majoritaires, « [s]i aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle » (par. 72, citant l'arrêt *Housen*, par. 23 (souligné dans *Housen*)).

Fish J. then goes on to clarify these passages from the majority reasons in *Housen*. Specifically, he states that they cannot be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached. Instead, Fish J. asserts that "[a]ppellate scrutiny determines whether inferences drawn by the [trial] judge are 'reasonably supported by the evidence'" (para. 74). This statement is in direct conflict with the majority's statement in *Housen* that "the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge" (para. 21 (emphasis in original)). Moreover, to the extent that Fish J.'s clarification of the majority reasons in *Housen* can be understood to mean that the views of the majority and minority as to the standard of review for inferences of fact can be reconciled, I respectfully disagree. In my view, there was a major rift between the views of the majority and the minority on this issue.

288 Le juge Fish apporte ensuite des précisions sur ces passages des motifs majoritaires dans *Housen*. Il dit qu'on ne peut en déduire que l'examen en appel des inférences du juge de première instance se limite à l'examen des conclusions relatives à des faits prouvés directement sur lesquelles elles sont fondées et du raisonnement à l'issue duquel elles ont été tirées. Il affirme plutôt que « [l]'examen en appel consiste à déterminer si les inférences du juge [de première instance] sont "raisonnablement étayées par la preuve" » (par. 74). Cette affirmation va directement à l'encontre des propos des juges majoritaires dans *Housen* selon lesquels « la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance » (par. 21 (souligné dans l'original)). De plus, dans la mesure où l'on peut conclure des précisions qu'apporte le juge Fish aux motifs des juges majoritaires dans *Housen* qu'il est possible de concilier les points de vue de la majorité et de la minorité quant à la norme de contrôle qui s'applique à l'inférence de fait, je ne peux les faire miennes. J'estime que cette question divisait profondément les juges majoritaires et les juges minoritaires.

For instance, although I agreed in my reasons for the minority in *Housen* that the standard of review is identical for both findings of fact and inferences of fact, I stated that "it is nonetheless important to draw an analytical distinction between the two" (para. 103). I was concerned that "[i]f the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings." Thus, it was my view that, "this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact". Thus, when reviewing the making of an inference, I stated that "the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles". The fact that the trial judge referred to some evidence to support his or her finding on

289 Par exemple, après avoir reconnu, dans les motifs que j'ai rédigés pour la minorité dans *Housen*, que la norme de contrôle était la même pour les conclusions de fait et les inférences de fait, j'ai indiqué qu'« il import[ait] néanmoins de faire une distinction analytique entre les deux » (par. 103). Je craignais que « [s]i le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. » J'estimais donc que « notre Cour a[vait] le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait ». J'ai opiné que « [l]a cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés ». Le

an issue will not insulate the finding from review (para. 169).

290 Iacobucci and Major JJ. for the majority in *Housen* disagreed with my articulation of the standard of review for inferences of fact in two respects. First, they stated that "the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard" (para. 21 (emphasis in original)). With respect, I still do not understand how an appellate court can reasonably make such a distinction, or how it can be said that the legislature would have wanted that a court clearly mandated to correct errors be so limited. I cannot see on what basis such a judicial policy can be justified. Second, in their view, drawing an analytical distinction between factual findings and factual inferences could lead appellate courts to engage in unjustified reweighing of the evidence. Iacobucci and Major JJ. stated that although they agreed that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, they added the caution that "where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error" (para. 22). This caution was based on the idea that "where evidence exists which supports [a factual conclusion], interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence". Because the majority felt that it is not the role of appellate courts to second-guess the weight assigned to various items of evidence, given what it perceived to be the advantageous position of the trial judge in this respect, it stated that "[i]f there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can

fait que le juge de première instance mentionne un élément de preuve à l'appui de sa conclusion n'a pas pour effet de la soustraire au contrôle (par. 169).

Au nom des juges majoritaires dans *Housen*, les juges Iacobucci et Major ont exprimé leur désaccord avec ma formulation de la norme de contrôle applicable aux inférences de fait pour deux raisons. Premièrement, selon eux, « la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte » (par. 21 (souligné dans l'original)). En toute déférence, je ne vois toujours pas comment un tribunal d'appel peut raisonnablement établir une telle distinction ni comment on peut prétendre que le législateur a voulu limiter ainsi les pouvoirs d'une cour à laquelle il a clairement enjoint de réparer toute erreur commise. Je ne vois pas comment un tel principe judiciaire pourrait être justifié. Deuxièmement, pour les juges Iacobucci et Major, établir une distinction analytique entre les conclusions factuelles et les inférences factuelles pouvait inciter les cours d'appel à soupeser la preuve à nouveau et sans raison. Ils ont convenu qu'une cour d'appel pouvait conclure qu'une inférence de fait tirée par le juge de première instance était manifestement erronée, mais ils ont ajouté : « lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante » (par. 22). Cette mise en garde reposait sur l'idée que « lorsqu'[une conclusion factuelle] est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance ». Comme, à leur avis, il n'appartenait pas à une cour d'appel de remettre en question le poids accordé aux différents éléments de preuve, compte tenu de leur perception de la situation privilégiée du juge de première instance à cet égard, les juges majoritaires ont dit que « [s]i

interfere with the factual conclusion" (para. 23 (emphasis in original)).

In response to the majority's criticism of my approach to the standard of review for inferences of fact, I would now say that we all agree that an appellate court must verify whether the making of an inference can be reasonably supported by the trial judge's findings of fact. It is the question of the standard of review that has to be addressed in more clear terms. In my view, there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her, and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic. To transport the analysis to the inference-drawing process is, in my view, of no assistance.

In light of the above discussion and in contrast with Fish J.'s assertion that it was in the application of a shared view as to the standard of review that the Court divided, I contend that the majority and the minority in *Housen* articulated different standards of review for inferences of fact. The majority was of the view that where evidence exists to support the trial judge's inference of fact, an appellate court will be hard pressed to find a palpable and overriding error. The error would have to be in the process. In contrast, the minority argued that it is not enough for an appellate court to verify that some evidence "exists" to support the trial judge's inference; rather, the appellate court must verify whether the inference can be reasonably supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. The standard articulated by the minority "entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion" (*Housen*, at para. 169).

aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle » (par. 23 (souligné dans l'original)).

291 Je répondrai maintenant à leur critique de mon point de vue sur la norme de contrôle applicable aux inférences de fait. Nous convenons tous qu'une cour d'appel doit vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance. C'est la question de la norme de contrôle applicable qui demeure nébuleuse. À mon avis, il n'y a aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » de tirer une inférence des faits établis et de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est d'ordre purement sémantique. Faire porter l'analyse sur le processus inférentiel n'est, selon moi, d'aucune utilité.

292 À la lumière de l'analyse qui précède, et contrairement à l'affirmation du juge Fish selon laquelle c'est la mise en pratique d'un consensus sur la norme de contrôle qui a divisé notre Cour, j'estime que, dans *Housen*, la majorité et la minorité ont préconisé l'application de normes de contrôle différentes aux inférences de fait. Selon les juges majoritaires, lorsque des éléments de preuve étayent l'inférence de fait du juge de première instance, une cour d'appel pourra difficilement conclure à l'existence d'une erreur manifeste et dominante. Il faudrait que l'erreur entache le processus lui-même. À l'opposé, les juges minoritaires ont estimé qu'il ne suffisait pas que la cour d'appel vérifie s'il « existe » quelque élément de preuve étayant l'inférence du juge de première instance; la cour d'appel devait plutôt se demander si l'inférence pouvait raisonnablement être étayée par les conclusions de fait du juge de première instance et si ce dernier avait appliqué les bons principes de droit. La norme proposée par la minorité « permet au tribunal d'appel de se demander si le juge de première instance a

P. M. Perell, in his article entitled "The Standard of Appellate Review and the Ironies of Housen v. Nikolaisen" (2004), 28 *Advocates' Q.* 40, at p. 52, notes that "this is a fundamental principle of Aristotelian logic, the law of contradiction that a proposition and its negation cannot both be true at the same time and in the same respect".

clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse » (*Housen*, par. 169). Dans son article intitulé « The Standard of Appellate Review and the Ironies of Housen v. Nikolaisen » (2004), 28 *Advocates' Q.* 40, p. 52, P. M. Perell signale que [TRADUCTION] « suivant un principe fondamental de la logique aristotélicienne, le principe de contradiction, deux propositions, dont l'une est la négation de l'autre, ne peuvent être vraies ensemble ».

293 My contention that the majority and the minority in *Housen* articulated different standards of review for factual inferences is supported by the fact that, on the issue of causation, the majority and minority came to opposite conclusions. For instance, the majority held that the trial judge's finding of fact that a hidden hazard existed at the curve where the accident occurred should not be interfered with, and this finding formed part of the basis of her findings concerning causation. Thus, because her finding regarding the existence of a hidden hazard had a basis in the evidence, the majority held that "her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence" and should not have been interfered with by the Court of Appeal (paras. 73 and 75). In contrast, the minority held that in coming to her conclusion on causation, the trial judge erred by: (a) misapprehending the evidence; (b) ignoring relevant evidence; and (c) drawing erroneous conclusions: see paras. 158-69; see also Perell, at p. 48. The minority emphasized that even though the trial judge referred to some evidence to support her findings on causation, this did not insulate her findings from review.

Mon opinion selon laquelle, dans *Housen*, la majorité et la minorité ont préconisé l'application de normes de contrôle différentes aux inférences factuelles est étayée par le fait que, en ce qui concerne la causalité, elles sont arrivées à des conclusions opposées. Par exemple, les juges majoritaires ont conclu qu'il n'y avait pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle le virage où s'était produit l'accident présentait un danger caché, et les conclusions de cette dernière sur le lien de causalité reposaient en partie sur cette conclusion. Étant donné que la conclusion relative à l'existence d'un danger caché était étayée par la preuve, la majorité a estimé que « celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve » et que la Cour d'appel n'aurait pas dû les modifier (par. 73 et 75). La minorité a pour sa part estimé qu'en tirant sa conclusion sur le lien de causalité, la juge de première instance avait commis une erreur en ce qu'elle : a) avait mal interprété la preuve, b) n'avait pas tenu compte de la preuve pertinente et c) avait tiré des conclusions erronées (par. 158-169); voir aussi Perell, p. 48. Les juges minoritaires ont précisé que même si la juge de première instance avait invoqué certains éléments de preuve à l'appui de ses conclusions sur le lien de causalité, celles-ci n'échappaient pas au contrôle.

294 The differences between the majority and minority opinions in *Housen* aside, in my opinion this case can be reconciled with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan by limiting its

Abstraction faite des divergences d'opinions entre les juges majoritaires et les juges minoritaires, je pense que l'arrêt *Housen* peut être concilié avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel

application as an authority to general standards of appellate review only.

Housen was an appeal from the Court of Appeal for Saskatchewan, but it did not refer to Saskatchewan's unique *Court of Appeal Act* (the modernized version of this Act, *The Court of Appeal Act, 2000*, came into force after the Court of Appeal's decision in *Housen* was released and while the appeal to this Court was pending). The Court of Appeal in *H.L.* (C.A.) surmised that this Court's failure to refer to the former Act, and especially s. 8 (now s. 14), may have been due to the fact that s. 8 "had ceased over time to attract much attention, with the exception of the limited attention given to it by this court in *Board of Education of Long Lake School Division No. 30 v. Schatz et al.* . . ., and by the Supreme Court of Canada in *Lensen v. Lensen*": para. 90. In addition to this, the court stated that "the general standards of review have tended to evolve outside the statutory framework regarding appeal".

Regardless of the reason why, in my view the mere fact that this Court did not refer to *The Court of Appeal Act* is indicative of a need to limit its precedential value to general standards of review only. As I noted earlier, Saskatchewan's legislative scheme for appeals is, as far as I am aware, the only one among all of the statutes governing the powers of appellate courts in Canada that frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to take its own view of the evidence. I conclude that this makes the nature of appellate review in Saskatchewan unique.

With respect, one would reasonably think that such a unique legislative mandate is deserving of mention. However, because this mandate was not brought to the Court's attention by the parties, the majority in *Housen* states that the role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199, at p. 204, a British Columbia Court of Appeal decision in which the court stated:

applicables en Saskatchewan si on limite sa portée jurisprudentielle aux seules normes générales de révision en appel.

295 Dans l'affaire *Housen*, le pourvoi visait un arrêt de la Cour d'appel de la Saskatchewan, mais nulle mention n'était faite de la loi unique applicable en Saskatchewan, la *Court of Appeal Act* (la version modernisée de cette loi, la *Loi de 2000 sur la Cour d'appel*, est entrée en vigueur après l'arrêt de la Cour d'appel et avant que notre Cour ne se prononce à son tour). Dans *H.L.* (C.A.), la Cour d'appel a émis l'hypothèse que cette omission de notre Cour de renvoyer à l'ancienne loi et, en particulier, à l'art. 8 (devenu l'art. 14), pouvait être due au fait que l'art. 8 [TRADUCTION] « avait cessé à la longue de retenir l'attention, sauf dans *Long Lake School Division No. 30 c. Schatz et al.* [. . .] et *Lensen c. Lensen*, où la Cour d'appel et la Cour suprême du Canada s'y étaient attardées quelque peu » (par. 90). La Cour d'appel a ajouté que [TRADUCTION] « les normes générales de contrôle ont eu tendance à évoluer indépendamment du cadre législatif de l'appel ».

296 Quelle qu'en soit la raison, le simple fait que notre Cour n'a pas renvoyé à la *Court of Appeal Act* justifie selon moi que l'arrêt *Housen* n'ait valeur jurisprudentielle qu'à l'égard des normes générales de révision en appel. Je le répète, en Saskatchewan, le cadre législatif de l'appel, autant que je sache, est le seul parmi ceux qui régissent les pouvoirs des cours d'appel au Canada à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de se déterminer en se fondant sur sa propre appréciation de la preuve. J'en conclus que la nature de la révision en appel en Saskatchewan est unique.

297 En toute déférence, il est raisonnable de penser qu'un mandat législatif aussi unique est digne de mention. Or, dans *Housen*, les parties n'ayant pas porté l'existence de ce mandat à l'attention de notre Cour, les juges majoritaires ont estimé que, dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199, p. 204, la Cour d'appel de la Colombie-Britannique avait bien défini le rôle d'un tribunal d'appel :

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

This statement from the British Columbia Court of Appeal is in direct contrast with the legislative direction to the court in s. 8 of *The Court of Appeal Act* (now s. 14 of *The Court of Appeal Act, 2000*) to "act upon its own view of what the evidence in its judgment proves".

298 In my respectful view, the Court's failure to mention *The Court of Appeal Act* at all and its use of a statement from a different province's Court of Appeal that is in conflict with the clear language of the Act demonstrates that the decision in *Housen* should not be used to understand the nature and (so-called) standards of review in Saskatchewan. Rather, this decision if left untouched should be limited in its application to general standards of appellate review. Thus, I agree with the Court of Appeal that "the majority judgment in *Housen v. Nikolaisen* represents the culmination of the evolution of the general standards of appellate review and serves to supply an adjudicative framework that differs in material respects from that laid down by the *Court of Appeal Act, 2000* and, in particular, section 14 of the Act": *H.L.* (C.A.), at para. 92.

299 Before leaving my discussion of *Housen*, there is one further point to consider. I said earlier that a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of facts properly established. I concluded that, in Saskatchewan, where the nature of appellate review is by way of rehearing, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. I used the term reasonableness because it is awkward to speak of a "correct" inference.

300 In contrast, I acknowledged that factual findings that engage the special advantage of the trial judge should be accorded some deference by the Court of Appeal. Therefore, I concluded that the Court of Appeal will only interfere with this type of factual

[TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

Cette affirmation va directement à l'encontre de la volonté du législateur, exprimée à l'art. 8 de la *Court of Appeal Act* (devenu l'art. 14 de la *Loi de 2000 sur la Cour d'appel*), que la Cour d'appel [TRADUCTION] « se détermine en se fondant sur son interprétation de la preuve ».

À mon humble avis, le fait que notre Cour a passé sous silence la *Court of Appeal Act* et cité l'arrêt d'une autre cour d'appel contredisant le libellé clair de la loi montre que l'arrêt *Housen* ne devrait pas servir à déterminer la nature de la révision en appel ni les « normes de contrôle » en appel applicables en Saskatchewan. En soi, cet arrêt ne devrait valoir que pour les normes générales de révision en appel. Je conviens donc avec la Cour d'appel que [TRADUCTION] « le jugement majoritaire dans *Housen c. Nikolaisen* constitue le point culminant de l'évolution des normes générales de révision en appel et offre un cadre décisionnel qui diffère à bien des égards importants de celui qu'établit la *Loi de 2000 sur la Cour d'appel* et, plus précisément, l'art. 14 de cette loi » : *H.L.* (C.A.), par. 92.

Je poursuis mon analyse de l'arrêt *Housen* en abordant un autre point. J'ai dit précédemment que le juge de première instance n'est pas mieux placé que la Cour d'appel pour tirer des inférences de fait d'une base de faits dûment établis. J'ai conclu qu'en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à celle du juge de première instance est celui de la raisonnabilité. J'ai employé le terme « raisonnabilité » parce qu'il serait incongru de parler d'une inférence « correcte ».

En revanche, j'ai reconnu que la Cour d'appel devait faire preuve d'une certaine déférence à l'égard d'une conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance. J'ai donc conclu qu'elle ne devait intervenir à l'égard

finding and apply its own view of the evidence if the trial judge has committed a palpable and overriding error.

Implicit in my analysis is the idea that, in the context of an appeal by way of rehearing, a palpable and overriding error standard, as it applies to factual findings engaging the special advantage of the trial judge, is more deferential than the reasonableness standard, as it applies to inferences drawn from those facts. It has not escaped me that some might find this reasoning to be potentially inconsistent with my reasons in *Housen*.

As discussed above, in *Housen*, I stated that "[t]he Court [of Appeal] will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong": para. 102. I also stated that "[i]n reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles": para. 103. I then concluded that "the standard of review is identical for both findings of fact and inferences of fact", noting that "there is no difference between concluding that it was 'unreasonable' or 'palpably wrong' for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts" (paras. 103-4).

Because I conclude that there is no difference between a palpably wrong inference and an inference that is not reasonably supported by the facts, my attempt to distinguish the so-called standard of review in Saskatchewan for factual findings engaging the special advantage of the trial judge (i.e., palpable and overriding error) from that for factual inferences (i.e., reasonableness) may be seen to conflict with my conclusion.

de ce type de conclusion factuelle et se fonder sur sa propre appréciation de la preuve que si le juge de première instance avait commis une erreur manifeste et dominante.

301 L'idée qui sous-tend mon raisonnement est que, dans le contexte d'un appel par voie de nouvelle audition, le critère de l'erreur manifeste et dominante, appliqué à une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance, commande une plus grande déférence que le critère de la raisonnabilité, appliqué à une inférence tirée des faits en cause. Je me rends bien compte qu'aux yeux de certains ce raisonnement peut sembler incompatible avec mes motifs dans *Housen*.

302 Dans cet arrêt, j'ai affirmé que « [l]a Cour [d'appel] ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée » (par. 102). J'ai ajouté que « [l]a cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés » (par. 103). J'ai ensuite conclu que « la norme de contrôle [est] la même et pour les conclusions de fait et pour les inférences de fait », faisant remarquer qu'« il n'y a aucune différence entre le fait de conclure qu'il était "déraisonnable" ou "manifestement erroné" pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits » (par. 103-104).

303 La distinction que j'ai tenté de faire entre la norme de révision qui s'appliquerait en Saskatchewan à l'égard d'une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance (la norme de l'erreur manifeste et dominante) et celle qui s'applique à une inférence factuelle (la norme de la raisonnabilité) peut sembler contredire ma conclusion qu'il n'existe aucune différence entre une inférence manifestement erronée et une inférence qui n'est pas raisonnablement étayée par les faits.

304 The conflict is only apparent. Specifically, in my opinion, it is necessary to consider foremost that the nature of appellate review in Saskatchewan is very different than the general nature of appellate review in the rest of Canada; that is, in Saskatchewan, appeal is conducted by way of rehearing, while in the rest of Canada, it appears that an appellate court reviews for error. Thus, in Saskatchewan, the Court of Appeal is not actually reviewing the inferences drawn by the trial judge to see if they are reasonably supported by the facts; rather, pursuant to the legislative direction in s. 14 of *The Court of Appeal Act, 2000*, the court is making its own inferences and comparing them with those drawn by the trial judge. The Court of Appeal will only interfere and substitute its own inferences if, on the basis of this comparison, it concludes that those inferences drawn by the trial judge were not reasonable. Therefore, in this light, it would be inappropriate to compare my comments in *Housen* about the general standard of review for factual findings and inferences of fact with those I made in the context of appellate review under *The Court of Appeal Act, 2000* in Saskatchewan. Although this may be a fine distinction, I would add that the appearance of this conflict is, in my view, indicative of the problem with using "standards of review" language in the context of appellate review by way of rehearing. While expressing the circumstances in which the Saskatchewan Court of Appeal will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced in language that does not connote the concept of appeal by way of review for error would most likely avoid conflicts such as the one discussed in this section, for purposes of clarity, it may still be necessary (for the purposes of this appeal, at least) to use "standards of review" language, subject, perhaps, to the proviso that such language is not meant to invite comparison to actual standards of review employed in appeals by way of review for error.

La contradiction n'est qu'apparente. Plus particulièrement, j'estime qu'il faut avant tout tenir compte du fait que la révision effectuée en appel en Saskatchewan est très différente de la révision générale qui a lieu en appel ailleurs au Canada. En Saskatchewan, l'appel est instruit par voie de nouvelle audition, alors que, ailleurs au Canada, la cour d'appel semble se livrer à un contrôle d'erreur. En fait, la Cour d'appel de la Saskatchewan ne vérifie pas si les inférences tirées par le juge de première instance sont raisonnablement étayées par les faits; conformément à ce que prescrit l'art. 14 de la *Loi de 2000 sur la Cour d'appel*, elle tire plutôt ses propres inférences et les compare à celles du juge de première instance. La Cour d'appel n'intervient et ne substitue ses propres inférences à celles du juge de première instance que si, à l'issue de la comparaison, elle arrive à la conclusion que celles tirées en première instance n'étaient pas raisonnables. Il serait donc inopportun de confronter mes observations dans *Housen* sur la norme générale de révision applicable aux conclusions factuelles et aux inférences de fait avec mes remarques actuelles sur la révision en appel sous le régime de la *Loi de 2000 sur la Cour d'appel* en Saskatchewan. Bien que la distinction puisse être subtile, j'ajouterais que cette contradiction apparente fait ressortir, à mon avis, le problème que pose l'emploi de la terminologie propre aux « normes de contrôle » dans le cas d'un appel instruit par voie de nouvelle audition. Cette contradiction disparaîtrait vraisemblablement si l'on définissait les circonstances dans lesquelles la Cour d'appel de la Saskatchewan peut se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être sans utiliser de termes qui renvoient à la notion d'appel par voie de contrôle d'erreur. Cependant, il peut demeurer nécessaire (du moins pour les besoins du présent pourvoi), par souci de clarté, d'employer la terminologie propre aux « normes de contrôle », mais en précisant, peut-être, que cet emploi n'invite nullement à la comparaison avec les normes de contrôle qui s'appliquent effectivement dans les appels instruits par voie de contrôle d'erreur.

(6) Conclusion

The Court of Appeal Act, 2000 is unique in Canada, and its provisions must "mean something". However, in his reasons in this case, Fish J. concludes that he is "not at all persuaded that the *2000 Act* was intended to create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces": para. 15. Based on my examination of the grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for the business of appeal, and the Act's historical foundations, I respectfully disagree. In my view, *The Court of Appeal Act, 2000* mandates that the nature of appellate review in Saskatchewan is by way of rehearing, with the Court of Appeal being directed to take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge.

B. *Application of the Standard of Review*

As will be explained more fully below, the trial judge's determination of H.L.'s entitlement to pecuniary damages was based on a series of factual inferences. In Saskatchewan, the (so-called) standard of review for such inferences is reasonableness. In my view, the Court of Appeal correctly applied this standard when it set aside the trial judge's pecuniary damages award, because the factual inferences on which the award was based were not reasonably supported by the evidence and were therefore not reasonable. As mentioned earlier, I would find the reasons of the trial judge reviewable on the general standard set out in *Housen* as well. The findings were so unreasonable that they amounted to palpable error in the appreciation of the evidence and the inferences drawn.

While this conclusion is sufficient to dispose of this appeal, in my view, it is also necessary to comment upon the trial judge's assessment of damages for past loss of earning capacity, since I agree

(6) Conclusion

305 La *Loi de 2000 sur la Cour d'appel* est unique au Canada, et ses dispositions doivent « signifier quelque chose ». Pourtant, dans ses motifs, le juge Fish dit qu'il n'est « pas du tout convaincu que la *Loi de 2000* visait à établir en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs et de l'objet » (par. 15). Compte tenu de mon examen du sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, ainsi que de l'objet de la Loi, de l'objet des dispositions établissant le cadre législatif de l'appel et des fondements historiques de la Loi, je ne peux, en toute déférence, être d'accord. À mon avis, la *Loi de 2000 sur la Cour d'appel* prescrit que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, la Cour d'appel devant se fonder sur sa propre appréciation de la preuve et pouvant tirer des inférences de fait et rendre la décision qu'aurait dû rendre le juge de première instance.

B. *Application de la norme de contrôle*

306 Comme je l'expliquerai davantage plus loin, la décision du juge de première instance d'accorder des dommages-intérêts pécuniaires à H.L. était fondée sur un ensemble d'inférences factuelles. En Saskatchewan, la « norme de contrôle » applicable à ces inférences est celle de la raisonnabilité. À mon sens, la Cour d'appel a appliqué cette norme correctement en annulant les dommages-intérêts pécuniaires accordés par le juge de première instance, car les inférences factuelles sur lesquelles se fondait cet octroi n'étaient pas raisonnablement étayées par la preuve et n'étaient donc pas raisonnables. Comme je l'ai déjà mentionné, les motifs du juge de première instance me paraissent également susceptibles de révision selon la norme générale énoncée dans l'arrêt *Housen*. Les conclusions étaient si déraisonnables qu'elles entachaient d'une erreur manifeste l'appréciation de la preuve et les inférences tirées.

307 Bien que cela suffise pour statuer sur le présent pourvoi, j'estime également nécessaire de faire quelques observations sur l'évaluation de la perte de capacité de gain antérieure, étant donné que je

with the Court of Appeal that the trial judge erred in his assessment in four respects. First, he failed to consider the plaintiff's duty to mitigate. Second, he unreasonably concluded that the plaintiff did not have a "crumbling skull" and therefore attributed too much to Starr's wrongful acts in his assessment of pecuniary damages. Third, he did not reduce the damages award to reflect the time H.L. was incarcerated. Fourth, he erred in not accounting for the social assistance payments H.L. received during the relevant period.

308 As it is the more fundamental error, I will commence my reasons in this section with a discussion of why the basic evidentiary foundation for the pecuniary damages award for past and future loss of earnings is lacking.

(1) No Evidentiary Foundation for Award of Pecuniary Damages for Past and Future Loss of Earnings

309 In order to find that the Government of Canada is liable to H.L. for pecuniary damages for past and future loss of earnings, one must determine whether H.L. suffered and will suffer a loss of employment income because of the two acts of sexual abuse to which he was subjected by Starr. At trial, Klebuc J. came to an affirmative conclusion on this issue. In support of this conclusion, he drew two factual inferences: (i) Starr's sexual abuse of H.L. caused H.L.'s emotional and alcohol-related problems; and (ii) these problems caused H.L.'s past loss of earnings and will cause H.L. to lose earnings in the future. In particular, with regard to the second inference, the trial judge stated:

> In my view, [H.]L.'s sporadic work record is consistent with the emotional difficulties described by Arnold and Stewart in their psychological assessments. However, his limited work history demonstrated to my satisfaction his willingness and ability to work as a construction worker and farm labourer but for his problem with alcohol.

. . .

conviens avec la Cour d'appel que le juge de première instance a commis quatre erreurs à cet égard. Premièrement, il n'a pas pris en considération l'obligation du demandeur de limiter le préjudice. Deuxièmement, il a conclu, de manière déraisonnable, que la vulnérabilité du demandeur n'était pas déjà active, de sorte qu'il a accordé trop d'importance aux actes répréhensibles de M. Starr en établissant les dommages-intérêts pécuniaires. Troisièmement, il n'a pas retranché de la période considérée le temps que H.L. avait passé en prison. Quatrièmement, il a eu tort de ne pas tenir compte des prestations d'aide sociale touchées par H.L. pendant cette période.

S'agissant de l'erreur la plus fondamentale, j'expliquerai tout d'abord pourquoi les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure ne s'appuient sur aucune preuve.

(1) Absence de preuve étayant l'octroi de dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure

Avant de condamner le gouvernement du Canada à verser à H.L. des dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure, il faut se demander si H.L. a subi et subira une perte de revenus d'emploi à cause des deux épisodes d'abus sexuel perpétrés par M. Starr. Au procès, le juge Klebuc a répondu par l'affirmative. À l'appui de sa conclusion, il a tiré deux inférences factuelles : (i) les abus sexuels étaient à l'origine des problèmes émotionnels et de consommation excessive d'alcool de H.L.; (ii) ces problèmes avaient infligé à H.L. une perte de revenus dans le passé et lui en infligeraient une dans l'avenir. Plus particulièrement, en ce qui a trait à la deuxième inférence, le juge de première instance a dit :

> [TRADUCTION] Selon moi, les emplois occupés sporadiquement par [H.]L. s'inscrivent dans la suite logique des difficultés émotionnelles décrites par MM. Arnold et Stewart dans leurs évaluations psychologiques. Ses antécédents professionnels limités m'ont néanmoins convaincu de sa volonté et de sa capacité d'occuper un emploi dans le secteur de la construction ou celui de l'agriculture, n'eût été son problème d'alcool.

. . .

TAB 12

Indexed as:

Hyslip v. Macleod Savings & Credit Union Ltd.

Between
Amond Hyslip, Plaintiff, and
Macleod Savings & Credit Union Ltd., Defendant

[1988] A.J. No. 642

62 Alta. L.R. (2d) 152

90 A.R. 141

12 A.C.W.S. (3d) 88

Action No. 8606-00208

Alberta Court of Queen's Bench
Judicial District of Lethbridge

Yanosik J.

July 11, 1988

L. Clark Warren, for the Plaintiff.
D.J. Welbourn, for the Defendant.

MEMORANDUM OF JUDGMENT

YANOSIK J.:-- The plaintiff, Amond Hyslip, is a farmer and businessman residing at Vulcan. The defendant, Macleod Savings and Credit Union Ltd., is a credit union incorporated under The Credit Union Act of Alberta, now R.S.A. 1980, Chapter C-31.

The plaintiff, Hyslip, sues the defendant, Macleod Savings, to recover moneys alleged by him to be overpayments of interest made in repaying two loans to Macleod Savings for which he gave

promissory notes, the first dated December 6, 1978 and the second dated April 2, 1979. Hyslip alleges that each of the loans was to be repaid by him with interest to be calculated at a rate fixed by the promissory note; that Macleod Savings thereafter unilaterally increased the rate of interest charged on each loan; that he relied upon Macleod Savings to calculate the interest charges properly in accordance with their agreement; that he repaid each loan in full together with the interest calculated and charged by Macleod Savings; and that as a consequence, he made substantial overpayments of money for interest.

The defendant, Macleod Savings, admits that the promissory notes given by Hyslip to Macleod Savings in connection with the two loans specified a fixed rate of interest in each case; that Macleod Savings did thereafter calculate and charge interest in each case at a fluctuating and higher rate than that fixed by the notes; and that Hyslip did repay the notes in full together with the interest as calculated and charged by Macleod Savings. Macleod Savings pleads, however, that Hyslip knew that this was being done; that he was given notice of the increases in the rate of interest when they occurred; that he acquiesced in the variation of the rate of interest by Macleod Savings; that he made payment in full of the principal loans and interest as charged by Macleod Savings without protest or complaint; and that he has, therefore, waived all of his rights of protest or complaint, and is now estopped from disputing the higher rates of interest charged by Macleod Savings and paid by him.

As I have already stated, Macleod Savings is a credit union, a body corporate under the Act. Upon the issuance of its certificate of incorporation under the provisions of the Credit Union Act of Alberta members of a credit union become and are a corporation under its registered name. The objects of a credit union are expressed to be the promotion of cooperative enterprize among its members, and the creation of a source of credit for its members at legitimate rates of interest, exclusively for provident, productive, and merchandising purpose. The purpose and objects of a credit union, and the general management of the affairs of a credit union are to be carried out by a board of directors elected from among its members. The duties of those directors are spelled out in the statute, and include, among other things, the duty to appoint and maintain a "credit committee" whose duty it is to approve loans to members, the duty to determine and fix the rates of interest to be charged on loans made to members, and the duty to employ a manager or managers for the purpose of carrying out the directors' policy and will and the day to day management of the affairs of the credit union.

I have mentioned these things concerning credit unions generally and the statutory duties of the directors of credit unions, because shortly after the loan of December 6, 1978 was made to Hyslip, and then throughout the currency of both loans, Hyslip was not only a member of Macleod Savings but a director as well, and for a brief period, its president, and as such the chairman of its Board of Directors. In December 1978 Hyslip had been a member of Macleod Savings and a depositor at its branch at Vulcan for many years. On March 23, 1979 he was elected to the Board of Directors, and he remained an elected director up to October 1985. In early 1985 he was elected to the office of president of Macleod Savings, and he chaired the directors' meetings. The Board of Directors of

Macleod Savings met once a month, and Hyslip attended these meetings regularly. Because the directors were responsible for determining and fixing the rate of interest to be charged by Macleod Savings on loans made to its members, in each and every month prior to a directors' meeting each director, including Hyslip, was given an "interest rate sheet" which set out precisely the rate of interest then being charged by Macleod Savings on loans to members. The Board would generally discuss interest rates at their meetings, and fix interest rates accordingly, and then instruct management to carry out the Board's policy and will. This practice remained in effect throughout Hyslip's tenure as a director.

It was the practice of Macleod Savings, and this practice remained constant throughout the currency of Hyslip's two loans, to send out a monthly statement of account to each depositor, similar to the usual bank statement, showing the recorded transactions in the depositor's account, and as well, where the depositor was also a borrower from Macleod Savings, showing the balance owing on each loan and the rate of interest then being charged on the loan.

On December 6, 1978 Hyslip negotiated and was approved for a loan from Macleod Savings of $103,000.00 (which I shall call the first loan), and he executed a loan agreement and a promissory note. Both of these documents were contained on a single page, one below the other. The first document, entitled "Loan Agreement", is addressed to Macleod Savings, bears the date December 6, 1978, and then sets out the following information:

Cash Received From This Loan	Total Principal Amount	Estimated Interest Other To Charges Maturity	Est. Total Amount To Be Paid	Interest Rate Per Cent Per Annum
$103,000.00	$103,000.00	$ $80.260.00	$183,260.00	12 1/2%

There is nothing said in the loan agreement concerning repayment of the loan. There then follows provisions respecting collateral security for the loan, additional interest upon default in payment, and responsibility for costs incurred in collecting the debt if action to collect is necessary. There is also this provision which is expressed to be a condition precedent, namely:

> "Notwithstanding anything contained herein or contained in the Promissory Note, the parties hereto agree, and it is a condition precedent hereto, that the Credit Union may at any time and from time to time at its option accept interest at a lesser rate than the rate set out herein and if the lesser rate is accepted by the Credit Union, then the Credit Union may at any time and from time to time at its

option further reduce or increase the interest rate so accepted without notice so long as the interest rate actually being accepted pursuant hereto does not exceed the rate of interest as specifically set out herein and any reduction or increase in the interest rate so accepted as agreed pursuant hereto shall not in any way affect the amount of the payments reserved hereby or the dates thereof."

The second document is entitled "Promissory Note". It is addressed to Macleod Savings, is dated December 6, 1978, and after setting out Hyslip's name and address in full provides as follows:

"TERMS AS FOLLOWS:

Final Payment Equal in any case to Unpaid Principal and Interest of Loan

	Annual Interest	Annual Interest	
Principal	Date Calculated	Rate If	Due Date
Amount	on Minimum Daily	Calculated	(Final)
of Loan	Outstanding	Semi-Annually	
$103,000.00	Balance 12 1/2%	Not in Advance %	On Demand

PAYMENT METHOD

	Principal	Interest	Blended
Demand			On Demand
Frequency			Semi-Annual
Amount		Total Interest	
of payment		Due for Period	$9163.00
First			
Payment			
Date			April 30/79

For value received, I promise to pay to the order of the Credit Union, the stated principal amount above set forth with interest on the unpaid from both before and after maturity at the rate above set forth and payable in the manner above set forth until the full amount of principal and interest has been paid; notwithstanding the foregoing, the full amount shall became due and payable, in case of default, forthwith without demand. I waive notice of dishonour and presentment for payment."

Because the loan agreement is silent with respect to repayment, or the due date of payment, but has estimated the interest payable at a very substantial figure, and the promissory note indicates that the debt is payable on demand but then deals with the frequency of payment, the amount to be paid, and has commencement date, it must have been intended by the parties that the two documents be read

together. The documents can then be interpreted to mean that although the loan and interest was expressed to be payable upon demand unless or until Macleod Savings made a demand for payment Hyslip was expected to pay the semi-annual payments of $9,163.00 each commencing April 30, 1979 to be applied firstly on interest to the date of payment, and the balance on principal. I do not believe that it was intended that the promissory note replace or supersede the loan agreement made, and I do not make that finding.

Although the loan evidenced by the documents dated December 6, 1978 was expressed to be for $103,000.00 the actual amount loaned to Hyslip was $101,200.65, and this was advanced to Hyslip by four separate advances made between December 20, 1978 and July 19, 1979. With respect to repayment, Hyslip authorized Macleod Savings to withdraw from his depositor's account the amount of the required payment as each payment became due, and there were sufficient funds in his account to cover the payment.

On December 20, 1978 Macleod Savings had made two advances to Hyslip on the first loan totaling $95,300.00. Macleod Savings was apparently prepared to accept, for the time being, a rate of interest which was a lower rate then that set out in the loan agreement and promissory note, and it reduced the interest rate on the loan to 11.5 percent per annum. Macleod Savings was entitled to do this under the express provisions in the loan agreement. On December 22, 1978 Macleod Savings then increased the rate of interest to the rate specified in the documents, namely to 12.5 percent, which it was entitled to do under the loan agreement. On January 22, 1979, however, notwithstanding the express provisions of the loan agreement that the rate of interest charged would not exceed the rate specifically set out in the loan agreement, Macleod Savings unilaterally increased the rate of interest it was charging on the loan to 13.25 percent. Prior to raising the interest rate Macleod Savings sent out a form letter addressed to Hyslip advising him that as a result of the economic turmoil and rising interest rates in Canada as reflected in the rising interest rates being charged by the Bank of Canada, Macleod Savings found it necessary to increase its rates of interest on loans to borrowers, and that effective January 22, 1979 the rate of interest on his loan would be increased to 13.25 percent per annum, and that his semi-annual payments were also being increased to cover the increased rate of interest. Hyslip acknowledges that he received this letter. The letter also invited Hyslip to make any comments, or ask any questions that he might have regarding the change in the rate of interest. Hyslip asked no questions, and made no comments or protest or complaint. A few months later, on March 23, Hyslip was elected to the Board of Directors of Macleod Savings, and prior to the regular monthly directors' meetings which were held in March and April he was provided with an "interest rate sheet" prepared by management which showed the rates of interest currently being charged by Macleod Savings on borrower's loans. By April 30, 1979, when Hyslip's first payment on this loan became due and payable, Hyslip had received $96,200.65 from Macleod Savings. On May 17, 1979 Macleod Savings withdrew from Hyslip's account the sum of $9,163.00, which was the payment specified in the promissory note, and a few days later on May 23 Macleod Savings withdrew from Hyslip's account the further sum of $277.97, apparently to cover the increased charges. These withdrawals, which were made in accordance with the arrangements for payment made between the parties, were applied firstly in payment of interest

as charged by Macleod Savings at 13.25 percent from January 22, and the balance on principal. Hyslip's monthly statement of account for May showed the withdrawals, and also showed the amount of the loan outstanding and the rate of interest then being charged. Hyslip made no protest or complaint, and did not question the withdrawals. On July 19, 1979 Hyslip received the further sum of $5,000.00 from Macleod Savings, which brought the total advance on the loan to $101,200.65. The balance owing on the first loan then stood at $97,038.73, and the interest rate being charged by Macleod Savings on the loan was 13.25 percent.

In late March 1979 Hyslip negotiated the second loan from Macleod Savings, and on April 2 he signed another loan agreement and promissory note covering the amount of the loan, which was for $234,000.00. Again, both documents were contained on a single page, one below the other. The first document, entitled "Loan Agreement", is identical to the loan agreement signed by Hyslip for his first loan, except for the figures therein stated, and the omission of a provision that was in the first loan agreement but not in the second, which is not relevant to this matter. The loan was shown as being for $234,000.00; the estimated interest calculated to maturity was shown to be $560,550.00; the estimated total of principal and interest was stated to be $794,550.00; and the rate of interest was set out at 13 percent per annum. Nothing was said in the loan agreement concerning repayment. The loan agreement also contained as a condition precedent to the loan the same provision that the first loan agreement said was a condition precedent, which is heretofore set out and need not be repeated. The second document, entitled "Promissory Note", is in the same printed form as the first one signed by Hyslip. The principal amount of the loan is shown at $234,000.00; the annual rate of interest is expressed at 13 percent; and due date is said to be on demand. The promissory note went on to specify semi-annual payment interest only was said to be payable on November 1, 1979, and thereafter the semi-annual payments were said to be $15,891.00, commencing May 1, 1980. Again, Hyslip authorized Macleod Savings to withdraw these payments from his depositor's account, and to apply them on the second loan as they became due and payable, and there were sufficient funds in the account to cover the payment. Because this loan agreement is also silent with respect to repayment but has estimated the interest payable at a very substantial amount, and the promissory note indicated that the debt was payable on demand, but then deals with the frequency of payments, again it must have been intended by the parties that the two documents be read together, and I place the same interpretation upon them as I did with the first two, and I make the finding that the promissory note did not supersede or replace the loan agreement.

Between April 2 and May 17, 1979 Macleod Savings advanced to Hyslip the full amount of the second loan. On July 5, 1979 Hyslip paid the sum of $128,000.00 on the loan which was applied firstly on interest calculated at 13 percent per annum (which is the rate specified in the loan agreement and promissory note) and the balance on principal so that the balance was reduced to $113,332.45. On August 10, 1979 the parties executed an amending agreement in writing by which they agreed that from and after July 5, 1979 the interest rate on this loan would be 13.5 percent per annum, instead of 13 percent as previously set out in the loan agreement and promissory note, and that the semi-annual payments set out in the promissory note, which were to commence on May 1, 1980, would be $7,954.00 each, instead of $15,891.00.

Hyslip testified that very early on in his tenure as a director (he was elected on March 23, 1979) the Board of Directors had to deal with interest rates on loans because interest rates in the market place generally speaking were rising very quickly, and that it was the responsibility of the directors to set Macleod Savings' interest rates on loans, and to instruct and direct management in this regard. I am satisfied that if it had not already become the practice of management to unilaterally raise interest rates on existing loans, notwithstanding what was expressed or set out in a loan agreement or promissory note, then it certainly became the practice on and after July 30, 1979. The practice of management after July 30 was to unilaterally raise and lower interest rates on existing loans notwithstanding what the loan agreement and promissory note said about the rate of interest. However, each time the rate of interest was unilaterally increased from the previous rate charged, Macleod Savings would send the borrower a form letter indicating the rate to be charged, the necessity for increasing the rate, the effective date of the increase, the increase in the payment to be made necessitated by the increased interest rate, and inviting the borrower to comment and ask questions regarding the increase in the rate. This practice by management must be held to have been at the direction and will of the Board of Directors, which included Hyslip, and that is my finding. As a director, therefore, Hyslip was fully aware of the practice by management to use a higher than agreed upon rate of interest on borrower's loans, and to have it fluctuate upwards and downwards.

With respect to Hyslip's first loan, on July 30, and again on October 11, and again on November 1, 1979 Macleod savings unilaterally increased the rate of interest being charged on the loan first to 13.75 percent, and then to 14.50 percent, and then to 16.25 percent. On each occasion before doing so Macleod Savings sent Hyslip its usual form letter respecting the increase, and Hyslip admits that he received these notices. Also, in each and every month throughout this period Macleod Savings set out in its monthly statement covering Hyslip's depositor account the rate of interest it was charging Hyslip on the second loan, which Hyslip admits he received. At no time did Hyslip protest or complain or question Macleod Savings about the increases. Hyslip's next semi-annual payment became due on October 30, 1979. It had been increased from $9,163.00, as originally specified, to $10,590.00, an increase of about $1,400.00. On November 15, 1979 Macleod Savings withdrew that amount from Hyslip's account, and applied it on his first loan, firstly on interest to the date of payment, and the balance on principal. The monthly statement of his depositor account showed this withdrawal, and the current rate of interest being charged on his loan. It was sent to Hyslip, and received by him. He made no complaint or protest. On March 20, 1980 the rate of interest being charged by Macleod Savings was still 16.25 percent, but notice had already been given to Hyslip that effective March 24, 1980 that rate would be increased to 17.25 percent. Again, at no time after receipt of this notice did Hyslip protest or complain, or question the increase.

With respect to Hyslip's second loan, the very same thing occurred as with the first loan. On July 30, and again on October 11, and again on November 1, 1979 Macleod Savings unilaterally increased the rate of interest being charged on the loan to 13.5 percent, and then to 14.25 percent, and then to 15.25 percent. On each occasion of an increase Macleod Savings sent Hyslip their usual form notice beforehand, and on each of his monthly depositor account statements the rate of interest being charged for the time being on his second loan was stated. Hyslip's first payment on this loan

became due on November 1, 1979. It was a payment of interest only, and on that date, in accordance with their prior arrangement for payment made, Macleod Savings withdrew $5,661.19 from Hyslip's account, and applied it in payment of interest to that date calculated at the increased rates. Hyslip's next monthly depositor account statement showed the withdrawal. Hyslip admits that he received the notices of increases in the rate of interest, and his monthly statements, and that he made no protest or complaint, and asked no questions. On March 20, 1980 the rate of interest being charged on the second loan was still 15.25 percent, but notice had already been given to Hyslip that effective March 24, 1980 that rate would be increased to 16.25 percent.

The date March 20, 1980, to which I have referred, is significant in this respect. The Board of Directors of Macleod Savings met regularly once a month, and in March that meeting was held on March 20. As was customary, prior to each Board meeting the directors were given a statement of interest rates being charged by Macleod Savings on its loans and in some manner were also kept informed of the rates of interest being charged by the Bank of Canada, and chartered banks and other lending institutions generally. Because management carried out the Board's policy and directions, it must be assumed that every increase in the rate of interest charged by Macleod Savings from early July 1979 to March 20, 1980, for which Macleod Savings had given notice by its usual letter to its borrowers, including Hyslip, had been sanctioned by the Board. Notwithstanding that only shortly before March 20 notice had gone out to borrowers that effective March 24 the rate of interest on their existing loan or loans was going to be increased by one percent, which Hyslip had to be aware of as a director and as a borrower, at the March 20 meeting of the directors Hyslip made a motion that approval be given to management "to raise interest rates on already written loans ---by one percent effective March 27, 1980". That motion was seconded, and carried, and management then gave notice again to its borrowers, including Hyslip, that the rate of interest was being increased by one percent effective April 8, 1980.

With respect to Hyslip's first loan, on April 8, 1980 the rate of interest being charged by Macleod Savings stood at 18.25 percent. Between April 8 and May 2, 1983 Macleod Savings unilaterally increased or decreased that rate on 27 different occasions, but never to the point where it stood either at or below the rate of 12.5 percent per annum set out in the loan agreement and promissory note dated that he received the notices. Hyslip also admits that he received his regular monthly depositor account statements and that they showed the rate of interest that he was being charged for the time being on the first loan. Except for an occasion or two sometime in 1982 when Hyslip asked the secretary of Macleod Savings to provide him with a calculation of interest on his loan based upon a rate of interest throughout of 12.5 percent as set out in his agreement and promissory note, which request went unanswered, and an expression of concern by Hyslip to the secretary with respect to the higher rates of interest being charged on his loans, Hyslip made no protest or complaint, and asked no questions, and he always paid the interest that was asked for. Between April 8, 1980 and March 16, 1984 Hyslip made eight semi-annual payments on this loan by withdrawals from his account. On each occasion Hyslip knew that the payments had been applied firstly on interest as calculated by Macleod Savings at the rate shown in his monthly statements, and then on principal. On March 16, the principal balance on the first loan had been reduced to

$66,455.32, and the rate of interest being charged was 13.25 percent. On March 16, 1984 Hyslip paid Macleod Savings $69,336.53 in full payment of the principal and interest to that date calculated at the increased rates.

With respect to Hyslip's second loan, on April 8, 1980 the rate of interest being charged by Macleod Savings stood at 17.25 percent. Between that date and August 27, 1985 Macleod Savings unilaterally increased or decreased that rate on 43 different occasions, and at times particularly after November 1, 1984, that rate was shown at 13.5 percent (the rate agreed upon by their amending agreement) and even below that rate. Macleod Savings lowered its rate shortly after April 8, but after that it gradually increased again to August 1981, when it reached a high of 22 percent. Macleod Savings then fluctuated the rate downwards and upwards and downwards again over the months to August 1985, when it was set at 11.75 percent. Throughout the whole of this time Hyslip received the usual notice from Macleod Savings when the rate of interest was going to be increased, and his monthly depositor account statements showed the rate that he was being charged for the time being. Although the evidence is not clear in this respect, I will assume that in 1982 when Hyslip spoke to the secretary of Macleod Savings and asked him for a statement showing a calculation of interest on the second loan based upon a rate of 13.5 percent throughout and expressed some concern about the high interest rates he was being charged Hyslip referred to this loan as well. Apart from that request, which went unanswered, and the comments he made, Hyslip made no protest or complaint and asked no questions, and in each case he paid the interest being charged for the time being. Between April 8, 1980 and August 27, 1985 Hyslip made ten semi-annual payments on this loan by withdrawals from his account. On each occasion Hyslip knew that these payments had been withdrawn from his account, and applied firstly on the interest being charged by Macleod Savings at their expressed rates, and the balance on principal. On August 27, 1985 the principal balance owing on the second loan was $107,406.01.

In the spring of 1985 Hyslip was still a director of Macleod Savings, and he was chosen by the directors to be the president of Macleod Savings, and as such the chairman of its Board of Directors. On May 1, 1985 Hyslip's semi-annual payment became due, but apparently there were not sufficient funds in his account to cover the payment.

Hyslip had never ever made his payments exactly on time, but he usually had sufficient funds in his account before too long to cover the payment that had become due. This time, however, he did not have the money there after some considerable time had elapsed, and he was in arrears. The by-laws of Macleod Savings, apparently, provided that a director whose loan was overdue and in arrears was not qualified to sit as a director, and someone must have said something to him regarding that matter. Hyslip then made some effort to re-negotiate the second loan, without success. It was probably suggested to him that he resign as president and director of Macleod Savings, because he became terribly upset, and immediately went to see his solicitor, and another lending institution. Hyslip obtained another loan, and he then instructed his solicitor to obtain a payout figure from Macleod Savings so that he could pay off the second loan in full. Macleod Savings requested payment of $117,175.62, being $107,406.10 for principal, and the balance for

interest calculated at the rates previously set. On August 27, 1985 Hyslip's solicitor sent Macleod Savings the said sum of $117,175.62 which had been requested as being the full amount still owing on the second loan. Hyslip's solicitor requested that Hyslip be sent a receipt for the payment, the documentation on both the second and first loans, and a loan history statement covering both loans showing the rates of interest charged from time to time, and the date of Hyslip's payments on account. The August 27 payment was made by Hyslip's solicitor on his behalf without any protest or complaint. Macleod Savings acknowledged receipt of payment, and complied with his other requests.

When Hyslip received all of the documents pertaining to the first and second loans, and the loan history statements in each case, he apparently resigned as a director and the president of Macleod Savings. Hyslip saw his lawyer again, and then he took his documents and the statements to his accountant. The loan history statements provided by Macleod Savings gave a full history of each loan the date the advances were made, the date Macleod Savings unilaterally changed the rate of interest, the rate of interest being charged from time to time throughout and the date of payments made and received. Hyslip asked his accountant to make a calculation of interest on each loan based upon the rate of interest set out in each loan agreement and promissory note and in the variation or amending agreement as it related to the second loan. On the first loan Hyslip had paid Macleod Savings the total sum of $70,143.85 for interest calculated at the rates set and charged from time to time by Macleod Savings. Hyslip's accountant calculated that at a rate of 12.5 percent per annum the interest he would have paid on the first loan was $49,123.85, a difference of $21,020.00. On the second loan Hyslip had paid Macleod Savings the total sum of $112,781.81 for interest calculated at the rates set and charged from time to time by Macleod Savings. Hyslip's accountant calculated that at 13 percent to August 1979, and then at 13.5 percent through to final payment the interest he would have paid on the second loan was $86,670.66, a difference of $26,111.15. It is acknowledged by Hyslip that the sum of $4,343.75 for interest paid by him on the second loan was recovered by him from the provincial government under an Interest Shielding Program implemented by the provincial government.

Hyslip alleges, therefore, that in respect of the first loan he overpaid Macleod Savings the sum of $21,020.00 for interest, and that in respect of the second loan he overpaid Macleod Savings the sum of $26,111.15 for interest, which includes the sum of $4,343.75 that he recovered from the provincial government under the Interest Shielding Program. Hyslip claims that he is entitled to recover these overpayments, which total $47,131.15, from Macleod Savings.

The evidence adduced at the trial was straight forward, and for the most part uncontradictory and credible. Credibility refers to what I believe and do not believe of the testimony that I have heard. It is elementary for me to say that I am not bound to accept and believe every word that every witness has said. I am entitled to believe the whole or a part, or to disbelieve the whole or a part of the testimony of any witness, and to assess and weigh the evidential value of the testimony found to be acceptable and believable. It is not necessary that I accept testimony that is uncontradicted if I do not find that testmony to be plausible. Evidence may be rejected, even if it is uncontradicted, solely

on the basis that it is not plausible, particularly when that evidence is assessed and weighed in the light of facts that have been properly and satisfactorily established on credible evidence.

Hyslip testified that soon after he was elected to the Board of Directors of Macleod Savings (March 23, 1979) he became aware of the fact that rapidly rising interest rates to borrowers in the market place were creating tremendous problems for Macleod Savings and its directors, and for management, and that the directors had to cope and struggle with the problems because it was their responsibility to set the interest rates for management. The problems that Hyslip was talking about can easily be found on the evidence, namely, what rate of interest should be set as a maximum rate in Macleod Savings' documentation of a loan, the loan agreement and promissory note; for future borrowers if that kind of documentation was to be continued, and what could be done about interest rates on existing loans where the maximum interest rate to be charged was set out and was now obviously too low. Hyslip did not say that the directors ever thought about or discussed making a demand upon all existing borrowers for payment and then re-negotiating the loans at higher or even a fluctuating rate of interest, or that they ever thought about or discussed revising the loan documentation being used to provide for fluctuating rates of interest in the future. I gather that the directors were not persons with very much experience in financial matters because Hyslip said these things were learning experiences for the directors, and the solutions were difficult. By mid-July 1979, if not sooner, the practice of management had developed under which Macleod Savings unilaterally increased the rate of interest on existing loans upon notice to the borrower of the increase and the effective date of the same, and I have found as a fact that when Macleod Savings did so it was at the direction and will of the directors. Hyslip testified that he was aware of the practice that had developed of the management of Macleod Savings unilaterally increasing interest rates on existing loans notwithstanding what was expressed in the loan agreement and promissory note upon notice of the increase being given to the borrower; but he says he did not believe that the practice applied to him and his first and second loan, and I did not accept and believe that testimony. Hyslip testified that he did not realize or know that rate of interest on each of his two loans herein had been unilaterally increased by management until the rate had increased to 15 or 16 percent. With respect to Hyslip's first loan the rate of interest was increased to 16.25 percent on November 1, 1979, and with respect to his second loan that rate of interest was increased to 15.25 percent effective November 1, 1979 and to 16.25 percent on March 24, 1980. I did not accept and believe that part of Hyslip's testimony either. I am completely satisfied, and have found as a fact, that Hyslip knew and understood what Macleod Savings was doing with respect to the rate of interest on each of the two loans herein right from the date that practice was developed. Hyslip knew and understood and was fully aware of the fact that management unilaterally increased the rate of interest on his first and second loan upon notice to him when interest rates generally were increasing, and that subsequently, when interest rates generally went down, that Macleod Savings reduced the rates, and after that, that Macleod Savings applied a fluctuating rate of interest on his loans, and upon notice to him each time the rate was being increased. I am also completely satisfied on the evidence that Hyslip knew what rate of interest had been set by Macleod Savings on his loan from time to time throughout until payment in full, and that in each case when payment was made by him he was aware of the current rate of interest being charged, and he paid what was being asked

for with full knowledge and without protest or complaint.

What I also believe, however, is that although Hyslip knew that the rate of interest being charged on his loans was higher than the rate set out in his loan agreements and promissory notes he may not have actually appreciated what that meant to him in terms of actual dollars and cents. I say this because of Hyslip's testimony which was to the effect that he was not concerned about the higher rates of interest being charged because it did not seem to him that the difference in the amounts actually paid would be very great.

Hyslip takes the position that there was an agreement made between the parties with respect to each loan, the agreement being contained in the "loan agreement" and "promissory note" in each case, under which the maximum rate of interest to be charged on the loan was fixed or set, and under which there was an express covenant on the part of Macleod Savings, expressed as a "condition precedent", not to raise the rate of interest beyond that rate at any time during the currency of the loan. Hyslip's counsel submits that the provisions of the agreement made in each case could not be unilaterally varied by Macleod Savings; that what occurred throughout amounted to a unilateral variation by Macleod Savings; that Hyslip did not agree to the variation and there is no evidence that he did; that the doctrine of estoppel pleaded by Macleod Savings does not apply because the essentials for the application of the doctrine have not been established; and that the Court must enforce the original agreements made and reimburse Hyslip the amounts overpaid for interest.

Counsel for Macleod Savings argues that although Macleod Savings did unilaterally increase the rate of interest on the loans beyond that fixed or set out in the loan agreement and promissory note and contrary to the provision in the agreement expressed as a "condition precedent", it did so only after written notice of its intention to do so had been given to Hyslip; that Hyslip with full knowledge of the rate being charged and without protest or complaint paid what was asked for; that Hyslip must be said to have accepted the variation and upon so doing their agreement was varied; that the "condition precedent" was obviously waived by Hyslip; that Hyslip is estopped from denying either the variation or the waiver; and that Hyslip's claims must be dismissed.

I am of the opinion that pleadings filed by Macleod Savings are broad enough to include the allegations that the "condition precedent" in the loan agreement had been waived by Hyslip, and that the agreement with respect to the interest rate to be charged on the loan as a fixed or set rate had been varied by agreement between the parties. I mention this because Hyslip's counsel seems to suggest that the doctrine of estoppel is the only defence to the action that was pleaded.

With respect to the question of waiver The Court of Appeal of Alberta has on several occasions, and most recently in Anguish vs. Maritime Life Assurance Co. (1987) 51 Alta. L.R. (2d) 376 held that the doctrines of waiver and estoppel are two distinct doctrines, and have gone on to define waiver. At Page 381 Prowse, J.A., who delivered the unanimous decision of the Court in the Anguish case said this:

"The doctrines of waiver and estoppel, while sometimes interrelated, are two distinct doctrines. In Spencer Bower and Turner, The Law Relating to Estoppel by Representation, 3rd ed (1977), the author states (at p. 317):

> 'There will, of course be many cases to which at first sight the term "election" might readily be applied, in which the facts will be found on examination to found a true estoppel; the representation will be one of fact, the result sought will be to prevent the representee from averring a state of facts; the estoppel will be used for this alone; and no attempt will be made to use it to support a cause of action. These are properly to be regarded as true estoppels, and the term "election" need not be used in respect of them. There will be others, however, where the representation is not one of fact, or where the result is to preclude the opposite party from taking a course of action, as distinguished from averring a state of facts; or in which the change in position consists in a judgment, or some other benefit being taken by the representor, rather than a detriment being suffered by the representee. These are waivers, or elections. The great majority of them consist of elections between alternative remedies in Courts of Justice.'

In Mitchell & Jewell Ltd. v. C.P. Express Co. (1974) 3 W.W.R. 259, 44 D.L.R. (3d) 603 (Alta. C.A.), a condition of the insurance contract provided that the carrier would not be liable for any damage, partial loss or shortage of a shipment unless written notice of such loss was received by the carrier within 30 days from delivery. The claimant submitted a claim to the carrier after the expiration of the 30 days to which the carrier replied with a letter claiming it was only liable for a portion of the amount claimed. This court, after considering a number of earlier Supreme Court of Canada cases that expressly acknowledged the existence of the doctrine of waiver separate and apart from the doctrine of estoppel, stated (at p. 612):

> 'Summarizing the law as set out in the above cases I am of the opinion that waiver as used in the present context arises where one party to a contract, with full knowledge that his obligation under the contract has not become operative by reason of the failure of the other party to comply with a condition of the contract, intentionally relinquishes his right to treat the contract or obligation as at an end but rather treats the contract or obligation as subsisting. It involves knowledge and consent and the acts or conduct of the person alleged to have so elected, and thereby waived that right, must be viewed objectively and must be unequivocal.'

> This court then held that the evidence in that case was such as to warrant the conclusion that the carrier had unequivocally elected to waive the failure of the claimant to provide written notice of the loss within the 30-day period. Therefore, the carrier could not rely on that requirement of the contract to absolve itself from liability."

And at page 382 Prowse, J.A. referred to the case of Nor. Life Assur. Co. of Can. v. Reierson (1977) 1 S.C.R. 390, (1976) 3 W.W.R. 275, (1976) I.L.R. 1-749, 67 D.L.R. (3d) 193, 8 N.R. 351 (Alta.), a decision of the Supreme Court of Canada where the Court, in dealing with waiver said this:

> "Before one can find waiver there must be express and unequivocal language or conduct,..."

And also at page 382 Prowse, J.A. referred to F.B.D.B. v. Steinbock Dev. Corp. (1983), 42 A.R. 231 (C.A.), where Laycraft J.A., now C.J.A., after referring to the decision in Mitchell & Jewell Ltd., supra, held, at p. 236:

> "The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained."

Before determining whether as a matter of fact it can be found that Hyslip waived the "condition precedent" in the loan agreements by his conduct, because he did not expressly do so, I go on to the issue of whether or not there was a variation or numerous variations of the agreement and promissory note in the case of each loan. it may be stated as a general principle that the parties to a concluded agreement may by agreement vary the terms of their concluded agreement, and that such variation may be by express agreement or may be implied by conduct. An agreement varying an existing agreement must in itself amount to a valid contract. To effect a variation the parties must be ad idem in the same sense as for the formation of a contract, and there must be consideration passing. Where an agreement is varied it then operates according to the variation, and the original term or terms cannot be set up by one of the parties against the other. A variation cannot occur by a unilateral notification by one party to the other, without any agreement, but if the variation is made unilaterally by one party and accepted by the other party and there is valid consideration passing, a variation of the original agreement can occur.

The case of Royal Bank of Canada vs. Davidson (1972) 25 D.L.R. (3d) 202, is a decision of the Supreme Court of Nova Scotia, Appeal Division. The bank had a promissory note from the

defendant, Davidson, with a fixed interest rate and payable on demand. From time to time over a period of about a year the bank unilaterally raised the interest rate upon notice being given to Davidson. Because Davidson did not want the bank to make a demand for payment if he did not pay what was asked for, Davidson paid interest at the higher rate without protest or complaint. Subsequently, on two more occasions the bank raised the interest rate on the note even further, but this time Davidson did not pay, and the bank demanded payment, and then sued on the note. The case dealt primarily with the issue whether the variations made by the bank in respect of the interest rate from time to time was a material alteration of the note which destroyed the character of the note so that the bank could not sue on it. The trial judge had found as a fact that the parties had varied the interest rate by agreement, the agreement having been made by the notice given by the bank to Davidson and his acceptance of the increased rate by payment, the consideration being the bank's withholding of a demand for payment. The variation was said to have occurred with his payment, and the increased interest sought by the bank after that payment was not allowed because there was no agreement to vary. The Court of Appeal agreed with what the trial judge had said and done. At page 205 Coffin, J.A. who delivered the unanimous decision of the Court said this:

> "The trial Judge found in favour of the respondent (the bank) as to the principal amount due on the note of $10,750. As to interest, he found that the rate on the demand loan had been increased to 9 1/4% as of April 21, 1969, by agreement between the parties:
>
> > 'This agreement was brought about by the unilateral action of the bank in increasing the rate and the unwilling acceptance of the defendant who reluctantly chose the new rate rather than take a chance on having the loan called. This acceptance was crystallized by his payment of interest at the increased rates from time to time.'"

And at page 208:

> "In Royal Bank v. Hogg, (1930) 2 D.L.R. 488 at p. 489, 64 O.L.R. 653, Riddell, J.A., made this comment:
>
> > 'Then, coming down to the note on demand, while no formal demand was made, it has been law certainly for nearly a century, since Norton v. Ellam (1837), 2 M & W 461, 150 E.R. 839, and probably for centuries before, that a promissory note on demand is due as soon as it is delivered.'
>
> .....

> All the bank was doing in this case, as I see it, was to advise the appellant (Davidson) in advance that on certain specified times there would be a change in the rate of interest on his borrowing of money from the bank. What was involved was a demand note. The appellant could at any time have paid off the note by tendering the respondent the principal together with the interest at 7 1/2%. This he did not do. In fact, he paid, as I have already said, some of the interest at the amended rates and he explained why he did this. It is to me an important point that the trial Judge was very careful not ,to allow the respondent interest in excess of the amount of the note after the final payment which had actually been made by the appellant. The appellant, therefore, is in no position to allege that he has been in any way prejudiced by the procedure adopted by the bank."

The finding by the trial judge that there was varied consideration for the agreement to vary the terms of the note was based upon Davidson's evidence that he accepted the bank's unilateral increase of the interest rate and paid it because his financial circumstances were strained at the time and he did not want the bank to make a demand of his commitment.

I now go in to set forth the requirements for estoppel. It is most appropriate in this case to make reference to the very old case of Cairncross v. Lorimer (1860) 3 L.T. 130, a Scottish appeal to the House of Lords, where Lord Campbell, L.C., said this as a doctrine, and he was not referring to the doctrine of estoppel, at p. 130:

> "The doctrine will apply which is to be found, I believe in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. Also, a little further on (ibid, at p. 131): I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it had been done by his previous licence."

This doctrine, which has been described as "estoppel in pais", has been applied in cases involving contracts between parties where one party has unilaterally changed a term, which he was not lawfully entitled to do, and the other has by words or conduct accepted and consented to the act. See Wolfe v. Hogan (1949) 1 All E.R. 570; and City & Westminster Properties v. Mudd (1958) 2 All E.R. 733.

With respect to the doctrine of waiver first mentioned as a defence of Hyslip's claims, I am not so certain that waiver has been established, or that it applies in this case. In my view the issues can be decided by determining whether or not there was a variation in each case of the terms of the original agreement with respect to the interest rate, and for that matter the amount of the semi-annual payments, and if not, whether the doctrine of estoppel applies. There was no express agreement to vary made between the parties, no express acceptance or consent to the unilateral act of Macleod Savings in each case to raise and lower interest rates and adjust the semi-annual payments as interest rates generally fluctuated up and down in the market place, but proof of positive acceptance or consent by Hyslip is not necessary and may be established by fair and reasonable inference from Hyslip's conduct. Estoppel as well may be found on fair and reasonable inference to be drawn from Hyslip's conduct.

The loan agreement and promissory note, which constituted the full agreement with respect to each loan made between the parties in each case, set out the maximum rate of interest to be charged by Macleod Savings and paid by Hyslip on the loan, and although all was payable on demand the promissory note set out the amount of a semi-annual payment that Macleod Savings was until a demand for payment was made. I say "maximum rate of interest" because it is obvious from the documentation of each loan, and a term or provision of their agreement in each case, that at the option of Macleod Savings, Macleod Savings could decrease and increase over and over again the rate of interest provided that the rate of interest would not at any time exceed the rate set out in the documentation. The parties, therefore, intended that the rate could be fluctuated below the rate set out at the option of Macleod Savings, and it is understandable why such a term or provision would be agreed to, particularly by Macleod Savings, when you look at the nature, purpose, and objects of a credit union, and consider that loans were made to its members only. Credit unions are not in business for commercial profit, and what profit is made generally goes to its membership in the form of dividends.

What Macleod Savings unilaterally did not long after each of the two loans were made, and when interest rates in the market place generally were on the increase, was to increase the rate of interest on each loan beyond that set out or specified in the loan documentation and to increase the semi-annual payments to be made to reflect the increase in interest upon written notice to Hyslip. Thereafter, throughout the history of each loan, and to the date each loan and interest was paid in full by Hyslip, Macleod Savings fluctuated the rate of interest on each loan both up and down and over and over again, and altered the amount of the semi-annual payment, without regard to the rate of interest or the amount of the semi-annual payments that were set out or specified in the original agreements. And with full knowledge, understanding, and consent Hyslip paid the interest asked for by Macleod Savings throughout, and made the semi-annual payments requested, until each loan was fully repaid. Can it be found, therefore, that the term of the original agreement restricting a fluctuating maximum rate of interest at the option of Macleod Savings to the rate set out or specified in the loan agreements and promissory notes, and the term setting out the amount of the semi-annual payments, were varied in each case by agreement of the parties, to the extent that Macleod Savings could at its option increase or decrease the rate of interest without regard for the

maximum rate set out, and vary the semi-annual payments which would be accepted. I am not talking about a new agreement, but a variation of a term in the original agreements.

The facts in this case are unique in this respect. What occurred between the parties occurred over a lengthy period of time, over several years With respect to the first loan the period is from December 1978 to March 1984, when the loan and the interest thereon asked for by Macleod Savings was paid in full by Hyslip; and with respect to the second loan from April 1979 to August 1985, when the loan and the interest asked for by Macleod Savings was paid in full by Hyslip. In my view, in each case I am entitled to look at what occurred between the parties during the whole of those periods of time, and to draw fair and reasonable inferences from Hyslip's conduct throughout those periods.

For variation of a term of a contract to operate there must be a valid agreement made to vary an actual term of an existing agreement. Where the variation is made unilaterally by one party to the agreement unless the variation is accepted by the other party with full knowledge and consent and for valid consideration the variation is not enforceable. If the variation is made by an enforceable agreement then the original agreement operates, but according to the variation.

Macleod Savings started the process of variation by unilateral acts on its part with express notice to Hyslip. I am completely satisfied, and it is a fair and reasonable inference to be drawn from Hyslip's conduct thereafter, in fact in my view it is the only fair inference that can be drawn from his conduct, and I find this as a fact, that Hyslip accepted and consented to what Macleod Savings had done.

Hyslip's conduct must be viewed in light of his participation in and his knowledge of the practice of the management of Macleod Savings, who were carrying out the directions and will of its directors, to apply a fluctuating rate of interest on existing loans in excess of the rate set out or specified in their agreements, and also in light of Hyslip's knowledge of the increased and fluctuating rate of interest being charged to him on his existing loans which he derived from the written notices that he received from Macleod Savings each time an increase in the rates occurred, and also in light of Hyslip's knowledge derived from his monthly depositor's account statement which clearly showed what the interest rate being charged on his loan was at that time. There is also the evidence of Hyslip's payments on the loans made in increased amounts on account from time to time as semi-annual payments, and ultimately as a final payment in full satisfaction. In each case Hyslip paid exactly what was asked for without protest or any complaint. The fair and reasonable inferences that must be drawn for this conduct is that Hyslip accepted and consented to the higher rates being charged by Macleod Savings and the higher semi-annual payments, and, therefore, it can be found that Hyslip accepted and consented to the variation of the original term of their agreements in each case which restricted Macleod Savings from increasing the rate of interest beyond the rate originally set out or specified in the agreements and altering the amount of the semi-annual payments. With respect to whether there was valid consideration for such a variation, in my view, it can fairly and reasonably be inferred from the facts of this case that there was. In consideration of

Hyslip's undertaking or covenant to pay the higher rate of interest requested by Macleod Savings from time to time, the completely fluctuating rate without restriction, Macleod Savings can be said to have undertaken to withhold or forego making a demand for payment upon acceptance of the new or higher rate. In my view it is clear from the policy of the Board of Directors, as appears on the evidence, the directors' instructions to management that is evident, and the nature and substance of the notices of the increase in interest rates given to borrowers on existing loans, and the necessity for such increases which was evident, that Macleod Savings was not prepared to carry loans payable on demand at the rate of interest originally agreed upon and set out in the documentation of the loan, because of the substantial increase in rates on the open market, and that unless the borrower, which included Hyslip, was prepared to come to terms with respect to a realistic rate of interest payment of the loan would be demanded. That is the fair and reasonable inference to be drawn. And as a matter of fact, in connection with the second loan, near the end when Hyslip went into default, he was immediately called to task. All of these things prompt me to find as a fact that a valid agreement to vary the existing agreements with respect to the first and second loans was made by the parties, and that Hyslip did nothing more than to repay each loan in accordance with the agreements as varied.

If I am wrong in finding that the loan agreements had been varied by a valid agreement made between the parties then based upon the foregoing facts as I have found them, which need not be repeated here, I would have been inclined to apply the doctrine described as "estoppel in pais" against Hyslip. In my view, if the evidence does not support a finding that a valid variation agreement had been made by the parties, Hyslip should be precluded from asserting a right, the so called condition precedent set out in each loan agreement, by reason of his acts and conduct throughout in relation to each loan, and his silence when it was his duty to speak. By his numerous acts and conduct throughout, and his silence throughout, when he had full knowledge and understanding of what was taking place, it could be said that he induced a reasonable belief on the part of Macleod Savings that he accepted and consented to its unilateral acts of raising the interest rates, and the amount of the semi-annual payments, and to its prejudice, Had Hyslip not induced that reasonable belief on the part of Macleod Savings, the fair and reasonable inference is, and the probability was, that Macleod Savings would have demanded payment of the loans, and upon collecting the same would have been in a position to loan that money out again to someone who was prepared to pay the higher or even a fluctuating rate of interest on the loan. Therein lies the prejudice or detriment to Macleod Savings.

For the reasons expressed herein, Hyslip's claims against Macleod Savings must fail. Accordingly, the plaintiff's action against the defendant is dismissed with costs, which the defendant will tax under column 3 of Schedule C of The Alberta Rules of Court, no limiting rule to apply.

YANOSIK J.

TAB 13

Case Name:

Bird Construction Co. v. Theo C. Ltd.

Between
Bird Construction Company, plaintiff, and
Theo C. Limited and Polychronis Emmanuel Kostas
a.k.a. "Paul" Kostas, defendants

[2006] M.J. No. 86

2006 MBQB 61

200 Man.R. (2d) 273

51 C.L.R. (3d) 306

146 A.C.W.S. (3d) 638

2006 CarswellMan 78

Docket: CI 02-01-28615

Manitoba Court of Queen's Bench
Winnipeg Centre

Kaufman J.

March 8, 2006.

(119 paras.)

Contracts -- Breach of contract -- Exemption clauses -- Action claiming $920,131, inclusive of GST, plus interest being the balance remaining for construction of a hotel allowed -- Defendant claimed plaintiff breached contract through delay of substantial completion -- Delay in completion of the project was completely due to factors covered by the contract being by an action or omission of the owner or by weather being a cause beyond the contractor's control -- Accordingly, the delayed substantial completion date did not breach the contract.

Construction law -- Building contracts -- Breach -- By contractor or subcontractor -- Frustration

and force majeure clauses -- Action claiming $920,131, inclusive of GST, plus interest being the balance remaining for construction of a hotel allowed -- Defendant claimed plaintiff breached contract through delay of substantial completion -- Delay in completion of the project was completely due to factors covered by the contract being by an action or omission of the owner or by weather being a cause beyond the contractor's control -- Accordingly, the delayed substantial completion date did not breach the contract.

Action commenced by Bird Construction against Theo and Kostas claiming $920,131, inclusive of GST, plus interest -- Plaintiff also claimed relief relating to builders' lien and statutory holdback -- Plaintiff was in construction business -- Corporate defendant, Theo, built and owned the Hampton Inn -- Defendant Kostas was an officer and effective owner of Theo -- In Fall 2000, Talbot, Vice-president and Branch Manager of plaintiff, gave Kostas an estimate for proposed building of hotel -- Estimate was based on proposed square footage that the project could be completed in eight months and cost in the range of $6.5 million -- In March 2001, Nejmark Architects (consultant) provided drawings -- Revised budget was provided by Bird -- Budget remained about $6.5 million and general conditions had risen to about $200,000 -- Letter of March 2, 2001 from Bird expressed caution with respect to budget as design was still being finalized -- Cost plus contract was entered into on April 2001 -- Contract indicated work was to commence by April 9, 2001 and "subject to adjustment and contract times provided for in the contract documents" attain substantial performance of the work by November 16, 2001 -- Certificate of substantial performance was issued on February 13, 2002 -- Defendant claimed delay in substantial completion -- HELD: Judgment for the plaintiff -- Delay in completion of the project was completely due to factors covered by the contract being by an action or omission of the owner or by weather being a cause beyond the contractor's control -- Accordingly, the delayed substantial completion date did not breach the contract -- No evidence that Kostas personally guaranteed the contract and claim for personal judgment against him was dismissed.

Statutes, Regulations and Rules Cited:

The Builders' Liens Act,

Counsel:

Dave Hill and Richard Van Dorp for the plaintiff

Randie Kushnier for the defendants

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1 **KAUFMAN J.**:-- The plaintiff ("Bird") is a company carrying on the business of construction.

The defendant Theo C. Limited ("Theo") built and owns the Hampton Inn, a hotel located in Winnipeg (the "hotel"). The defendant Kostas ("Kostas") is an officer and effective owner of Theo.

2 The plaintiff initially claimed $920,131.48, inclusive of GST, plus interest.

3 The plaintiff also claimed relief relating to Builders' Lien and statutory holdback. The claim was made against Theo, and Kostas was sued personally as well.

4 Pursuant to a court order in December 2002, Theo paid the invoiced holdback amount. Bird acknowledged that a calculation error resulted in a claim of $10,000 plus $700 in GST which should be deducted. The amount claimed in this action, as a result of the foregoing, is $433,158.22 plus interest at the Bank of Canada rate, plus 4% compounded monthly as at February 28, 2002 (the date that the holdback amount was billed).

5 In an amended statement of defence and counterclaim, the defendants say that as at September 30, 2001, they had paid $3,952,973.24 inclusive of GST and statutory holdbacks, and they further admit the particulars of registration of lien. They generally deny the amount owing as exaggerated and without foundation and allege that many charges under the contract were unauthorized.

6 The defendants set out a series of specific amounts that should not have been charged or that ought to be deducted as damages caused by plaintiff for which defendants should be compensated.

7 Theo also advances a counterclaim for lost revenue and unnecessary expenses incurred as a result of Bird's breach of contract.

8 Kostas denies any personal liability for any amount that may be owing and alleges that he was simply acting on behalf of Theo.

9 I propose to generally set out the events that give rise to this claim and then deal with each of the issues raised.

10 In the fall of 2000, Kostas had discussions with Tim Talbott, Vice-President and Branch Manager of Bird, with respect to the hotel he was proposing to build. At this time, Kostas owned and operated two Super 8 Motels and he was exploring the type of contract that he would enter into. Talbott suggested several options that they could work under. He gave Kostas an estimate in January of 2001, based on proposed square footage that the project could be constructed in eight months and cost in the range of $6.5 million.

11 During consideration of a cost plus option, he also gave him a list of proposed general conditions with an estimated cost of about $162,000. The general conditions were twenty items that essentially were the general work and disbursements of Bird managing the construction site, including items such as first aid, general clean-up, power consumption, temporary telephone, building permit performance bonds, insurance and so on.

12 In March of 2001, Nejmark Architects ("consultant") provided drawings. A revised budget was provided by Bird. The budget was still at about six and a half million dollars and the general conditions had risen to just under $200,000.

13 A letter of March 2, 2001 from Bird proposed for consideration two names for project manager and two names with respect to project superintendent. The letter expressed caution with respect to budget as design was still being finalized. Thompson was picked as the project manager and Kleemola became the superintendent.

14 During this time, Bird was also obtaining information with respect to financing of the project from Kostas.

15 On the 4th of April 2001, Theo as owner and Bird as contractor entered into a Cost Plus Contract. Bird's fee was fixed at $175,000 payable in seven monthly payment of $25,000 each and there is no dispute that the fee has been paid.

16 Both sides tried to rely on conversations and correspondence conducted at this time to bolster their respective cases. However, the contract states as follows:

ARTICLE A-2 AGREEMENTS AND AMENDMENTS

2.1 The Contract supersedes all prior negotiations, representations or agreements, either written or oral, relating in any manner to the Work, including the bidding documents that are not expressly listed in Article A-3 of the Agreement B CONTRACT DOCUMENTS.

2.2 The Contract may be amended only as provided in the Contract Documents.

17 The parties effectively by explicit or implicit agreement strayed from the contract. Change orders for example were not approved by Theo's consultant but in direct discussions with Kostas. Kostas was on site on a regular basis and at times entered into subcontracts directly rather than going through Bird.

18 Generally speaking, the contract contemplates complete control of the work by Bird and supervision by the consultant. Change orders, time extensions and requests to amend schedules were all contemplated by the contract to be administered and documented through the consultant but were not. While the consultant attended meetings and was involved on site, virtually all consultant documentary responsibilities were not followed.

19 The contract indicated the work was to commence by the 9th of April 2001 and "subject to adjustment and contract times provided for in the contract documents" attain substantial

performance of the work by the 16th day of November 2001.

20 The certificate of substantial performance was issued the 13th day of February 2002 certifying that the work has been substantially performed within the meaning of The Builders' Liens Act on the 8th day of February 2002.

21 Throughout the project, in addition to being on site, Kostas met regularly with principals of Bird, particularly Thompson and Kleemola. This was in addition to the conference and sub-trade meetings.

22 The parties conducted 19 regular conference meetings, reviewing the progress of the project and discussing various items that needed to be looked after, assigning responsibility for dealing with them. Kostas was present at 18.

23 Records of the meetings in point form were circulated as reports to all present. The earliest one, Exhibit 13, was April 2, 2001, and Exhibit 52, being conference report number 19, records a meeting on January 8, 2002 with the next one being scheduled January 22, 2002.

24 Each of the reports on the first page stated that the notes are considered to be correct and errors or omissions had to be notified within seven days or at the next scheduled meeting or the minutes will be accepted as written. There were no errors or omissions reported.

25 There were also thirteen sub-trade meetings and Kostas is shown as attending the last three, being Exhibit 48 meeting of December 10, 2001, Exhibit 50 the date being December 20, 2001 and Exhibit 53 being the meeting of January 7, 2002 (the exhibit is actually dated 2001 but it is clearly a typographical error).

26 These sub-trade minutes again noted on the front page that errors or omissions had to be notified within seven days or at the next scheduled meetings or the minutes will be accepted as written. No errors or omissions were noted.

27 The amount claimed by the plaintiff is substantiated by invoices tendered, backed up by documents which were tendered and submitted in the same fashion throughout the project. The cost charged was the cost of the work as defined in Exhibit 12, Article A-4. Eleven progress claims were submitted, plus the holdback invoice, together with supporting documentation. Progress Claims 1 to 6 were paid, but Progress Claims 7 to 11 were only partially paid. The defendants, in effect, admitted the amount claimed represented the unpaid portion of the invoices.

28 The amount that may ultimately be owing, if any, depends on the defence and counterclaim. If completely or substantially successful, the amount claimed by the plaintiff could be eliminated and the plaintiff could owe Theo money.

29 The issue of delay will be dealt with first because:

(a) the allegation supports a counterclaim of $900,000 for lost revenue;
(b) some of plaintiff's claim is alleged to be unwarranted costs as they are attributable to the delay;
(c) some of the set-offs are expenses incurred by Theo as a result of the delay; and
(d) the analysis of credibility with respect to the issue of delay will weigh heavily on any further credibility findings on specific items.

DELAY

30 Theo relies on the contract which stipulated a date for substantial completion of November 16, 2005. Theo says there were no agreements, written or verbal, extending this time. It supports its argument by pointing to the correspondence and discussions prior to the signing of the contract in which an eight-month schedule was contemplated. Theo says they were concerned about the completion date and, in fact, the contract provided a bonus of $10,000 for early completion. Kostas testified that he hired Bird because he had confidence that Bird would complete the contract on time. Theo points out that in direct examination, Kostas indicated he intended to open in accordance with the contract before Christmas. Gamble, Theo's accountant, confirmed this was the date intended before the contract was signed. Theo submits that as Bird failed to meet the date for substantial completion, it breached its contract and therefore it cannot charge for any costs incurred by virtue of its breach and is liable for damages which flow from such breach.

31 Bird submits that the contract stipulates certain delays for which the contractor is not responsible. It points out that these delays were recorded in conference reports and that it is clear that no objection was made with respect to the delays even though the consultant was present and Kostas attended all but one of the conferences. The same comment is made with respect to the sub-trade meetings, the last three of which Kostas attended.

32 Bird points out too, that Thompson's evidence was that the weather and the inability to get timely decisions from Kostas caused the delay. This was supported by Kleemola. Bird points out that the delay of information flow from Kostas is confirmed not only in the minutes of meetings but in memos from his own consultant in the late summer and early fall (Exhibits 90 B 102). Exhibits 101 and 102 are dated as late as December 4 and 10, 2001. All are memos from the consultant to Kostas, requesting information necessary to carry out some part of the job. It is Bird's position that as activities are interrelated, delay on one aspect affects scheduling in other parts of the job.

33 Kostas testified that he did not say anything at the meetings because he "didn't want to start a war" that would jeopardize the project and says that he complained privately to Thompson and Kleemola. As to the consultant's memos to himself, he derisively dismisses them as attempts by the consultant to increase his fees by generating paper.

34 There is a dispute between Kleemola and Thompson on the one hand and Kostas on the other as to the precise conversations that took place a couple of times over lunch. Thompson and

Kleemola testified that Kostas was asked when he intended to open the hotel. At one time he answered I don't know and at another time he changed the subject by discussing the Euro. Kostas denied changing the subject as alleged and explained that he said I don't know because of frustration about the delay in construction. At another point in the evidence, he indicated that he complained to Bird away from the meetings about the delay and indicated that someone will have to pay.

35 There were attempts by Theo to identify specific areas of delay and they were answered by Bird's witnesses by either indicating that it was unavoidable or that it did not hold up the project. Minic Drywall Ltd. was an example of both explanations. Bird explained that labour shortages in the industry caused the delay. They outlined the steps taken to eliminate the impact on the project and testified that ultimately it did not delay the project.

ANALYIS

36 In Campeau v. Imperial Life Assurance Co. of Canada, [2005] M.J. No. 448, 2005 MBCA 148, Freedman J.A. said as follows:

> 34 In questions of ambiguity arising out of commercial agreements, a court should consider the commercial context in which the words were used. See, e.g., Paddon-Hughes Development Co. v. Pancontinental Oil Ltd., [1999] 5 W.W.R. 726, 1998 ABCA 333, and H.W. Liebig & Company Limited v. Leading Investments Limited, [1986] 1 S.C.R. 70. The principle is expressed in the oft-quoted passage from Lord Wilberforce's decision in Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All E.R. 570 (H.L.) (at p. 574):
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. 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.
>
> 35 At all times an effort should be made to "avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively" (Goudge J.A., for the Ontario Court of Appeal in Kentucky Fried Chicken Canada v. Scott's Food Services Inc. et al. (1998), 114 O.A.C. 357 at para. 27).

37 It is clear that the original contract had a fixed time for completion and provided procedures for extending the time. These procedures involved the consultant. The consultant's role in the original or written contract was clearly intended to provide a competent person to implement orderly procedures for change orders, extensions, certification of delay and hold back of money. It is also clear that throughout the contract, at the insistence of the owner the consultant's role under the contract was reduced although he did attend at the site and participated at the conference meetings. The processes put in place by the parties did not conform to the letter of the contract but fulfilled the intent of the contract.

38 Exhibit 12 at page 71, GC 6.5 deals with delays:

GC 6.5 DELAYS

6.5.1

If the Contractor is delayed in the performance of the Work by an action or omission of the Owner, Consultant, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the Contract Documents, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor's Fee and the Guaranteed Maximum Price shall be adjusted by a reasonable amount for overhead costs incurred by the Contractor as the result of such delay.

.....

6.5.3

If the Contractor is delayed in the performance of the Work by labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound), fire, unusual delay by common carriers or unavoidable casualties, or without limit to any of the foregoing, by a cause beyond the Contractor's control, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor's Fee and the Guaranteed Maximum Price shall be adjusted by a reasonable amount for overhead costs incurred by the Contractor as the result of such delay.

6.5.4 No extension shall be made for delay unless notice in writing of claim is given to the Consultant not later than 10 Working Days after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.

(Underlining mine)

39 It would be absurd to allow Theo to substantially reduce the role of the consultant in the operation of the contract and then rely on the non-action by the consultant to get away from the clear intent of the contract. The parties by their conduct carried on the project without much of the documentation required from the consultant.

40 The contract contemplates, understandably, that completion time that is delayed beyond the control of the contractor will not be viewed as a breach and the contract would be extended by an appropriate amount of time. The intent of the documentation is to advise the owner and to allow him to respond. It also records the matter.

41 Kostas attended every one but one of the conference meetings and was aware of the delays as a result of weather. He was also aware of the actions required of him. He was receiving memos from his consultant as late as December, requesting information that was necessary for continuation of the contract.

42 His explanations are completely unbelievable. He insists that he did not say anything at the meetings because he did not want to start a war. This does not explain why he did not vigorously pursue Bird away from the meetings if, in fact, as he says, he was planning to open in November.

43 Kostas' explanation that he did not bother responding to the minutes because he felt they were inaccurate appears to be advanced as a fall back position if I do not accept his evidence that he did not say anything because he did not want to start a war. In any event, it is not reasonable to conclude that he would be attending these meetings with all the people running the project, receive the minutes and say nothing either at the meeting or after it.

44 If he is to be believed, we are to accept that while preparing to open in November and spending money on doing so even in September and October, he was still being polite, not wanting to start a war, even in the fall through November and December.

45 His dismissal of his own consultant's memos asking for information as an attempt to generate fees does not contradict the fact that the consultant was requesting the information. It does confirm the consultant's diminished role on the job.

46 I accept Kleemola's and Thompson's evidence that the couple of times they asked him about when he intended to open, he said once that he didn't know and the second time he changed the conversation to the Euro. This behaviour is consistent with his attitude toward his own consultant's memos.

47 His explanation as to why he said I don't know, namely, that it didn't look like the project was

going to be completed on time is not a credible explanation and certainly inconsistent with his other evidence that he was spending money and proceeding to prepare to open in November.

48 It is curious that the consultant was not called as a witness with respect to this matter or any of the other matters given his contemplated role in the contract, his presence on the job and his expertise. It may be that there is a fee dispute but, in any event, I am not drawing any adverse inference from this lack of evidence other than observing that without it, Kostas' evidence is uncorroborated.

49 I find that the parties by their conduct agreed to use the conference meetings as a way to implement the intention of the contract, namely, to share information and keep everybody updated. This replaced the contract requirements to document matters through the consultant.

50 Given the foregoing, I find that the delay in completion of the project was completely due to factors covered by s. GC 6.5.1 being by an action or omission of the owner or by weather being a cause beyond the contractor's control and, accordingly, the delayed substantial completion date did not breach the contract. A similar decision can be found in Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd., [1996] B.C.J. No. 1237, paras. 168, 169 and 186.

QUANTUM OF COUNTERCLAIM

51 Theo advanced a claim for $900,000 for loss of revenue as a result of the hotel not opening on the date contemplated in the contract. In case I am wrong about the delay, I will briefly examine the quantum claim.

52 Theo's interpretation of the evidence uses the approach of averaging out income presented in evidence over a number of years or the life of the hotel. It relies on the reasonable assertion that, as Gamble put it, a month lost is not recoverable.

53 Theo tried to approach it on the basis of gross profit.

54 Bird recalculated the matter on the basis of Gamble's Exhibits 87, 106, 109, 110, 111 and 112, showing in the last three fiscal years the best performance is $2.4 million in sales for an average of $200,000 per month to the end of February 2005.

55 Bird then continues to talk about actual profit percentages.

56 It seems to me that when one takes account of lost revenue, one should not only look at profits since there are fixed costs that the revenue covers and, if a person loses this income as a result of a breach of contract, they are entitled to recover these costs as well as profit.

57 I accept Gamble's approach which is to take average revenue and deduct that amount which was an expense in earning that revenue. Unlike fixed costs, this would be an expense not incurred when the revenue is not earned. He estimates this avoidable expense at 20%.

58 Using as an average, $200,000 per month to the end of February 2005 and deducting 20% for expenses incurred in earning this income, leaves a recoverable loss of $160,000 per month or $480,000 for the three months alleged to have been lost as a result of the late completion.

GENERAL CONDITIONS

59 Kostas states that he was concerned about the amount of General Conditions from the beginning. He was of the view that this was an area in which it would be difficult to monitor costs. Put less politely, he was of the view that this is an area in which Bird could increase its costs at will.

60 There were multiple complaints about the General Conditions, starting with the allegation that the plaintiff hired itself without tender to perform work under the contract described as General Conditions. This allegation in paragraph 16 of the amended statement of defence and counterclaim was not pursued. This is understandable since it is clear that the General Conditions were in fact intended to cover cost to Bird for work done by its own people.

61 Kostas notes that the General Conditions amount increased from $200,018.00 in Progress Billing No. 1 (Exhibit 65) to $279,000 in Progress Billing No. 11. He submits that certain expenditures contained in the estimates were not incurred. These unspent figures would add up to $75,375.00 so that the final adjusted figure was in fact $354,375.00, being an increase of $154,357.00 from the estimate in Progress Billing No. 1.

62 He points out that Talbott testified that they like to be "bang on" with their estimate of General Conditions. He also complains that neither he nor his accountant were able to follow all the detailed documentation that Bird gave them to support the General Conditions charge.

63 In its brief, Theo's attitude toward the General Conditions is summed up as follows:

> The huge increases, the lack of providing understandable breakdowns to Kostas and the complicated detailed figures given all support Kostas's concerns, namely that a lot of costs can be put into General Conditions by the contractor which are almost impossible to track or verify.

64 Theo also alleges at the end of its argument that it claims the amount of the increase in General Conditions as damages for breach of contract by virtue of the fact that Bird failed to perform the contract within the time provided. In effect, in its argument Theo conceded that its claim for the amount of the increase in the General Conditions is based on the allegation that the extra costs were incurred as a result of the delay in the contract and the increase in expenses connected with this extension.

65 Bird submits that the cost of General Conditions is always subject to change and that Theo was consistently cautioned about this by Bird. It submits that it provided all documentation possible to Theo to justify and detail the increase in General Conditions cost. Bird points out that there were

no challenges to the documents submitted as justification.

ANALYSIS

66 Of relevance to this particular issue and others are two items in the contract:

(a) References to maximum contract price have been removed;
(b) At the end of Article A-4.1 detailing some of the items included in cost of the work is the following general paragraph:

> Notwithstanding the foregoing and any provisions contained in the General Conditions of the Contract, it is the intention of the parties that the Cost of the Work referred to herein shall cover and include any and all contingencies other than those which are the result of or occasioned by any failure on the part of the Contractor to exercise reasonable care and diligence in the Contractor's attention to the Work. Any cost due to failure on the part of the Contractor to exercise reasonable care and diligence in the Contractor's attention to the Work shall be borne by the Contractor.

67 It is clear that it is the intent of this Cost Plus Contract that the $175,000 fee paid to the contractor be a net fee to the contractor and that all cost that is not due to failure on the part of the contractor to fulfill its obligations shall be chargeable to the owner.

68 None of the general concerns and suspicions alleged by Theo were detailed or supported by the evidence. The only contention by Theo with respect to increased cost of General Conditions that was concurred in by witnesses for Bird was that there were extra costs of General Conditions attributable to the extended contract time. As I have already found that the delay in completion was not attributable to any fault of Bird, it follows that extra charges in General Conditions occurring as a result of the extended contract work would be chargeable to the owner and, accordingly, the charge for General Conditions will remain.

ELEVATORS

69 Theo says that the elevators installed were deficient and not fit for the purpose. It claims a set-off for the installation of replacement elevators in the amount, including GST and PST, of $153,270.72. Although Theo and its consultant Riddell were the ones who selected the company to install the elevators, the actual contract was signed between Bird and Thyssen Krupp to provide and install the elevators according to the specifications.

70 Theo called evidence, including Riddell, to show that problems started with the elevators in January of 2002 and continued to the date of trial. The problems had to do with the elevators stopping and having to be reset. While Thyssen Krupp initially attended to deal with the matter,

they ultimately refused to do so, and Theo argues that the elevators have to be replaced.

71 Bird points out that they were not told about the problems with the elevators until March of 2003 as Kostas chose to deal with Thyssen Krupp himself and through the assistance of his consultant Riddell. Bird also points out that there is no evidence of the elevators being unfit for the purpose as they were still operating at the time of trial and Riddell testified that a maintenance contract should have fixed the problem. Bird says that the absence of a maintenance contract is not their responsibility.

ANALYSIS

72 Section GC 12.3 in the contract deals with the contractor's warranty and it states as follows:

12.3.1 The warranty period with regard to the Contract is one year from the date of Substantial Performance of the Work or those periods specified in the Contract Documents for certain portions of the Work or Products.

12.3.2 Except for the provisions of paragraph 12.3.6, the Contractor shall be responsible for the proper performance of the Work to the extent that the design and Contract Documents permit such performance.

12.3.3 Except for the provisions of paragraph 12.3.6 and subject to paragraph 12.3.2 and Article A-4 of the Agreement B COST OF THE WORK, the Contractor shall promptly correct defects or deficiencies in the Work which appear prior to and during the warranty periods specified in the Contract Documents.

12.3.4 The Owner, through the Consultant, shall promptly give the Contractor notice in writing of observed defects and deficiencies that occur during the warranty period.

12.3.5 The Contractor shall enforce the warranty obligations of the Subcontractors and Suppliers which shall include the following provisions:

.1 The Subcontractor or the Supplier shall correct promptly at their expense defects or deficiencies in the work which appear prior to and during the warranty periods specified in the Contract Documents.

.2 The Subcontractor or the Supplier shall correct or pay for damage resulting from corrections made under the requirements of

paragraph 12.3.3.

12.3.6

> The Contractor shall be responsible for obtaining Product warranties in excess of one year on behalf of the Owner from the manufacturer. These Product warranties shall be issued by the manufacturer to the benefit of the Owner.

(Underlining mine)

73 The claim that the elevators are unfit for the purpose is unsubstantiated and, in fact, is contradicted by the fact that the elevators were still operating at the time of trial. Theo's own witness, Riddell, indicated that a service contract would cure the problem. There is no suggestion that Bird is responsible for putting in place a service contract.

74 The actual damages flowing from the problems with the elevator were never quantified or proven. Even if they were, the contract stipulates that the contractor is to be notified promptly. Given the way the project proceeded, I would not emphasize the fact that the consultant did not get involved in giving notice in writing as stipulated in Article 12.3.4. The intent and spirit, however, of the contract is that the contractor is to be advised promptly. The owner chose not to advise the contractor until March of 2003 so that even if he had quantified damages for problems with the elevator, I would find that he was precluded from making any claims against the contractor.

PARKING LOT REPAIRS

75 Theo claims a credit for a charge of $1,096.75 for repairs done to the parking lot October 16, 2003. It alleges that the repairs were made necessary by either the failure to put on the final two inches of asphalt or the fact that the trenching done by the electrician for cable did not follow the diagram but in fact went through a portion of the parking lot. The amount paid is Exhibit 77 and the photos of the trenching are in Exhibit 78. Theo contends that Forest Park ought to have been called to explain the trenching. Theo also claims an unspecified amount as damages for future problems caused by this diagonal trenching.

76 Bird, testifying through Thompson, indicates that the areas that were repaired were not in the areas where the trenches were.

77 Bird's subcontract with Maple Leaf provided that a further two inches of asphalt would be installed in the spring of 2002 at a cost of $6,000. Given the lack of payment and break of relations between the parties, the asphalt was never installed and was never billed.

78 Theo submitted a copy of a fax from Superior Asphalt marked as Exhibit 76, indicating that as per the site inspection and the directions received, they proposed to prepare the surface, install an

average of two inches of hot-mixed asphalt and line paint at a price of $35,342.00, plus GST. Theo claims this amount of $37,815.94 as damages for non-completion of the Bird contract.

ANALYSIS

79 The onus is on Theo to connect alleged errors or omissions by Bird with the damages it claims.

80 I am satisfied that Theo has failed to show that the repairs in the amount of $1,096.75 were related to the change of plans in the trenching. No evidence other than speculations by Kostas was called to connect it. The picture would seem to indicate that the area covered by the trench is much smaller and removed from the area of the repairs.

81 Similarly, the onus is on Theo to prove that the quote by Superior Asphalt of $35,342.00, plus GST, is somehow related to the failure of Bird to have the asphalt placed on the lot. Without evidence and cross-examination, it is difficult to connect the failure to perform $6,000 worth of work to the need to spend approximately $35,000. I would add, parenthetically, that the quote obtained is dated October 27, 2005 as the work had not yet been done but even the passage of time, without evidence, fails to explain the discrepancy in prices.

82 Theo was not billed for the work by Bird. Any reasonable increase over $6,000 might be claimable if Bird is found at fault for not putting down the asphalt. The amount claimed is not supported by the evidence nor is there any evidence connecting the lack of putting down the asphalt with any subsequent damages. Both claims in relation to the parking lot are dismissed.

INSURANCE DEDUCTIBLE

83 Theo claims that $9,000 for insurance deductibles should not be chargeable to Theo.

84 $4,000 of the claim related to four $1,000 deductibles related to thefts on the site and Theo says that security was not good enough to stop these four minor thefts and, therefore, it should be Bird's responsibility.

85 Bird also claims $5,000 deductible on its own insurance policy for its own tools and, again, Theo says that it should not be responsible for losses as Bird was in charge of security.

86 Theo further points out that the insurance for contractor's equipment was to be in a form acceptable to the owner and no evidence was led by the plaintiff that the owner knew about Bird's policy or approved it. Theo further complains that the other policies had a deductible of $1,000, whereas Bird's was $5,000.

87 It is difficult to follow the last point as presumably a higher deductible would lower the premium and as it was a Cost Plus Contract, the premium would be chargeable to Theo.

88 Bird points out that Kleemola testified that proposed security measures with quotes were given to Kostas but he refused all of them and only later did he ultimately accept security cameras.

ANALYSIS

89 I have already indicated that the lack of formality in the performance of this contract was waived continuously by both parties. There is no evidence to suggest that either the security measures or the insurance contracts themselves were unreasonable in any way and, as this is a Cost Plus Contract and the deductibles were a legitimate cost of carrying on the project, the request by Theo to deduct this amount from the claim is dismissed.

INTEREST

90 Theo claims there should be a deduction of $3,806.37, showing as Item 128 on Progress Billing No. 11, which is to the month ending February 28, 2001. It is Theo's position that interest remains to be argued by the parties.

91 As the matter is still to be argued, the amount of $3,806.37 interest will be deducted from the claim.

EXTRA STAFF

92 Theo claim $25,145.00 for extra staff engaged early and that had to be paid for three months longer because of delay. This extra charge consists of a general manager, who was paid every two weeks, as well as other staff required for the hotel. The documentation referred to is Exhibit 106, the February Statement of Operations.

93 The evidence supporting the expenditures is deficient in details with respect to staff and there is no explanation as to how Theo can claim a portion of payment which, according to the evidence, was covered by a Motel 8 Corporation. It is also difficult to understand and was not satisfactorily explained why Theo hired staff when it was obvious that the project was delayed. The explanation by Kostas was that staff had to be trained. This does not explain the early hiring. Kostas further explained that good staff had to be hired in order to retain them. This seems to be a decision by Kostas, not a result of anything Bird did.

94 The above, however, are peripheral for two reasons:

(a) I have already found that the delay was not attributable to the fault of Bird, and
(b) this claim is a duplication of a claim that has already been rejected.

95 There was a counterclaim for lost revenue for the three months attributable to the delay. This counterclaim was rejected but its calculation effectively included the cost of staff for the three months. The claim for lost revenue, had it been allowed, would have covered the cost of any staff.

96 As the delay was not the fault of Bird and the claim duplicates the claim for lost revenue, the request for compensation of staff costs for the three months is dismissed.

TEMPORARY HEATING

97 Theo claims $9,236.58 as a deduction from the claim. This amount is included in Exhibit 67 as Item 1175-7, shown as temporary heating system.

98 Theo points out that Thompson agreed that 126 heaters were provided because they were required to heat the building after November 16, 2001. It is a side issue that Theo has retained the heaters. Thompson testified Kostas authorized the purchase.

ANALYSIS

99 Theo does not question the need for heating the building or the need for the extra heaters but, in effect, says that they were necessary because of the delay. Since the delay was not the fault of Bird, Theo's claim for this deduction is dismissed.

CLEAN-UP COSTS

100 Theo claims $17,502.50 deduction for clean-up costs, being extra clean-up costs shown in Exhibit 67 as Item 1290-1.

101 It is Theo's argument that the item was budgeted in Exhibit 8 as $3,500 and the final cost was $19,857.00. Theo claims the difference between the budgeted amount and the actual amount.

102 Theo further argues that the contract provided that the subcontractors shall remove all waste materials and the evidence indicates that there was some clean-up after the subs by Bird.

103 Bird explained that in addition to each sub-trade cleaning out after itself they got together and cleaned, but Theo says that Bird should not have participated as it was the subcontractor's responsibility.

104 In further support of the argument, Theo points out that Bird budgeted $5,250.00 for a final clean-up and only spent $2,265.00.

ANALYSIS

105 Bird, as general contractor, was responsible for the site, which included making sure that it was clean for other trades to come in. There is no evidence that Bird did not do its reasonable best to ensure that each subcontractor, either individually or collectively, cleaned up the site. It is reasonable that the residual clean-up had to be done to keep the project moving. I am satisfied this was a legitimate cost and is properly chargeable to the owner.

STUDS

106 Kostas alleged that the studs were screwed in improperly as there was only one screw at the top and bottom instead of two. Thompson testified that Exhibit 83, which indicates four screws are necessary, relates to exterior load-bearing walls. Kostas alleged that the result of failing to put in four screws is that walls were cracking and doors were twisting. No expert evidence was called to counter Thompson's experience and knowledge. No quantification of damages in relation to the alleged problem was provided. Supporting Thompson's evidence was Kleemola's evidence that the studs were put in according to code. I accept the evidence of Bird's witnesses and the claim with respect to studs is dismissed.

CEILING FIXTURES

107 Kostas claimed that the ceiling fixtures had to be reinstalled as a result of a mistake. Bird's evidence was that they were installed on the directions of the consultant and that the plans requiring the change were not provided until later. Not having the consultant to contradict Bird's evidence, I accept it, and the claim for the ceiling fixtures is dismissed.

WALL FIXTURES

108 Kostas says that the wall fixtures were placed in the wrong location and had to be moved. Kleemola agrees that they were in the wrong location but says that Theo was never billed for the extra work of moving the switches. Theo adds a claim for repairing the walls, relocating pictures and replacing the vinyl all related to relocating the fixtures. The claim is with respect to three matters, two of them being charges to Theo contained in Exhibit 62 as Item Nos. 122 and 123 being, together with GST, $1,557.17 and $1,343.48, respectively. Given the admission, the claims for set-off are allowed.

109 Kostas explained that Theo will incur a charge because the vinyl to repair the wall after the wall fixtures were moved was taken from behind the headboards and now the headboards have to be moved, exposing the hole in the vinyl. He estimates that he can no longer match it and his estimate for repairs is $5,000, plus $350 GST. No explanations or details were given as to how he arrives at this number and I am not prepared to allow it.

BATH-TUB

110 There is a claim for set-off with respect to Exhibit 62, Change No. 124. This is a claim for $791.80 which is related to repairing of bath-tubs. The evidence indicates that the tubs may have been damaged by other sub-trades and Theo says they should not be charged the amount. As there is no denial or explanation with respect to this claim, it is allowed.

AMOUNT OWING BY THEO

Total Amount Claimed		$433,158.22
Interest Deducted	$3,806.37	
Light Fixtures set-offs, including GST,	$1,557.17	
and	$1,343.48	
Repair bath-tub	$791.80	
Total allowed as set-off	$7,498.82	$7,498.82
Net amount owing by Theo		$425,659.40

PERSONAL GUARANTEE BY KOSTAS

111 Bird put forward the conversations between Talbott and Kostas, arguing that they constitute a personal guarantee. They point to the letter from Cambrian Credit Union, Exhibit 86, indicating that Kostas arranged for approximately $1.5 million in additional funds over and above the $5 million in financing provided to Theo. Bird concludes by saying that the evidence indicates that Kostas is personally liable for the amount claimed. He was responsible himself for arranging approximately $1.5 million in additional funds over and above the corporate loan to the corporate defendant and the discussions indicate personal responsibility.

112 Kostas says that he never guaranteed in writing or verbally to make up any shortfall. He only indicated that he would arrange for additional financing through his other companies which did not constitute a guarantee and which, in any event, he did.

ANALYSIS AND CONCLUSION

113 The contract, Tab 12, on page numbered 56, has both signatures by Kostas but underneath the second signature is an indication of his name and title, signing as President. No one argued that this signature constitutes a guarantee and I certainly do not take it as such.

114 Part 5 of the contract dealing with payment and financing information required of the owner is found at Tab 12, page 67. Section GC 5.1 states as follows:

> 5.1.1 The Owner shall, at the request of the Contractor, prior to execution of the Agreement, and/or promptly from time to time thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract.
>
> 5.1.2 The Owner shall notify the Contractor in writing of any material change in the Owner's financial arrangements during the performance of the Contract.

The owner is Theo.

115 While Talbott indicated that he was under the impression that Kostas would be putting in additional monies, he never went as far as to indicate that he felt Kostas was personally guaranteeing the contract nor did he indicate that they would not have entered into the arrangement if they did not have the personal guarantee of Kostas.

116 It is clear from the evidence that additional financing was in fact arranged by Kostas through his other two companies that owned the two motels. He also, pursuant to the contract, complied with requests for additional information, including allowing Bird to obtain information from Cambrian Credit Union. This was fulfilling Theo's obligation to provide information.

117 There is no evidence that Kostas personally guaranteed the contract and the claim for a personal judgment against Kostas is accordingly dismissed.

118 There was no opposition to the claims for relief under the lien and same will be granted subject to any comments counsel will make at our next meeting with respect to details.

119 Counsel are to address the issues of interest and costs and an appointment should be made with the trial coordinator, allowing for sufficient time to make submissions.

KAUFMAN J.

cp/e/qw/qlrds/qlbrl/qlmll

Case Name:

Bird Construction Co. v. Theo C. Ltd.

Between
Bird Construction Company, (Plaintiff) Respondent, and
Theo C. Limited, (Defendant) Appellant, and
Polychronis Emmanuel Kostas a.k.a. "Paul" Kostas,
(Defendant)

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212 Man.R. (2d) 152

60 C.L.R. (3d) 133

155 A.C.W.S. (3d) 573

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Docket No. AI 06-30-06420

Manitoba Court of Appeal

Scott C.J.M., Monnin, Hamilton JJ.A.

Heard: January 23, 2007.
Judgment: January 23, 2007.
Written reasons: February 12, 2007.

(15 paras.)

Construction law -- Building contracts -- Breach -- Terms -- Variation -- Appeal by the defendant from a decision dismissing its counterclaim for breach of contract -- Construction contract provided for a completion date of November 16, 2001 -- The contract was completed on February 12, 2002 -- Appellant, in its counterclaim, alleged that the respondent was in breach of the contract due to the delay on achieving substantial completion and sought damages -- Judge found that parties had by their conduct agreed to amend certain provisions of the contract and that the delay

in completion was due to factors covered by an amended section -- Appeal dismissed -- More than ample evidence before the trial judge on which he could come to the conclusion that he did -- Same rationale applied to the issue of interest -- Judge committed no overriding or palpable error.

Appeal by the defendant from a decision dismissing its counterclaim for breach of contract. The parties entered into a construction contract. The contract provided for a completion date of November 16, 2001. However, the contract was completed on February 12, 2002. The respondent sued for the balance of the contract price, but the appellant, in its counterclaim, alleged that the respondent was in breach of the contract due to the delay on achieving substantial completion and sought damages. The contract provided that the respondent would not be responsible for delays which were beyond its control. A second issue on appeal was whether a clause on the contract dealing with the payment of interest was void for uncertainty. The judge found that parties had by their conduct agreed to amend certain provisions of the contract and that the delay in completion was due to factors covered by an amended section, being by an action or omission of the owner or by weather being a cause beyond the contractor's control. The delayed substantial completion date did not breach the contract.

HELD: Appeal dismissed. There was more than ample evidence before the trial judge on which he could come to the conclusion that he did. The same rationale applied to the issue of interest. The judge committed no overriding or palpable error.

Counsel:

R.N. Kushnier, for the Appellant.

D.G. Hill and R. Van Dorp, for the Respondent.

The judgment of the Court was delivered by

1 **MONNIN J.A.**:-- This is an appeal that arises from the interpretation of a construction contract and findings made by the trial judge.

2 Following a hearing, the appeal of the defendant/appellant Theo C. Limited (Theo) was dismissed with costs to the plaintiff/respondent Bird Construction Company (Bird) with reasons to follow. These are the reasons.

3 There were two main issues brought forward on appeal. The first is whether the contract was breached by reasons of delay on the part of Bird. The second is whether a clause in the contract dealing with the payment of interest was void due to uncertainty.

4 Because both of those issues are either fact based or a mixture of fact and law, it was incumbent on Theo to demonstrate that the judge made palpable and overriding error in arriving at his findings.

5 The parties entered into a construction contract on April 4, 2001. The contract provided for a completion date of November 16, 2001. The contract, however, was only completed on February 12, 2002. Bird sued for the balance of the contract price, but Theo, in a counterclaim, alleged that Bird was in breach of the contract due to the delay in achieving substantial completion and claimed damages. The contract provided that Bird would not be responsible for delays which were beyond its control.

6 The judge made a strong finding of credibility against the president of Theo. He went on to find that the parties had by their conduct agreed to amend certain provisions of the contract, and then went on to make the following findings with respect to the allegations of delay (at paras. 49-50):

> I find that the parties by their conduct agreed to use the conference meetings as a way to implement the intention of the contract, namely, to share information and keep everybody updated. This replaced the contract requirements to document matters through the consultant.
>
> Given the foregoing, I find that the delay in completion of the project was completely due to factors covered by s. GC 6.5.1 being by an action or omission of the owner or by weather being a cause beyond the contractor's control and, accordingly, the delayed substantial completion date did not breach the contract. A similar decision can be found in **Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.**, ... [1996] B.C.J. No. 1237 (S.C.), paras. 168, 169 and 186.

7 Theo argued that the delay was in fact mostly caused by a sub-trade and that the delay was Bird's responsibility and that the judge's findings were not based on the evidence. Counsel for Bird refuted this allegation and demonstrated to the court that, based on the documentary evidence alone, there was ample evidence on which the judge could come to the conclusion that he did on this issue.

8 The second issue before us was whether a clause in the contract dealing with the payment of interest was void due to uncertainty.

9 The standard form of the contract provided:

> Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at percent (%) per annum above the prime rate on such unpaid amount shall also become due and payable until payment. Such interest shall be compounded on a monthly basis. The prime rate shall be the lowest rate of interest quoted by the Royal BANK of Canada for prime business loans.

10 The following words "Bank of Canada rate + four" were however inserted in the blank spaces in what I have just quoted.

11 In oral reasons delivered April 19, 2006, the judge found:

> Now, it is true that there is a slight confusion in that clause, and that confusion arises from the fact that the last sentence in clause 7.3.1 says the prime rate should be the lowest rate of interest quoted by the Royal Bank of Canada for prime business loans, whereas the insertion, the second line, talks about interest at Bank of Canada rate plus four per cent.
>
> Since that was inserted by the parties I will find that that is the intent of the parties, and that they simply forgot to X out the last line which talks about the Royal Bank, and that means that the interest clause would then read that should the parties fail to pay when they become due then interest will run at the Bank of Canada rate plus four per cent, per annum, above the prime rate.

12 Again, Theo argues that the judge's finding was not supported by the evidence to which Bird replies that the fact that the Bank of Canada interest clause was inserted into the contract is a clear sign of the intent of the parties that interest would be payable and at the Bank of Canada rate which is clearly more favourable to Theo than interest at the rate of any of the chartered banks.

13 Both issues raised by Theo must be considered in the light of the standard of review that I have set out earlier in these reasons and the extent of appellate review that this court can exercise. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.).

14 It might have been preferable if the judge, in his disposition of the delay issue, had particularized his finding as he did for other issues before him, but notwithstanding that lacuna, there was more than ample evidence before him on which he could come to the conclusion that he did. The same rationale applies with respect to the issue of interest.

15 The judge committed no overriding or palpable error. There is no basis for appellate interference. The appeal is dismissed with costs.

MONNIN J.A.
SCOTT C.J.M.:-- I agree
HAMILTON J.A.:-- I agree

cp/e/qlcct/qllkb

TAB 14

Case Name:

Barclays Bank PLC v. Devonshire Trust (Trustee of)

Between
Barclays Bank PLC, Plaintiff, and
Metcalfe & Mansfield Alternative Investments VII Corp., in its capacity as Trustee of Devonshire Trust, The Bank of New York as Custodian, and CIBC Mellon Trust Company, in its capacity as Indenture Trustee, Defendants

[2011] O.J. No. 3988

2011 ONSC 5008

82 C.B.R. (5th) 159

93 B.L.R. (4th) 205

2011 CarswellOnt 9183

Court File No. CV-09-0370103

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: September 21, 27, October 1, 4, 6, 12-15, 18-22, 25-29, November 2-5, December 6-10, 13-17, 2010; April 18-21, 26-29, May 2-4, 9-10, and June 6-9, 2011.
Judgment: September 7, 2011.

(482 paras.)

Contracts -- Performance and discharge -- Termination -- By notice -- Action for breach of contract dismissed ---- Devonshire held income-producing assets financed through asset backed commercial paper -- Plaintiff was asset and liquidity provider to Devonshire -- Under Master Agreement between parties, Devonshire acquired two credit default swap transactions from plaintiff -- Plaintiff failed to pay liquidity funds to Devonshire in 2007 -- Plaintiff paid funds in 2009 and purported to

terminate Agreement based on defendant's insolvency -- Plaintiff could not terminate agreements early -- Plaintiff failed to make timely payment to Devonshire in 2009 before delivering notice of termination -- Plaintiff breached its good faith obligations under Master Agreement.

Contracts -- Breach of contract -- Action for breach of contract dismissed ---- Devonshire held income-producing assets financed through asset backed commercial paper -- Plaintiff was asset and liquidity provider to Devonshire -- Under Master Agreement between parties, Devonshire acquired two credit default swap transactions from plaintiff -- Plaintiff failed to pay liquidity funds to Devonshire in 2007 -- Plaintiff paid funds in 2009 and purported to terminate Agreement based on defendant's insolvency -- Plaintiff could not terminate agreements early -- Plaintiff failed to make timely payment to Devonshire in 2009 before delivering notice of termination -- Plaintiff breached its good faith obligations under Master Agreement.

Action for breach of contract. The plaintiff was the asset and liquidity provider to the defendant Devonshire Trust. Devonshire was established as the special purpose trust for the purpose of acquiring and holding income-producing assets financed through the issuance of asset backed commercial paper. In 2006, the plaintiff and Devonshire entered into several agreements, including an International Swap Dealers Association Master Agreement. Under the agreements, Devonshire acquired two credit default swap transactions from the plaintiff. Under these transactions, Devonshire sold the plaintiff protection against the possibility of credit defaults in a portfolio of debt obligations not owned by the plaintiff. The plaintiff paid a monthly premium to Devonshire for this protection. When the market froze in August 2007, Devonshire, like other independent conduits, was unable to roll its Class A notes. The plaintiff then entered into a Consortium Agreement which contained a long-term proposal under which all outstanding asset backed commercial paper would be converted into term floating rate notes maturing no earlier than their scheduled termination dates and the signatories, including the plaintiff, agreed in principle to the long-term proposal and to work in good faith to bring about its timely implementation. Devonshire sent market disruption notices to the plaintiff in 2007 requesting payments under the liquidity facility it had with the plaintiff to be used to pay the noteholders whose notes had become due. The plaintiff took the position that no market disruption event as defined in the relevant agreement had occurred and refused to provide any liquidity payments to Devonshire. Devonshire delivered a default notice to the plaintiff. Suspension Notices suspended the notice of default sent by Devonshire until the end of the Standstill Period to allow the plaintiff to implement the Consortium Agreement. In 2009, the plaintiff wired to Devonshire's bank the liquidity payments demanded by Devonshire in 2007. The plaintiff then delivered its notice of termination of the Master Agreement based on an alleged insolvency of Devonshire. On the same day, Devonshire delivered a notice purporting to terminate the Master Agreement for the plaintiff's failure to pay the liquidity calls made in 2007. Devonshire argued that the plaintiff's failure to make the liquidity payments was the proximate cause of its insolvency and that the plaintiff should not be able to take advantage of its breach by relying on Devonshire's insolvency.

HELD: Action dismissed. The plaintiff could not rely on its notice of early termination of 2009. The plaintiff failed to make timely payment to Devonshire in 2009 before delivering its notice of early termination and could not rely on the conditional payment it made by reason of its breach of its good faith obligations under the Master Agreement. The plaintiff obtained the last two extensions of the Standstill Period misrepresenting to Devonshire that its negotiations with the Caisse under the Consortium Agreement were progressing. The misrepresentations influenced the decision of Devonshire to accept those extensions and were reasonably relied on by Devonshire to its detriment. Devonshire was entitled to rescission of the last two extensions. Although Devonshire was insolvent when the liquidity payments were made by the plaintiff in 2009, the plaintiff elected not to terminate swap contracts on the basis of the insolvency of Devonshire. Its notice of early termination on the ground of Devonshire's insolvency was thus ineffective. It was only after the liquidity funds were transferred into Devonshire's account that the funds were made available to Devonshire. Based on the timing of the fund transfer, the plaintiff failed to pay the outstanding liquidity amount before purporting to terminate the swap contracts. As the plaintiff was not a non-defaulting party, it had no right under the Master Agreement to deliver its notice of early termination when it did. The plaintiff's conduct leading up to its purported termination of the swap contracts in 2009 breached its good faith obligations. Devonshire was entitled to terminate the agreement. Any amounts payable to the plaintiff on the termination were subordinated to amounts payable to Devonshire. By reason of the Intercreditor Agreement, Devonshire was entitled to receive $532,668,082 as the Base Calculation Amount as well as the Unpaid Amounts claimed, together with interest.

Counsel:

Peter F.C. Howard, Eliot N. Kolers, Samaneh Hosseini and Lindsey Love-Forester, for the plaintiff.

J. Thomas Curry, Monique J. Jilesen, Kate McGrann and Brendan Gray, for the defendant Metcalfe & Mansfield Alternative Investments VII Corp., in its capacity as Trustee of Devonshire Trust.

Jeffery S. Leon, for the defendant, CIBC Mellon Trust.

[Editor's note: An amended judgment was released by the Court May 18, 2012. The changes were not indicated. This document contains the amended text.]

REASONS FOR JUDGMENT

1 F.J.C. NEWBOULD J.:-- This judgment is lengthy and an index at the outset will assist in making headway through what is by any account a complex matter.

Index

1. Prelude
2. Asset Backed Commercial Paper market
3. The Barclays and Devonshire swap transactions
4. The Montreal Accord
5. Interim suspension of rights
6. Events of January 13, 2009 and litigation
7. Bifurcation order
8. Credibility of witnesses
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10. Did Barclays waive its right to remedy its default?
11. Effect of the Suspension Notice
12. Misrepresentation claim

(a) Nature of claim
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(c) Analysis
(d) Result of misrepresentation

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(b) Did Barclays elect to abandon its right to rely on the insolvency of Devonshire?
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(f) Did Barclays make the liquidity payments on time to enable it to terminate the swaps?

14. Did Barclays act in breach of a duty of good faith?
15. Did Barclays have the right to terminate the ISDA Master Agreement?

16. Did Devonshire have the right to terminate the ISDA Master Agreement?
17. Settlement on Barclays default
18. Settlement on Devonshire default

    (a) Evidence of Leslie Rahl
    (b) Valuation date
    (c) Loss as of January 13, 2009
    (d) Mitigation issues
    (e) Barclays' recourse

19. Conclusion

1. Prelude

2 This action arises from the events in 2007 and 2008 surrounding the liquidity crisis in the asset backed commercial paper (ABCP) market in Canada that led to a portion of the ABCP market referred to as the third party or independently sponsored ABCP market being compromised and restructured under the CCAA in 2008-9. The Devonshire Trust was the only trust, or in the jargon of the market, the only "conduit" in the independently sponsored Canadian ABCP market that was not a party to the CCAA restructuring.

3 The plaintiff Barclays Bank PLC was counterparty to Devonshire by virtue of it being the asset and liquidity provider to Devonshire, as will be explained. It was only through the Devonshire Trust that Barclays participated in the Canadian ABCP market.

4 Barclays and Devonshire each claim that the other breached the relevant agreements. The rights of Barclays and Devonshire in this action depend in part on the interpretation of the legal documentation that governs their relationship. The deal between them took nine months to negotiate. Each side had businessmen who were legally trained and who were advised by teams of outside lawyers. The legal documentation is byzantine in its complexity and would make the work of the most Philadelphian of lawyers look like mere child's play. The financial product involved was relatively new and complex, with many acronyms being used by the players as short form descriptions.

5 There is collateral of $600 million plus interest held in trust. There is a further amount of approximately $183 million plus interest held by Devonshire. Barclays claims to have suffered a loss of $1.2 billion and claims entitlement to all of the funds. Devonshire claims to be entitled to all of the funds in order to pay the outstanding noteholders of Devonshire.

2. Asset Backed Commercial Paper market

6 Commercial paper is a term used to refer to promissory notes, or bonds, issued in the commercial world. Asset backed commercial paper (ABCP) is a term used that refers to commercial paper secured, or backed, by some asset. A secured note is a shorter description of ABCP.

7 In the market involved in this case, securitization is a method of raising financing. It involves the use of a special-purpose entity such as a trust that repackages the cash flow from income-producing financial assets into securities, or notes, that are purchased by investors in the debt capital markets. In a securitization transaction, financial assets are purchased by the trust from operating or finance companies that sell or "originate" those assets. Examples of so-called traditional assets that are securitized are mortgages, loans, leases, and credit card receivables. Other assets are called "structured financial assets", including "synthetic" assets such as credit default swaps (CDS), which were used in the transactions between Barclays and Devonshire.

8 In securitizations, the trust (or conduit) acquires assets and earns a return from the income produced by those assets. To pay for the assets, the conduit issues ABCP. The ABCP is sold and interest is paid by the trust to the investors holding the notes at a spread over the Canadian Dealer Offered Rate ("CDOR"). The trust earns revenue on the spread between its return on the underlying asset and the cost of interest it must pay its investors on its ABCP.

9 The ABCP market in Canada at the relevant times was described by Purdy Crawford, Q.C., who was the chairman of an investor's committee that spearheaded the restructuring of the independent conduits in the Canadian ABCP market. In his affidavit filed in CCAA proceedings, Mr. Crawford described the market and the problems that arose as follows:

> [7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.
>
> [8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."
>
> [9] Some of these supporting assets were mid-term, but most were long-term, such as pools of residential mortgages, credit card receivables or credit default

swaps (which are sophisticated derivative products). Because of the generally long-term nature of the assets backing the ABCP, the cash flow they generated did not match the cash flow required to repay maturing ABCP. Before mid-August 2007, this timing mismatch was not a problem because many investors did not require repayment of ABCP on maturity; instead they reinvested or "rolled" their existing ABCP at maturity. As well, new ABCP was continually being sold, generating funds to repay maturing ABCP where investors required payment. Many of the trustees of the Conduits also entered into back-up liquidity arrangements with third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.

[10] In the week of August 13, 2007, the ABCP market froze. The crisis was largely triggered by market sentiment, as news spread of significant defaults on U.S. sub-prime mortgages. In large part, investors in Canadian ABCP lost confidence because they did not know what assets or mix of assets backed their ABCP. Because of this lack of transparency, existing holders and potential new investors feared that the assets backing the ABCP might include sub-prime mortgages or other overvalued assets. Investors stopped buying new ABCP, and holders stopped "rolling" their existing ABCP. As ABCP became due, Conduits were unable to fund repayments through new issuances or replacement notes. Trustees of some Conduits made requests for advances under the back-up arrangements that were intended to provide liquidity; however, most Liquidity Providers took the position that the conditions to funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, and with long-term underlying assets whose cash flows did not match maturing short-term ABCP, payments due on the ABCP could not be made -- and no payments have been made since mid-August.

3. The Barclays and Devonshire swap transactions

10 Quanto Financial Corporation, the sponsor and financial services agent of Devonshire, was formed in October, 2005 by Mr. Lafleur-Ayotte and Mr. Alain Pelchat, both of whom had been with National Bank. Mr. Lafleur-Ayotte and Mr. Pelchat had started up the conduit business while at National Bank, setting up three conduits. They left National Bank to establish Quanto, at which time National Bank transferred the conduit business to Quanto. Each of Mr. Lafleur-Ayotte and Mr. Pelchat owned 20% of Quanto at the outset, the other shareholders being National Bank and Deutsche Bank, each as to 15% and the balance of 30% being owned by key employees.

11 In the fall of 2005 Mr. Lafleur-Ayotte and Mr. Pelchat began discussions with Barclays regarding a conduit business. They knew Mr. Lovisolo of Barclays from earlier days when all three

worked at Deutsche Bank and they knew Mr. Neville of Barclays whom they had met while working for National Bank. The transaction with Barclays was negotiated and eventually agreed in August, 2006 and amended in December, 2006.

12 Devonshire and Barclays entered into an ISDA[1] Master Agreement dated as of July 6, 2006, an Amended and Restated Master Credit Derivatives Confirmation Agreement dated December 1, 2006, two Amended and Restated Transaction Supplements dated August 16, 2006 and August 25, 2006 and two Amended and Restated Seller Credit Support Annexes (CSAs) also dated August 16, 2006 and August 25, 2006, a Trust Indenture dated August 2, 2006 and a Series A Supplemental Indenture made as of August 2, 2006, which, along with detailed Schedules and Annexes to these agreements, governed the credit derivative transaction between the parties.

13 Devonshire was established as the special purpose trust for the purpose of acquiring and holding income-producing assets financed through the issuance of ABCP. Under the terms of the agreements between the parties, Devonshire was only permitted to acquire assets from Barclays. The two transactions in dispute were intended to be only the first of several transactions between the parties, but they became the only transactions.

14 Barclays was the "asset provider" to Devonshire. The assets acquired by Devonshire from Barclays were two credit default swap transactions, or contracts, between Barclays and Devonshire called "synthetic leveraged super senior credit default swaps". Synthetic leveraged super senior credit default swap transactions came into the market in Canada in the fall of 2004 and were made by the independent conduits. The bank sponsored conduits did not enter into leveraged super senior contracts.

15 Under these transactions, Barclays was a "credit protection buyer" and Devonshire was a "credit protection seller". That is, Devonshire sold Barclays protection against the possibility of credit defaults in a portfolio of debt obligations not owned by Barclays. Barclays paid a monthly premium to Devonshire for this protection and Devonshire agreed that if the level of losses in the portfolio reached a certain point, Devonshire would pay an amount to Barclays.

16 The term of the two swaps was to run until 2016. The monthly premium paid to Devonshire by Barclays for this protection was the source of the payments to the noteholders who purchased their ABCP from Devonshire.

17 The portfolio of underlying debt obligations consisted of 130 corporate bonds issued by various corporations in the first swap and 100 in the second swap, as well as various asset backed and mortgaged backed securities. The contents of the portfolio were negotiated between Barclays and Devonshire. Thus the transactions were called "bespoke" transactions. Because Barclays did not have any ownership interest in the pool of assets for which it was buying credit protection, the swaps were called "synthetic".[2]

18 In order to secure the contingent obligation of Devonshire to Barclays if there were credit

defaults in the underlying portfolio, Devonshire was required to, and did, pay $300 million to Barclays for each transaction, or $600 million in total, at the outset of the transactions. Under the relevant agreements, if there were no defaults in the underlying portfolio of obligations at the end of the agreements in 2016 that required Devonshire to pay Barclays, Barclays was obliged to repay Devonshire the $600 million. In order to secure this obligation to repay Devonshire, Barclays was required to, and did, post $600 million of its own assets or funds as collateral, and it is held by Bank of New York under a custodian agreement.

19 The swaps were called "leveraged" because while the amount that Devonshire could be called upon to pay under each swap was $3 billion, Devonshire was required to post collateral for this obligation of only $300 million for each swap. Thus the swaps were initially leveraged on a 10 to 1 basis, which allowed Devonshire to be paid premiums on $6 billion worth of protection for initial collateral of one-tenth that amount. However, to protect Barclays in the event that the value of the swaps to Barclays increased beyond certain trigger points based on a mark to market[3] valuation of the underlying portfolio for which credit protection was being purchased, Devonshire agreed to post further collateral to Barclays on certain conditions. This was to protect Barclays against its "gap risk", being the risk that the collateral held by Barclays was less than the loss to Barclays in the event that there was early termination of the swaps.

20 The credit risk of the bond portfolio was broken into "tranches" and Devonshire was responsible only for losses in the tranche referred to as the "super senior" tranche. If aggregate losses in the bond portfolio exceeded 15% in the case of one of the swaps and 16% for the other the ("attachment point") Devonshire became liable for a portion of those losses.[4] The super senior tranche went up to 62.5% ("detachment point") for one swap and 60% for the other. Because of the quality of the corporate bonds which made up the underlying portfolio on which Barclays bought credit protection,[5] it was thought by both Barclays and Devonshire that it would be highly unlikely that any losses would occur during the term of the swaps that would reach the attachment point, and thus highly unlikely that Devonshire would ever be called upon to pay anything to Barclays for losses in the super senior tranche.

21 There were three classes of notes of one series issued by Devonshire, being short term notes (Class A), extendible notes (Class E) and floating rate term notes (Class FRN). The Class A notes were short term notes that matured within 30 to 90 days and were either rolled over on maturity by the holders or cashed in with new notes being issued by Devonshire to other investors. In order to ensure that there would be funds available to Devonshire to buy up maturing Class A notes in the event notes could not roll over, Barclays agreed to be a "liquidity provider' to Devonshire. This means that Barclays agreed to supply funds to repay Devonshire's maturing Class A notes upon the occurrence of a "Market Disruption" event. Barclays' maximum obligation as liquidity provider was to provide $205 million in liquidity payments for one year, later extended to two years. Devonshire paid a monthly fee to Barclays for this liquidity protection.

22 Whether there was a "Market Disruption" in August 2007 became a hotly contested issue.

23 There were other features of the transactions that have taken on an importance in this litigation. One was what was described by Barclays in internal trade approval documentation as a non-standard non-recourse feature that did not permit any claim against Devonshire if upon the "unwind" or termination of the transactions, the collateral posted by Devonshire was not sufficient to cover Barclays loss. What collateral is available to Barclays in the event of a default by Devonshire is contested.

24 Another is what Devonshire describes as a stop-loss provision, under which Devonshire had the right upon being called to post more collateral during the life of the swaps to terminate the swaps rather than post more collateral. The effect of this provision plays a role in the debate in the case as to the losses claimed by Barclays to have been suffered upon the termination of the swaps.

4. The Montreal Accord

25 It was on August 13, 2007 that the independent ABCP market froze in Canada. Because of the uncertainty in the marketplace and the increased lack of liquidity, the spreads on ABCP notes quickly widened, which raised the likelihood of collateral calls being made on the conduits by the asset providers to provide more collateral to secure the asset providers. Because noteholders were not rolling their notes, liquidity calls were being made by conduits for cash to pay out these noteholders on their ABCP that became due.

26 A meeting of the major players in the independent ABCP market was held in Montreal on August 15 and into the early hours of August 16. It was organized in large part by the Caisse, a very large investor in ABCP, and by National Bank, a large dealer of ABCP. It was attended by ABCP noteholders, dealers, and asset and liquidity providers. Barclays attended the meeting. The conduits were not represented. The idea was to get the asset providers to agree on a moratorium against any collateral calls being made for more security and a moratorium on the conduits from making liquidity calls for funds to pay noteholders who were not rolling their notes. As Mr. Davis of National Bank testified, the purpose was to prevent a blow-up of the market and to have everyone put their weapons down and take a pause.

27 On August 16, 2007, before the opening of the markets, an agreement known as the Montreal Accord was made. It contained an interim agreement for 60 days called the Standstill Period that precluded calls by the conduits for liquidity payments and calls by the asset providers for collateral to be posted by the conduits. The Montreal Accord also contained a proposal with a framework of principles to be used in restructuring each of the conduits. It was later extended to March 14, 2008.

28 Barclays, the asset and liquidity provider to Devonshire, was a signatory to the Montreal Accord. Major note holders of Devonshire who signed the Montreal Accord were the Caisse, National Bank and Desjardins Group. There were 22 conduits in the independent ABCP market at the time of the Montreal Accord. They initially were not signatories to it. However on October 15, 2007 Devonshire and all other affected conduits signed it.

29 Following the Montreal Accord, a "Pan-Canadian Third Party Asset-Backed Commercial Paper Investors Committee" was formed by investors of ABCP notes to negotiate for investors in the restructuring of the ABCP market. Purdy Crawford Q.C. was appointed its chairman. It was the Investors Committee and its advisors, including Goodmans and JPMorgan, who spearheaded the negotiations on behalf of the conduits, including Devonshire.

30 On December 23, 2007 a "Framework Agreement" was made covering 20 of the trusts[6]. This was an agreement in principle as to how those conduits were to be restructured and it eventually led to a restructuring under the CCAA. Barclays was not a signatory to the Framework Agreement as it was not prepared to make the kind of concessions required by that agreement.

31 From then on the attempts to restructure Devonshire were carried on outside the provisions of the Montreal Accord. The discussions for the most part did not involve Devonshire. They were carried on by the major note holders of Devonshire, together with the Investors Committee, directly with Barclays.

32 A CCAA filing took place in March, 2008 covering the restructuring of the 20 conduits that were parties to the Framework Agreement of December 23, 2007. The CCAA plan was later approved by Campbell J. and then by the Court of Appeal in August, 2008. After that, because of dramatic market changes that took place in the fall of 2008 following large financial failures, including Lehman Brothers, the plan was twice renegotiated in December, 2008 at the insistence of the Investors Committee led by Purdy Crawford. This larger restructuring closed in January, 2009.[7]

5. Interim suspension of rights

33 When the market froze on August 13, 2007, Devonshire, like other independent conduits, was unable to roll its Class A notes, meaning noteholders whose notes became due on those days were unwilling to roll them over for new notes and Devonshire was unable to sell other notes to obtain funds to pay the noteholders whose notes had become due. Devonshire sent market disruption notices to Barclays on August 13, 14 and 15 requesting payments from Barclays under the liquidity facility it had with Barclays to be used to pay the noteholders whose notes had become due. Barclays took the position that no market disruption event as defined in the relevant agreement had occurred and refused to provide any liquidity payments to Devonshire. On August 14, 2007 Devonshire delivered a default notice to Barclays, the effect of which was to give Barclays three days to cure the default.

34 Because of the Montreal Accord, and in order to allow negotiations to take place with a view to restructuring Devonshire, Devonshire delivered a Suspension Notice to Barclays on August 16, 2007 in which it suspended without prejudice the effect of the default notice it had sent to Barclays and agreed not to take any further steps to enforce its rights under that notice until the end of the Standstill Period. Barclays wanted Devonshire to simply rescind the default notice, but Devonshire refused unless further assurances were provided, which did not occur. This Suspension Notice was extended for fixed periods of time until February 22, 2008, then daily until March 14, 2008, then for

a fixed period until April 16, 2008, and thereafter on a daily basis until January 12, 2009.

35 The effect of the Suspension Notice is contested. Further, Devonshire claims that the daily extensions of January 8 and 9, 2009 contained misrepresentations of fact by Barclays entitling Devonshire to set aside those extensions.

6. Events of January 13, 2009 and litigation

36 The last daily extension between Barclays and Devonshire was made on Friday, January 9, 2009 effective through the close of business on Monday. January 12, 2009.

37 Shortly after 9 a.m. on January 13, 2009 Barclays delivered a notice to Devonshire purporting to terminate the ISDA Master Agreement based on an alleged insolvency of Devonshire. Just moments before that, Barclays had given notice that it would pay to Devonshire under protest the past due liquidity amount under the market disruption notices given by Devonshire on August 13, 14 and 15, 2007, plus interest, and these funds, some $71,000, were sent by Barclays just before 9 a.m. and received in Devonshire's bank account around 11 a.m. that morning. Barclays also issued and served its statement of claim that morning commencing this action.

38 Devonshire did not accept that Barclays had grounds to terminate the ISDA Master Agreement. On the same day, at 2:22 p.m., Devonshire delivered a notice to Barclays purporting to terminate the ISDA Master Agreement for failure of Barclays to pay the liquidity calls made by Devonshire on August 13, 14 and 15, 2007.

7. Bifurcation order

39 Prior to this trial, a bifurcation order was made by Campbell J. on consent, in which it was agreed that a number of issues would be bifurcated. The bifurcated issues were (i) whether there was a market disruption event in August 2007, (ii) whether Devonshire's market disruption notices and notice of default were valid, (iii) whether Barclays was in default under the notices sent by Devonshire up to August 16, 2007, (iv) whether Devonshire was precluded from asserting the occurrence of a market disruption event. It was agreed that for the purposes of this "first trial", these issues would be determined in favour of Devonshire without prejudice to the position of Barclays that its payment on January 13, 2009 cured any default.

40 On October 15, 2010 I made a ruling as to what evidence could be led in this first stage of the trial as a result of the bifurcation order. In particular, I ruled that the only evidence pertaining to the alleged default of Devonshire that could be led at this stage was evidence relating to the claim that Devonshire was insolvent at some time after August 16, 2009.

8. Credibility of witnesses

41 This case is one of extreme complexity involving a market unknown to all but those who have

practised in it. I was fortunate to have counsel who recognized the need to make things intelligible, no doubt born from their need to understand the market from the time they first became involved many years ago. The witnesses all did their best to simplify matters to the extent that they could be simplified, and to explain the myriad of concepts. As might be expected, the witnesses without exception were highly educated and intelligent.

42 Much of what happened in this case took place by e-mail. There were a large number of telephone conversations amongst the various participants, most of which were recorded because they were made on traders' lines that are automatically recorded, and transcripts of these calls were made exhibits. This was not a case, however, which could be decided on the basis of only such evidence. Issues were raised which required consideration of the credibility and reliability of the evidence of some witnesses. In making credibility and reliability assessments, the statement of O'Halloran J.A. in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), is helpful:

> The credibility of interested witnesses...cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ... Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

43 While I found the evidence of the fact witnesses of Barclays extremely helpful, I must say that I found some of them too engaged in trying to sell their case regarding the state of negotiations between Barclays and the Caisse and the state of the market, and as will be discussed, I have not been able to accept all of their evidence as reliable or credible. Regarding the fact witnesses called by Devonshire, I did not have the same concerns. Some had better recollection than others, as is not unusual, but they all attempted to give their evidence according to their recollection of things. Regarding Mr. Lafleur-Ayotte, I found him to be loquacious, and one of those persons who, when asked a question, hears more in the question than asked and drifts off into areas not directly responsive to the question. I did not find him purposely doing so, however, and did not find him trying to argue the case any more than most witnesses are prone to do. I found his evidence generally to be credible and reliable.

44 Regarding the expert witnesses and their valuation evidence, a trial judge is entitled to accept or reject the evidence of an expert witness in whole or in part. The fact that the evidence of a witness is accepted or rejected in any part does not mean that the whole of the evidence of that witness must be accepted or rejected. A trial judge need not accept the valuation of the experts, and is entitled to make his own calculations to arrive at a valuation. See *R. v. Towne Cinema*, [1985] 1 S.C.R. 494 and *Connor v. The Queen*, [1979] C.T.C. 365, 79 D.T.C. 5256 (F.C.A.). In *Connor*,

Urie, J., referred to the trial judge's reasons, [1978] F.C.J. No. 905, and stated:

> ... In this case he accepted some of the evidence but he rejected in all cases the methods, at least in part, whereby the experts arrived at their valuations. He was entitled to do so and unless it can be said that thereafter he proceeded on a wrong principle or that he made a palpable error in reaching his own conclusions as to value, we ought not to interfere with his findings. We have not been persuaded by the arguments of counsel that he proceeded on a wrong principle or made any such error. Certainly he appears to have adopted parts of the methods used by the witnesses in making their calculations but in using only parts and not the whole of their respective methods we do not believe that he erred in law.

See also generally the decision of Greenberg J. in re *Domglas Inc; Domglas Inc. v. Jarislovsky* et al (1981) 13 B.L.R. 135; aff'd (1982) 138 D.L.R. (3d) 521, as to the role of a judge in setting value. In that case, Greenberg J. fixed value guided by, but not slavish to, the values and factors chosen by the various experts. See also my comments in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Ltd.* (2010), 318 D.L.R. (4th) 513; aff'd [2011] O.J. No. 2476 (C.A.).

9. Which law governs the Montreal Accord, the Suspension Notice and Extension Agreements?

45 Devonshire contends that the contractual relations between Devonshire and Barclays embodied in the Montreal Accord, the Suspension Notice and extension agreements are governed by Quebec law and subject to an obligation to act in good faith, among other things. None of these agreements state what law governs them.

46 Where an agreement does not stipulate the governing law, a court will, if possible, infer the parties' choice of law from the circumstances of the case. If it is not possible to infer the parties' intention in this manner, then the proper law is determined by the application of the "closest and most real (or substantial) connection" test. See J. Walker, *Castel & Walker Canadian Conflict of Laws*, loose-leaf, 6th ed. (Markham, Ontario: LexisNexis, 2005) at s.31.2c and d.

47 With respect to determining the proper law of the contract by considering the system of law that has the closest and most substantial connection with the transaction, Ritchie J. stated in *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 at p 4:

> [T]he problem of determining the proper law of the contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

48 The Suspension Notice recited the ISDA Master Agreement, the market disruption notices delivered by Devonshire under the Special Provisions Annex of that agreement and the default

notice delivered by Devonshire under the ISDA Master Agreement. The ISDA Master Agreement expressly provides that it is to be governed by and construed in accordance with the laws of Ontario and the laws of Canada applicable in Ontario.

49 The Suspension Notice provides that in light of the Montreal Accord and at the request of the consortium that signed it, Devonshire "hereby suspends without prejudice the effect of the Default Notice and agrees not to take any further steps or proceedings to enforce its rights thereunder until the end of the Standstill Period..." Thus the central issue as to the meaning of the Suspension Notice involves the effect of suspending the default notice and agreeing not to take steps to enforce Devonshire's rights under it. That is, it involves the extent to which the suspension of the default notice affected or amended the rights of the parties under the ISDA Master Agreement. The inescapable inference, in my view, is that as the Suspension Notice did not expressly provide what law was to govern it, the law governing the ISDA Master Agreement and the default notice, i.e. Ontario law, would be the applicable law involved in interpreting its meaning.

50 Devonshire contends that as the meeting which led to the Montreal Accord was held in Quebec, and called by the Caisse and National Bank personnel from Montreal, Quebec law governs its interpretation. As the Suspension Notice was given at the request of the participants to the Montreal Accord and incorporated by reference the Standstill Period contained in the Montreal Accord, Devonshire contends that the Suspension Notice should also be governed by Quebec law.

51 I cannot accept these contentions of Devonshire. The Montreal Accord did not have a governing law clause. That may be due to the fact that the participants chosen to attend purposely excluded legal counsel for the participants. It is highly likely that the participants never discussed the issue of what law was to govern. However, the evidence of Brian Davis of National Bank who was instrumental in calling the meeting, was that the concerns that were dealt with involved liquidity calls that had been made by a number of trusts, including Devonshire, and collateral calls that asset providers had or could make. He testified that the purpose of the Montreal Accord at that time was to have the players in the market put their weapons down and take a pause in order to prevent the market from blowing up. Those weapons arose from the ISDA Master Agreements applicable to all of the trusts, which were governed by Ontario law.

52 The Support Agreement made as of March 14, 2008 by the participants to the large Crawford restructuring, following on the Montreal Accord and the Framework Agreement, does provide that the agreement is governed by Ontario law and the laws of Canada applicable in Ontario. That is some indication that the parties to the Montreal Accord did not intend Quebec law to govern it.

53 In the circumstances, I would not infer that the parties to the Montreal Accord intended Quebec law to govern it or the Suspension Notice of Devonshire that was made following the Montreal Accord. The same is applicable to the extensions that followed. They extended "the Montreal Accord standstills and the related suspension of default notices".

54 In the circumstances, I conclude that Ontario law applies to the interpretation of the Montreal

Accord, the Suspension Notice and extension agreements and to a consideration of any rights flowing from these documents, including a consideration of any obligation to act in good faith.

(a) Principles of interpretation

55 The ISDA Master Agreement and its annexes and the several other related agreements are commercial contracts. In interpreting a contract, the goal is to determine the intent of the parties by reference to the words that they chose. The plain meaning of the words is to be given effect, read harmoniously and in the context of other provisions of the contract, and in light of the factual matrix as a whole. Interpretations that give effect to all the terms of a contract should be preferred over interpretations that render one or more terms superfluous or ineffective. A commercial contract should be interpreted in a manner that accords with sound commercial principles, good business sense and that does not result in absurdities. While evidence of the factual matrix is generally admissible and relevant to the construction of a contract, extrinsic evidence as to the meaning of a contract is inadmissible unless there is an ambiguity. See generally *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1998), 40 B.L.R. (2d) 1, aff'd (1999) 45 O.R. (3d) 417 (C.A.) and *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, (2007), 85 O.R. (3d) 254 (C.A.).

56 With respect to what may be considered to be the factual matrix, Goudge J.A. in *Kentucky Fried Chicken v. Scott's Food Services Inc.*, (1998), 41 B.L.R. (2d) 42 stated:

> While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In his famous passage in *Reardon Smith Line v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 at 995-996 (H.L.) Lord Wilberforce said this:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of a 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.

57 In *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, Estey J. stated the following regarding avoidance of interpretations that produced commercially unfair and reasonable results:

> ... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the

> true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation ... which promotes a sensible commercial result.

10. Did Barclays waive its right to remedy its default?

58 On January 13, 2009 Barclays took steps to make a payment to Devonshire purporting to pay the outstanding liquidity payments that had been demanded on August 13, 14 and 15, 2007 by wiring $71,196,072.58, the amount of the liquidity calls made plus interest. Barclays also sent to Devonshire a document headed Liquidity Demand Notice. That document included the following statement:

> It has been and remains the position of Barclays that the Liquidity Call Notices were not proper and the Barclays was not and is not under any contractual obligation to pay the Liquidity Call Notices. Equally, Barclays takes the position that the Event of Default notice was not proper or justified as a matter of contract (collectively, the Barclays' Position).
>
> Notwithstanding the Barclays' Position, Barclays has arranged for payment of the Liquidity Amount which is being made within the contractual period for payment, as extended from time to time. Such payment is being made without any admission or inference that it is due or that any demand therefore was valid, and, accordingly, Barclays reserves all of its rights and remedies under the Master Agreement, including the right to demand the return of all such funds, subject to resolution of dispute, together with interest thereon.

59 Section 5(a)(i) of the ISDA Master Agreement provides that a failure to make any required payment is an Event of Default if not remedied within 3 days:

> 5. Events of Default and Termination Events
>
> (i) Failure to Pay or deliver. Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business

Day after notice of such failure is given to the party.

60 Devonshire takes the position that Barclays unequivocally waived its right to remedy its default in failing to pay the liquidity demands when made.

61 The evidence makes clear, in my view, that Barclays never had an intention to pay the liquidity demands made on August 13, 14 and 15, 2007. On each of those days Barclays decided not to pay the demands. Barclays' position was that there was no market disruption event because the notes of bank sponsored conduits were rolling on each of those days. It is clear from internal Barclays documents prior to the signing of the contractual documents with Devonshire in the first place that Barclays intended to take the position that there would never be a market disruption event within the meaning of the contractual documents if the notes of bank sponsored conduits were rolling on days on which the notes of independent sponsored conduits such as Devonshire were not rolling. Barclays determined on each of August 13, 14 and 15, 2007 that notes of bank sponsored conduits in Canada were rolling and never after those days made any investigation on the matter. Barclays' notice of January 13, 2009 to Devonshire reiterated its position that it had no obligation to pay the liquidity demands of Devonshire.

62 There is also no question on the evidence that Barclays made clear to Devonshire that it did not intend to make payment on the liquidity calls that had been made because on its view there had been no market disruption event. The question is whether on the evidence it can be inferred that Barclays waived its right to remedy its default by later making liquidity payments.

63 In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 Major J. described the law of waiver as follows:

> 19. Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party... The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
> > The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> 20. Waiver will be found only where the evidence demonstrates that the party

> waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.
>
> 24 ... The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

64 One difficulty in concluding that Barclays waived its right to cure is that Barclays had taken the position from August 13, 2007 onwards up to January 13, 2009 that it had no obligation to cure. Intentionally waving a right to cure presupposes knowledge of an obligation to cure. It can be taken, however, that Barclays knew that if its position regarding no obligation to cure was incorrect, it had an obligation to cure.

65 I am not able to conclude on the evidence that Barclays communicated a clear intention to waive its right to cure in the event that it was incorrect in refusing to pay the liquidity demands made by Devonshire. Barclays certainly communicated to Devonshire its intention not to pay, but did not go further and communicate any intention to waive a right to later remedy its default.

66 Had I found that there was a communication by Barclays of an intention to waive its right to cure, I do not think that sections 9(b) or (f) of the ISDA Master Agreement would preclude a finding of waiver. Section 9(f) provides that a failure or delay in exercising any right will not be presumed to operate as a waiver. This section does not state that such a failure or delay could be deemed to be a waiver, but merely that a waiver will not be presumed. Section 9(b) provides that no waiver will be effective unless in writing and executed by each of the parties. However, there is authority that variation of a contract is effective even if the contract purports to exclude subsequent oral variations and also that oral statements may operate as a waiver of rights evidenced by an earlier written document or may set up an estoppel. See Waddams, *The Law of Contracts*, 6th Edition at para. 329 and *Shelanu Inc. v. Print Three Franchising Corp* (2003), 64 O.R. (3d) 533 at para. 50.

11. Effect of the Suspension Notice

67 Once Barclays had signed the Montreal Accord, it asked Devonshire to rescind the notice of default that Devonshire had sent on August 14, 2007. Devonshire did not want to do that for fear of liability to its noteholders in the event that a restructuring was not reached. It proposed a suspension rather than a rescission. Eventually that was settled on by Devonshire in the form of the Suspension Notice. Barclays was unhappy about it but was prepared to live with it and in its pleadings admitted that it accepted the terms.

68 The Suspension Notice recited the ISDA Master Agreement, the market disruption notices and the default notice. It then provided:

> In light of the agreement reached on August 16, 2007 (the "Consortium Agreement") between the Bank and a number of investors and financial institutions (the "Consortium"), and at the request of the members of such Consortium.

69 The Consortium Agreement referred to was the Montreal Accord. The operative part of the Suspension Notice provided:

> The Trust hereby suspends without prejudice the effect of the Default Notice and agrees not to take any further steps or proceedings to enforce its rights thereunder until the end of the Standstill Period (or any extension thereof consented to by the Trust), provided that the Bank complies with its obligations under the Agreement and as a Signatory under the Consortium Agreement.
>
> ...
>
> The Trust otherwise reserves all of its rights under the Agreement and Default Notice.

70 Devonshire contends that the language of the Suspension Notice "suspends without prejudice the effect of the Default Notice" suspended Devonshire's right to take steps to enforce its rights under the ISDA Master Agreement but did not suspend the obligation of Barclays to make the liquidity payments needed to remedy its default. It says this is made clear by the next part of the sentence "and agrees not to take any further steps or proceedings to enforce its rights thereunder" and by the last sentence which provides the Devonshire otherwise reserves all of its rights under the ISDA Master Agreement and default notice. Devonshire further says that the words "without prejudice" means that the Suspension Notice was without prejudice to Devonshire's rights under the agreements including its right to have the liquidity payments made during the three business days following the Default Notice.

71 Barclays contends that one of the effects of the Default Notice was that it had three days to pay the liquidity payments, a failure of which would result in an event of default permitting Devonshire to terminate the swaps and that by suspending the effect of the Default Notice, Devonshire suspended the three day period which Barclays had to cure its failure to make the liquidity payments. Devonshire counters by contending that if Barclays were correct, the further provision that Devonshire agrees not to take any further steps to enforce its rights would not be needed and would be surplus.

72 The Default Notice delivered by Devonshire to Barclays on the evening of August 14, 2007 notified Barclays of an Event of Default provided for under section 5(a)(i) of the ISDA Master Agreement, which provides as follows:

> **5. Events of Default and Termination Events**
>
> **(a) Events of Default.** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party: --
>
> > **(i) Failure to Pay or deliver.** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party.

73 Absent the Suspension Notice, on the expiry of the three day period on August 17, 2007, Devonshire would have had the right to designate an Early Termination Date under paragraph 6(a) of the ISDA Master Agreement, which provides as follows:

> **6. Early Termination**
>
> **(a) Right to Terminate Following an Event of Default.** If any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-Defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions.

74 One of the effects, therefore, of the Default Notice was that if Barclays failed to make the liquidity payments within three business days after the Default Notice was given, an event of default would have occurred permitting Devonshire to terminate the swaps. By suspending the effect of the Default Notice, Devonshire in my view suspended whatever part of the three day cure period remained. Whatever the meaning of the words "without prejudice" in the Suspension Notice, they cannot make meaningless the suspension of the effect of the Default Notice.

75 It is agreed that the Suspension Notice and its extensions constitute a contract. Part of the factual matrix surrounding the Suspension Notice is the Montreal Accord, which is recited in it. The Montreal Accord contained a framework for a long term restructuring. It also contained an interim agreement which provided, amongst other things,

3. Signatories who are counterparties of the Third Party ABCP conduits [Barclays was a signatory] will not pursue any existing margin calls or make any further margin calls during the Standstill Period.
4. The Third Party ABCP conduits [Devonshire was one] will agree not to pursue any existing liquidity calls during the Standstill Period or make any further liquidity calls for 150 days after the Standstill Period.

76 The purpose in clause 3 of agreeing not to pursue any existing margin calls was to prevent the necessity of a conduit having to post collateral resulting from a margin call i.e. preventing the conduit from having to pay cash to meet a margin call. Likewise, the purpose of an ABCP conduit agreeing not to pursue any existing liquidity call was to prevent the counterparty on whom the liquidity call had been made from having to pay cash to the conduit required by the liquidity call.

77 The operative paragraph in the Suspension Notice begins by providing that the suspension is given in light of the Montreal Accord and at the request of the members of the consortium who signed it. This is an indication that what was being sought in the Suspension Notice was an agreement by Devonshire consistent with clause 4 of the interim agreement contained in the Montreal Accord, i.e. an agreement "not to pursue" any existing liquidity calls, the meaning of which could only be not to require the payment by Barclays of the existing liquidity calls. Otherwise agreeing "not to pursue" the liquidity calls would be meaningless. The provision in the Suspension Notice that Devonshire agreed not to take any steps to enforce its rights until the end of the standstill period was consistent with that position.

78 There was much argument as to the meaning of the words "without prejudice" in the Suspension Notice. The words are puzzling and there was no evidence of any discussion between the parties regarding them at the time the Suspension Notice was prepared and signed. Devonshire contends that the words mean that the granting of the Suspension Notice could not be detrimental or prejudicial to Devonshire, in the sense that it could not be harmful to Devonshire, and thus the obligation on Barclays to make the payment within three business days was not suspended. In answer to a question as to whether the words meant "apart from what we are doing here it is without prejudice to our other rights", the response was that it had to mean more as the last sentence in the Suspension Notice already provided that Devonshire otherwise reserved all of its rights under the ISDA Master Agreement and Default Notice.

79 I confess to being unsure what was intended by the words "without prejudice". The best I can make of them is that Devonshire was saying that the effect of the Default Notice was suspended without prejudice to the rights of Devonshire under that Default Notice at the end of the standstill period.

80 Barclays contended that in the event of any ambiguity in the meaning of the Suspension Notice, regard could be had to discussions between Mr. Lafleur-Ayotte and representatives of Barclays prior to Barclays agreeing to operate under the terms of the Suspension Notice. It is not

necessary in my view to consider that evidence. However, if I were to do so, I would not put much if any weight on it. Two things from the evidence appear clear. One is that people at Barclays had little regard for Mr. Lafleur-Ayotte and I doubt very much if they paid any attention to his views. It is also clear from the conversation in question that they wanted to look at the document before considering their position.

81 In my view by construing the language of the Suspension Notice and considering its factual matrix, the time during which Barclays had to pay the existing liquidity calls in order to remedy its failure was suspended during the period of the Suspension Notice as extended from time to time.

82 The default notice was given at 8:07 p.m. on Tuesday, August 14, 2007, after the close of business that day, and so is taken to have been given on August 15, 2007. The Suspension Notice was given at 7:44 p.m. on August 16, 2007, after the close of business that day, and so is taken to be effective on August 17, 2007. Therefore one of the three days to remedy Barclays' failure to pay the liquidity calls expired before the Suspension Notice.

12. Misrepresentation claim

(a) Nature of claim

83 Devonshire claims that in extending the Standstill Period on January 8 and 9, 2009, Barclays misrepresented the state of negotiations that were going on between Barclays and the Caisse. This was just days prior to the purported termination of the ISDA Master Agreement by Barclays on January 13, 2009. The parties agree that the daily extensions of the Standstill Period were each separate contracts. Devonshire claims that the extensions that took place on January 8 and 9, 2009 should be rescinded because of the misrepresentations. Devonshire claims that even if the three day cure period for Barclays to cure the default did stop running on August 16, 2007 during the Standstill Period, it started running again at the latest on January 9, 2009 and expired before January 13, 2009.

(b) Relevant facts

84 Following the Montreal Accord and the suspension by Devonshire of its notice of default, the Standstill Period between Barclays and Devonshire was extended by various agreements to April 18, 2008. Following the expiry of the extension agreement on April 18, 2008, the Standstill Period and the Suspension Notice served by Devonshire were extended by daily e-mails sent on each business day from Barclays to Mr. Lafleur-Ayotte of Quanto. These e-mails contained the same language each day as follows:

> "There are still a number of issues being worked out regarding the proposed restructuring of Devonshire Trust. Accordingly, for the sake of good order we are confirming that, as between Barclays and Devonshire, the Montreal Accord standstills and the related suspension of default notices have and will continue

> through [the next business day] to allow for these negotiations to continue. If anyone takes a different position, please let us know ASAP." (underlining added)

85 The second last e-mail was sent on January 8, 2009 and the last was sent on January 9, 2009. The last one extended the standstill and suspension of Devonshire's default notice to January 12, 2009, which was the next business day, a Monday. Devonshire takes the position that the underlined words misrepresented the situation in that the restructuring negotiations being held by Barclays had reached an impasse and that Barclays did not at that stage expect the negotiations to be successful and planned instead to terminate the Devonshire swaps. In order to understand the issue, it is necessary to review what the discussions were by this time.

86 Following the Montreal Accord, discussions were held amongst all of the major parties in the ABCP market with a view to restructuring the entire market. These included discussions by Barclays with the major Devonshire noteholders with a view to a restructuring of Devonshire. No one on behalf of Devonshire or Quanto participated in these negotiations. Legal and financial representatives of the Investors Committee participated from time to time.

87 As early as August, 2007 Barclays was of the view that Devonshire was a good trust to be restructured individually with the noteholders, and it proposed to the Caisse as well as other large noteholders the idea of taking some or all of the leveraged super senior trades out of Devonshire and creating a super senior swap directly between Barclays and the Caisse and other note holders. The effect of such a transaction would be to remove from Devonshire that portion of the swap between Barclays and Devonshire represented by the notes held by each note holder and transferring that swap to a new swap between Barclays and each particular note holder who agreed to do it. If the new swap were on economically identical terms as the swap between Barclays and Devonshire, Barclays would effectively be made whole for that portion of the swap transferred to the note holder. The first of such proposals was sent to the Caisse, National Bank and Desjardins on August 31, 2007. Later iterations of the proposal were sent to them and to Citibank as well.

88 Although Barclays wanted to achieve a restructuring by the end of 2007, that was not possible, and discussions continued. Barclays was concerned with delays and in early April, 2008 was considering terminating the Devonshire swaps if the latest term sheet sent by Barclays was not signed by the Caisse, National Bank and Desjardins within a week.

89 On April 8, 2008 a meeting took place in New York amongst representatives of Barclays, the Caisse, National Bank and the Investors Committee. Attending the meeting for Barclays were a number of executives, the most senior of whom was Mr. Jerry del Missier, the co-CEO of Barclays Capital. There were a number of representatives from the Caisse, the most senior of whom was Mr. Henri-Paul Rousseau, the CEO of the Caisse. National Bank was represented by Mr. Ricardo Pascoe.

90 A power point presentation was made by the Caisse in which a number of concerns of the Caisse with the Barclays term sheet were set out. The concerns had to do with accounting issues

that the Caisse said would be very unfavourable to it. At the end of the power point presentation there was a counter-proposal by the Caisse and National Bank which contained terms, including terms regarding how to deal with the small noteholders who held $75 million of Devonshire notes. During the presentation, the Caisse stated that neither Citibank nor Desjardins wanted to participate in a swap proposal.

91 Gregory Neville of Barclays attended the meeting. He testified that after the power point presentation, the Barclays representatives went into a side meeting to discuss the proposal of the Caisse and concluded that while they were concerned about Desjardins and Citibank, they could work with the Caisse's proposal and agreed to go back into the meeting and accept the proposal and then later work on Desjardins and Citibank. Mr. Neville testified that they went back into the meeting and told the Caisse that they accepted the proposal of the Caisse and would work toward a revised term sheet to reflect the terms. He said that Mr. del Missier spoke on behalf of Barclays and Mr. Rousseau spoke on behalf of the Caisse. He said that the meeting ended with a handshake deal.

92 Mr. Bergeron of the Caisse and Mr. Pascoe of National Bank both testified that no agreement was reached on all necessary terms for a restructuring and that further work was required.

93 On April 9, 2008, the day following the meeting in New York, Mr. Neville sent a revised term sheet to the Caisse, National Bank, Desjardins and Citibank. Desjardins and Citibank did not want to participate and that month Barclays acquired the notes held by Desjardins and Citibank at only a fraction of their face value.

94 From mid-April to mid-September, 2008, there were ongoing discussion amongst lawyers for Barclays, the Caisse and National Bank regarding the term sheet. Matters proceeded slowly.

95 On October 10, 2008 Barclays and National Bank signed a framework agreement under which Barclays acquired the National Bank notes with a face value of $59.2 million for one dollar. National Bank agreed to assist Barclays in obtaining MAV II notes that would become available upon the successful larger restructuring of the ABCP market. These MAV II notes would then be offered by Barclays to the small noteholders[8] holding notes with a total face value of $75 million. While the offer to be made to the small noteholders pursuant to this framework agreement was not conditional upon a successful agreement between Barclays and the Caisse, Barclays did not proceed with the offer after it failed to reach an agreement with the Caisse.

96 After the agreement was made between Barclays and National Bank, the only remaining Devonshire note holder with whom there was no agreement, apart from the small noteholders holding about $75 million of notes, was the Caisse which held Devonshire notes with a face value of $385 million. Once Barclays had made its deal with National Bank, Barclays pushed to settle terms with the Caisse. By this time, the senior officers of the Caisse at the time of the meeting in New York in April, 2008, including Mr. Rousseau and Mr. Guay, were no longer at the Caisse and Barclays had to deal with other personnel, and in particular Mr. Claude Bergeron, a vice-president of the Caisse.

97 Another thing that had changed was the market for ABCP. From September to December 2008 there were large financial failures, including Fannie Mae and Freddie Mac being put into conservatorship, the bankruptcy of Lehman Brothers and the failures of Washington Mutual and three Icelandic banks. World markets reacted and became extremely illiquid. Appetite for risk dried up. Continued deterioration of the credit market caused credit spreads to widen to unprecedented levels and investment grade debt was trading at junk debt spreads. The mark to market values of swaps moved severely against the position of investors in the ABCP market. Although a framework agreement in principle had been reached by the Investors Committee led by Purdy Crawford on December 23, 2007 with the asset and liquidity providers for the large restructuring involving 20 conduits, new rounds of negotiations twice led to modifications in December 2008 to give investors more protection required by them as a result of the market changes.

98 For Devonshire, the spreads increased from August, 2007 to January 2009 by an unprecedented 228%. In early November, 2008 the Caisse began asking for revised terms to reflect the market changes, and made clear during the remainder of 2008 that it was looking for changes of the kind agreed to in the larger Crawford restructuring. While Barclays was not happy with the requested changes, it began to negotiate with the Caisse on the Caisse's requests and during those negotiations made a number of concessions.

99 On November 4, 2008 Mr. Bergeron told Barclays that a mark to market valuation was no longer a good indication of value and he suggested some cap on the collateral requirements that the Caisse might be called on to deposit with Barclays. Barclays interpreted this as the Caisse wanting to change the trigger for collateral calls from a mark to market valuation of the swaps to a spread and loss trigger, which Barclays did not want. As Mr. Neville explained, Barclays lived in a mark to market world and if the trade with the Caisse was to have triggers on a different spread/loss basis, it could create a very significant gap risk for Barclays, which is a notional risk from Barclays's point of view if the mark to market value of the swaps is less than the value of the assets in Devonshire which is the collateral available to Barclays if the swaps are terminated early.

100 On November 18, 2008, in anticipation of a meeting with the Caisse the following day, Barclays proposed as a compromise a partial spread/loss trigger mechanism once the mark to market reached 50%, with concessions on other points being made by the Caisse. At a meeting in New York the next day, Mr. Bergeron said they would discuss the Barclays proposal with his board the next week but said that they had problems with a spread trigger and preferred a loss-only trigger.

101 On November 20, 2008, in anticipation of the Caisse board meeting to be held on Monday, November 24, 2008, Barclays sent a power point presentation that explained their proposal that had been made at the meeting in New York and term sheet that contained the proposal. The board did not deal with it then and on December 2, 2008 Mr. Neville again asked Mr. Bergeron to put the proposal to the Caisse's board. Mr. Neville testified that he did not think that was done. In exchanges of e-mails between Barclays' representatives and Mr. Bergeron in early December,

Barclays took the position that it had a binding agreement that had been reached earlier in the year in April, 2008. The Caisse denied the existence of any binding agreement.

102 One of the changes negotiated by the participants in the large Crawford restructuring due to the same changes in the market that were effecting Devonshire was a one year moratorium on collateral calls that could be made by asset providers. The Caisse followed suit and asked for the same thing from Barclays. On December 16, 2008 Mr. Neville made a proposal that Barclays would agree to such a moratorium on condition that the Caisse agree to a number of other changes, including increasing the initial recourse commitment of the Caisse to $1.5 billion for the term of the moratorium and thereafter unless certain conditions were met.

103 On December 18, 2008 Mr. Charles Quintal, who was assisting Mr. Bergeron with Devonshire, e-mailed Barclays with a proposal that changed the Barclays proposal in a number of respects. The changes, which Mr. Neville described as huge, included lengthening the moratorium to 14 months, limiting the recourse obligation of the Caisse to $900,000,000 with no further collateral calls available to Barclays and amending to the benefit of the Caisse the spread/loss triggers. The e-mail ended by Mr. Quintal stating that he appreciated that Barclays might not find the terms acceptable. Later the same day Barclays responded to Mr. Quintal and said they would agree to the 14 month moratorium on collateral calls by Barclays, but with a $1.2 billion recourse obligation on the Caisse, and would agree to widen the spread/loss triggers as proposed by the Caisse. Barclays said it was still reviewing the request to change the trigger that Barclays would have to end the moratorium.

104 On December 23, 2008 Mr. Neville and Mr. Quintal had a lengthy telephone discussion, in which Mr. Quintal re-iterated that the Caisse wanted a deal similar to the deal that was being negotiated by the Investors Committee for the remaining ABCP market and that was not going well for Barclays. Mr. Quintal threw out a number of $600,000,000 to $700,000,000 as the limit of the Caisse's liability for a collateral call, which was less than their earlier position of $900,000,,000 and increased the request for a moratorium for collateral calls to 18 months, longer than their earlier request for 14 months, with no ability to Barclays to terminate the moratorium at all regardless of the market losses of the underlying synthetic bond portfolios. On that day, the Investors Committee had announced that the moratorium in the larger Crawford restructuring had been increased from 14 to 18 months, and the Caisse sought the same from Barclays. Mr. Neville told Mr. Quintal that he would take the proposal back to the Barclays traders, on whose book the Devonshire trade was accounted for within Barclays, but that he was not optimistic that they were even close.

105 Christmas and New Years intervened with no further communications between Barclays and the Caisse.

106 On January 8, 2009, at 12:46 p.m., Mr. Lovisolo of Barclays sent an e-mail to Messrs. Bergeron and Quintal of the Caisse enclosing a term sheet that reflected what Mr. Lovisolo said was agreed between the parties in April, 2008. It did not reflect the later terms that had been discussed

between them since November, 2008. The e-mail requested that Messrs. Bergeron and Quintal assemble a meeting of the board of directors of the Caisse to "ratify our previous agreement on the restructuring of the Caisse's holdings". The e-mail concluded by stating that Barclays looked forward to receiving a signed copy of the term sheet by no later than 5 p.m., Monday January 12th. On cross-examination, Mr. Neville reluctantly acknowledged that the deadline in the e-mail could fairly be called an ultimatum.

107 Mr. Bergeron testified that upon receipt of the January 8, 2009 ultimatum requiring the Caisse to sign the April 9, 2008 term sheet, he felt insulted and had no intention of recommending it to the board of the Caisse.

108 The daily extension of the arrangements between Barclays and the Caisse was sent by Mr. Neville on January 8, 2009 at 4:47 p.m. There had been no communication between Barclays and the Caisse since the ultimatum had been sent earlier that day.

109 On January 9, 2009, Mr. Neville took steps to arrange for the liquidity payment that was later made to Devonshire on January 13, 2009 to be set up within Barclays, and the payment was booked internally on January 9, 2009 to be effective January 13, 2009.

110 On January 9, 2009 at 2:33 p.m., Mr. Neville and Mr. Quintal spoke on the telephone. Mr. Quintal told Mr. Neville that Mr. Bergeron said they were supposed to respond to the e-mail that afternoon but he did not think they would be in a position to deal with it by January 12 due to all of the work involved in the large Crawford restructuring that was to close the week of January 12. After Mr. Neville told Mr. Quintal that 5 p.m. on Monday, January 12 was a real deadline, Mr. Quintal said that Mr. Bergeron would address the e-mail that afternoon. Nothing further was heard from the Caisse before the extension to January 12, 2009 was e-mailed by Barclays at 4:58 p.m. on January 9, 2009.

(c) Analysis

111 A misrepresentation is an incorrect statement of a present or past fact that is false. See John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at p. 326.

112 Partial disclosure of facts may also be misleading. See *Spinks v. Canada* [1996] 2 F.C. 563 (C.A.) per Linden J.A. at para. 29. In S.M. Waddams, *The Law of Contract*, 6th ed. at para. 439, it is stated:

> An incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations. Almost always something is said to induce the transaction and it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations ... Silence may, in its contest, amount to an assertion that

there is nothing of significance to reveal.

113 See also *Xerex Exploration Ltd. v. Petro-Canada*, 6 B.L.R. (4th) 1 (Alta. C.A.), in which it was stated:

> We can see no reason to disturb the learned trial judge's finding that there was a misrepresentation by silence or incomplete disclosure. Ordinarily in contractual negotiations between sophisticated parties, operating at arm's length, there is no general duty of disclosure. When a representation is made during the course of negotiations, however, the party making it must ensure that it is accurate so that it does not amount to a misrepresentation. This gives rise to a further duty to speak when silence effectively renders a representation, already made, inaccurate. Having brought a particular subject up in negotiations, a party assumes a duty to ensure that the other party is aware of all the material facts relevant to that assertion.

114 Can it be said that the statements in the January 8 and 9, 2009 extension e-mails that "that there are still a number of issues being worked out regarding the proposed restructuring of the Devonshire Trust" and that "for the sake of good order" the extensions of the standstill agreement and suspension of the default notice should continue "to allow those negotiations to continue" were accurate? In my view, for a number of reasons, it cannot. The statements were misleading. These statements had been made daily for over eight months and the last two in question gave the impression that it was business as usual so far as negotiations were concerned. It was not.

115 Messrs. del Missier, Lovisolo and Neville gave evidence to the effect that when these last extensions were sent out, negotiations were continuing with a view or hope that they would result in some acceptable restructuring with the Caisse. For the reasons that follow, I do not accept that evidence.

116 By the time these extensions were sent to Devonshire, what had occurred, and I so find, is that the "deal team" at Barclays dealing with Devonshire, being the sales team, credit structuring team and trading team[9] involved in the negotiations had come to the view that the Caisse would never agree to any reasonable terms and the decision was taken to back away from the terms that had been discussed between Barclays and the Caisse in November and December, 2008. Instead, Barclays put an ultimatum to the Caisse on January 8, 2009 to sign by January 12, 2009 at 5 p.m. the term sheet that had been given to the Caisse on April 9, 2008. No one at Barclays thought the Caisse would sign that term sheet and the decision was all but formally made to terminate the Devonshire trades. That formality occurred on January 12, 2009 shortly after 5 p.m. when, after the Caisse had failed to sign the term sheet, Barclays took the decision to terminate the trades, and they took steps to do so on the following morning.

117 The conclusion I draw is that in sending out the April 2008 term sheet in January 2009, Barclays was effectively ending negotiations. The credit meltdown in world markets in October and

November, 2008 was dramatic. It led the parties in the larger Crawford restructuring to twice negotiate new terms in December, 2008 and to governments at both the provincial and federal levels agreeing to participate in massive funding obligations. The Caisse was a major player in that restructuring who benefited from those new terms. For Barclays to revert without notice to the April 2008 term sheet after it had made several concessions in negotiations with the Caisse in November and December 2008, could only serve to cause a negative reaction in the Caisse who quite clearly could not be expected to agree to it. It was not done with a view of eliciting some other offer from the Caisse. Barclays did not want any other offer from the Caisse.

118 The e-mail of January 8, 2009 from Barclays with the April 2008 term sheet requested Mr. Bergeron to convene a meeting of the board of the Caisse to confirm an agreement said to have been reached and contained in the April 9, 2008 term sheet. Yet the April 9, 2008 term sheet drafted by Barclays contained terms not discussed in the meeting in New York the day before and never agreed to afterwards, such as recourse increases of 6.25 % and 11.25% and cross-default provisions. Barclays knew that Mr. Bergeron had in December 2008 denied that any agreement had been reached in April, 2008. Mr. Bergeron had attended the meeting in New York on April 8, 2008 on behalf of the Caisse, as had Mr. Pascoe of National Bank. Their evidence, which I accept, was that while there was an agreement in principle reached on some issues, mainly on how to deal with the small noteholders, there was no binding economic agreement reached on all terms as between the Caisse and Barclays. As Mr. Pascoe testified, he left the meeting thinking that they had a framework for an agreement but that everyone understood they had a lot of work to do before they had an agreement.

119 Barclays knew that National Bank did not consider itself bound by any alleged agreement reached in New York in April, 2008. On September 23, 2008, Mr. Davis spoke to Barclays and proposed that Barclays take back the Devonshire notes held by National Bank for a nominal consideration. In an internal e-mail that day, Mr. Neville referred to the position of National Bank as being "slimy" after negotiating with Barclays for over a year and then walking away. If Barclays were right, it had an agreement with National Bank from the time of the New York meeting in April, 2008. No mention was made of any such agreement in the internal e-mail of Mr. Neville on September, 23, 2008.

120 The inference I draw is that in its e-mail of January 8, 2009 to the Caisse, Barclays was positioning itself to exit the Devonshire trades and that it knew that litigation would take place. Indeed Barclays issued and served its statement of claim on January 13, 2009 just moments after terminating the trades. The reference to an agreement reached in April 2008 in the e-mail of January 8, 2009 was, I believe, posturing by Barclays for the litigation that it knew would follow shortly.

121 Mr. James Lee, a director of trading for Barclays in New York and involved at the time in the economic analysis of the Devonshire trade and terms being discussed with the Caisse, was of the view by December 23, 2008 that because of the market changes, it made more economic sense for Barclays to terminate the Devonshire trades than to go through a restructuring on the terms being

discussed. Mr. Alexandre Pointier, to whom Mr. Lee reported, recommended that day that Barclays should "take a step back" and only mention the earlier proposal made to the Caisse, meaning the April, 2008 term sheet.

122 On January 7, 2009 Mr. Lee recommended that given that the market had clearly moved in favour of Barclays as against the Caisse, Barclays should move off its latest proposal of December 18, 2008. He testified that his view at the time was that the changes in the market over the holidays meant that the cost to Barclays of terminating the trades had come down and that terminating the trades made sense unless they could get a substantially better deal from the Caisse than had been proposed in December, 2008 by Barclays.

123 Barclays acted on these views by sending its ultimatum on January 8, 2009 to the Caisse with the term sheet that had been earlier provided to the Caisse on April 9, 2008, which required a response by January 12 at 5 p.m.

124 At the time the term sheet was sent on January 8, 2009, Barclays did not believe that the Caisse would sign it, which is hardly surprising given the negotiations that had taken place between the Caisse and Barclays in November and December, 2008 to change the April 9, 2008 term sheet as a result of the dramatic market changes that took place in the fall of 2008 following the collapse of Lehman Brothers. The investors in the larger Crawford restructuring had refused to close without changes being agreed in two rounds of changes in December, 2008. The Caisse was the largest investor in Canadian ABCP and a major player in the conduits involved in that restructuring and it would have been completely against the Caisse's economic interests at that stage to sign the April, 2008 term sheet.

125 The term sheet of April 9, 2008 was materially worse to the Caisse than the proposal of Barclays made on December 18, 2008. It did not contain any moratorium on collateral calls and required an initial $1 billion in recourse to be committed to by the Caisse. The trigger for collateral calls was to be a mark to market trigger instead of spread/loss triggers which Barclays had said in December they would accept in part. Nor was there any cap on collateral calls. Mr. Lee testified that he believed that the mark to market would have gone up after January 12, 2009 and that if the Caisse had accepted the April 2008 term sheet, it would have then been required to commit to additional recourse of over $1 billion.

126 Mr. Lee did not believe that the Caisse would accept the earlier proposal of Barclays made on December 18, 2009 and while reluctantly, agreed on cross-examination that it was probable that the Caisse would not sign the April 2008 term sheet sent on January 8, 2009.

127 Mr. Neville, who from the outset was the person on Barclays' sales team responsible for dealing with the Caisse, testified that at the time the term sheet was sent on January 8, 2009 he thought it unlikely that the Caisse would sign it.

128 On January 12, 2009 in the morning, Mr. Neville told Ms. Sandra Godard, Barclays'

relationship manager for large financial institutions based in Toronto, that neither he nor "anyone here" thinks the Caisse would sign the term sheet. Ms. Goddard told him that she was hearing the same thing and that she had had a heads up from Mr. del Missier, who is said to have ultimately made the decision to terminate the trades.

129 Mr. Neville, who sent out the extension e-mail of January 8, 2009 (the January 9 e-mail was sent by the Barclays New York legal team but copied to many, including Mr. Neville), testified in chief that over the week-end before January 12, 2009 his belief that the Caisse would sign the term sheet went down. He also testified that he hoped that the Caisse might come back with last minute negotiations. This evidence, I believe, was given in an effort to support his position that the e-mails were not misleading and to justify the timing of his comment to Ms. Goddard on January 12, 2009 that no one thought the Caisse would sign the term sheet. However, I cannot accept his evidence on this point.

130 Mr. Neville's assertion is contradicted by his evidence in several respects. At the time the term sheet was sent out on January 8, 2008 he thought it unlikely that it would be signed by the Caisse, and at no time did he say otherwise. He learned from his conversation with Mr. Quintal of the Caisse on January 9, 2009 that it was unlikely that the Caisse people could get to the e-mail by January 12th because of a weeklong closing process in Toronto of the large Crawford restructuring and when Mr. Neville said that the deadline of January 12th was a real deadline, Mr. Quintal said that Mr. Bergeron would address the e-mail that afternoon, which did not happen. There was nothing in the call with Mr. Quintal to give Mr. Neville any hope that the ultimatum would be accepted and Mr. Neville agreed on cross-examination that he knew from this call with Mr. Quintal that the Caisse was unlikely to sign the April 9, 2008 term sheet. I do not accept that Mr. Neville went into the week-end with positive views regarding the Caisse agreeing to the term sheet. Moreover, nothing material occurred over the week-end to make Mr. Neville change his views.

131 Mr. Lovisolo, to whom Mr. Neville reported, testified that he thought that the chances of the Caisse signing the term sheet were 30%. I question the reliability of Mr. Lovisolo's evidence and his purported recall of the percentages that he mentioned. Regardless, it is clear he did not think it likely the Caisse would sign the term sheet. In my view, in light of the drastically changed economic circumstances since April, 2008, the chances of the Caisse signing the April 2008 term sheet in January, 2009 were nil.

132 Mr. del Missier is the co-CEO of Barclays Capital. He authorized the term sheet to be sent to the Caisse on January 8, 2009. He was not communicating at the time with the Caisse, although he had met with the Caisse earlier on April 8, 2008. His information in December, 2008 and January, 2009 about the prospects for the Caisse agreeing to the term sheet was information learned from others within Barclays. He acknowledged on cross-examination that when the term sheet was sent to the Caisse, he thought there was a low probability that the Caisse would sign it.

133 I do not accept that although Barclays thought was that it was unlikely that the Caisse would

sign the term sheet, they thought there was a prospect that the Caisse would respond to the term sheet in a way that could lead to an agreement with Barclays such that it could be said there was negotiations still going on at the time of the extension e-mails in question.

134 The sales team involved at Barclays thought that the Caisse would not accept any reasonable terms, which was an indication that not only would the Caisse not sign the term sheet, but that it would not come back with any proposal that would be acceptable to Barclays. On January 7, 2009 Mr. Pointier, a trader and part of the credit derivates team, reported by e-mail to his superior Mr. Azzollini that after discussion with "sales", it was clear that the Caisse was not going to accept any reasonable terms. Mr. Neville, who was part of the sales team, testified that the discussion was a group discussion, in which he was involved, and involved more than one discussion.

135 Further, Mr. Neville told Mr. Davis of National Bank on January 13, 2009 that Barclays had given the Caisse a deadline of 5 pm on January 12, 2009 "to stop negotiating" and sign the term sheet. On the afternoon of January 13, 2009 Mr. Neville told Mr. Silgardo that it was the unanimous view of Barclays that they were never going to get anywhere with the Caisse who kept making increasing demands and so Barclays gave the Caisse an opportunity to change their position and come back to fall in line with Barclays. These statements, which were made on the telephone and recorded, were quite inconsistent with any belief of Mr. Neville at the time the extension e-mails of January 8 and 9, 2009 were sent that further negotiations with the Caisse might be successful.

136 Mr. Lovisolo testified that he thought that there was a 30% chance that the Caisse would respond to the ultimatum by making an alternative proposal, the implication of this evidence being that there was some prospect of further negotiations with the Caisse at the time the extension e-mails were sent on January 8 and 9, 2009. Again, I have doubts of the reliability of Mr. Lovisolo's evidence. In any event, I do not accept this implication.

137 Mr. Lovisolo did not think it likely that the Caisse would accept the ultimatum to sign the April 8, 2008 term sheet. Nor was he prepared to accept anything less, as is evident from a call he made on January 8, 2009 to Mr. Truell, whom Mr. Lovisolo said ran corporate communications for Barclays. He told Mr. Truell that they were giving the Caisse one final chance to sign the term sheet and if the Caisse did not sign it, they were going to "blow up the box", meaning terminate the Devonshire trades. There was no discussion regarding any other possibility such that negotiations with the Caisse might continue if the Caisse did not sign the term sheet. The reason why there was no such discussion, and the reason for the termination, is to be found in Mr. Lovisolo's call to Mr. Truell in which he said that the market had changed since December and that it was now economic for Barclays to blow up the trade. He also told Mr. Truell that Barclays did not want to be out after the group was done, which meant that Barclays did not want to be exposed to the Caisse after the large Crawford restructuring had been completed because it was concerned that the Caisse would then have less incentive to deal with Barclays and more incentive to walk away from the trade.

138 Mr. Lovisolo's real feelings towards the Caisse were contained in an e-mail of December 16,

2008 that he sent to Mr. del Missier and others in which he said that the strategy of the Caisse was to have Barclays negotiate against itself and to walk away if it could not get a deal it could live with and that he did not expect the Caisse to come back with a real counter proposal to what Barclays was then proposing. There was nothing that the Caisse did after that that could have given Mr. Lovisolo any comfort that the Caisse would continue negotiations that could realistically result in a deal with Barclays. He acknowledged on cross-examination his view that if the Caisse did not sign the term sheet, Barclays should and would likely terminate the Devonshire trade.

139 Mr. del Missier testified in his evidence in chief that when the term sheet was sent to the Caisse on January 8, 2009 he thought one response from the Caisse might be a counter-proposal and he was hopeful that they could re-engage with the Caisse to get a restructuring. He said that Barclays was not ending negotiations but fully expecting and hoping to continue. On cross-examination he testified that the parties were in negotiations and he thought that they might end up with a restructuring close to the terms agreed in April, 2008. While Mr. del Missier apparently ultimately gave approval to the recommendation to terminate the trades, I do not believe that what he testified to was the thinking of the deal team and I have some difficulty accepting his evidence as reliable.

140 While it was from others that Mr. del Missier was getting his information at the time, he was not able to say in the witness box that he was aware of what the deal team knew. On December 23, 2008 Mr. Quintal of the Caisse told Mr. Neville that what the Caisse wanted for a deal would "not be pretty" from Barclays point of view, a view that Mr. Neville held. Mr. del Missier testified that he was not aware of what was going back and forth and he could not recall if he was told of the position of the Caisse as expressed on December 23, 2008. Further he testified he did not recall if he was told of the view of the sales team by January 7, 2009 that the Caisse would never agree to any reasonable terms. If Mr. del Missier held the rosy view that he testified to, of which I have considerable doubt, it appears that it would have been a misinformed view.

141 What is more indicative of Mr. del Missier's view at the time was contained in an e-mail he sent to Mr. Silgardo on January 8, 2009, a few minutes before the e-mail was sent by Mr. Lovisolo to the Caisse with the April 9, 2008 term sheet. Mr. Silgardo was the CEO of Barclays Global Investors in Canada which managed money on behalf of large financial institutions. In his e-mail Mr. del Missier said that over the next 48 hours Barclays was going to try to put pressure on the Caisse to sign the agreement he said had been reached, and "if they don't sign we will likely terminate and things will get legal (and public) very quickly". He asked Mr. Silgardo to keep the information confidential. Mr. del Missier did not expect the Caisse to sign and said nothing about expecting the Caisse to come back with some proposal that he thought would lead to some other restructuring. On the same day he sent the same e-mail to Sandra Godard, Barclays' relationship manager for large financial institutions based in Toronto.

142 What Mr. del Missier told Mr. Silgardo was consistent with what Mr. Dunsche told Mr. Brandon Ashcroft, a Barclays' communications person, on the same day, January 8, 2009, to arrange

for a media statement to be released by Barclays in the event that the Devonshire trades were terminated. He told Mr. Ashcroft that in the first few weeks of January, 2009 the market had turned around and that the options that had been presented to the Caisse as concessions by Barclays were now a lot more expensive than terminating the trades. He also told Mr. Ashcroft that as a result, Barclays had taken all these other proposals off the table and given the Caisse an ultimatum to sign the earlier term sheet of April, 2008. Mr. Dunsche went so far as to say that while Barclays did not expressly say so, the strong hint made to the Caisse was that if the term sheet was not signed, Barclays' only recourse would be to terminate the trades.

143 I also have difficulty with Mr. del Missier's statement that he thought that they might end up with a restructuring close to the terms agreed in April, 2008. The dramatic market changes in the fall of 2008 as a result of the large financial failures meant that holders of ABCP notes could not agree to close any restructuring based on terms discussed or worked out before those changes occurred. Mr. del Missier either knew that or was too far from the market to have an informed view.

144 The framework agreement made in the larger Crawford restructuring in December, 2007 had to be extensively changed in December, 2008 in order to achieve a restructuring. The Caisse was the largest investor in the trusts that were restructured in that restructuring, and the economic forces in play in the larger restructuring would obviously have to come into play in the Devonshire restructuring. That is why Barclays had made so many concessions in negotiations with the Caisse in November and December, 2008 and no informed person could expect the Caisse to agree to terms close to those discussed in April, 2008.

145 There is an e-mail from Mr. del Missier sent shortly after midnight on January 12, 2009 that is peculiar. It suggests to me that Mr. del Missier was not much involved in the decision taken earlier in the day to terminate the Devonshire trade. I am of the view that his evidence as to what happened that day is unreliable.

146 On January 12 at 5:09 Mr. Lovisolo sent an e-mail to a number of people at Barclays, including Mr. del Missier, which stated that at 4:52 p.m. that afternoon Barclays had received an e-mail from the Caisse. Mr. Lovisolo did not say what the e-mail from the Caisse disclosed. After mid-night, at 12.49 a.m. on January 13, 2009, Mr. del Missier forwarded that e-mail to the Barclays Capital executive committee with the note "Still a chance of last minute settlement as our threat to terminate has appeared to have woken them up". While it is asserted that this e-mail is supportive of the position of Barclays that they still hoped for a negotiated settlement with the Caisse, I do not accept that.

147 There is no evidence that the e-mail from the Caisse at 4:52 p.m. was forwarded to Mr. del Missier and his evidence in chief was that he did not recall if he received it. On cross-examination he gave inconsistent statements regarding it, stating at one point he could not recall if he read it, or if "we" met as a group to discuss it, or if there was any discussion about it, and at another point stating that he read the e-mail from the Caisse at least in part before making the decision to

terminate the Devonshire trade. He testified in chief that he was aware of the basic message in the response of the Caisse and that he was very disappointed with it and accepted the recommendation to terminate the Devonshire trades. Yet he testified that his statement to the executive committee that there was still a chance of a last minute settlement as the Caisse had appeared to have woken up was based on the e-mail, which he had said was very disappointing to him.

148 When Mr. del Missier made the ultimate decision is unclear. He did not testify as to when that happened. Nor did anyone else. Mr. Lovisolo testified that shortly after the e-mail came in from the Caisse, the deal team met and decided to terminate the Devonshire trade. He said the persons present were himself, Mr. Neville, Mr. Dunsche, Mr. Wysocki, Mr. Warren and their counsel. He testified that they would not have terminated the trade without Mr. del Missier's approval and that it was fair to say that the decision to terminate was made subject to his approval. Mr. Lovisolo could not recall who telephoned Mr. del Missier for his approval. Mr. Neville's evidence was that the decision was a group discussion but that ultimately Mr. del Missier and Mr. Bommensath made the decision.

149 I gained the clear impression that Mr. del Missier does not remember much of that day. This is hardly surprising given his position and responsibilities at Barclays. It appears likely that Mr. del Missier was not aware at the time he sent his e-mail to the executive committee what the response of the Caisse was and it may well be that it was sometime after that e-mail was sent that he accepted the recommendation to terminate. What is more likely is that he and the deal team at Barclays had made the decision in their minds by the time the term sheet was sent to the Caisse on January 8, 2009 that when the Caisse did not sign the term sheet, which they expected to be the case, they would terminate.

150 Sometimes actions speak louder than words. On January 9, 2009, Mr. Kane of the London derivatives department of Barclays who is a trader who manages risk sent an internal e-mail to James Lee, Alex Pointier and others that he executed a hedge at the end of the day on January 8, 2009 "partly thinking about potential Devonshire impact next week." On January 12, 2009 at 1:41 p.m. London time (8:41 a.m. New York time) Mr. Kane sent another e-mail to the same people that stated that Barclays traders had managed to do a few trades "mainly in anticipation of Devonshire unwind". The timing of these trades, of course, was after the ultimatum of January 8, 2009 and prior to the deadline given to the Caisse to agree to the term sheet by 5 p.m. on January 12 and was contrary to any notion of any continuing negotiations if the Caisse did not agree to the ultimatum put to it. These e-mails reflected a belief that the Caisse was not going to agree and that the result would be a termination of the Devonshire trades.

151 While Mr. Kane was a junior trader, he was helping to trade the credit risk in the Barclays book. Mr. Pointier was the Barclays global head of correlation and exotic trading to whom he reported. There was no response from Mr. Pointier criticizing what Mr. Kane had done. Mr. Lee was not able to say whether Mr. Kane had been instructed to do the hedges, but no one was called to say that Mr. Kane was acting on his own. While Mr. Lee may not have been asked to do any

hedging regarding the termination prior to the evening of January 12, 2009, that does not mean others such as Mr. Kane acting under the authority of Mr. Pointier were not doing hedging in anticipation of a Devonshire termination. I can only assume that the evidence of Mr. Pointer would not have been helpful to Barclays, but whether that is the case, the inference I draw from the evidence is that Mr. Kane was not acting on his own without some instructions.

152 Also, on January 8, 2009, in the morning prior to the delivery of the ultimatum to the Caisse, Mr. Pointier asked Ms. Franke to reserve the profit and loss statement for the day until there was more clarity on Devonshire. Ms. Franke was a director in the product control group at Barclays covering the global correlation desk, including the Devonshire trade, and had responsibility for the oversight of the daily profit and loss calculation. Ms. Franke had "heard that rumour" that there "should [be] a real resolution by Monday." Ms. Franke had begun work by 10:00 a.m. on January 8, 2009 to gather the relevant trade information so "that when we terminate we knew the relevant trades."

153 Barclays relies upon an earlier ultimatum to Devonshire noteholders that had resulted in positive results so far as negotiations had concerned to support its contention that it thought the ultimatum to the Caisse on January 8, 2009 would result in some response from the Caisse that could lead to an agreement. I do not find that at all persuasive. On April 4, 2008 Barclays sent to these noteholders and the Investors Committee a draft term sheet with a deadline of 4 days. That resulted in the meeting in New York on April 8, 2008 at which the terms as to how the small noteholders were to be dealt with were apparently agreed in principle. However, the Barclays e-mail attaching the term sheet sent out on April 4, 2008 stated that the term sheet included "all of the essential terms that we have been discussing", not terms that had been discussed eight months previously in markedly different market conditions that had since been substantially altered by the parties, including Barclays.

154 Given that Barclays had sent out a term sheet to the Caisse on January 8, 2009 as an ultimatum, which the Barclays people involved in the transaction did not think the Caisse would accept, and given that Barclays intended to terminate the trades once the Caisse did not accept the ultimatum, all of this before the extensions of January 8 and 9, 2008 were sent, the extensions were misleading, both in the language used and in what was not said. It was misleading to say that there were issues being worked out. The negotiations were over from Barclays' point of view. Moreover, having made the statements that it did, it was misleading for Barclays not to disclose the ultimatum that it had made and its intention to terminate the trades if the ultimatum, which it did not think would be accepted, was declined. Thus the daily extensions of January 8 and 9, 2009 contained misrepresentations of facts.

(d) Result of misrepresentation

155 The parties agree that each daily extension formed a new contract. At issue is whether the extensions of January 8 and 9, 2009 should be rescinded because of the misrepresentations in them

that I have found to exist.

156 A material misrepresentation, whether innocent or fraudulent, may be grounds to set aside a contract entered into by one party in reliance on the representation. A fraudulent misrepresentation is a statement known to be false or made not caring whether it is true or false. For innocent misrepresentation the misrepresentation might be entirely honest and careful, there is no need for promissory intention, the negligence of the party seeking relief is no defence, and there is a presumption that a material representation did in fact cause the misrepresentee to enter into the transaction. The presumption can be rebutted by proof of no reliance on the misrepresentation. See S.M. Waddams, *The Law of Contracts*, 6th ed. at para. 419-421.

157 The requirement that the misstatement of fact be material means that the misrepresentation must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question. See J. D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at p. 300. McCamus further states at p. 301:

> In addition to being shown to be material, the misrepresentation must have constituted an inducement to enter the agreement upon which the misrepresentee relied. Thus, a representee who undertakes his or her own separate investigation of the facts would not be held to have relied on the misrepresentation. On the other hand, is clearly established that the representee has no obligation to engage in "due diligence" and make such an independent investigation, even where the means of doing so are made available by the misrepresenter. Further, it is clearly established that the misrepresentation need not be the exclusive or even a predominant inducement for entering the agreement. It must be established, simply, that it was an inducement. Moreover, once it is established that a misrepresentation is of such a nature that it is liable to induce the misrepresentee to enter the contract, it would be presumed against the misrepresenter that such inducement did occur.

158 As stated by McCamus, *supra*, it is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it matters not if the misrepresentation was only one of several factors contributing to the plaintiff's decision. See *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 at paras 35-36; *Kripps v. Touche Ross & Co.* (1997), 89 B.C.A.C. 288 (C.A.) at paras. 102-103; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.) at para 81.

159 The issue of reliance is a question of fact to be inferred from all the circumstances of the case and evidence at the trial. See G.H.L. Fridman, *The Law of Contracts*, 5th ed. (Scarborough: Thomson Carswell, 2006) at p. 293.

160 Courts of equity in the past held that there could be no rescission after the contract induced by the misrepresentation had been executed except in the case of fraud, "error in *substantialibus*" or complete failure of consideration. See Waddams, *supra*, at para. 422 for a discussion of this history.

Professor Waddams states that recent cases suggest that courts will be willing to find an "error in *substantialibus*" whenever justice seems to require rescission and he argues for a flexible test. He stated:

> It is submitted that execution should be recognized as a relevant, but not decisive, factor in determining whether, in all the circumstances, rescission should be denied because it might affect third parties or because of the plaintiff's undue delay in seeking his remedy.

161 It is not argued that the statements which I have found to be misrepresentations were not material, nor could it be. They were relevant to the decision by Devonshire to accept the extensions in question. What is contended by Barclays is that there was no detrimental reliance on them by Devonshire.

162 Mr. Lafleur-Ayotte testified that in the fall of 2008 Quanto had been informed that the negotiations between Barclays and the Caisse were going well and that the parties were close to reaching an agreement with Barclays. Quanto was also informed that National Bank had sold all of its Devonshire notes to Barclays and that an offer would be made to all of the small holders of Devonshire notes to exchange their notes for MAV II notes being issued in the large Crawford restructuring that was to close in early January, 2009. He testified that the only other information that he had about the Barclays negotiations was the information in the daily standstill e-mails that the negotiations were ongoing, which he said was consistent with his understanding of the situation. He was not aware of the ultimatum made by Barclays to the Caisse on January 8, 2009 to sign the April 2008 term sheet by the close of business on January 12, 2009.

163 Mr. Lafleur-Ayotte testified in chief that if he had been told of the ultimatum made by Barclays and the deadline for a response, he would have verified the information with the Investors Committee. He testified that assuming he was told that the Caisse would not have accepted the Barclays ultimatum, Devonshire would have objected to the extensions on January 8 and 9, 2009 and its only option would have been to proceed with the termination of the swaps. He said that the only reason Devonshire did not terminate the swaps in August, 2007 was because of the Montreal Accord and Devonshire had committed to Barclays that it would not terminate the swaps if Barclays was negotiating in good faith with investors. If those negotiations had come to an end, there was no purpose in continuing with that arrangement and the only option would have been to protect the assets of Devonshire and take steps to terminate the swaps.

164 Robert Girard is a partner at Fasken Martineau in Montreal. He was a director of M & M Alternative Investment VII Corp., the Issuer Trustee of Devonshire, and was the person who signed documents such as the default notice on behalf of the Issuer Trustee and who liaised between Quanto and the board of directors of the Issuer Trustee. Mr. Girard was not aware of the ultimatum of Barclays made to the Caisse on January 8, 2009. He testified that his understanding on that day and the following day as to the state of negotiations between Barclays and the Caisse was that the

negotiations were ongoing and was based on the daily extension e-mails sent by Barclays on those two days. Nor was he aware of the response made by the Caisse to Barclays on January 12, 2009. He was surprised to learn of the termination of the swaps by Barclays on the morning of January 13, 2009.

165 Mr. Girard testified that if had been told of the ultimatum of Barclays of January 8, 2009 with a hard deadline of January 12, 2009 at 5 p.m. and been told that the Caisse would not accept the term sheet offered he would have consulted with Quanto and then recommended to the board of the Issuer Trustee to immediately address the subject of the termination of the swaps.

166 Counsel for Barclay's elicited on cross-examination evidence from Messrs. Lafleur-Ayotte and Girard that it relies on to counter the testimony of these witnesses given in chief. For reasons that follow, I do not think this evidence assists Barclays.

167 On cross-examination, Mr. Lafleur-Ayotte said that on the assumption that he had been told by the Caisse that Barclays had put a deadline on the Caisse to respond to its term sheet by 5 p.m. on January 12, 2009 and that the Caisse intended to respond to Barclays within the deadline, it would have been a difficult situation but he suspected that his advice would have been to not interfere with the daily standstills or object to them.

168 On cross-examination, Mr. Girard said that had Devonshire been advised that in the past Barclays had set deadlines with the noteholders and those deadlines had led to progress in negotiation, that on January 8, 2009 Barclays had made a proposal to the Caisse and unilaterally proposed to the Caisse that Barclays would extend the standstill with Devonshire to January 12, 2009, and that on January 9, 2009 the Caisse had indicated to Barclays that it would make a response to the Barclays proposal by January 12, 2009, Devonshire would not have objected to the daily extensions on January 8 and 9 through to January 12, 2009.

169 The issue is whether Devonshire reasonably relied on the statements made in the extension e-mails that I have found to be misrepresentations of fact. What Devonshire may have done had Mr. Lafleur-Ayotte or Mr. Girard been told things that they did not know is relevant in assessing their evidence, and in considering whether they reasonably relied on what they were told, but the underlying question is not what they may have done had they been told things that they were not.

170 The questions put by counsel for Barclays on the cross-examinations of Messrs. Lafleur-Ayotte and Girard did not put the facts as I have found them. That is, they were not asked what Devonshire would have done had they been told (i) that Barclays had come to the view that the Caisse would never agree to any reasonable terms, (ii) that Barclays had put in its ultimatum to the Caisse a term sheet from April 2008 that did not reflect the market upheavals that occurred in the fall of 2008 or the revised terms that had been negotiated by the Investors Committee for the large Crawford restructuring and negotiated to some extent between Barclays and the Caisse, (iii) that no one at Barclays believed that the Caisse would accept the term sheet, (iv) and those involved at Barclays intended to terminate the swaps once the Caisse did not accept the ultimatum.

171 In my view, and I so find, had Messrs. Lafleur-Ayotte and Girard been advised of these facts, they would have taken immediate steps necessary to terminate the swaps in order to protect the assets of Devonshire, including not agreeing to the extensions of the standstill and the default notice suspension.

172 Mr. Bergeron of the Caisse testified that if someone from Devonshire learned of the e-mail of January 8, 2009 from Mr. Lovisolo to the Caisse and asked him what the Caisse would do, he would have told Devonshire that the Caisse surely would not accept the ultimatum. I accept that evidence. His evidence on cross-examination, which I accept, was that he knew when he saw the e-mail from Mr. Lovisolo what his response would be. That response denied the existence of any prior agreement. Mr. Bergeron was insulted by the e-mail from Mr. Lovisolo and it would be more than unlikely that he would have given any different impression to Devonshire. Had Devonshire spoken to Mr. Bergeron before deciding what to do with the daily extensions of January 8 and 9, 2009, what Mr. Bergeron would have told them would have led Devonshire to immediately take steps to terminate the swaps.

173 Barclays relies on an e-mail exchange by Mr. Martis with Mr. Neville as evidence that Devonshire were not influenced by the language of the daily extensions. I do not think the exchange assists Barclays. On Friday, March 14, 2008 a draft extension agreement was circulated by Barclays. Mr. Martis, a solicitor for Devonshire in Montreal, was away and could not open the draft on his blackberry. His partner working on the matter was also away. Mr. Martis was concerned that his silence might be taken to be consent to the draft. On Saturday, March 16, 2008 he sent an e-mail to Mr. Neville in which he referred to his inability to access the draft and concern that his silence be taken as consent. He said that the intention of Quanto and Devonshire was that until such time Barclays and the investors reached an agreement, or that Barclays or the Investors Committee determined that the negotiations had terminated unsuccessfully, the status quo established in August should be maintained on identical terms. He said Barclays would be hearing on Monday from his partner regarding the draft.

174 I cannot accept that what Mr. Martis said in his e-mail in March, 2008 to tide things over until his partner could review draft documentation regarding an extension agreement would have continued to be the view of Quanto and Devonshire in January, 2009 had disclosure been made to them of the views and intentions of Barclays as I have found them to be. Barclays had effectively decided to terminate any further discussions with its ultimatum which it knew would not be accepted by the Caisse.

175 It is quite evident that Barclays did not want to disclose to Devonshire the true state of affairs and that Barclays had a concern that Devonshire might terminate the trades before Barclays if it had notice of the ultimatum.

176 Mr. Martis of Faskens, solicitors for the indenture trustee of Devonshire, e-mailed Mr. Neville and Mr. Bergeron on December 30, 2008 and asked that as the Montreal Accord

restructuring was now headed for a mid-January closing, would it now be appropriate to hear where Barclays stood with the Devonshire restructuring and when it might be expected to proceed to its consummation. Mr. Neville said he received the e-mail while he was skiing in Wyoming and did not respond to it. He said getting involved in Devonshire was not something he wanted to do and he did not think he had to respond. Mr. Dunsche on the same day e-mailed Mr. Neville and Mr. Lovisolo and said "Funny guy. Do we need to respond? Don't think so." Mr. Neville's explanation on cross-examination that they had received humorous e-mails from Mr. Martis in the past rang hollow as an explanation for Mr. Dunsche's comment to Mr. Neville.

177 On January 6, 2009 Mr. Martis e-mailed Mr. Neville and asked "Gregg, any chance of a reply to my e-mail?" Mr. Neville did not respond, although he was back in his office after the holidays. He testified that he did not recall focusing on it at the time. This response is hard to credit. Devonshire was a big issue at the time for Barclays and Mr. Neville and there has to be an explanation why he did not respond to Mr. Martis.

178 The inference I draw, in spite of Mr. Neville's denial, is that Barclays did not want Devonshire to know the state of play or to answer a direct question from Mr. Martis regarding the expectations of a Devonshire restructuring. Mr. Neville acknowledged that Barclays did not want any advance notice to be given to Devonshire of the liquidity payment by Barclays and reluctantly admitted on cross-examination that it was possible that Barclays did not want to put Devonshire in a position where it could take steps to terminate before Barclays did. He also acknowledged that there was a risk that if Devonshire was given notice of the ultimatum put to the Caisse, Devonshire might take steps to terminate the trades, although he said he thought that before doing so Devonshire would call the Caisse for permission. The failure to respond to Mr. Martis compounded the misleading nature of the extensions e-mails, which were also copied to Mr. Martis, in the face of these requests from Mr. Martis who clearly wanted to be advised of the situation.

179 In my view, and I so find, the misrepresentations in the extension e-mails of January 8 and 9, 2009 influenced the decision of Devonshire to accept those extensions and were reasonably relied on by Devonshire to its detriment. Moreover, had the true situation been disclosed in the e-mails, Devonshire would have taken immediate steps towards terminating the Devonshire trades in order to protect the trust assets.

180 Technically, it can perhaps be said that the two contracts entered into by the extensions of January 8 and 9, 2009 were executed, in that the standstill provisions continued. This, however, is not in my view any reason to refuse rescission based upon an innocent misrepresentation. No third-party rights will be disadvantageously affected by the rescission and the justice of the situation requires a rescission.

181 While it is not strictly necessary for the purposes of the misrepresentation claim to determine whether the misrepresentations amounted to a fraudulent misrepresentation, in my view they did. Mr. Neville, who sent the extension e-mail of January 8, 2009, and the Barclays sales team knew

that there were not a number of issues being worked out between Barclays and the Caisse and knew that the negotiations were at an end. They also knew of relevant facts such as the ultimatum put to the Caisse and the intention to terminate when the Caisse did not accept the ultimatum, which they expected would occur. The extension e-mail of January 9, 2009 was sent by Ms. Sheila Chapman, an in-house lawyer at Barclays in New York. What she knew is not in evidence as it is a privileged matter. However, the e-mail was copied to Mr. Neville and others in the Barclays sales team who again knew of the misrepresentations. I view these e-mails as being part of the litigation strategy that shortly thereafter unfolded. Barclays did not want to disclose to Devonshire what was going on with the Caisse and did not want to run the risk that Devonshire might terminate the swaps before it did. The e-mails, to the knowledge of the Barclays sales team, were false.

182 In the circumstances, Devonshire is entitled to rescission of the two extensions of January 8 and 9, 2009.

183 One result of the rescissions is that the two remaining days during which Barclays had to remedy its default in paying the liquidity demands before an event of default occurred began to run on January 9, 2009.

13. Can Barclays rely on the insolvency of Devonshire to terminate the swaps?

184 On January 13, 2009 Barclays delivered an early termination notice to Devonshire. The notice stated that an event of default had occurred with respect to Devonshire pursuant to section 5(a)(vii) of the ISDA Master Agreement and it designated January 13, 2009 as the early termination date. The notice did not state what the event of default was other than to refer to section 5(a)(vii) of the ISDA Master Agreement and did not state when the event of default had occurred.

185 Section 6(a) of the ISDA Master Agreement provides that the non-defaulting party is to specify the relevant event of default. In its notice of early termination on January 13, 2009, Barclays did not do so. It merely stated that an event of default had occurred with respect to Devonshire pursuant to section 5(a)(vii) of the ISDA Master Agreement. It did not specify which subsection of (vii) it relied on and said nothing of the facts it relied on. It did not specify any date of an alleged event of default.

186 Section 5(a)(vii) of the ISDA Master Agreement provides for 9 different classes of events as constituting an event of default, all of which involve financial distress of one kind or another. One of these, sub-clause 2, is now relied on by Barclays. It provides:

> (a) Events of Default. The occurrence at any time with respect to a party... of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:-
>
> ...

(vii) Bankruptcy. The party...

(2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

187 Strictly speaking, section 5(a)(vii)(2) contains four events of default: (i) a party becomes insolvent; (ii) a party is unable to pay its debts: (iii) a party fails to pay its debts generally as they become due: or (iv) a party admits in writing its inability generally to pay its debts as they become due. Each is distinct and not cumulative.

188 With respect to the event of default that a party is unable to pay its debts, there is authority that evidence of a mere failure to pay the debt is not sufficient if there is evidence of a substantial reason for not paying. In *Re Taylor's Industrial Flooring Ltd.* [1990] BCC 44 (C.A.), referred to by Flaux J. in *Marine Trade S.A, supra,* Dillon L.J. stated:

> In my judgment, something more must be proved than simply that the company has not paid a debt. In some cases the circumstances surrounding the non-payment may justify the inference that the debtor is unable to pay its debts as they fall due. A series of dishonoured cheques might justify that inference. But in the present case a reason for non-payment has been put forward. The reason may not be a very good one, but unless it is not being put forward honestly, I do not see why an inference of inability to pay should be drawn from the fact of non-payment.

189 Barclays does not rely on the first event of default contained in section 5(a)(vii)(2), i.e. a party becomes insolvent. The word "insolvent" is not defined in the ISDA Master Agreement. In Firth, *Derivatives Law and Practice*, (London: Thomson Reuters (Legal) Limited 2010), it is opined that the word may have to do with a balance sheet test of insolvency. This need not be considered as Barclays relies on the other three events of default referred to in section 5(a)(vii)(2).

190 In its statement of claim, Barclays pleaded that from and after August 13, 2007 an event of default under section 5(a)(vii)(2) existed against Devonshire. In a ruling at the outset of the trial, I ruled that because of the scope of the bifurcation order, Barclays could not lead evidence at this stage on the issue of whether there was an insolvency of Devonshire prior to August 16, 2007, i.e. prior to the Suspension Notice. The word "insolvency" in the context of the ruling was not intended to distinguish the different events of default contained in section 5(a)(vii)(2).

191 Thus at this stage of the trial, Barclays contends that there was an event of default existing on January 13, 2009. Devonshire contends that for a number of reasons, Barclays cannot rely on the insolvency of Devonshire as a basis for terminating the swaps.

(a) Was Devonshire insolvent on January 13, 2009?

192 More particularly, the issue is whether there was an event of default on the part of Devonshire on January 13, 2009 at the time Barclays delivered its notice of early termination.

193 As at January 13, 2009, the Class A notes that matured on August 13 to 15, 2007 and thereafter up to November 7, 2007, totalling $209,716,441, had not been paid. Most of the Class FRN and Class E notes had long matured and were unpaid.

194 From August 13, 2007 to January 13, 2009, no Devonshire noteholders made a demand on any class of Devonshire notes or presented a note for payment. Sometime after the Montreal Accord, the Devonshire noteholders signed an extraordinary standstill resolution pursuant to the Devonshire trust indenture directing the indenture trustee from delivering any notice of default to Devonshire, exercising any powers to declare money due and payable, taking any steps to realize on security, enforcing payment of money, exercising any remedies under the trust indenture or under any statute or at law or equity or taking other steps to enforce the trust indentures. The resolution stated that the noteholders wished the powers they held be used to effect a temporary standstill to facilitate the Montreal Accord beyond March 14, 2008. The term of the standstill was stated to run to April 14, 2008 or such later date as the Investor Committee might advise the indenture trustee. There is no evidence whether the Investor Committee did later advise of an extension, but in light of the Investor Committee's continuing efforts to restructure through to January, 2009 and the fact that the indenture trustee took no steps the entire time contrary to the instructions contained in the extraordinary resolution, it can safely be inferred that the instructions were explicitly or implicitly continued.

195 Devonshire refers to authority that in considering whether a debtor has ceased to meet his liabilities as they become due (the BIA language for insolvency) a court should consider the attitude of creditors regarding payment. In *Re Tysak Ltd* (1981), 38 C.B.R. (N.S.) 142 Saunders J. stated:

> While the attitude of a creditor is not relevant to the issue of whether his account is overdue, the fact that a creditor is not pressing and is willing to tolerate delay in payment is, in my opinion, one circumstance that may be taken into account in determining whether a debtor has ceased to meet its liabilities.

See also *Re 345531 Ont. Ltd.*, (1980) 35 C.B.R. (N.S.) 18 per Saunders J.

196 Barclays counters this by relying on a statement of Ground J. In *Re Brock R.V. Centre* (2007), 33 C.B.R. (5th) 219, Ground J. stated:

> The law is clear that the fact that Brock R.V. was not being pressed for payment of a particular debt does not make it any less a liability for purposes of the B.J.A. In *Re Cappe* [1993] O.J. No. 775, I stated at pg. 6:

> In *Re Hayes* (1979), 34 C.B.R. (N.S.) 280 (B.C.S.C.), the debtors argued as

> a defence that given creditors other than the petitioning creditor were not pressing for payment, they had not failed to meet their liabilities generally as they became due. The Court was of the view that in order to refuse a petition, a debtor must satisfy the court affirmatively that they are able to pay their debts, not that the creditors are not pressing for payment.

197 I have been referred to no case dealing with the language in the ISDA Master Agreement as to what is meant by the words "fails to pay its debts as they become due". I take the words of the BIA "ceases to meet his liabilities generally as they become due" to mean the same as the words "fails to pay its debts generally as they become due" in the ISDA Master Agreement.

198 Regarding the test for a party being "unable" to pay its debts, Devonshire relies on a statement of Briggs J. in *Re Cheyne Finance plc*, [2008] 2 All E.R. 987, dealing with the words "unable to pay its debts as they fall due" in the U.K. Insolvency Act relied on by Lord Neuberger MR in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc & Ors*, [2011] EWCA Civ 227, who stated:

> This is not dissimilar from the point made in relation to section 123(1)(e) by Briggs J in *Re Cheyne Finance plc* [2008] 2 All ER 987, para 51, when he contrasted "a momentary inability to pay ... as a result of temporary liquidity soon to be remedied" with "an endemic shortage of working capital" which renders "a company ... on any commercial view insolvent, even though it may be able to pay its debts for the next few days, weeks or months before an inevitable failure." ... The point that I think Briggs J was making is that section 123(1)(e) does not require slavish adherence to the immediate present. It is unnecessary to decide whether that is correct, although it is only right to say that, as at present advised, I am inclined to think that it is. However, that does not call into question the conclusion that section 123(2) applies to a company whose assets and liabilities (including contingent and future liabilities) are such that it has reached the point of no return.

199 Devonshire is a very unusual case. It is not about a debtor who was having financial difficulties unable to earn or raise enough cash to pay off its debts.

200 Once the financial crises in August 2007 took hold, the negotiations to restructure the ABCP market, including the negotiations for Devonshire, were with the intent that the asset providers, including Barclays, would enter into direct swap contracts with the noteholders of the various conduits, including the Devonshire noteholders. It was never contemplated that the noteholders would look to Devonshire. The swaps would be taken out of Devonshire. It is not surprising that the noteholders who were negotiating with Barclays instructed the trustee not to take any steps to enforce the notes.

201 The standstill arrangements between Barclays and Devonshire were consistent with this

dynamic as Devonshire agreed during the standstill not to enforce its rights against Barclays under its default notice, i.e. not to attempt to obtain the liquidity payments which it would require in order to pay the Class A notes unpaid at the time of the standstill, so long as Barclays complied with its obligations as a signatory to the Montreal Accord. The Montreal Accord contained a long-term proposal under which all outstanding ABCP would be converted into term floating rate notes maturing no earlier than their scheduled termination dates and the signatories, including Barclays, agreed in principle to the long-term proposal and to work in good faith to bring about its timely implementation. By agreeing to this long term proposal, Barclays could hardly have expected Devonshire to take any steps to attempt to pay off its noteholders.

202 Major note holders of Devonshire, including Desjardins and National Bank, sold their notes to Barclays. They did not attempt in any way to collect on their notes from Devonshire, nor did Barclays once it acquired these notes. Barclays had no intention during the standstill to attempt to collect on the Devonshire notes that it had acquired, and once it terminated the standstill its efforts were not to collect on the notes but rather to terminate the swap contracts and obtain the collateral held by Mellon Bank and arguably by Devonshire in order to compensate it for its loss as provided for in the ISDA Master Agreement.

203 On October 20, 2008, without any input from either Devonshire or Barclays, DBRS withdrew its rating of Devonshire. The DBRS press release stated: "As efforts continue to restructure Devonshire, it is now no longer necessary for DBRS to continue its rating of Devonshire." Up to then, Devonshire throughout had a AAA rating from DBRS. Without a rating, it would be impossible for Devonshire to issue new notes. Neither Barclays nor Devonshire objected to this withdrawal of the rating, obviously because neither contemplated that Devonshire would try to raise new capital to pay off its noteholders.

204 Barclays relies on a statement by Xeno Martis, a solicitor at Faskens acting for Devonshire, as constituting an admission in writing on the part of Devonshire of its inability generally to pay its debts as they become due. I would not accept this argument.

205 In December, 2007 there was a proposal to amend the trust indentures for the trusts that Quanto was administering, including Devonshire, in order to solve a tax issue. During the standstill, the affected trusts were collecting revenues from swap counterparties without corresponding expenses, creating a potentially unrecoverable tax liability for the trusts. Faskens recommended a solution to the Investor Committee. The solution was based upon a market practice of debtors to pay a forbearance fee to creditors. The obligation to pay the forbearance fee would correspond approximately to the taxable income that accumulated in the trust. The obligation to pay the forbearance fee would be at the bottom of the waterfall of payments to be made to creditors, so that the forbearance fee would not be paid before noteholders themselves were paid in full.

206 The note of Mr. Martis stated:

> ... The compensation being offered is simply a fee articulated in the form an

> interest expense. The Trusts are insolvent and are compensating the creditors that have the power to accelerate their debts with a fee in consideration of a standstill intended to allow its creditors to restructure their debt. Those creditors that have that power are the holders of all of the Notes and not just the holders of the A Notes. That is all we were doing...

207 Mr. Martis was making an argument to support the recommendation, in order to save a potential tax. In the end, what he proposed was not agreed to or carried into effect. He had no authority from Quanto or Devonshire to make an admission in writing of an event of default.

208 The standstill terminated at the close of business on January 12, 2009. Had someone taken the position at the opening of business on January 13, 2009 that Devonshire had ceased to pay its liabilities generally as they became due and thus should be put into bankruptcy under the BIA, it is difficult to think that in these circumstances the petition would have been successful. This situation is more than creditors not pressing for payment, which in itself is a circumstance which Saunders J. would take into account. It is a situation in which Barclays had agreed to a long-term proposal to change the terms of the outstanding notes to make them long term and was negotiating with the Devonshire noteholders to that end.

209 However, a bankruptcy order is a discretionary order. The fact that a bankruptcy order might not be made that day does not necessarily mean that Devonshire had not failed generally to pay its debts. While it may be a harsh conclusion, for the purposes of the ISDA Master Agreement I am of the view that on January 13, 2009 Devonshire had failed generally, and was unable, to pay its debts as they had become due.

(b) Did Barclays elect to abandon its right to rely on the insolvency of Devonshire?

210 Devonshire contends that by its actions Barclays should be taken to have abandoned its ability to rely on the insolvency of Devonshire.

211 The general conditions of the ISDA Master Agreement contain provisions regarding the requirement to pay money. They provide:

> 2. **Obligations**
>
> **(a) General Conditions.**
> (i) Each party will make each payment or delivery specified in each Confirmation to be made by it ...
> (iii) Each obligation of each party under section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing ...

212 Therefore the obligation to make payments under the relevant agreements is subject to the condition precedent that there is no existing event of default. Thus, the obligation of Barclays to make payments to Devonshire for credit protection under the swap contracts was subject to the condition precedent that there was no insolvency event of default on the part of Devonshire.

213 Barclays did not take the position following the Suspension Notice that an event of default had been committed by Devonshire under 5(a)(vii) of the ISDA Master Agreement, which I shall refer to as taking the position that Devonshire was insolvent, or take steps to terminate the swaps. It could have. Barclays as a credit protection buyer continued to pay monthly payments to Devonshire as the credit protection seller against the possibility of defaults in the underlying portfolio of debt obligations. This carried on right to the end until Barclays delivered its early termination notice on January 13, 2009. Likewise, Barclays continued to charge Devonshire for liquidity protection against a market disruption event under the liquidity line until that protection terminated by its terms in February, 2008 by deducting the liquidity premium payable by Devonshire from the protection premium payable to Devonshire.

214 Devonshire contends that by making these protection payments and not taking steps to terminate under section 6(a) of the ISDA Master Agreement, Barclays elected to affirm the ISDA Master Agreement and abandoned its right to claim insolvency as an event of default.

215 Devonshire relies on a passage in Firth, *Derivatives Law and Practice*, (London: Thomson Reuters (Legal) Limited 2010). The same text is relied on by Barclays for a different point. In chapter 11, dealing with the ISDA Master Agreement, it is stated on p. 11-59 that a right to terminate will be lost if the non-defaulting party affirms the agreement. It is also stated that it is a question of fact whether this has occurred and that notwithstanding a non-waiver clause, for the non-defaulting party to continue to perform the agreement without protest for a significant period may be construed as an election by it to abandon its right to terminate. Two cases are cited for these propositions. Neither case deals with an ISDA Master Agreement.

216 The first case is *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corp of India* [1990] 1 Lloyd's Rep. 391 (H.L.). In that case, a vessel was chartered to load oil at a safe port. The port nominated by the charterer was not safe, but by various actions the owner was taken to have acted on the nomination. It was held that by its actions, the owner of the vessel elected to accept the nomination and thereby waived or abandoned its right to reject the nomination. In the course of his judgment, Lord Goff made an extensive analysis of the doctrine of election and affirmation of a contract. He stated, amongst other things :

> It is a commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more than one

> context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract.
>
> ...
>
> In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. Instances of this phenomenon are to be found in s. 35 of the *Sale of Goods Act*, 1979. In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him - for example, to determine a contract or alternatively to affirm it - he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in s. 35 of the 1979 Act.

217 The second case cited in Firth, *supra,* is *Tele2 International Card Co. SA v. Post Office Ltd* [2009] All E.R. (D.) 144. In that case Tele2 had failed to provide a guarantee of its parent company to the Post Office for obligations under a phone card supply contract, which failure gave the Post Office the right to terminate the contract. However, it was held that under the doctrine of affirmation of a contract by election, the Post Office had elected not to terminate the contract by continuing with the contract for a year after the breach.

218 See also *Charter Building Company v. 1540957 Ontario Inc. (Mademoiselle Women's Fitness & Day Spa)*, 2011 ONCA 487 for a recent discussion by Epstein J.A. of the doctrine of election.

219 Section 6(a) of the ISDA Master Agreement provides that if at any time an event of default has occurred and is then continuing, the non-defaulting party may deliver a notice of early termination and thereby terminate the contract. The word "may" indicates that the non-defaulting party need not do so, but may elect to keep the contract running. There is a body of case law that

confirms that section 6(a) is a contractual right that may or may not be exercised. For example, in *Lomas et al. v. JFB Firth Rixson Inc. et al.*, [2010] EWHC 3372 (Chancery), Briggs J. held that on the bankruptcy of Lehman Brothers, which was an event of default, the counterparty to Lehman Brothers on interest rate swaps made under an ISDA Master Agreement was entitled to not deliver an early termination notice and to rely on section 2(a)(iii) to withhold payment of interest payments otherwise payable to Lehman Brothers under the swaps. Briggs J. stated that section 6(a) was plainly to be exercised in such a way as the non-defaulting party considered best served its own interests "by way of a choice between alternative remedies" arising out of its counterparty's default.

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220 The words "and is then continuing" in section 6(a) suggest that the non-defaulting party may not be required to immediately deliver its notice of early termination upon an event of default, if that is the course which it wants to follow. That does not necessarily mean, however, that a non-defaulting party cannot by later actions be taken to have affirmed the contract. Firth, *supra*, says otherwise. No case was cited by Barclays in which a non-defaulting party under an ISDA Master Agreement continued to make payments to the defaulting party after an event of default and was held entitled at a later date to have the right to deliver an early termination notice.

221 What happened in *Enron Australia Finance PTY Ltd. (In Liquidation) v. TXU Electricity Ltd.*, [2003] 48 A.C.S.R. 266 (N.S.W.S.C.); aff'd [2005] NSWCA 12 (C.A.) was the same as in *Lomas et al. v. JFB Firth Rixson Inc. et al.* On the insolvency of Enron, the counterparty to electricity swap contracts under an ISDA Master Agreement did not deliver an early termination notice and was held entitled to rely on section 2(a)(iii) to withhold payments otherwise payable to Enron. What is the critical difference in those cases is that unlike Barclays, the non-defaulting parties chose their remedy by stopping the payments that would have been required had there been no event of default.

222 I agree with Devonshire that if, as is Barclays case, Devonshire became insolvent, Barclays elected to affirm the swap contracts by continuing to pay premiums to Devonshire for credit protection from losses in the underlying bond and ABCP portfolio and by continuing to charge and collect liquidity payments from Devonshire. It was open to Barclays not to enter into any standstill agreement, or elect at any time not to renew it, and to take the position that it was going to rely on section 2(a)(iii) and not make any further payments because of Devonshire's insolvency, but it did not do so. What its motivation was to keep making the payments is perhaps not relevant, but on my view of the evidence, the answer lies largely on the concern that Barclays had from the outset of the financial crises right through to January, 2009 of the effect on its "franchise", i.e. the effect on its reputation in the Canadian marketplace, if it were seen to be what it referred to as an "outlier" in terminating an ABCP program during reconstruction discussions. Barclays contends that it also did so on the strength of assurances from National Bank and the Caisse as to what it would do in a restructuring, but I think Barclays overstates considerably the assurances that it says it had from National Bank and the Caisse. It is clear that Barclays continued to make the premium payments with its eyes wide open.

223 Barclays could have taken the position that Devonshire was insolvent and refused by virtue of section 2(a)(iii) to make payments to Devonshire. It did not do so from August 16, 2007 onward. It elected not to exercise that right, which was effectively abandoning that right. Nor during that time did it elect to terminate the swap contracts. Even if Barclays was entitled under section 6(a) of the ISDA Master Agreement to sit on its hands after the insolvency of Devonshire until it was favourable to it to terminate the swap contracts, it would be quite inconsistent for it to elect to abandon its right to refuse payment to Devonshire due to Devonshire's insolvency, and to affirm the existence of the swap contracts, and now claim that it was entitled on January 13, 2009 to terminate the contracts on the basis of Devonshire's insolvency, which it pleads occurred from and after August 15, 2007.

224 Just because Barclays' case at the trial was that Devonshire was insolvent on January 13, 2009 does not protect Barclays. In its notice of early termination, Barclays did not specify any date of an alleged insolvency. In its statement of claim, Barclays pleaded that Devonshire was insolvent from August 15, 2007. On Barclays' case, if Devonshire was insolvent on January 13, 2009, Devonshire was also insolvent on August 15, 2007, prior to the date of the Suspension Notice, and on August 17, 2007 after the Suspension Notice, as the evidence indicates that from at least August 15, 2007 Devonshire did not have funds to pay the Class A notes that were not rolling as a result of Barclays refusing to acknowledge any liability under the liquidity facility. Indeed, Barclays argues that the liquidity backed notes, the Class A notes, were in default on their maturity, which means that Barclays argues that Devonshire was in default on these notes on which payment was due on each of at least August 14 and 15, 2007. As well, the Class FRN and Class E notes had long become due, after which Barclays continued to pay its price protection premiums to Devonshire. Interest on the FRN notes was not paid on August 16, 2007 and thereafter and on September 25, 2007 the Issuer Trustee informed the Indenture Trustee that default had occurred on the FRN notes.

225 To permit Barclays to terminate on January 13, 2009 on the basis of the insolvency of Devonshire, an insolvency that Barclays says commenced in August, 2007, in the face of Barclays afterwards making payments to Devonshire in spite of section 2(a)(iii), would be to ignore Barclays electing not to rely on section 2(a)(iii) and keeping the swap contracts in effect. In my view, in the circumstances, Barclays has to be taken to have elected not to terminate the swap contracts on the basis of the insolvency of Devonshire.

226 I conclude that for these reasons Barclays did not have the right on January 13, 2009 to terminate the swap contracts on the basis of the event of default relied on by Barclays. On that basis, its notice of early termination was ineffective.

227 Barclays takes the position that sections 9(b) or (f) of the ISDA Master Agreement preclude such a finding. I do not agree. These sections deal with waiver. What is at issue is an election exercised by Barclays to affirm the contract.

228 Section 9(b) provides that no waiver will be effective unless in writing and executed by each

of the parties.

229 Section 9(f) provides that a failure or delay in exercising any right will not be presumed to operate as a waiver. This section does not state that such a failure or delay could be deemed to be a waiver, but merely that a waiver will not be presumed.

230 In *Tele2 International Card Co. SA v. Post Office Ltd, supra*, it was held that a clause stronger than section 9(f) would not preclude a finding of abandonment by election. In that case the clause in question provided:

> Waiver
>
> In no event shall any delay, neglect or forbearance on the part of any party in enforcing (in whole or in part) any provision of this Agreement be or be deemed to be a waiver thereof or a waiver of any other provision or shall in any way prejudice any right of that party under this Agreement.

231 Aikens L.J. held that such a provision did not deal with the issue of election of whether or not to exercise a contractual right.

232 Even if what was at issue was simply a waiver, the case of *Fitkid (York) Inc. v. 1277633 Ontario Ltd.* [2002] O.J. No. 3959 indicates that a non-waiver clause is not necessarily the end of the matter. In that case, it was held by Swinton J. that a landlord who had the right to terminate a lease for failure of the tenant to pay rent waived that right by later accepting some rent and doing other acts consistent with the lease being in force. It was argued that the following provision in the lease precluded such a finding:

> Landlord's failure to insist upon a strict performance of any covenant of this Lease or to exercise any option or right herein shall not be a waiver or relinquishment for the future of such covenant, right or option, but the same shall remain in full force and effect. Acceptance of rent, whether due before or after and [sic] event of default, whether with or without knowledge of such default, shall not operate as a waiver by the Landlord of any right, including its right of forfeiture.

233 Swinton J. rejected that argument and stated:

> Even where there is a term in the lease governing waiver, the cases on waiver indicate that courts look at the conduct of the landlord to determine whether it has elected not to terminate the lease in the circumstances after the right of forfeiture arises. In my view, despite the wording of Paragraph 41 of the lease, the acceptance of rent accruing after the act which gave the landlord a right of

> forfeiture is a waiver in law, since that acceptance presupposes the continued existence of the landlord and tenant relationship.

234 There is also authority that variation of a contract is effective even if the contract purports to exclude subsequent oral variations and also that oral statements may operate as a waiver of rights evidenced by an earlier written document or may set up an estoppel. See S.M Waddams, *The Law of Contracts*, *supra*, at para. 329 and *Shelanu Inc. v. Print Three Franchising Corp* (2003), 64 O.R. (3d) 533 at para. 50.

(c) Is Barclays prevented by its own wrongdoing from relying on Devonshire's insolvency?

235 Barclays failed to make liquidity payments under the market disruption notices delivered by Devonshire on August 13, 14 and 15, 2007. For the purposes of this first portion of the trial, it is agreed that the notices were valid and that Barclays was in default in failing to make these payments, without prejudice to its position that it cured the defaults on January 13, 2009.

236 Devonshire takes the position that the failure by Barclays to make the liquidity payments was the proximate cause of its insolvency and that Barclays should not be able to take advantage of its breach by relying on Devonshire's insolvency.

237 Devonshire relies on the principle that no one should be permitted to take advantage of a state of affairs which he himself produced. In *Southcott Estates Inc. v. Toronto Catholic School Board*, [2010] O.J. No 1772 (C.A.) Sharpe J.A. stated:

> It is a well-established principle of contract law that a party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations.

238 This principle extends to preventing a party from taking a benefit under a contract as a result of his own breach. The law presumes that the parties do not intend to permit a party in breach from relying on its own wrong for the purposes of obtaining a benefit under a contract. In the absence of clear express language indicating that the parties in fact had that intention, this presumption will not be displaced. See *Alghussein Establishment v. Eton College*, [1991] 1 All ER 267 (H.L.). In that case, Lord Goff stated:

> Although the authorities to which I have already referred involve cases of avoidance, the clear theme running through them all was that no man can take advantage of his own wrong.... A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

239 See also *Commissioner of Agricultural Loans of Ontario v. Irwin*, [1940] O.R. 489 at para. 15, per McTague J.A.

240 Barclays makes several points in response to Devonshire's position. It says that it subsequently made the liquidity payments and thereby remedied any alleged failure to pay. Thus there was no breach by Barclays that would prevent it from exercising rights under the ISDA Master Agreement. I cannot accept that. It is agreed for the purposes of this trial that Barclays breached its obligations under the liquidity line by failing to make payments to Devonshire on August 13, 14 and 15, 2007. Even if Barclays remedied the breach on January 13, 2009, that did not mean that there was no breach back in August 2007.

241 Barclays also contends that Devonshire seeks to reverse its own actions in entering into the Standstill Agreement and later the Montreal Accord in which the obligation of Barclays to make the liquidity payments was suspended. This ignores the fact, however, that it was the failure of Barclays to make the liquidity payments that initially caused Devonshire to take those measures to attempt to protect the interests of the Devonshire noteholders. Barclays had made clear to Devonshire that in its view there was no market disruption event and that it was not going to make the liquidity payments. It was not realistic, as suggested by Barclays in argument, for Devonshire to wait for three days to see if Barclays would make the liquidity payments. Not only had Barclays failed to make the liquidity payments, but it also on the evening of August 15, 2007 sent a mandatory collateral call on one of the two swaps which, because it is agreed for the purposes of this stage of the trial that there was a market disruption event at the time, could not have been validly made.

242 It is probably the case that at the time, the liquidity crisis in the independently sponsored ABCP market in Canada, partly at least caused by the refusal of the liquidity providers such as Barclays to acknowledge that a market disruption event had occurred, led to the Montreal Accord and, with respect to Devonshire, led Devonshire to agree to the Suspension Notice on August 16, 2007 and later to sign the Montreal Accord. It is not reasonable, however, on Barclays' case as pleaded, for Barclays to assert that it was not a cause of Devonshire's insolvency at that time. Barclays pleads that from and after August 13, 2007 an event of default under section 5(a)(vii)(2) existed against Devonshire as the Class A notes that did not roll on August 13, 14 and 15 were due and payable at maturity. That alone meant Devonshire was unable to pay its debts as they became due.

243 The Class E (extendible) and Class FRN (floating rate) notes to the knowledge of Barclays ranked pari passu with the Class A notes. This ranking was reflected in the Series A Supplemental Trust Indenture which was the subject of negotiations with Barclays. Interest became payable on one group of FRN notes on August 16, 2007. Although Devonshire had the funds to make the FRN interest payment on August 16th, this interest was not paid. The Issuer Trustee made the decision not to pay interest on the Class FRN notes because all of the notes were pari passu and the Trust did not want to treat one class of noteholders differently from the others. The Class E notes that came to maturity were extended and, once interest was payable on them, it was not paid for the same reason.

244 It is also probably the case, as Barclays asserts, that Devonshire would have needed to be part of the Montreal Accord to deal with the Class E and Class FRN notes because they were part of the same series as the Class A notes. Whether this would have been necessary had Barclays made liquidity payments on the Class A notes is a matter of speculation, but it is not a matter of speculation that Barclays failure was a prime cause of Devonshire agreeing to the Suspension Notice and later becoming a signatory to the Montreal Accord.

245 The event of default of Devonshire relied upon by Barclays, being Devonshire's inability to pay its debts as they became due, began when Barclays failed to make the liquidity payments on August 13, 14 and 15 2007. Because for the purpose of this stage of the trial it is agreed that Barclays was in default in failing to make those liquidity payments, the event of default of Devonshire relied upon by Barclays was first caused by Barclays. Insofar as the insolvency of Devonshire on January 13, 2009 related to the Class A notes, Barclays would impermissibly gain a benefit on account of its own breach or wrong.

246 I would not come to the same conclusion, however, regarding the insolvency of Devonshire on January 13, 2009 insofar as that insolvency relates to the Class FRN and Class E notes. The liquidity obligation of Barclays did not apply to these notes. Also, it was a decision by Devonshire, not Barclays, which led to those notes initially not being paid because they ranked pari passu with the Class A notes. To that extent, Barclays was not relying on its own breach on January 13, 2009.

(d) Should a term be implied preventing Barclays from relying on the insolvency of Devonshire?

247 Devonshire claims that a term should be implied in the ISDA Master Agreement that Barclays cannot rely on the insolvency of Devonshire caused by Barclays's failure to make the liquidity payment as a ground to terminate the swap contracts.

248 The tests for implying a term in a contract are well settled. A term it may be implied in a contract based on the presumed intention of the parties where the implied term is be necessary "to give business efficacy to a contract or is otherwise to meet the officious bystander test as a term which the parties would say, if questioned, that they had obviously assumed". What is important is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it and why, if there is evidence of a contrary intention on the part of either party, an implied term may not be found on this basis. As well, no term will be implied that is inconsistent with the terms of the contract. See *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619 at para 27, per Iacobucci J. and *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.*, (1983), 43 O.R. (2d) 401 (C.A.) at para. 9, per Cory J.A.

249 Terms have been implied in contracts to the end that a party may not take advantage of wrong doing. In *Gillespie v. Bulkley Valley Forest Industries Ltd.* (1973) 39 D.L.R. (3d) 586

(B.C.S.C.); aff'd 50 D.L.R. (3d) 316 (C.A.), cited in Waddams, *The Law of Contracts*, 6th ed, para. 499, a term was implied in a contract under which an employer agreed to repurchase a departing employees home if the employee had been employed for 12 months that the employer would not wrongfully terminate the employment.

250 An entire agreements clause that does not expressly bar an implied term does not preclude the implication of a term into a contract. See *CivicLife.com Inc. v. Canada*, [2006] O.J. No 2474, at para 48 (C.A.) at para. 52.

251 Devonshire asserts that that the implication of a term prohibiting Barclays from relying on its own failure to respond to a Market Disruption Notice is necessary to give business efficacy to the contract. Devonshire says that as a special purpose vehicle selling ABCP, its ability to pay its debts as they became due depended on the existence of a functioning market, or on ready access to liquidity in the event of a market disruption and that this fact receives objective confirmation in the emphasis placed on liquidity covenants by DBRS. Liquidity support in the event of a market disruption event was necessary to ensure a rating from DBRS of R-1 (high) of the Class A notes, without such rating the notes would not be marketable. DBRS was very involved in the criteria to be used in ABCP programs in Canada and the liquidity agreement reached between Devonshire and Barclays contained the latest DBRS criteria for a market disruption event made in June, 2006.

252 Devonshire contends that if, as Barclays suggests, it was possible for Barclays to refuse to perform its covenants and then capitalize on this refusal by terminating the swaps, the rationale behind the entire program would be undermined. Devonshire's arrangements could scarcely have been rated as they were if it were made plain to DBRS that Barclays could terminate the swaps in reliance on the consequences of its own failure to respond to a market disruption notice.

253 I would imply a term as suggested by Devonshire. It would not, as suggested by Barclays, read out the provisions of sections 5(a)(i) or 5(a)(vii)(2) or otherwise be inconsistent with the ISDA Master Agreement and related contracts. No one could seriously contend that a party in breach of an agreement would be able to rely on the results of that breach to exercise a contractual right of termination, absent a very clear provision in the contract authorizing that result.

254 Such an implied term, however, does not assist Devonshire because of the Class FRN and Class E notes that remained unpaid on January 13, 2009. That was not caused by Barclays.

(e) Could Barclays cure its failure to make the liquidity payments?

255 On January 13, 2009, just before 9 a.m., Barclays took steps to have wired to Devonshire's bank the liquidity payments demanded by Devonshire on August 13, 14 and 15, 2007. Shortly after that, Barclays delivered its notice of termination of the swap contracts.

256 Devonshire contends that Barclays was unable to remedy its failure to make the liquidity payments if it did not do so within three business days as provided in section 5(1)(a) of the ISDA

Master Agreement. Section 5(a)(i) makes it an event of default where:

> Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party.

257 Barclays contends that even if the time to remedy the failure had passed, it was entitled to terminate the swap contracts because under section 6(a) of the ISDA Master Agreement the event of default must "be continuing" at the time the notice of early termination is sent, which Barclays says is an indication in this case that it could remedy its failure. Section 6(a) provides:

> If any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-Defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions.

258 Devonshire contends that the use of the word "remedied" in section 5(a)(i) is highly significant. It says that the ISDA Master Agreement does not provide that an event of default occurs if the amount that was supposed to have been paid is not paid within three business days. Rather, it provides that an event of default occurs if the defaulting party does not remedy "such failure", which means not just the failure to pay the amount due, but rather the failure to pay the amount due when due. Devonshire says that Barclays has "no right" to remedy its default once that has occurred. It distinguishes the default from a credit support default referred to in section 5(a)(iii)(1) which makes it a default if a failure to perform is continuing after any applicable grace period, suggesting in that case a failure could be remedied after the grace period.

259 I have difficulty with Devonshire's argument. I read nothing into section 5(a)(i) that deals with either an ability or inability to remedy the event of default after it has occurred.

260 Devonshire relies on two U.K. cases dealing with charterparty contracts that gave ship owners the right to terminate the charters "failing the punctual and regular payment" by the charterers. In *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia* (*The Laconia*), [1976] 2 W.L.R. 668 (C.A.); rev'd [1977] A.C. 850 (H.L.)., it was held in the House of Lords, overruling the Court of Appeal on the point, that once a punctual payment of any instalment had not been made, a right of withdrawal accrued to the owners and the charterers could not avoid the consequences by tendering an unpunctual payment. The other case, *The Brimnes v. Tenax Steamship Co.*,

[1975] QB 929, contains a similar statement by Cairns L.J. in obiter.

261 I do not think these cases assist Devonshire. Firstly, they depended heavily on the obligation

in the charterparty to make payments "punctually". More importantly, the charterparty did not contain a provision such as section 6(a) which provides a right to terminate if an event of default has occurred "and is then continuing". Those words contemplate that an event of default, however it is caused, may cease to be continuing, i.e. some step may be taken to cause it to no longer be continuing. In the case of a failure to make a liquidity payment within three business days after a notice of default has been given, the step that would be required would be to make the payment. In this case, if the payment were made by Barclays after the three business days had elapsed, but before termination of the swap contracts by Devonshire, the event of default would not be continuing.

262 Thus I conclude that Barclays could cure its failure to make the liquidity payments, either by making the payment within the three business day period or after that if the trades were not terminated by Devonshire.

(f) Did Barclays make the liquidity payments on time to enable it to terminate the swaps?

263 On January 13, 2009, just before 9 a.m., Barclays took steps to have wired to Devonshire's bank the liquidity payments demanded by Devonshire on August 13, 14 and 15, 2007. Shortly after that, Barclays delivered its notice of termination of the swap contracts.

264 Devonshire contends that even if Barclays was otherwise entitled to terminate the swaps on January 13, 2009, Barclays was in default when it purported to do so because it failed to make the liquidity payments to Devonshire that morning before the termination occurred. Thus, Devonshire contends, Barclays was not a non-defaulting party at the time it purported to terminate the swaps, and as it is only a non-defaulting party who may terminate under section 6(a) of the ISDA Master Agreement, Barclays had no right to terminate. This contention involves an issue of (i) the interpretation of the relevant provisions of the ISDA Master Agreement and (ii) a technical question as to when the payment on January 13, 209 was made and received by Devonshire.

265 The obligation to make a liquidity payment is contained in Annex VI to the ISDA Master Agreement. The annex provides that if a market disruption notice has been delivered to Barclays by Devonshire, "[Barclays] shall pay to [Devonshire]" the amount specified in the notice.

266 Payments under an ISDA Master Agreement are governed by the following section:

2. Obligations

(a) General Conditions

[...]

(ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the manner customary for payments in the required currency.

267 Barclays sent its payment by wire transfer from its bank, CIBC, to Devonshire's bank, National Bank. The money was received in the National Bank general account at 9:00 a.m. on January 13, 2009. It was credited to Devonshire's account at 10:59 a.m. that day. Devonshire was not able to confirm that these funds were received until 11:12 a.m.

268 On January 13, 2009 Barclays sent notice to Devonshire that it had made arrangements for the liquidity payment by e-mail at 9:04 a.m. and notice of its early termination notices by fax (at 9:08 a.m. and 9:11 a.m.), by email (9:14 a.m.) and by hand delivery at a time unknown. Thus, at the time of the purported termination, the liquidity payment had been received by Devonshire's bank for some 8 minutes (four minutes after Barclays gave notice to Devonshire) but not yet credited to Devonshire's account.

269 This timing was well orchestrated. Barclays did not want any advance notice to be given to Devonshire of the liquidity payment, as expressed by Mr. Neville, who also reluctantly admitted on cross-examination that it was possible that Barclays did not want to put Devonshire in a position where it could take steps to terminate before Barclays did.

270 The arguments on this payment point are elaborate. The issue reminds one of a game of chess and the risk that one wrong move can prove calamitous.

271 Section 2(a)(ii) provides for payments to be made "in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement", "in freely transferable funds" and "in the manner customary for payments in the required currency". Devonshire contends that payment was not made to it until the funds were credited to it in its account and available to it for withdrawal. Barclays contends that was it important is when the payment was made, and that occurred when Devonshire's bank had the money. When it was deposited into Devonshire's account is irrelevant.

272 Under section 2(a)(ii), the payments are to be made "in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement". The word "Confirmation" is not defined in the ISDA Master Agreement. There is, however, a confirmation agreement entitled Amended and Restated Master Credit Derivatives Confirmation Agreement. There is no "place of account" specified in it or in the six annexes to it. Annex VI, dealing with the liquidity payment requirement, states only that Barclays shall pay to Devonshire the amount set out in the market disruption notice not later than 2:30 p.m. Thus, according to section 2(a)(ii) of the ISDA Master Agreement, payments are to be made "pursuant to this Agreement", which means they are to be made "to Devonshire".

273 In this case, as is the case with all wire transfers of large amounts of money between Canadian banks, the payment was made through the Large Value Transfer System (LVTS). The LVTS handles large real-time wire transfers between participant institutions and is operated by the Canadian Payments Association (CPA). Only member institutions in the CPA have access to the LVTS system. The LVTS is the only method for an immediately final and irrevocable payment in Canadian dollars other than by delivery of bank notes and coins. See Bradley Crawford, *The Law of Banking and Payment in Canada* (Looseleaf) (Aurora, ON: Canada Law Book, 2008) at paras. 12:10.10.

274 The CPA is a statutory body created under the *Canadian Payments Act* with the power to create by-Laws and rules governing LVTS payments. The LVTS by-laws are subordinate legislation pursuant to that *Act.*

275 Barclays contends that the conditions of payment prescribed in section 2(a)(ii) required the parties to make payments using the LVTS system. This presumably would flow from the language that payments will be made "in the manner customary for payments in the required currency".

276 There is no credit risk associated with payments through the LTVS system. See Bradley Crawford, *supra*, at p. 16-5:

> In the [LVTS], the system is so designed and operated that when the customer receives notice of the incoming payment, the payment is already irrevocably collected in good funds and on deposit with its bank. Even at the level of the banks, when an LVTS message arrives, the receiving financial institution has nothing to do except post it to the proper account and give notice to the account owner.

277 The LVTS by-laws provide that a payment will be available to a payee when its bank credits the funds to its account. They provide:

> FINALITY OF PAYMENT TO PAYEES
>
> Timing of Payments to Payees
>
> 43.(1) On actual receipt by a receiving participant [National Bank] of a payment message, the receiving participant shall make the amount of the payment message finally and irrevocably available to the payee [Devonshire] on the earlier of
>
> (a) the end of the LVTS cycle [5:30 p.m.], and
> (b) a reasonable request by the payee being made to the receiving participant for the amount of the payment message.

...

Finality of Payment

45. For the purposes of sections 43, 44 and 46 to 51, once a receiving participant [National Bank] has actually received a payment message, final and irrevocable availability of the amount of the payment message by a receiving participant to a payee [Devonshire] is deemed to occur on the earliest of

(a) credit in the amount of the payment message, less any service charges (subject to any provisions that may be set out in the rules regarding the disclosure and the manner of processing of service charges), being made to the account of the payee,...

278 As to these provisions, Bradley Crawford, *supra*, states:

> These provisions appear to owe something to the precedent of the UNCITRAL Model Law on International Credit Transfers and, as such conform to the international norm for signalling the completion of a credit transfer operation...

279 Thus, so far as the LVTS system is concerned, the payment from Barclays to Devonshire became available to Devonshire in this case when it was credited to the account of Devonshire at 10:59 a.m.

280 Devonshire contends that as under the LTVS system the payment became available to Devonshire when it was credited to its account, it cannot be said that Devonshire received or had the use of the funds until those funds were put into its account, which took place at 10:59 a.m., nearly two hours after Barclays purported to terminate the swaps. Thus, Devonshire contends, Barclays was in default at the time of the purported termination and not able to terminate the trades. In this contention, I think Devonshire is correct.

281 Each side made reference to authorities in the U.K. to bolster their arguments. None of these are of course binding, but in any event I do not find them to be conclusive. One thing that becomes clear, however, is that a matter of minutes can be crucial as to whether payment was made in a timely matter.

282 Barclays relies on cases for the proposition that if there is no credit risk to the payment being received by the receiving bank the payee's right to payment arises when the bank receives the payment and it does not matter when the payee's account is credited with the funds. These cases involved charter parties where the owners attempted to revoke the contract due to alleged late payments.

283 In Zim *Israel Navigation Co. Ltd. v. Effy Shipping Corporation (the "Effy")*, [1972] 1 Lloyd's L.R. 18 (QB), a payment was to be made to the owners account at a branch of WD bank. It was

credited to WD bank's overseas branch account at Hanover bank, a correspondent bank, on October 5th. Notice of this was received by WD's overseas branch in London on October 6th and shortly thereafter credited to the owner's account at the WD branch. The owner, however, had terminated the charter on October 5th. It was held that the payment had not been made before the charter was terminated because the payment had not been credited to the named account and the owner could not have drawn on any account until October 6th. This case would appear to support Devonshire rather than Barclays. It stands for the proposition that payment is not effected until the payee is in a position to draw on its account for the amount of the funds transferred.

284 In *Tenax Steamship Co. Ltd. v. Reinante Transoceanica Navegacion S.A. (The Brimnes)*, [1973] 1 W.L.R. 386 (QB), the charterparty provided that payment was to be made in cash to the owner's account at Morgan Guaranty Trust (MGT) in New York. The owner sent instructions on April 1, the date for payment, to its bank Hambros, which upon receipt on April 2 sent by telex to MGT at 10. a.m. an order to pay instructing MGT to debit its account at MGT and credit the owner's account. Because a telex instruction was not considered legal tender, the time of payment was held to be the moment when MGT made the transfer from the Hambros account to the owner's account, which occurred at 6.07 p.m. However, approximately 15 minutes before this occurred, but long after the telex had been received by MGT, the owner terminated the charter. It was held that the payment was not made before the termination. This decision is irrelevant because it involved payment instructions by telex, not legal tender.

285 Barclays relies, however, on obiter in *Brimnes*, in which Brandon J. said that when payments on other occasions had been made by banker's cheques, it was reasonably clear that payment was effected when the banker's cheque was received by MGT. The point did not arise for decision. In the Court of Appeal, Edmund-Davies L.J. said in obiter that there was no contest that when payment by banker's cheque was made, the payment was made when received by MGT.

286 Both Barclays and Devonshire rely on the statement of Brandon J. that the words "payment in cash" in the charterparty did not mean only bills or other legal tender, but "any commercially recognized method of transferring funds the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred". Barclays says the word "right to the funds" crystallized when National Bank received the funds. Devonshire says that under the LVTS that did not occur until the funds were put into its account. I think too much is being made of the words of Brandon J. He was intending to describe the quality of a payment, not when it might be available as between a transferee bank and its customer.

287 I do not think the case of *A/S Awilco of Oslo v. Fulvia S.p.A. Di Navigazione of Cagliari (The Chikuma)*, [1981] 1 W.L.R. 314 (H.L.) relied on by Devonshire is of much assistance. In that case, it was held that as the payment made by the charterers through its Italian bank on the due date was held not to be a payment in cash because under Italian banking law and the terms under which the payment was made, interest was not payable on the money for four days, and so the payment was held to amount to an overdraft facility.

288 Barclays relies on statements by Lord Denning M.R. and Lawton L.J. in *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia (The Laconia)*, [1976] 2 W.L.R. 668 (C.A.); rev'd [1977] A.C. 850 (H.L.). In that case, payment by the charterers was due on Sunday, April 12. It was conceded by the charterers that as the banks were closed on the week-end, payment should have been made by Friday, April 10. Arbitrators found that a punctual payment was to be made by 3 p.m. on Friday, April 10 at 3 p.m. and that a payment by bank order on April 13, 2009 was too late. On appeal, Donaldson J. upheld the award. His decision was reversed in the Court of Appeal, which held the payment could be made on Monday the 13th and that while the payment was not transferred by the owner's bank to the owner's account before the owner terminated the charterparty, it was sufficient that the payment had been received by the bank. The majority held that there had been waiver of the requirement that the payment was due on the Friday, April 10 by virtue of the owner's bank accepting the payment on April 13. Denning M.R. said that the bank was the agent of its customer. Lawton L.J. stated that once the payment was received by the bank, the customer could draw against the cash at once, and internal paper work did not affect that situation. In dissent, Bridge L.J. held that the owner had not waived the requirement that payment be made on April 10.

289 The House of Lords reversed the Court of Appeal decision, holding that the owner's bank had no authority from the owners to waive when payment was due and as the payment was not made on April 10, the charterers had the right on April 13 to terminate the charter. The issue as to whether payment by a bank order to a bank was sufficient to constitute payment to its customer was moot. Lord Wilberforce, with whom Lord Simon concurred, said in obiter "As between banks, a payment order is the equivalent of cash, but a customer cannot draw upon it. The amount must first be credited to his account, but he can, of course, make special arrangements for earlier drawing." Lord Fraser said that the payment would not have been made until it was credited to the owner's bank account, even though the payment order was one on which the payee's bank could safely rely because it was irrevocable and was made by a bank they could trust. He also said that he thought that the charterers must pay in sufficient time to allow for the period of processing normally required for the method of payment they had chosen. Lord Salmon said that while he preferred to express no concluded view, he was inclined to think there was no difference between dollar bills and a payment by money order. Lord Russell referred to the issue of payment in cash, and said while it was unnecessary to decide, he would incline to the view that a payment order between banks was the equivalent of cash and that it should suffice for payment to be tendered to the nominated bank to be credited to the named account.

290 Thus, in *Mardorf Peach* the issue as to whether payment to a bank is sufficient to be payment to its customer was moot, and in any event the various judges were split on the issue.

291 Whatever the common law on the point is in the United Kingdom, the LVTS by-laws govern this case. Under them, Devonshire did not have any unconditional right to the use of the funds once received by National Bank. It was only after the funds were transferred into Devonshire's account that it can be said that funds were made available to Devonshire. Barclays must be taken to have been aware of the LVTS by-laws and their effect.

292 With respect to the U.K. common law, the statement of Lord Fraser in *Mardorf Peach* that the payment would not have been made until it was credited to the owner's bank account seems to me to make commercial sense, as until that happens, the payee as a practical matter would not be able to draw on it. His statement that the payors must pay in sufficient time to allow for the period of processing normally required for the method of payment they had chosen also makes commercial sense. In the case of a wire transfer of funds through the LVTS, what that processing time is spelled out in the by-laws.

293 Barclays were in a hurry to carry out their plan of attack on the morning of January 13, 2009. Barclays had to know that Devonshire would in all likelihood not know of the payment into its account before it took steps to terminate the swap contracts. Barclays knew that Quanto, and particularly Mr. Lafleur-Ayotte, was in Toronto to review and sign documents in connection with the large Crawford restructuring. Their "Liquidity Amount Notice" was e-mailed at 9:04 a.m. and said that "Barclays has arranged for payment" of the liquidity amounts, not even that "Barclays has paid" those amounts. Four minutes later the early termination notice was sent. Mr. Lafleur-Ayotte learned that Barclays purported to terminate the Devonshire swap sometime after 9 a.m. when he was on his way to the Goodmans' offices to sign documents for the large Crawford restructuring of other Quanto administered trusts. He was not able to review the notices received from Barclays until after signing the closing documents.

294 In my view, Barclays acted unreasonably in moving with the haste that they did. They should have waited for a reasonable time to ensure at least that the funds had reached Devonshire's bank account. But whether or not Barclays acted reasonably, I find that Barclays failed to make payment of the outstanding liquidity amount before purporting to terminate the swap contracts. As Barclays was not a non-defaulting party, it had no right under section 6(a) of the ISDA Master Agreement to deliver its notice of early termination when it did.

14. Did Barclays act in breach of a duty of good faith?

295 Devonshire contends that Barclays owed obligations of good faith to Devonshire that were breached.

296 Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into. See *Transamerica Life Canada Inc. v. ING Canada Inc.* 68 O.R. (3d) 457 (C.A) at para. 53 per O'Connor A.C.J.O. and *Nareerux Import Co. v. Canadian Imperial Bank of Commerce,* [2009] O.J. No 4553 (C.A.) at para. 69 per Blair J.A.;

297 Courts have used the doctrine of good faith to police the bargain the parties have already made and to supervise performance of their contractual obligations. Even where good faith is not pleaded, in many contexts courts have held that one contracting party owes the other an implied duty to carry out its obligations or to exercise any discretion given by the contract in good faith. See *Transamerica, supra,* at para. 87 per Laskin J.A. and *CivicLife.com Inc. v. Canada (Attorney General)*, [2006] O.J. No 2474 (C.A.) at para 49, per Weiler J.A.

298 Contracts in which performance is dependent upon the exercise of discretion on the part of one of the parties are contracts that are characterized by an implied duty of good faith performance. In such circumstances, the discretion must be exercised reasonably and in good faith and in light of the purposes for which it was conferred. See *Nareerux, supra*, per Blair J.A. at para. 71 and John D. McCamus, *supra,* at p. 791.

299 Devonshire's claims relating to bad faith to some extent center on the events leading to the termination of the trades and to some extent on things that occurred before then.

300 Regarding the latter, Devonshire contends that it was in bad faith for Barclays not to explain its failure to make the liquidity payments in August 2007. I do not accept that Barclays had any such obligation and in any event it clearly took the position with Devonshire that in its view a market disruption event had not occurred. I see no obligation on the part of Barclays at that time to tell Devonshire that it was acquiring notes from bank sponsored ABCP trusts.

301 Regarding the negotiations between Barclays and the Devonshire noteholders, Devonshire points to the provisions in the documentation requiring Barclays to negotiate in good faith towards a restructuring. In the Montreal Accord, to which Barclays was a signatory, as well as major Devonshire noteholders, Barclays agreed to work in good faith with the other participants to bring about a timely implementation of the long-term proposal contained in it. Under the Montreal Accord, the negotiations leading to the large Crawford restructuring were carried out by the Investors' Committee. Whether, as Barclays asserts, this was merely an unenforceable agreement to agree is not the point, as there were contractual good faith obligations on Barclays. However, once the framework agreement in December 2007 was made by the other participants other than Barclays and Barclays dropped out of those negotiations, it is questionable whether a good faith obligation continued under the Montreal Accord in favour of the Devonshire noteholders.

302 However, there was a contractual obligation on the part of Barclays with Devonshire contained in the Suspension Notice that Barclays was to comply with its obligations as a signatory under the Montreal Accord. This imported into its agreement with Devonshire an obligation of Barclays to work in good faith with the other participants, including the major noteholders of Devonshire, to bring about the timely implementation of the long-term proposal contained in it. The extensions of the Montreal Accord standstills and the Suspension Notice continued to import this obligation.

303 Thus even though Barclays may not have owed a duty of good faith directly to the

Devonshire noteholders after it left the large restructuring negotiations, it owed a duty to Devonshire to carry out the negotiations with the Devonshire noteholders in good faith. This is understandable as it would not have made commercial sense to Devonshire to agree to the continuation of the standstills if Barclays was not dealing with the noteholders in good faith.

304 I agree, however, with Barclays that a duty of good faith does not preclude self-interested behaviour and that a party under such a duty may be required to temper its self-interest, but not to avoid it. See *Shelanu Inc. v. Print Three Franchising Corp* (2003), 64 O.R. (3d) 533 (C.A.) at para. 69 for the proposition asserted by Barclays that so long as a party under a duty of good faith deals honestly and reasonably with the other side, its counterparty's interests are not necessarily paramount.

305 Devonshire contends that Barclays initially booked its trade with Devonshire as a full recourse trade and that negotiations later premised on that booking had the effect of Barclays attempting to improve its economic position in the restructuring. I do not see this as any bad faith on the part of Barclays. Barclays was quite entitled in its negotiations with the Devonshire noteholders to attempt to improve its commercial position, just as the Devonshire noteholders were entitled to attempt to do the same.

306 I agree, however, with Devonshire that in the closing days leading to the purported termination of the swap contracts by Barclays on January 13, 2009, Barclays breached its good faith obligations. Barclays decided to terminate the swaps for its own economic reasons, which a party under an ISDA Master Agreement is entitled to do. But in doing so in this case, it breached its obligation to not act in a way that defeated the objectives of the agreements that they entered into and to be honest and candid with Devonshire.

307 Barclays took a number of steps leading to the termination of the swap contracts. The steps were taken pursuant to an obvious plan. It would be artificial to look at each step as taken independently of the other steps. They were all part of a concerted effort. The plan began no later than January 8, 2009 when, as Mr. Lovisolo said, they intended to "blow up the box", meaning to terminate the trades, for the economic reasons that he expressed to Mr. Truell that day.

308 Prior to the end of 2008, I do not think it can be said that Barclays was not negotiating in good faith with the Caisse, nor for that matter that the Caisse was not negotiating in good faith with Barclays. Each was asserting commercial positions in very difficult economic times that they were entitled to assert. However, in putting its ultimatum to the Caisse on January 8, 2009, Barclays in my view was not negotiating with the Caisse in good faith. It was reverting to a position taken for the most part eight months earlier in much different economic circumstances and it was not made with any expectation that it would be accepted by the Caisse. Rather, Barclays had to know that the Caisse would not accept it and Barclays had no intention other than to terminate the trades when that occurred. The ultimatum did not constitute good faith bargaining, but rather the first step in Barclays' termination and litigation strategy.

309 The daily standstill agreements of January 8 and 9, 2009 prevented Devonshire from taking any steps to enforce its rights resulting from the failure of Barclays to make the liquidity payments arising from the market disruption event notices delivered by Devonshire on August 13, 14 and 15, 2007 and, in particular, extended the continuation of the standstill of the cure period in which Barclays would have to either make the payment or have an event of default occur. The timing was not coincidental but rather designed to permit payment of the outstanding liquidity amounts on January 13, 2009 just minutes before the early termination notices to be delivered to Devonshire that morning. These standstill extension agreements were induced by misrepresentation, as I have found, that was the antithesis of good faith actions in furtherance of the purposes of the agreements between Barclays and Devonshire. Devonshire was entitled to the true facts from Barclays, which it did not receive.

310 Barclays contends that it was in an adversarial relationship with Devonshire and could not be expected to disclose to Devonshire in advance its litigation strategy. While this may be true, once it made statements of fact to Devonshire, it was obliged to ensure that those facts were not misleading, either directly or by omission.

311 The purpose of the obligation of Barclays to make a liquidity payment under Annex VI of the ISDA Master Agreement, as conceded by Mr. Howard in argument, was to provide Devonshire with funds to pay the holders of the Class A notes that were not rolling. When the liquidity payment was made by Barclays on the morning of January 13, 2009, it was not at all for that purpose. It was, as conceded by Mr. Howard, done to enhance the litigation strategy that was underway.

312 The Liquidity Amount Notice that Barclays delivered to Devonshire that day stated that Barclays was not under any obligation to make the payment and that while Barclays had arranged for the payment to be made, Barclays reserved the right to demand the return of the funds "subject to resolution of dispute". The litigation that Barclays commenced moments later claimed the return of the funds. The liquidity provisions in Annex VI of the ISDA Master Agreement did not provide for any Liquidity Amount Notice of the kind delivered by Barclays or provide for any conditional payment. The payment in these circumstances could not be used by Devonshire to pay any noteholders and was not an unconditional payment in accordance with the ISDA Master Agreement.

313 Barclays contends, however, that as long as the time to make the payment was preserved by the extension agreements, it could make it. However, apart from the fact that the payment was not made in accordance with the contractual provisions governing Barclays, it was not only the making of the payment in itself that is the issue, but it being part of a strategy that included a misrepresentation of the facts in order to extend the time to make the payment and the fact that the payment was not going to achieve the purpose it was designed and contracted for because of the imminent termination of the trades by Barclays and the imminent litigation to follow. The payment was not a good faith exercise with a view to securing the performance and enforcement of the contract made by the parties, but rather one that defeated the objectives of the agreement. As was said in *Transamerica*, it is such circumstances that courts have implied a duty of good faith with a

view to securing the performance and enforcement of the contract.

314 Much the same can be said with respect to the notice of early termination that was delivered by Barclays. Under section 6 (a) of the ISDA Master Agreement, Barclays had a right in the event of a default to deliver such a notice, assuming that there were no other problems of the kind that I have found to have existed. According to *Transamerica* and the other authorities to which I have referred, a duty of good faith could not be used to alter the express terms of the contract, and I would not do so. It is not the delivery of the notice of early termination itself that is the issue, but rather the other matters to which I referred that were done in furtherance of the plan.

315 Barclays relies on *Marathon Canada Limited v. Enron Canada Corp.*, (2008), 97 Alta. L.R. (4th) 137 (Q.B.), aff'd (2009), 99 Alta. L.R. (4th) 213 (C.A.) for the proposition that termination of an agreement in accordance with its terms is not a breach of good faith. I do not think that the case goes so far as to state the point categorically, but rather suggests there may be instances that could be in breach of such an obligation of good faith. In that case, the trial judge stated that exercising one's contractual right of termination is not evidence of a breach of good faith. On appeal, the Alberta Court of Appeal declined to consider this issue. The Court did state, however:

> We need not address this issue except to point out that the trial judge made no findings of fact that Enron was a vulnerable party, or that there was lack of good faith by Marathon, or that Marathon took an unfair opportunistic advantage for a "disingenuous" motive, or that Marathon ran roughshod over reasonable contractual expectations that existed in the Agreement. Although suggestions like this are braided into the appellant's arguments, there is no specific basis for an attack on good faith in the evidence and no specific challenge to the trial judge's finding on that issue. Under those circumstances, we do not need to address good faith.

316 In the circumstances, assuming that there were not the other problems involving the steps taken by Barclays, such as electing not rely upon insolvency of Devonshire and failing to make timely payment, I would hold that for the reasons given Barclays breached its good faith obligations to Devonshire in executing its strategy commencing January 8, 2009. Thus for these reasons it cannot rely upon the January 8 and 9, 2009 extensions of the standstill agreements or the conditional payment made to Devonshire on January 13, 2009. Thus for these reasons Barclays cannot rely on its notice of early termination on January 13, 2009.

15. Did Barclays have the right to terminate the ISDA Master Agreement?

317 For the reasons given, Barclays did not have the right to rely on its early termination notice on the morning of January 13, 2009. In summary those reasons are (i) Barclays by its election is taken to have waived the right to rely on the insolvency of Devonshire as an event of default, (ii) Barclays failed to make timely payment to Devonshire on January 13, 2009 before delivering its notice of early termination and (iii) Barclays may not rely on the conditional payment it made by

reason of its breach of its good faith obligations.

318 The delivery of the notice of early termination and the other steps taken, including the litigation that immediately followed, constituted a repudiation by Barclays of the ISDA Master Agreement and related agreements. Repudiation can be by words or conduct evincing an intention not to be bound by the contract. Such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right. See Waddams, *The Law of Contracts, supra*, at para. 620.

16. Did Devonshire have the right to terminate the ISDA Master Agreement?

319 At 2:22 p.m. on January 13, 2009 Devonshire delivered a notice of early termination of the swap contracts and designated that date as the early termination date. Devonshire's termination notice stated that an event of default, namely Barclays' alleged failure to pay the liquidity amounts that had been demanded on August 13 and 14, 2007, for which a notice of default had been delivered on August 14, 2007, had occurred under section 5(a)(i) of the ISDA Master Agreement with Barclays as the defaulting party.

320 For the purposes of this stage of the trial, it is agreed that the market disruption notices delivered by Devonshire were valid and that Barclays was in default under those notices, without prejudice to the position of Barclays that its payment on January 13, 2009 cured any default.

321 I have held that the time during which Barclays could cure recommenced on Friday, January 9, 2009. The remaining two days of the three day period therefore expired at the close of business on Monday, January 12, 2009. Therefore an event of default under section 5(a)(i) occurred at the close of business on January 12, 2009. I have also held that Barclays's payment on January 13, 2009 did not cure its default. Thus Barclays for the purposes of this trial was a defaulting party under section 6(a) and Devonshire had the right to deliver its early termination notice designating January 13, 2009 as the termination date.

322 In its notice, Devonshire stated that the Suspension Notices did not suspend the obligation of Barclays to remedy its failure to pay. While I have found to the contrary, I do not think the notice was invalid for that reason. The default was clearly identified, namely the failure to make the payments as required under the notices of August 13 and 14 and the default notice of August 14, 2007. What was provided was far more information that the notice that had been sent earlier that day by Barclays which only referred to the section of the ISDA Master Agreement relied on by Barclays.

323 While I have held that Devonshire was insolvent on January 13, 2009, I have also held that Barclays had elected to waive reliance on Devonshire's insolvency. Thus for the purposes of section 6(a) of the ISDA Master Agreement, Devonshire is a non-defaulting party entitled to deliver notice of termination to Barclays.

324 If Devonshire were not able to deliver a notice of early termination under section 6(a), by its notice it made clear that it regarded the contract as at an end and thus accepted the repudiation of Barclays. The option to "accept" a repudiation can be exercised by communicating to the repudiating party that the other regards the contract as at end. The communication need not be by words if it can reasonably be inferred from the circumstances. See Waddams, *The Law of Contracts, supra*, at para. 623.

17. Settlement on Barclays default

325 The principles to be used in determining payments that are to be made as a result of an early termination are in some instances easily understandable and in other instances quite complex due to the complexity of the various agreements that are in play in this case.

326 Section 6(e) of the ISDA Master Agreement sets out a detailed set of alternative formulae for the purpose of determining the amounts to be paid on early termination. In relation to termination on the basis of an event of default, four different formulae are specified: First Method and Market Quotation, First Method and Loss, Second Method and Market Quotation, Second Method and Loss. In the Amended and Restated Schedule, Barclays and Devonshire selected Second Method and Market Quotation to apply.

327 Section 6(e)(i)(3) of the ISDA Master Agreement contemplates that where Second Method and Market Quotation applies, amounts, referred to as settlement amounts, may be owing both by the defaulting party to non-defaulting party and by the non-defaulting party to the defaulting party. This was referred to by Flaux J. in *Britannia Bulk* as a method of calculating close out positions on the termination of the contracts. Depending on the amounts owed by one to the other, the final payment could be one to be paid by the defaulting party to the non-defaulting party, or vice versa.

328 However, section 11 of Part I of the Amended and Restated Schedule to the ISDA Master Agreement and section 2.2(c) of an Intercreditor Agreement between Barclays and Devonshire both provide that if an early termination date is designated by Devonshire due to an event of default of Barclays, any settlement amount payable to Barclays shall be subordinated to amounts specified in another contract entitled Series A Supplemental Indenture, which is an agreement made by Devonshire with CIBC Mellon, the Indenture Trustee for the Devonshire noteholders, (the "Trust Indenture"). The Trust Indenture provides for the priority of payments to be made by the trustee in the event of a default. This provision is referred to by the parties as the "waterfall" provisions.

329 One of the amounts to which any settlement amount payable to Barclays for its losses under the ISDA Master Agreement is subordinated is the amount of the principal and interest owing to Devonshire's noteholders.

330 The uncontradicted evidence is that the outstanding principle and interest owing to the Devonshire noteholders as at January 13, 2009 was $718,687,020.60. Of the approximately $71 million paid by Barclays on January 13, 2009, $67.3 million may be considered to have been

"liquidity notes" issued to Barclays, which if the case would mean there would be $786,018,937.73 of notes outstanding in principal and interest.

331 As of January 13, 2009 Devonshire had approximately $112 million plus the $71 million liquidity payment made that day for a total of $183 million. If Barclays was in default, Devonshire is also entitled to the return of the $600 million plus interest posted as collateral, subject to the contention of Barclays that the $67.3 million it paid on January 13, 2009 is to be deducted from the $600 million. . Devonshire says that as a practical matter, as the value of Devonshire's assets after payment of the settlement amount by Barclays will still be less than the amounts owing to the noteholders for principal and interest, there is no need to determine Barclays' claim against such assets, as there would be no assets left to satisfy such a claim.

332 Barclays contends that its claim (i.e. "Loss" amount due to Barclays from Devonshire) should be calculated, and that such amount should be deducted from Devonshire's claim of loss. If this were correct, and Barclays' claimed loss of $1.2 billion were upheld, it would mean that nothing would be required to be paid by Barclays to Devonshire.

333 I do not accept that submission. It is based on Barclays's reading of the definition of "Loss" in the ISDA Master Agreement. However, it ignores the language of section 2.2(c) of an Intercreditor Agreement. It would make no commercial sense to provide that amounts to be paid to Barclays on its default for its loss are to be subordinated to the settlement amount payable to Devonshire, including amounts owing to Devonshire's noteholders, but that the settlement amount payable to Devonshire is to have deducted from it the Barclays loss. Such a result would eviscerate the effect of the Intercreditor Agreement.

334 Under the Market Quotation method of determining loss chosen by the parties in the ISDA Master Agreement, loss is to be determined with reference to quotations to be obtained from other market participants that would have the effect of preserving for the party not in default the economic equivalent of any payment that would be paid after the termination, had the termination not occurred. However, if less than three quotations are provided by other market participants, it is deemed that the Market Quotation cannot be determined.

335 In this case, Devonshire requested but failed to obtain any response from other market participants. Devonshire's request to market participants was made on February 9, 2009. Barclays is critical of this late date for the request, as section 6(d)(i) of the ISDA Master Agreement requires a party to make its calculation of loss on or soon as practicable following the early termination date. However, taken that Barclays had commenced its action on the morning of January 13, 2009 Devonshire would have needed time to consider with its legal advisors how to respond, and this delay does not seem unreasonable.

336 If a Market Quotation cannot be determined, the loss must be calculated by the party not in default. "Loss" is defined in the ISDA Master Agreement to mean, in the case of a claim by Devonshire,

> "Loss" means... an amount that [Devonshire]... reasonably determines in good faith to be its total losses and costs (or gain, in which case as expressed in a negative number) ... including any loss of bargain...Loss includes losses and costs (or gains) in respect of any payment ...required to have been made ...on or before the relevant Early Termination Date and not made... A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets".(underlining added)

337 Devonshire determined its loss to be the outstanding amounts owing for principal and interest on the Devonshire notes plus approximately $1 million for Unpaid Amounts. It relies on the evidence of Mr. Lafleur-Ayotte who testified that the ability to repay noteholders in full was what Devonshire lost with the termination of the swaps on January 13, 2009. Devonshire did not calculate any loss payable to Barclays because of the Intercreditor Agreement provisions subordinating any payment owing to Barclays. In my view, this method was reasonable.

338 Pursuant to the Intercreditor Agreement, Devonshire is entitled to be paid the $600 million delivered by it to Barclays at the outset of the transaction as security for its contingent obligation to Barclays if there were credit defaults in the underlying portfolio against which Barclays bought credit protection. It is agreed that Devonshire is entitled to be paid $1,061,916.48 as an Unpaid Amount as defined in the ISDA Master Agreement, if Barclays' calculations as to its loss are accepted. The parties differ, however, as to whether Barclays is entitled to deduct from those amounts the liquidity payment of approximately $67.3 million in principal which it paid to Devonshire on January 13, 2009.

339 That issue depends on the interpretation of the Market Disruption Support Amounts provisions in Annex VI, the Special Provisions Annex, to the ISDA Master Agreement. These provisions provided Barclays with an election as to how it would fund a liquidity call made by Devonshire in the event of a market disruption event. Barclays could (i) pay the amount of the liquidity call to Devonshire from the $600 million originally posted by Devonshire as security for its obligations, referred to as a "Synthetic Liquidity Arrangement" or (ii) purchase new Class A, Series A notes from Devonshire ("liquidity notes") in the amount of the liquidity call, referred to as a "Traditional Liquidity Arrangement". If Barclays did not notify Devonshire of its election, the Traditional Liquidity Arrangement was deemed to apply. Barclays was entitled to fulfil its obligation under (i) or (ii) in such portions as it elected, provided that if the Traditional Liquidity Arrangement applied, the proportion of the amount to be paid by way of such Traditional Liquidity Arrangement was not to be less than $75 million.

340 The Liquidity Amount Notice delivered by Barclays on January 13, 2009 was silent as to whether Barclays elected a Synthetic Liquidity Arrangement or a Traditional Liquidity Arrangement as the method of payment. Devonshire therefore takes the position that Barclays is deemed to have used (ii), i.e. deemed to have acquired liquidity notes under a Traditional Liquidity Arrangement. If this is the case, Barclays may not deduct the $67.3 million liquidity payment from

the $600 million to be paid to Devonshire.

341 Barclays takes the position that as the liquidity payment was less than $75 million, it cannot be taken to have elected a Traditional Liquidity Arrangement and that the payment is to be treated as a Synthetic Liquidity Arrangement. In that case, the $67.3 million would be deductible from the $600 million to be paid to Devonshire.

342 The material part of the Market Disruption Support Amounts provision in the Special Provisions Annex provides:

> Barclays may elect to pay such CP Redemption Amount [the liquidity call] ...either by (i) returning to [Devonshire] that part of the Initial Seller Payment [the $600 million] ..." a **Synthetic Liquidity Arrangement**" equal to the [liquidity call] or (ii) purchasing new Class A Series A Notes ("**Liquidity Notes**") from [Devonshire] in an amount equal to such [liquidity call]that are due and payable in full in 30 calendar days...(a "**Traditional Liquidity Arrangement**"). [Barclays] shall notify [Devonshire] of its election not later than 2:30 p.m. ...on the business day such market disruption notice is effective, and if [Barclays] fails to make such election, then clause (ii) shall be deemed to apply. [Barclays] may fulfil its obligation to pay any [liquidity call] pursuant to clause (i) or (ii) ... in such proportions as it elects, provided, if Traditional Liquidity Arrangement applies, then the proportion of the [liquidity draw] paid by way of such Traditional Liquidity Arrangement shall not be less than $75,000,000 ... Buyer and Seller acknowledge and agree that such amount and percentage was specifically negotiated by the parties and represents a fair and equitable percentage of risk that buyer would retain in respect of Traditional Liquidity Arrangement. If buyer has paid all are part of the CP Redemption amount pursuant to a Synthetic Liquidity Arrangement (the sum of such amounts being the "**Synthetic Liquidity Amount**"), Buyer may elect, at any time that the Synthetic Liquidity Amount has not been repaid to Buyer, to purchase Liquidity Notes from Seller pursuant to a Traditional Liquidity Arrangement in a principal amount up to the amount of such Synthetic Liquidity Amount that has not been so repaid. In such circumstances, Liquidity Notes in the relevant principal amount shall be delivered free to the Buyer and the purchase price of such Liquidity Notes will not be paid to Devonshire but will be retained by the Bank and shall be applied to reduce the Synthetic Liquidity Amount. (underling added)

343 On a literal reading of this provision, the requirement that a Traditional Liquidity Arrangement shall not be less than $75 million applies only if Barclays has elected to pay part or all of the liquidity calls by way of a Traditional Liquidity Arrangement. On this reading, as Barclays did not make any election, the fact that the liquidity payment was only $67.3 million makes no difference and Devonshire would be right in its argument that the liquidity payment is deemed to be

a Traditional Liquidity Arrangement with issuance of Class A notes to Barclays rather than a Synthetic Liquidity Arrangement as claimed by Barclays.

344 Barclays contends that the $75 million minimum required for it to acquire liquidity notes was put in for the protection of Devonshire noteholders. The terms of the liquidity notes permitted Barclays to designate an early termination date if not paid in 30 days, which would not be in the other noteholders' interests, even if Barclays had only a small amount of these notes. For that reason, the $75 million minimum was inserted as a protection to Devonshire so that before Barclays was to be permitted to acquire liquidity notes, and be in a position to terminate the swap transactions if not paid within 30 days, it would have to commit at least $75 million of its own money so that if it subsequently terminated the transactions, it would face a loss pro rata with the other noteholders. In other words, the $75 million minimum was meant to ensure that Barclays would have a substantial economic interest in the transactions and therefore have to think twice before terminating the swap transactions for failure of the notes to be paid in 30 days.

345 Devonshire argues that there was reason for a Traditional Liquidity Arrangement if Barclays did not make an election. This derives from the fact that a Synthetic Liquidity Arrangement benefits Barclays in that the use of a Synthetic Liquidity Arrangement leads to a reduction in the amount of collateral available to protect remaining noteholders without a corresponding risk transfer of the swap contracts to Barclays. The use of a Traditional Liquidity Arrangement, on the other hand, puts Barclays in the position of Series A noteholders, therefore transferring the risk of the underlying transactions back to Barclays for the amount of these notes. In order to avoid this risk transfer, which is built in the very structure of the agreements it has entered into with Devonshire, Barclays had and should have the burden of making such an election. Devonshire therefore says that the $75 million threshold is protection negotiated by Devonshire as a limit on the ability of Barclays to elect between Traditional and Synthetic Liquidity Arrangements.

346 The Special Provisions Annex gave an election to Barclays to determine how it wanted to fund a liquidity call. The purpose of the deeming provision that a Traditional Liquidity Arrangement would apply if Barclays failed to make an election is somewhat puzzling. In the normal course one would have thought that Barclays would decide what arrangement it wanted and elect accordingly.

347 The $75 million proviso was obviously not for Barclays' benefit. It was inserted to protect Devonshire. What purpose it would serve for the proviso to apply only to an election by Barclays to have a Traditional Liquidity Arrangement needs to be considered.

348 I have difficulty with the argument of Devonshire. I can see that if a Traditional Liquidity Arrangement were more beneficial to Devonshire than to Barclays, as Devonshire asserts, a presumption that the arrangement would be a Traditional Liquidity Arrangement if Barclays did not make an election would be in Devonshire's interest. However, if a Traditional Liquidity Arrangement were better for Devonshire, there would be no benefit to Devonshire in requiring

Barclays to have a minimum $75 million in order to have a Traditional Liquidity Arrangement. The $75 million is not a limit on the ability of Barclays to elect, as contended by Devonshire, but a minimum threshold.

349 Whatever its purpose, the $75 million threshold was inserted to restrict Barclays' election. If it applied only to a situation in which Barclays elected a Traditional Liquidity Arrangement but not in a situation in which Barclays failed to make an election, Barclays could avoid the restriction by simply failing to make an election. That would make no commercial sense and the parties could have not intended such a result.

350 Devonshire also argues that the circumstances at the time of the creation of the agreements dictate that the liquidity payments be treated as being under a Traditional Liquidity Arrangement. The liquidity arrangements contemplated in the Special Provisions Annex were subject to daily limits as to the amount of notes that were to mature on any day. The aggregate amount of liquidity that could be requested on any day could not exceed 25% of the Initial Limit of each transaction, being $100 million for Transaction 1 and $105 million for Transaction 2, i.e. it could not exceed $51.25 million. Thus the minimum threshold of $75 million for each Transaction could never be reached on any day, and the election of Barclays had to be made by 2:30 p.m. on the day of the liquidity call. Thus, if the purpose of the threshold was to deem any payment that was less than $75 million to be a Synthetic Liquidity Arrangement, there never could have been any Traditional Liquidity Arrangement and the deeming provision would have no purpose.

351 Devonshire contends therefore that the only commercially reasonable meaning to be given to the provision is that the $75 million threshold was not a daily threshold, but a cumulative one. In other words, once Barclays elected to make payments by way of a Traditional Liquidity Arrangement, it had to continue to make any further funding by way of a Traditional Liquidity Arrangement until it had funded at least $75 million by way of Traditional Liquidity Arrangement. One difficulty with this argument is that the provision does not say what Devonshire contends. Also, if another market disruption event did not occur, Barclays would be in a position to require payment of the liquidity notes it acquired within 30 days and terminate the swaps, which would not be in the other noteholders interests.

352 Barclays contends that in order to take advantage of a Traditional Liquidity Arrangement, it would have to fund at least $75 million of liquidity over several days by way of a Synthetic Liquidity Arrangement. Once the minimum of $75 million were reached, it could convert the Synthetic Liquidity Arrangement to a Traditional Liquidity Arrangement under the mechanism provided for in the provision. While that mechanism as drafted does not refer to a $75 million minimum, Barclays presumably would say that it was the intention that the minimum referenced earlier in the provision was applicable. This argument of Barclays at least has the advantage that a conversion from a Synthetic Liquidity Arrangement to a Traditional Liquidity Arrangement was specifically referred to in the provision. A requirement that once a Traditional Liquidity Arrangement for less than $75 million was elected by Barclays, further funding up to the $75

million had to be by way a Traditional Liquidity Arrangement, as argued by Devonshire, was not referred to in the provision.

353 Like other provisions in the contractual arrangements that are at issue, the reading of this Market Disruption Support Amounts provision in the Special Provisions Annex is tortured, which does little credit to the myriad of lawyers that were involved in the drafting process.

354 Taking all of this into account, I interpret the clause in question to mean that if Barclays elects a Traditional Liquidity Arrangement, or if Barclays is deemed to have elected a Traditional Liquidity Arrangement by not notifying Devonshire of its election, the $75 million proviso applies to prevent Barclays from acquiring liquidity notes under a Traditional Liquidity Arrangement. Thus I hold that Barclays funded the liquidity call under a Synthetic Liquidity arrangement and that it is entitled to deduct the payment of $67.3 million from the amount payable to Devonshire.

355 Accordingly, Devonshire is entitled to receive $532,668,082 as the Base Calculation Amount as well as the Unpaid Amounts claimed[10], together with interest. If the interest cannot be agreed, the parties may make written submissions as to the appropriate interest.

356 The measure of damages that Devonshire would be entitled to for Barclays' repudiation of the ISDA Master Agreement in the event Devonshire had no right to deliver a notice of early termination would in my view be the same as the settlement amount Devonshire is entitled to.

18. Settlement on Devonshire default

357 In view of the fact that I have held that Barclays was in default on January 13, 2009 and that any amounts payable to Barclays on the termination are subordinated to amounts payable to Devonshire by reason of the Intercreditor Agreement, it is perhaps not necessary to consider this issue. However, in light of the arguments, I will deal with it.

358 There are two major issues. The first is the amount of Barclays' Loss as defined by the ISDA Master Agreement. The second is the collateral Barclays is entitled to look to that is held by Devonshire, and in particular whether Barclays is limited to the $600 million posted by Devonshire as collateral at the outset of the transactions, or is also entitled to look to all of the assets of Devonshire, which including the payment of approximately $71 made by Barclays on January 13, 2009, totalling as of that date approximately $183 million.

359 Barclays claims that it was Devonshire's default that led to the termination of the two swaps on January 13, 2009 and that the loss suffered by Barclays is $1.2 billion. Barclays sent a statement of this amount to Devonshire on January 29, 2009.

(a) Evidence of Leslie Rahl

360 Devonshire attacks the claimed loss. It relies in part on the evidence of Leslie Rahl, who was

conceded by Mr. Howard to be an expert in "the general derivates area".[11] Barclays contends, however, that much of her evidence is inadmissible, and attacks it as well on the basis that her opinion is biased. The evidence of Ms. Rahl was put in by agreement that it was subject to objection by Barclays. I was provided with written argument by both sides and it was left that a ruling on the motion by Barclays to exclude all or part of her evidence would be dealt with as part of this judgment.

361 Admissibility of an expert's evidence is to be determined taking into account the principles enunciated in cases such as *R. v. Mohan*, [1994] 2 S.C.R. 9 and *R. v. Abbey* (2009), 97 O.R. (3d) 330. While a court should exercise a gatekeeper function, particularly if there is a jury, in my view that is of less importance in this case in which there is no jury and which, by agreement of the parties, the evidence has been heard and tested on cross-examination. See *Masters' Association of Ontario v. Ontario (A.G.),* [2001] O.J. No. 1444 (Div.Ct.).

362 Ms. Rahl has over 30 years experience in the derivatives market in a wide range of capacities, including as a derivatives trader and manager of a $100 billion derivatives division at Citibank. She has also sat on the board of directors of ISDA and chaired the committee responsible for drafting the original 1987 ISDA Master Agreement. She has been a director of Fannie Mae and chair of its risk policy and capital committee. She currently is a director of CIBC and a member of its risk committee and a director of the International Association of Financial Engineers. She has undertaken valuations of complex structured products for special purpose vehicles and reviewed collateralized debt obligation valuation practices for several institutional clients.

363 Barclays contends that Ms. Rahl has interpreted the contracts in issue and impermissibly expressed legal conclusions, purported to make findings of fact on contested issues and provided opinions for which there is no foundation. I do not intend to go through all of these arguments other than to say that in my view they are overstated. The core of her evidence concerns the proper method to determine loss under the swap contracts, which in this case is to be "reasonably determined in good faith". The experts called by Barclays, whose evidence was not challenged as inadmissible, also provided evidence of the proper method to value the loss to Barclays of the Devonshire swaps. These experts differed, as might be expected. Inevitably they dealt with contractual rights and obligations. What is "reasonable" in a complex case such as this is something that certainly can be the subject of expert evidence. In the end, of course, what the contracts in question mean is a matter for the court. To the extent the opinions of Ms. Rahl are based on any faulty legal assumptions or factual assumptions not proven, their reliability will be negatively affected.

364 There is no basis, in my view, to attack the evidence of Ms. Rahl as biased. She was no more an advocate than were the experts called by Barclays. She gave her evidence in a professional manner and made concessions where appropriate. She stuck to her guns when she felt it appropriate to do so, which in no way could be taken to be an advocate for her client in any pejorative sense. If anything, I found Dr. Hull, Barclays lead expert, to be far more argumentative than should have

been the case, to the point that his opinions must be treated carefully.

365 It is not practicable to examine all of the various parts of the evidence of Ms. Rahl, as Barclays invites me to do, to determine admissibility. Rather, in my view, her evidence should be admitted, subject to determining what weight should be given to it.

(b) Valuation date

366 Devonshire says that while ordinarily, if there had been no Suspension Notice or standstill, January 13, 2009 would be an appropriate date for the valuation. However, because of the Suspension Notice and the effect of the without prejudice suspension of the Default Notice contained in it, the date of valuation should be August 16, 2007, the date of the Suspension Notice. Alternatively, Devonshire says that it would be reasonable to value Barclay's loss as of November 27, 2007 or, using a discounted cash flow analysis plus risk premium, as of January 13, 2009.

367 In this case, the default relied on by Barclays was the insolvency of Devonshire caused by its failure to pay on its notes, which Barclays claimed began the moment notes were not paid on August 13, 2007.

368 Ms. Rahl testified that market practice on a default is to determine the economics of a transaction as of a date that is closely tied to the date of default. She noted that a party would want to terminate the transaction as quickly as possible in order to avoid being exposed to market movements where there is a risk that the counterparty may not reimburse it. She also testified that this uncertainty would make it difficult to know what kinds of hedging decisions to make. Further, she testified that large gaps between the date of default and valuation would result in this risk having to be built into the price of transactions or would change the way that banks and others currently calculate risk. In her market experience, she had never heard of any circumstances where a valuation of a swap occurred at a time not at or near the time of default.

369 Ms. Rahl also is of the view that the effect of Suspension Notice and the seventeen month standstill severely impacted the swaps, including the effect on value of the stop-loss provision and the liquidity facility, and that to fairly value Barclays' loss, a valuation date of August 16 or November 27, 2007 would better reflect the economic circumstances of the swaps.

370 It is undoubted that the ISDA Master Agreement does not contemplate a standstill such as seen in this case. Dr. Hull agreed that the ISDA agreements do not contemplate a standstill, that he had never seen a standstill like this nor a calculation of loss performed with a date seventeen months after a default. He agreed that in normal circumstances a default, termination and calculation of loss would follow quickly together in time and that it makes sense to calculate loss at or near the time of default and termination. Mr. Draycott, another expert called by Barclays, said the same thing and he too had never had any experience where a termination happened seventeen months after a default.

371 Devonshire relies on the Suspension Notice which provided that it "suspends without

prejudice the effect of the Default Notice..." Devonshire contends that in order to give the without prejudice nature of the Suspension Notice some meaning, Barclays' loss should be valued as of the date of the Suspension Notice. Devonshire further contends that the requirement that the Loss determination must be made "reasonably" imposes at least one limit: if the choice of a valuation date produces an unreasonable result, then a valuation date that does produce a reasonable result must be used instead.

372 I have difficulty with this argument. Devonshire essentially says that the reference to "without prejudice" means without harm being caused to it. Without prejudice in a legal setting has a fairly standard meaning, and it is not "without harm". If that is what was intended, it would in my opinion have taken more precise language than was used.

373 Devonshire relies on a U.S. bankruptcy case of *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 (JMP), Bankruptcy, SDNY, September 15, 2009 (transcript), at 99-113 [*Metavante*]. I do not think it assists Devonshire. In that case, Metavante was a counterparty with Lehman on a contract swapping fixed for floating rate interest payments. The contract was as ISDA Master Agreement. On the bankruptcy of Lehman, Metavante took the position that it did not have to continue making payments to the estate of Lehman because of section 2(a)(iii) of the ISDA Master Agreement. It was held that because of U.S. bankruptcy law, as Lehman had not decided whether to assume or reject the contract, an executory contract, Metavante was required to continue making payments. Metavante argued that the safe haven provisions of the U.S. Bankruptcy Code, which gave it the right to terminate the swap contract, did not require it to terminate. It was held, however, that while those provisions gave a party the right to terminate to contract, it was contrary to the Bankruptcy Code to ride the market for a period of one year while taking no action. The case says nothing of whether absent the safe harbor provisions of the U.S. Bankruptcy Code, a party under an ISDA Master Agreement can or cannot sit on its hands after an event of default before delivering an early termination notice under section 6(a).

374 While there is a reasonableness requirement involved in establishing a loss under an ISDA Master Agreement, I do not think that it is permissible on that ground to change the valuation date to a date other than as prescribed. The definition of Loss in the ISDA Master Agreement provides that a party will determine its Loss as of the relevant Early Termination Date or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. If the loss calculation is determined to be commercially unreasonable, that may require a different calculation of loss, but it would not permit the valuation date to be changed.

375 For the purpose of determining Barclays' loss on the assumption that Devonshire was in default and Barclays was a non-defaulting party, I see no basis to ignore the contractual requirement for the valuation to be made as of January 13, 2009.

(c) Loss as of January 13, 2009

376 As stated, the parties chose Second Method and Market Quotation to apply in the event of a

default.

377 Under the Market Quotation method, quotations are to be requested by the non-defaulting party from third-party market participants for an amount to be paid to or by such party for a transaction that would have the effect of preserving the economic equivalent of any payment or delivery that but for the early termination of the swaps would have been required after the date of termination. If fewer than three quotations are provided, it will be deemed that the Market Quotation cannot be determined. Market quotation is defined, in part, as follows:

> **"Market Quotation"** means, with respect to one or more Terminated Transactions and a party making the determination, an amount determined on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as positive number) in consideration of an agreement between such party ... and the quoting Reference Market-maker to enter into a transaction (the "Replacement Transaction") that would have the effect of preserving for such party the economic equivalent of any payment or delivery ... by the parties ... respect of such Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date. ... If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations shall be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transactions cannot be determined.

378 On January 13, 2009, the date of termination, Barclays sent requests for firm quotations to four market makers in the CDS market (UBS, Deutsche Bank, Goldman Sachs and Bank of America). Only UBS responded with a quote of $2.18 billion. This was an "indicative" quotation which meant that it was not a firm or binding offer. As no quotations as required were provided to Barclays, it was deemed that the Market Quotation could not be determined.

379 The definition of Settlement Amount provides that if Market Quotation cannot be determined or would not in the reasonable belief of the party making the termination produce a commercially reasonable result, Loss is to apply. "Loss" is defined in the ISDA Master Agreement, in part:

> "**Loss**" means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency

> Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or re-establishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made ... A party will determine its Loss as of the relevant Early Termination Date or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

380 Firth, *Derivates Law and Practice*, *supra*, states at para. 11-161 that the party calculating its loss must use commercially reasonable procedures and that the result must be commercially reasonable.

381 Mr. Lee was responsible for the calculation of the "Loss", the amount which Barclays claims is its damages. He testified that Barclays proxied the Market Quotation process which he described as an attempt to find what the replacement cost was, assuming Barclays stood in the place of one of the dealers that it asked to bid. The valuation date was January 13, 2009, the early termination date.

382 The definition of Loss in the ISDA Master Agreement states that it is an amount that the party "reasonably determines in good faith to be its total losses". In this case, it appears that the Barclays lawyers had considerable influence in how the loss was to be calculated. On cross-examination, Mr. Lee said this was the first time he had done a loss calculation under the Loss definition. He was asked why he calculated the loss as he did. He said he did not recall and then said "This was in concert with legal. We had ongoing discussions as to how to run the process and I followed their lead". If legally the method used by Barclays was required, little harm was done. But if not, in these circumstances, where the lead was taken by lawyers rather than commercial actors in the market, considerable caution must be placed on any argument that so long as Barclays considered its loss calculation to be reasonable, that should be accepted.

383 As seen, the definition of Market Quotation is an amount to be paid to or by the party seeking the quotations that would have the effect of preserving for such party the economic equivalent of any payment or delivery in respect of the terminated swap that but for the early termination, would have been required after that date. In the case of Barclays and Devonshire, had the swaps not been terminated, the only payments that would have been required were the monthly premiums to be paid by Barclays to Devonshire for the credit protection of the underlying synthetic

bond portfolio. The liquidity protection for which Devonshire paid monthly premiums to Barclays had terminated. At the time the swap contracts were made, it was not expected that there would be any defaults in the underlying bonds that would require payments during the life of the contracts from Devonshire to Barclays. This is because the swaps were "super senior" swaps in which the credit protection was for the tranche of losses that had an attachment point of 15 % for the first transaction and 16% for the second. Even at the date of the early termination, it was not expected that there would be any future material loss in the underlying bond portfolio that would give rise to any payments from Devonshire to Barclays. There would also have been delivery of collateral required to be made by Devonshire in the event that Barclays' mark to market figures increased in the future, or a reduction in the event that they decreased.

384 The theory of whether there would be a loss or gain on early termination depended on whether, in the language of the market, the swaps were "in the money" or "out of the money" to a party. In this case whether Barclays was in or out of the money on the swaps at any time depended on the amount it was paying to Devonshire for credit protection. The amount that is paid for credit protection at any time in the market depends upon the market's view of risk of loss in the bond portfolio against which the protection is bought. Under the swap contracts between Barclays and Devonshire, Barclays was paying 61 basis points on a notional amount of protection of $6 billion worth of bonds.

385 If the market's appetite for risk increased at a later date, narrowing market spreads, the market price for protection on those bonds would decrease below 61 basis points and Devonshire would be said to be in the money as against Barclays as it would be receiving more than the market would have required on a new contract. Barclays would gain on an early termination at that time as it no longer would have to pay more than the market price for the protection, and this gain would be measured by the amount someone would have to pay to Barclays to take over Devonshire's position. On the other hand, if the market's appetite for risk decreased at a later date, and margins widened, as dramatically happened because of the market turmoil by the time of the early termination in this case, the market price for protection on the bonds would have increased above the 61 basis points that Barclays was paying, and Barclays would be said to be in the money as it would be paying less than what the market would have required on a new contract at that time. The value of Barclays's loss caused by the early termination would be the amount someone would have to be paid by Barclays to replace Devonshire.

386 Of the $1.2 billion claimed as a loss, $1.02 billion represents what Mr. Lee said was the market value of the two swaps (not including the risk on the ABS portfolio of the underlying portfolio) based on a model used by Barclays. The balance consists of various theoretical incremental hedge costs that would have been made, assuming Barclays was starting from a clean plate, i.e. starting a new swap agreement with a new party.

387 The value of $1.02 billion was obtained from a proprietary model developed by Barclays which it used on a daily basis to obtain what it calls a mark to market value of its various trading

positions. This model is of a type that was referred to by the experts as a Gaussian copula model. Inputs to the model were made daily by Barclays traders. Mr. Lee testified that the mark to market derived from the model is a representation of the market value of a derivative at a point in time. It calculated the market value by using mid-market values that did not include a risk premium for the trade.

388 A further $185 million of the claimed Loss related to hypothetical hedging costs that the Barclays model recommended for the replacement trade. The hedges were credit default swap hedges, to reflect the "offer side" price Barclays would have to pay above the mid-market mark to market value derived from the Barclays model, interest rate hedges, foreign-exchange hedges, correlation hedging and a charge referred to as a "quanto" charge. The final $13.7 million of the claimed Loss represented the hypothetical replacement cost of credit protection on the underlying ABS portfolio.

389 Thus, Barclays calculated its loss caused by the early termination to be what it said was the market value of the swaps of $1.02 billion, based on its model that it uses, plus theoretical hedging costs for a total of $1.2 billion.

390 Mr. Lee's calculation of loss was supported by Dr. Hull, who is a professor of derivatives and risk management at U of T's Joseph L. Rotman School of Management. He used different models, looked at various indexes and information and concluded that Barclays's valuation of the bond portfolio protection was reasonable. He valued the ABS protection and the incremental hedging costs at a little less than Barclays, saying his assumptions were conservative, and concluded that the amount due to Barclays was $1.082 billion. He opined that Barclays followed the required procedures and that its estimate of loss of $1.2 billion was reasonable.

391 Barclays' method of calculating its loss was also supported by Mr. Anthony Draycott who at one time was a derivatives trader and since 2007 has been a consultant involved in residential mortgage backed securities and exposures created as a result of synthetic exposures to residential mortgage backed securities. Mr. Draycott has no experience in transacting leveraged super senior derivative credit transactions. His opinion is that the only appropriate way to value a loss given the default of a counterparty is to estimate the cost of replacing the contract and that financial institutions would do that only by using mark to market models like that used by Barclays.

392 Professor Hull stated, and Ms. Rahl agrees, that assets can be valued in two broad ways: (1) using the valuations of related assets; or (2) estimating expected cash flows and discounting them to the present. They agree that market practice is normally to use the first approach, and in particular, by the use of a Gaussian copula model. Ms. Rahl refers to this as a mark to model method. Dr. Hull refers to it as a mark to market model. Mr. Draycott says that the only way to value the contract in question here is to use a mark to market model.

393 In this case, for several reasons, Ms. Rahl's opinion is that a mark to model method of calculating loss as of January 13, 2009 does not lead to a commercially reasonable valuation and

that a discounted cash flow valuation is more reasonable. The key difference between the experts is whether, in the circumstances of this case, a mark to model or cash flow-based valuation is justifiable as of January 13, 2009.

394 Barclays relies heavily on statements in U.K. cases to the effect that the Market Quotation measure and the Loss measure are intended to lead to broadly the same result, and argues that therefore a proxy for the Market Quotation method of calculating the settlement amount should be used.

395 In *Peregrine Fixed Income Limited (in liquidation) v. Robinson Department Store Public Company Limited plc.* [2000] Lloyd's Rep. Bank. 304 (Q.B.)(Commercial Div.), the issue was the gain that had to be paid by the non-defaulting party Robinson to the defaulting party Peregrine under an interest rate swap contract for the future payments that Robinson was relieved of as a result of the termination of the contract due to Peregrine having gone into liquidation which under the contract automatically terminated the contract. The defaulting party had already performed the whole of its side of the bargain. The present value of future payments that would have been paid by Robinson to Peregrine but for the termination was $87 million, whereas the quotations obtained under Market Quotation was only $9.5 million, the reason being that Robinson was also under financial stress and the market considered its risk of default to be high and thus substantially discounted what it would have to pay to take over the payments to be made by Robinson. Moore-Brick J. concluded that the Market Quotation method did not produce a commercially reasonable result and that the gain was to be calculated using the Loss method.

396 In the course of his reasons, Moore-Brick J. accepted submissions from Peregrine that his reading of the ISDA Master Agreement indicated that the Market Quotation measure and the Loss measure were intended to lead to broadly the same result. He stated:

> Loss is defined in terms which make it clear that loss of bargain is one of the principal heads of damage intended to be covered and both Section 6(e)(i)(3) and Section 6(e)(iv) indicate that the Market Quotation measure and the Loss measure are intended to lead to broadly the same result.

397 Section 6(e)(i)(3) does not deal with this issue. I am not sure that it can be said that section 6(e)(iv) leads to the categorical statement that the two measures are intended to lead to broadly the same result, such that as claimed by Barclays, the Loss method must calculate loss by using a proxy for the Market Quotation method. Section 6(e)(iv) was inserted to prevent an argument that the Market Quotation method was not to be a penalty. It provides:

> (iv) **Pre-Estimate**. The parties agree that if Market Quotation applies an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of such

losses.

398 If the Loss method required the loss to be calculated by using a proxy for the Market Quotation method, as contended by Barclays, one would have expected there would have been a similar clause dealing with the Loss method to prevent an argument that it too was a penalty. There is no such clause. This is understandable as the definition of Loss, unlike the definition of Market Quotation, does not prescribe any method to calculate Loss other than it must be reasonable. It deals with heads of loss.

399 Professor Hull testified on cross-examination that he always assumed that the Loss method was a proxy for the Market Quotation method, but was reluctant to say that the definition of Loss directed that as he said he was not an expert at reading legal documents and legal definitions. When pressed, he said he would rely on the last sentence of the definition. That sentence, however, makes clear that unlike the Market Quotation method, a party in determining its loss under the Loss method need not use quotations from leading dealers in the market. Ms. Rahl too testified on cross-examination that the practice and expectation is that Loss is a proxy for Market Quotation and that in normal circumstances one would expect that they would normally arrive at similar results. Her evidence was for several reasons the circumstances were not normal.

400 While it may be understandable in a legal context to say that the two measures are intended to lead to broadly the same result in a case such as the case before Moore-Brick J. in *Peregrine* in which the Market Quotation method led to three firm bids being received, and to conclude that the bids from the Market Quotation method led to a commercially unreasonable result as opposed to the Loss method, the case said nothing about how the Loss calculation should be made. The figure for Loss was agreed, being the present value of the future stream of payments that would not have to be made by Robinson because of the default of Peregrine. That method of valuation of Loss was not at all an attempt to use some model to proxy the Market Quotation method of valuing the gain.

401 I have difficulty with unequivocal statements such as that made by Gloster J. in *Pioneer Freight Futures Company Ltd. (in liquidation) v. TMT Asia Ltd.*, [2011] EWHC 778 (Comm.) that it is plain that Market Quotation and Loss purport to broadly achieve the same result. There is little in the inch thick book of "Key Agreements" before me that can be said to be plain. The definitions of Market Quotation and Loss are quite different and to say that they are intended to lead to the same result because the word "bargain" is contained in the no penalty provision for Market Quotation and also in the definition of Loss is to my mind too simplistic.

402 For the Market Quotation method to work requires clearly that there be a liquid market in the particular swap product. Parties to the ISDA Master Agreement who choose the Market Quotation method, such as Barclays and Devonshire, agree that on the termination of a contract, settlement will be made on the basis of what the liquid market tells them is the amount needed to replace the economic equivalent of any payment and delivery that would have been required to be made but for the termination. But if there is no liquid market for the swaps, as was the case as no firm bid was

available, does it follow that the contract means that the loss as defined in Loss is to achieve the same broad result as Market Quotation and that a proxy for Market Quotation is therefore to be used? How could one necessarily know what that broad result of Market Quotation was? If there were evidence of a market for the swaps, such as say two bids having been received, it might be possible to say that the two methods were intended to lead to the same result, but if not, how can one be so sanguine as to say that they were.

403 It may be just as commercially logical to think that the contract was meant to say that if there is a market price for the particular swap identified by leading market makers, settlement will be made on the basis of that market price. However, if a market price cannot be identified, the parties are left to determine the settlement amount by looking at the actual commercially reasonable loss or gain incurred. It makes little sense, in my view, for a party to say that there is no identifiable market price, because no one will make a firm bid, i.e. there is no market for the swap, and so we will use some construct to come up with a price as if there were a market and call that construct the market value of our loss. That would be making an assumption that there is a functioning market, and if there is no functioning market, I see no basis to construct one. The definition of Loss certainly does not indicate that in its language.

404 What principles should be used in determining Loss? The ISDA Master Agreement defines Loss, and it is that definition which governs.

405 Assuming that Barclays was entitled to terminate the swap contracts, its loss of bargain on early termination would be the value to Barclays of the contracts at the time of the termination. If the Market Quotation method could be used and at least three quotations were received, what the value of the terminated swaps was would be easily determinable.

406 Without a Market Quotation determination, as in this case, Barclays in my view must establish on a balance of probabilities that the market in fact would have been prepared to enter into a transaction to replace Devonshire on its swap contracts on the terms asserted by Barclays in its claim for Loss in this case. If Barclays is unable to establish that, then Loss must be determined on some other basis.

407 The construct of the $1.2 billion claim was based on a Gaussian copula model utilized by Barclays. How that model works and what goes into it is, to say the least, quite complex. That is clear from the reports of Professor Hall and Ms. Rahl. The dollar figure that Barclays derived from its model does not seem to be seriously in dispute as a figure derived from a model based approach. Professor Hull and Ms. Rahl each did a model analysis and both concluded that Barclays' figure was reasonable. Ms. Rahl, of course, did not think that a model analysis was appropriate if the valuation date was to be January 13, 2009. If a Gaussian copula model approach is accepted as the right method to value, no one can seriously quarrel with Barclays' number.

408 However, the fact that a model can be used to derive a price for a transaction for which there is no actual market price available, as in the case of Devonshire, does not necessarily mean that it is

the price that the swaps in question would trade for in the market, particularly when we know that the swaps in question did not attract a firm bid in the market at the time. I do not accept the assertion of Mr. Lee that there was a market for the Devonshire swap contracts. No firm bids were received.

409 I accept Ms. Rahl's evidence that the market for products such as the Devonshire swaps was a highly illiquid market. Professor Hull's evidence was that he had not done any analysis of whether there was liquidity for this product and he was not sure if it was liquid or not.

410 Mr. Lee did say that the inputs for the Barclays model were readily observable throughout 2008 and 2009, but on the evidence before me the fact that single name CDS or indexes of tranche risks traded does not necessarily mean that the indicated value that the model threw out was a value at which the Devonshire swaps would have traded on January 13, 2009. In this regard, Mr. Lee admitted that the Barclays model did not take into account the fact that the Devonshire swaps had triggers giving Barclays the right to make calls for more collateral. The triggers for collateral calls in the Devonshire swaps as negotiated in 2006 were triggers that the Devonshire investors such as the Caisse were no longer prepared to accept in the restructuring negotiations. Mr. Lee also admitted that the model did not take into account the fact that the Devonshire swaps were non-recourse, a feature he admitted would be relevant to someone wanting to step into the shoes of Devonshire. He admitted that someone such as UBS would want to be paid more if the swap were full recourse than if it were non-recourse. He also admitted that the model did not take into account the stop-loss feature that permitted Devonshire to terminate the swaps if a collateral call were made, although he questioned the value of that as Barclays could also terminate the swaps if a collateral call was not met by Devonshire.

411 Ms. Rahl's opinion is that although Barclays' loss calculation methodology could be considered mathematically accurate in evaluating a standalone collateralized swap obligation, it does not value the transaction with all of the features laid out in the transaction documentation. In this I agree and accept her view to the extent of Mr. Lee's admissions as to what was not included in the Barclays' model.

412 It is one thing to say that using a Gaussian copula model is standard market practice to value a trade, as Mr. Lee, Professor Hull and Mr. Draycott said, but that does not necessarily make it appropriate in all circumstances.[12] Professor Hull did not say he had seen such a model used to value a synthetic swap contract for determining Loss in circumstances in which it was not possible to use the Market Quotation because no bids were received, nor did he say that he had seen it used during an illiquid market.

413 Mr. Draycott's report was to the effect that a market maker such as Barclays values its contracts on a periodic basis using a mark to market model. He said that market makers assemble portfolios of derivative transactions with offsetting market risks in order to avoid creating an

aggregate P & L that is exposed to market risk. The methodology used to value these transactions is a mark to market model. What Mr. Draycott was talking about was the method of calculating the value of contracts during their currency, and not when there has been a termination and not in circumstances of a highly illiquid market. His report said that he understood, which I took him to mean that he did not have firsthand experience, that the purpose of a valuation caused by the event of default was to determine the actual, or estimated cost to the non-defaulting party of replacing the terminated derivative transaction. On his cross-examination he said that default of a derivative counterparty is an extremely rare occurrence and that there have been very few in history. He said he had done dozens of valuations of a derivative product on voluntary terminations, but what those were or in what circumstances was not said.

414 Mr. Draycott said in his report that there was a market for the Devonshire swap contracts on January 13, 2009. He also said that although there were few trades in bespoke tranches similar to the Devonshire swaps in January 2009, it was possible to observe market inputs. He relied on the bid from USB. He did not realize at the time of his report that the bid was not a firm bid and acknowledged his error on cross-examination. He also relied on the fact that Barclays bought some of the Devonshire notes from noteholders in 2008 at prices he said were determined by a valuation of the transactions in place between Barclays and Devonshire. On cross-examination, he said that was based on an assumption that the parties would have based the price on what the transaction was worth. He acknowledged that he did not take into account what else the parties might have been considering, such as whether there was any value to National Bank settling over what value may have been in the notes. In my view Mr. Draycott was overreaching in his statements that there was a market for the Devonshire swaps in January, 2009 and that there were observable market inputs. Mr. Draycott was not a trader in the market at that time and had no experience with swaps such as the Devonshire swap contracts. I do not accept his evidence that there was such a market or observable inputs.

415 In this case, the ABCP market in January 2009 had been frozen and in turmoil for seventeen months and the collapse of Lehman Brothers and other financial institutions had caused the worst financial crisis in the market in 2008 since at least the 1930s. The terms of the Montreal Accord restructuring twice had to be changed in the latter part of December 2008. It is hardly surprising that no firm bid to replace Devonshire in the swap contracts that it had with Barclays was received. It is clear that the market did not have an appetite for it.

416 The Caisse, the largest investor in the Canadian ABCP market, was no longer prepared in January 2009 to accept the original 2006 Devonshire trade terms. The Caisse, like other investors in the Montreal Accord restructuring, demanded a moratorium on collateral calls for 18 months, a cap on collateral calls that could be made afterwards and a change in the trigger for collateral calls from mark to market to spread/loss triggers, which Barclays did not want. If the Caisse would no longer live with the 2006 terms of the Devonshire swaps, it is unlikely that any other investor would have agreed to those terms. The lack of any firm bid in January 2009 when Barclays sought firm bids from four leading market dealers was an indication of that.

417 While under the Barclays valuation scenario, $1.02 billion would be paid to an investor replacing Devonshire, the investor would be required to post $600 million collateral as Devonshire had done at the outset, and also post an additional $900 million collateral. This was because of the increase in Barclays's mark to market figures that had occurred by January 13, 2009 and the increase of the trigger point to 16.5%. If those figures increased, further collateral would have to be posted by the new investor.

418 Barclays contends that an investor would have been prepared to post $1.5 billion in collateral, just as Devonshire did in 2006 by putting up $600 million in collateral. If that occurred, and if the marks continued to increase after January 13, 2009 due to the market upheaval and uncertainty at the time, the replacement investor would be obliged to post more of its own money as collateral. Selling notes to other investors by the new investor to raise money to meet the increasing collateral calls would in all likelihood not have been available as an option to the new investor. The sophisticated investors in the Devonshire notes would not accept the terms of the original swaps and it is unlikely anyone else would either. The market upheavals of 2008 in particular made such terms unmarketable, as became clear to Barclays in its negotiations with the Caisse in 2008. If other investors would not be prepared to accept such terms, why would a new investor dealing directly with Barclays be any different? If a collateral call made by Barclays was not met, Barclays would be in a position to terminate the swaps and claim a loss that if accepted, might eat up the collateral already posted by the new investor. There is certainly no evidence at all that any replacement investor would likely be ready to put up $1.5 billion in collateral in the market as it existed in January 13, 2009, and accept such a risk, even if it received $1.02 billion up front. The money up front was not for the purpose of the investor having money available for collateral calls, but to compensate for the lower basis points it would receive rather than what Barclays mark to market figures said should be earned.

419 In his evidence, Mr. Lee said that if a bidder such as UBS had said they would step into Devonshire's shoes for a payment of $850 million, Barclays would have accepted the bid. However, there is no evidence at all that UBS or any other investor would have been prepared to post $1.5 billion in collateral with an upfront payment of $850 million. The "indicative" or non-binding bid from UBS was for a payment of $2.18 billion to be paid to UBS, and Professor Hull agreed that it was not a commercially reasonable bid from Barclays' point of view either. His view, understandably, was that Barclays would not want to run the risk that the trigger point for a collateral call might move from 16.5%, where it was at on January 13, 2009, to 17% and see UBS refuse to put up more collateral and keep the difference between the $2.18 billion paid to it and the $1.5 billion in collateral it had put up.

420 Barclays points to evidence given by Ms. Rahl on her cross-examination that in the absence of the standstill agreement, she would have probably done what Mr. Lee and Professor Hull had done. Her view, however, was that the standstill had economic consequences, including having to value the Devonshire swaps on January 13, 2009 in highly illiquid times.

421 Barclays also points to Ms. Rahl's evidence that in order to purchase equivalent protection in January 13, 2009, Barclays would have had to pay over $1 billion on an unsecured basis. That is not evidence, in the context of her evidence as a whole, that she was of the view that such a contract would be made. Her evidence was to the opposite effect. Her view was that on the construct of the Devonshire swap contract terms, a replacement investor would receive $1 billion and be required to initially post $600 million. It would then be obliged to pay a further $900 million in collateral because of the movement in the mark to market figures. The request for firm bids by Barclays provided for this additional amount to be paid "immediately on the effectiveness of the Transactions". If it failed to post the further $900 million, Barclays would have lost the difference between the $1 billion it paid out and the $600 million it received in collateral. Her view was that Barclays would never make such a deal. She was not challenged on this. Even if, as Barclays contended in argument, it would never have closed the replacement trade with a new investor unless the total $1.5 billion were paid by the investor on closing, there was no evidence from Ms. Rahl or anyone else that such a replacement trade was likely to occur.

422 In my view, Barclays has not established that the model that it used valued the Devonshire swaps with its conditions as they existed from the time the swaps were agreed in 2006. What a different model might have calculated is of course not before me.

423 Nor am I satisfied that Barclays has established on a balance of probabilities that its claimed loss of $1.2 billion is a value that the market in fact would have placed on the Devonshire swaps and that its loss calculation is commercially reasonable. While its model indicated that its Devonshire swaps were in the money, and that their value was $1.2 billion, the evidence does not support such a real value. It is an artificial construct. Barclays has not established that the swaps had the replacement value it claims they had at the time it decided to terminate the Devonshire swaps in January, 2009.

424 What then is the measure of Barclays' loss on this transaction?[13] One is driven to consider the cash flow analysis of Ms. Rahl.

425 Ms. Rahl's opinion was that the most appropriate method was to determine Barclays loss based on the actual and real-world projected losses of the underlying synthetic portfolio over the remaining life of the trades had they remained in place. She calculated the loss to Barclays using a cash flow analysis. Her reasons for using a cash flow analysis rather than using a mark to model method of calculating the loss were severely criticized as being contrary to market practice. She acknowledged that the usual practice was to use a mark to market model, and said but for the standstill agreement and its adverse economic effect on what would have been the normal way the Devonshire trades worked she would likely have done the same thing.

426 Ms. Rahl used models of the kind that are ordinarily used by market participants in structured finance to project cash flows and by investors to decide whether to buy or sell trades as these models provide what she referred to as a real-world estimate of loss. This method differs from using

implied estimates taken from market data that contain market perception driven risk premiums. She used models developed by Standard & Poor's and Moody's Investor Services to predict losses on the underlying portfolio of bonds. She did this analyzing the Devonshire II portfolio as it was the riskier of the two. She concluded that the expected losses over the life of the trade that would exceed the attachment point for the trades, given expected defaults as of January 13, 2009, was $12,347. Professor Hull agreed that rating agencies such as Moody's use of historical data to reach a conclusion of expected losses was a recognized way of calculating real world financial losses. Mr. Draycott does not dispute that Ms. Rahl used the rating agencies' models as they intended them to be used, but he like Professor Hull disputed their relevance.

427 I accept Ms. Rahl's opinion that these models are used by market participants as she described. I also accept Ms. Rahl's evidence that during the period in question many financial institutions used credit loss projections for mortgage backed securities, collateralized debt obligations and other structured products because the variance between fundamental analyses and market quotes diverged so dramatically as market quotes reflected an illiquid or dislocated market.

428 Ms. Rahl then added to her de minimus figure of $12,347 a risk premium. Her evidence was that market spreads for a credit default swap imply a loss that is generally much higher than the real-world loss market participants would actually expect. She said that the difference between the real-world estimate of loss and the market implied estimate of loss is the market risk premium. Her opinion was that the events of late 2008 and early 2009 resulted in extraordinarily high and temporary risk premiums that did not reflect the likely losses in the future. She therefore used which she referred to as a "normalized" risk premium, which she derived by averaging the risk premiums in the CDS markets in August and November 2007. She also looked forward to the risk premium in the CDS market in April 2010 and determined that it was at the same level as her average of August and November 2007. Assuming that using a normalized risk premium is appropriate, I do not see anything wrong with looking at what happened after January 13, 2009 if it is used to consider the reasonableness of the assumptions that she made in using data prior to that date. It would not be appropriate to use it as a hind sight basis for her opinion, and I think it can be fairly said that she did not do so.

429 The risk premiums that Ms. Rahl derived in August and November 2007, and also in January 2009, were taken from mark to model valuations of the Devonshire II underlying bond portfolio. These valuations valued the swaps in August 2007 at $107 million, in November 2007 at $157 million and in January 2009 at $544 million. By subtracting the expected cash flow losses of nil in August and November, 2007 and $12,347 in January, 2009, she calculated the risk premiums at $109 million in August 2007, $157 million in November 2007 and $544 million in January 2009. She averaged the August and November 2007 figures to "normalize' the risk premiums to get a risk premium of $132 million for the Devonshire II portfolio, as compared to the risk premium for that portfolio in January 2009 of $544 million. She then assumed the risk premium for the Devonshire I portfolio would be no higher and likely lower than Devonshire II as it was a slightly less risky portfolio, and used a normalized risk premium for it using the Devonshire II risk premium of $132

million. The total risk premium she calculated was therefore $264 million.

430 Ms Rahl then added this total normalized risk premium of $264 million to the expected cash flow loss above the attachment point of $12,347 to get a total loss of $264 million.

431 I have some difficulty with this theory. If a reasonable forecast on a cash flow basis of what Barclays has lost by the termination of the swaps is the key, I do not understand why the loss is not the present value of the expected loss of $12,347. Dr. Hull agrees that the alternative cash flow method of valuing an asset is to estimate the cash flow and then discount that cash flow at an appropriate discount rate. He said nothing of adding some risk premium. Ms. Rahl herself said in her report that one could argue that the cash flow projection is the loss. She went on to say, however, that to be conservative, she would add a normalized risk premium to the cash flow.

432 However, the theory of what Barclays' actual loss is would not lead one to add a risk premium to an expected cash flow loss, based on a mark to model basis, which Ms. Rahl says is not an appropriate way to value in January 2009, let alone a premium of $264 million on $12,347. I do not understand the conceptual basis for doing so. In my view, the loss to Barclays is the present value of $12,347, which I will call $12,000 dollars as it is not known when the expected losses of the underlying portfolio would exceed the attachment points of 16 and 15 % on the two swaps.

433 If Barclays had incurred costs in closing hedges as a result of the early termination, it would be entitled to those costs. However it led no evidence of such costs.

434 It was Ms. Rahl's view that there should be deducted from the amount of the Barclays loss the liquidity payments that she says would have been made if Barclays had not breached its obligations in July 2007 and made the liquidity payments requested by Devonshire. Her view is that the full amount of the liquidity line would have been demanded and paid by November, 2007 because of the market conditions, and this amount should be deducted from whatever Barclays' loss is calculated to be. I would not make such a deduction. The loss of Barclays is calculated as of January 13, 2009 on the assumption it was entitled to terminate the swaps on that day, and by then the liquidity facility had expired. I understand Ms. Rahl's opinion that the standstill agreement changed the dynamics of the swaps as contracted for, which no one questions, but that was agreed. I would not make the deduction.

(d) Mitigation issues

435 In light of my decision on the quantum of Barclays' loss, these issues are of little importance. However as they were fully argued and evidence was led, I will deal with them.

436 Devonshire takes the position that Barclays had an obligation to mitigate its loss and that there were losses that Barclays could reasonably have avoided by taking appropriate hedging strategies in 2007 to avoid any losses above the collateral that was pledged by Devonshire to Barclays. It says that in a determination of Loss, the ISDA Master Agreement contemplates a

measure of damages precisely mirroring the ordinary common law damages payment. Loss is defined to include:

> an amount that party reasonably determines in good faith to be its total losses and costs ... including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or re-establishing any hedge or related trading position ...

437 Devonshire says that compensating a contracting party for the loss of bargain on the termination of a contract is precisely what the common law measure of damages is meant to achieve. S.M. Waddams, *The Law of Contracts*, states at paras. 698-699 that loss of bargain is the fundamental expectation measure of damages in contract law: the party is placed back in the place they would have been had the contract been performed.

438 Firth, *supra*, at para. 11.140 dealing with Loss states:

> The contractual measure of damages applies for this purpose, i.e. the objective is to ascertain what amount is necessary to put that party in the position it would have been in if the terminated transactions had been fully performed.

439 The obligation to act reasonably to avoid loss is often referred to as a duty to mitigate. It is a corollary to the requirement that the party claiming damages cannot be compensated for a loss that it could reasonably have avoided. At common law, loss that could reasonably be avoided cannot be regarded as having been caused by the breach. In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be overly critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendants wrong. See S.M. Waddams, *supra*, at para. 15.140 and *Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L. (the "Elena d'Amico")* [1980] 1 Lloyd's Rep 75 at p. 89 (QB per Robert Goff J.)

440 Firth, *supra*, further states at para. 11.148:

> The determining party's duty to act reasonably and in good faith probably means that the Loss must be determined on the assumption that the determining party has taken reasonable steps to minimise any costs or losses it suffers as a result of the termination of the transactions. Equally, if the determining party has actually avoided such costs or losses, this probably has to be reflected in the computation, even if the steps it took went beyond what was reasonably required. Such an approach is similar to the common law rules on mitigation to the assessment of damages for breach of contract.

441 Barclays points to the provision in the Second Method and Market Quotation provisions that the parties chose which provides for a settlement of amounts owing by the defaulting party to the non-defaulting party and vice versa, and asserts that the common law of damages plays no part. It

relies on dictum of Moore-Bick J. in *Peregrine,* approved by Flaux J. in *Britannia Bulk* that the fact that a non-defaulting party must account to the defaulting party for any gain clearly deprives an event of default of most of its characteristics as a breach of contract. Barclays also refers to a comment by Flaux J. that it is a misconception to seek to equate the Loss provision with what the position would be if the non-defaulting party had a claim for damages at common law.

442 I agree with Barclays to the extent that the ISDA Master Agreement contemplates payments by a non-defaulting party to a defaulting party, the common law position that only the party that breaches a contract is liable to pay has been modified by contract. But that does not, in my view, necessarily mean that common law contractual principles are entirely abrogated.

443 Barclays also contends that the parties expressly contracted out of the necessity of mitigation. It relies on two provisions of the Amended and Restated Master Credit Derivatives Confirmation Agreement and its Annex 1. The first provides:

> Barclays Bank PLC does not guarantee the performance of or otherwise stand behind the reference entities or reference obligations referred to herein and is under no obligation to make good losses suffered as a result of credit events with respect to any such reference entity or reference obligation. Barclays Bank PLC is not required to hold any reference obligations and no inference may be drawn from this document that Barclays Bank PLC holds any such reference obligations or has any credit exposure to any reference entity. Devonshire acknowledges and agrees to the foregoing.

444 The second provides:

> The parties confirm that no Transaction is intended to be and no Transaction constitutes a contract of surety, insurance, guarantee or indemnity. The parties acknowledge that the payments to be made by the Seller [Devonshire] will be made independently and are not conditional upon the Buyer [Barclays] sustaining or being exposed to risk or loss and that the rights and obligations of the parties hereunder are not dependent upon the Buyer owning or having any legal, equitable or other interest in the Reference Obligations or mitigating any actual loss suffered. (underlining added)

445 I do not see the first clause as having anything to do with mitigation. It and the second clause are part of the structure of the "synthetic" nature of the credit default swaps, in which Barclays has no ownership interest in the underlying portfolio in which it is buying credit protection. The "payments" referred to in the second clause are clearly payments to be made by Devonshire to Barclays on the happening of Credit Events, i.e. when losses on the underlying portfolios reach the attachment point and credit protection payments become due. The reference to Barclays not having to mitigate any actual losses suffered can only be in reference to those payments and to losses suffered on the underlying bond or ABS portfolio that gives rise to the credit protection payment. It

has nothing to do with the measure of Loss in the ISDA Master Agreement.

446 Barclays also asserts that a duty to mitigate arises only on a breach, and that the breach here was on January 13, 2009. Thus there could be no obligation to mitigate before then. In this case, however, the breach relied on was the insolvency of Devonshire, which Barclays pleaded began on August 13, 3007 when notes that were not rolling became due. Barclays cannot resile from that pleading. The fact that Barclays waited until January 13, 2009 to declare a default would not preclude any duty to mitigate in the face of an earlier breach.

447 Hedging is a technique employed by market practitioners to neutralize the risks of a particular trade. Devonshire relies on the evidence of Ms. Rahl that a prudent manager of a CDS trading desk would have frozen the Devonshire trade as an economic hedge as of August, 2007. She testified that once the standstill came into place in August 2007, Barclays should have unwound or bought back trades that amounted to hedges on the Devonshire CDS protection in excess of the collateral. This would have had the economic effect for Barclays of it not facing any exposure above the capped amount regardless of the resolution of the standstill situation.

448 Ms. Rahl further testified that even if the hedges had not been frozen at the amount in August 2007, in light of the stop loss provision, at the very least Barclays should have capped the trade once the atop loss trigger was hit in November 2007. The 5% trigger had been breached by then and Barclays had clearly not been able, and was not entitled under the Montreal Accord, to receive any additional collateral.

449 On his cross-examination, Mr. Draycott agreed that it would be prudent for a trader to adjust his hedges if he had an expectation that the mark-to-market might not be recovered on a default.

450 Devonshire asserts that Barclays should have realized at the latest by November 27, 2007 that it would have no access to more collateral and that it should have protected itself from losses higher than the collateral it had access to by appropriate hedging. Barclays should have recognized that with a built-in recourse cap, the trade could not possibly be worth more than that to Barclays and, as a result, its reasonable good faith estimate of loss could not have exceeded the collateral.

451 Barclays contends that because of the way it ran its hedging, it would not be possible to isolate hedges related to Devonshire and deal with them individually. Mr. Lee testified that Devonshire was hedged throughout as part of a bespoke correlation book that contained approximately 500 bespoke tranche trades, 50,000 single name CDS trades, and several hundred interest rate and currency swaps all together having a $200 billion notional size.

452 Although the trade was viewed by Barclays' personnel as non-recourse, it did not initially book it as such. Barclays' internal trade approval noted that the trade was to be booked as a full-recourse CSO and that this was "viewed as acceptable without adjustment under current market conditions", but that if a collateral call trigger was likely "an adjustment to these sensitivities may be deemed necessary to account for the impact of the non-recourse feature." That trade approval

made the "maintenance of daily sensitivity adjustments in this situation ... a condition for approval."

453 Ms. Rahl testified that she understood this trade approval to mean that a trader may have to reduce his or her hedges to account for the non-recourse nature of the transaction. Ms. Rahl also noted that the reference to daily sensitivity adjustments meant that the precise mechanism to achieve appropriate hedging would have to be adjusted to reflect the fact that there was a stop loss on any collateral call trigger. She testified that she understood this document to approve an exception to usual practice and that she would expect a financial institution to keep track of these kinds of conditions or requirements, at least on a monthly, if not a daily, basis. Her evidence on this was not contradicted by anyone from Barclays. It confirms that Barclays knew from the outset that it might have to make appropriate adjustments to its hedging to reflect a non-recourse possibility.

454 Barclays relies upon evidence given by Ms. Rahl on cross-examination as an admission that hedging should not be considered. She stated:

> Q. And I'm going to turn to the subject of hedging. Would you agree with me that the ISDA practice is that market quotation and loss are calculated without reference to either the existence of hedges or lack of hedges?
>
> A. Based on our standing understanding, yes.
>
> Q. And you're aware, I don't want to get into the precedent thing again, but you are aware that there's legal cases' deciding that issue to that effect?
>
> A. Yes.
>
> Q. And if someone were completely unhedged or a speculator or badly hedged, that makes [no] difference in the calculation of the replacement value?
>
> A. I would agree with you but not everybody would.
>
> Q. For the moment I'm content if you do.
>
> A. I do.

455 I take this evidence to relate to the calculation of value of a replacement transaction as referred to in the definition of Market Quotation. I did not understand this evidence to be any admission by Ms. Rahl that in calculating a Loss, it was not appropriate to consider the strategies that should have been used to mitigate expected losses.

456 Barclays relies on *Australia and New Zealand Banking Group Ltd. v. Société Générale*, unreported, September 21 1999 at p. 7, aff'd [2000] 1 All E.R. 682 (C.A.) as authority for the proposition that the definition of Loss did not include losses or gains on hedges that were not bound up in the early termination of the transaction. I do not read that case as assisting Barclays. Société Générale unsuccessfully argued that the amount due to be paid to the bank on early termination should be reduced by the losses it had incurred on hedges that it had entered into with a third party Russian Bank, the losses being caused by the collapse of the Russian currency and a banking moratorium being imposed. It was held by Aikens J., and upheld by the Court of Appeal, that the Loss provisions did not intend that losses resulting from the identity or particular circumstances of the counterparty to the hedge were covered by the words "loss. . . incurred as a result of [the Affected Party] terminating [or] liquidating ... any hedge". He held that such a result would be unlikely because it would throw any risk associated with identity or circumstances of the particular counterparty to the hedge upon the other party to the contract. That is not the issue here.

457 What puzzles me about the mitigation issue in this case is its practical effect. Barclays cannot recover more the available collateral, whether it is limited to the initial $600 million posted by Devonshire, as I have found, or also includes the extra cash of Devonshire in its bank account that Barclays asserted was the case. The effect of the mitigation argument of Devonshire is that the loss claimed by Barclays should have been capped by hedging strategies so that the loss was not in excess of what Barclays could collect on a termination of the trades.

458 In the circumstances, I see little purpose in deciding this mitigation issue. However, in my view the position of Devonshire should be accepted. I accept the views of Ms. Rahl that Barclays should have taken steps no later than November 27, 2007 to hedge the Devonshire transactions to limit its losses to what it could look to collect from Devonshire.

459 There is another mitigation issue, however, that would have been of some importance had I found Barclays' Loss to be what it claimed. In 2008 Barclays purchased approximately $220 million in face value of Devonshire notes for nominal consideration from Citibank, Desjardins and National Bank. Devonshire contends that through the purchase of these notes, Barclays mitigated $220 million worth of risk should Devonshire be in default. Accordingly, if Devonshire defaulted but retained assets, Barclays would share in approximately a third of the amount that would be returned to noteholders. Accordingly, Devonshire contended that any Loss amount payable to Barclays must be adjusted accordingly. Otherwise there would be double recovery.

460 On December 12, 2008 Mr. Lee was doing calculations on potential losses on the notes held by the Caisse and the small investors. His document referred to the notional exposure amount of each of the trades being $2 billion, rather than the original $3 billion. The reason was because of the purchase of the notes with a face value of $200 million, which represented a notional exposure of $2 billion, and Mr. Lee described this purchase in different ways, as "buying back the risk" , being "a hedge for our original $6 billion trade" and "equivalent to a sell of protection".

461 Barclays counters this by contending that Devonshire confuses Barclays' management of its risk and the determination of Barclays' Loss. It says that the purchase of the notes was a hedge of the Devonshire trades, but the fact that Barclays reduced its risk through this hedge does not affect the replacement cost of the trades, which were left fully intact until terminated on January 13, 2009. It said that it paid for the credit protection right up to the termination (although it claims it back on its interpretation of the waterfall provisions in the Trust Indenture).

462 No matter how the purchase of the Devonshire notes from Citibank, Desjardins and National Bank was described internally, it seems to me that if Barclays were entitled to payment from Devonshire collateral on of a settlement on a Devonshire default for its Loss, and were able as well to recoup payment on the notes it acquired in Devonshire because Devonshire had more collateral than the settlement amount to be paid to Barclays, it would amount to Barclays obtaining double recovery for its loss. To this extent, if Barclays Loss is less than the available collateral plus Devonshire's cash, there should be a deduction from Barclays' Loss calculation of the amount it will receive from its Devonshire notes so that the Loss payable to Barclays is net of the amount it will receive on its Devonshire notes.

463 As I have found Barclays loss to be $12,000, well less than the available collateral, Barclays will more than recover this amount by reason of its notes and thus its loss will be reduced to nil.

(e) Barclays' recourse

464 In light of the result, the issue of what assets Barclays had recourse to is moot. However, in light of the arguments made and evidence led, I will deal with it.

465 It is common ground that if Devonshire is the defaulting party under the ISDA Master Agreement, Barclays is entitled to set off amounts due to it from Devonshire against the initial payments of $600 million made by Devonshire.

466 Barclays contended that it was entitled as well to be paid from the "residual assets" of Devonshire, being $183 million plus accrued interest held by Devonshire in its bank accounts. This amount is made up of $75 million returned to Devonshire in October 2007 that had previously been paid to Barclays as a result of a move in the Barclays marks, the balance of the monthly credit protection payments made to Devonshire by Barclays under the ISDA Master Agreement from August 2007 to January 2009, which totalled approximately $37 million and the $71 million payment made to Devonshire on January 13, 2009.

467 Barclays' assertion is based on its interpretation of language in the Series A Supplemental Indenture ("Trust Indenture"). When one looks at the document and the myriad of clauses that are unintelligible without looking at definitions that are also complex, it does no credit to the drafters in the law firms who negotiated back and forth. Clear, simple drafting was lost in the process.

468 The Trust Indenture contains what has been referred to as a "waterfall", or priority, of

payments to be made by the indenture trustee CIBC Mellon Trust Company, from money to be paid to the trustee. The first priority is to cover costs of the trustee. The second is "in or towards payment and satisfaction of any Related Permitted Liens". Barclays contends that the amount to be paid to it by Devonshire on the default by Devonshire is a Related Permitted Lien.

469 Barclays relies upon the following definition of "Devonshire Financial Contract" from section 1.1(i) of the Series A Supplemental Indenture:

> "**Devonshire Financial Contract**" means the credit derivatives transactions evidenced by an ISDA master agreement between the Trust and the Bank, or their respective successors and permitted assigns, together with the related schedule, master confirmation agreement (including the credit support annexes and special provisions annex (the "**Liquidity Agreement**") and transaction supplements thereunder), confirmations of any other transactions thereunder and custodial agreements, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, which, for greater certainty, (i) shall be a Related Asset Interest, Related Programme Agreement, Related Securitization Agreement and, with respect to the Liquidity Agreement, a Related Liquidity Agreement (ii) in respect of which the Bank shall be a Related Originator and a Related Specified Creditor and, with respect to the Liquidity Agreement, a Related Liquidity Provider, and the obligations of the Trust to the Bank under the Devonshire Financial Contract, including the security, lien and hypothec thereunder, shall be Related Obligations Secured and a Related Permitted Lien, (iii) but shall not be a Related Hedging Transaction." (underlining added)

470 Barclays reads the underlined language to say that the obligations of Devonshire to Barclays under the swap transactions resulting from the termination by Barclays shall be both Related Obligations Secured and a Related Permitted Lien. That is, the obligation is both an obligation and a lien.

471 To understand the argument, it is necessary to look to a number of definitions in section 1.1 of the Trust Indenture:

> "**Obligations Secured**" means all present and future debts, expenses, liabilities and obligations, direct or indirect, absolute or contingent, due, owing or accruing due or owing from time to time by the Trust to the Specified Creditors in their capacity as such. For greater certainty, amounts owing to any Specified Creditors by the Trust, at any time, shall include (i) the unpaid face amount of any Notes issued on a discount basis; (ii) the principal amount owing at such time, together with the accrued and unpaid interest on interest bearing Notes or Borrowings; (iii) accrued fees, whether or not then due and payable; and (iv) obligations to

deliver or return collateral or other credit support under Programme Agreements.

...

"**Permitted Liens**" means, in respect of any Series of Notes and the Related Collateral, such liens or other encumbrances expressly permitted in any of the Related Programme Agreements.

...

"**Related**" is used in reference to the Notes of a particular Series or in the case of Notes forming part of a Multiple Issue Series, such Notes or a Transaction funded by such Notes, as applicable, and means, when used in conjunction with:

...

"**Obligations Secured**" all Obligations Secured relating to the holders of such Notes and to Related Specified Creditors under the Related Programme Agreements, the Related Series Expenses and Related General Expenses or in the case of a Multiple Issue Series and a transaction financed or refinanced thereby, the obligations secured to the holders of the Notes of such Multiple Issue Series and to the Related Specified Creditors under the Related Programme Agreements the Related Issue Series and the Related General Expenses;

...

"**Permitted Liens**" Permitted Liens under a Related Programme Agreement;

472 Devonshire says that these sections use the words "obligation" and "lien" in a sense which is consistent with their ordinary meaning. "Obligation" connotes amounts owing, whereas "lien" connotes some form of proprietary interest that secures an obligation. The definitions do not contemplate that something can, at one and the same time, be an obligation and a lien. The definition of Related Permitted Liens leads back to the definition of Permitted Liens which is defined as "such liens or other encumbrances". There is no mention in either the definition of Permitted Liens or Related Permitted Liens to "obligations". The definition of Related Obligations

Secured leads back to the definition of Obligations Secured which is defined as "all present and future debts, expenses, liabilities and obligations". There is no mention in either the definition of Related Obligations Secured or Obligations Secured that such definitions could encompass liens.

473 Under the ISDA Master Agreement and related agreements, Barclays holds collateral posted by Devonshire initially, being the $600 million, and any other collateral posted by Devonshire as the result of a collateral call by Barclays under the Seller Credit Support Annex, of which there is none. None of the $183 million cash of Devonshire that Barclays seeks to access is covered by any security agreement and thus is not a "lien or other encumbrance expressly permitted in any of the Related Programme Agreements", being the definition of a Permitted Lien.

474 Devonshire points out that under the waterfall provisions in the Trust Indenture, there are payments to be made to Barclays that would be unnecessary if Barclays were to be entitled to be paid as it contends as second place in the waterfall.

475 The waterfall provides for the payment of money by the indenture trustee as follows;

(a) First, in payment or reimbursement in the following order or priority:

(i) To each of the Indenture Trustee and the Issuer Trustee of the Related Proportionate Share of all fees and expenses ...

(b) **Second, in or towards payment and satisfaction of any Related Permitted Liens;**

(c) **Third,** in and towards payment of the following Related Obligations Secured then owing in the following order of priority:

(i)**The fees and expenses due and payable to Related Liquidity Providers** in connection with the provision of services and facilities under the Related Liquidity Agreements; and

(ii) The fees and expenses due and payable to Related Servicers in respect of the Related Collateral;

(d) **Fourth**, in or **towards the payment of unpaid interest and/or accrued discount on the Series A Notes** and the Related Borrowings, all amounts owing to counterparties under the Related Hedging Transactions and the Related Proportionate Share (the transactions giving rise to the Related Collateral being

the only Transaction with respect to the Series A Notes) of all amounts required to be paid by the Trust under the Financial Services Agreement and in accordance with the priorities established thereunder, pro rata, and thereafter **amounts owing in respect of principal on such Series A Notes and the Related Borrowings, pro rata;**

(e) Fifth, by deposit to the Series A Reserve Account to the extent of the Series A Reserve Amount;

(f) **Sixth, in or towards the payment and satisfaction of all amounts due to the Bank under the Devonshire Financial Contract which have been subordinated pursuant to the Intercreditor Agreement;**

(g) Seventh, in or towards payment of all amounts required to be paid by the Trust to the Related Agents under the Related Agency Agreements, pro rata;

(h) Eighth, in or toward payment of the following Related Obligations Secured then owing in the following order of priority:

(i) The Related Proportionate Share of all amounts required to be paid by the Trust to the Administrative Agent under the Administration Agreement;

(ii) All other amounts properly incurred and owing by the Trust and which are solely attributable to the Related Collateral, the Related Obligations Secured or the Related Programme Agreements and not otherwise specified in this Section 3.1;

(iii) The Related Proportionate Share of all other amounts properly incurred and owing by the Trust which are not solely attributable to any Related Collateral, Related Obligations Secured or Related Programme Agreements and not otherwise specified in this Section 3.1 including, without limitation, all amounts owing to counterparties under Hedging Transactions; and

(iv) The Related Proportionate Share of all amounts required to be paid by the Trust to the Issuing and Paying Agent under this Indenture.

The balance in the Related Collateral Account following the application of monies in accordance with the foregoing shall be remitted to the Trust. [Emphasis added]

476 Devonshire contends that if it is the case that all obligations owing to Barclays are covered by Related Permitted Liens in second priority in the waterfall, there would be no need for the waterfall to provide for (i) Barclays' fees and expenses as liquidity provider in third place in the waterfall, or (ii) payment on notes acquired by Barclays for liquidity advances under a Traditional Liquidity Arrangement in fourth place in the waterfall or (iii) amounts owning to Barclays that were subordinated to the noteholders in accordance with the Intercreditor Agreement in sixth place in the

waterfall. I accept this. It would be inconsistent for these other priorities to be provided to Barclays if all obligations owing to Barclays were covered in the second place in the waterfall under Related Permitted Liens.

477 It is no answer for Barclays to say that it did not need the third priority for its fees and expenses as liquidity provider as it deducted them from payments it made to Devonshire for credit protection. The priority was presumably put in for a purpose, and the issue is as to the interpretation of the relevant provisions. It is no answer for Barclays to say that if it acquired Devonshire notes as a liquidity provider, it would be entitled to the interest and payments on the notes under the waterfall as a noteholder and that Devonshire's obligations would be independent of the ISDA Master Agreement. Obligations under the liquidity provisions in Annex VI are not independent of the ISDA Master Agreement; they are part of it, and are included in the definition of Devonshire Financial Contract relied on by Barclays as obligations of Devonshire to Barclays. It is no answer for Barclays to say that the amounts due to it that were subordinated under the Intercreditor Agreement, i.e. if Barclays is in default, relates to a settlement amount. That would be an obligation of Devonshire to pay under the ISDA Master Agreement, and if Barclays is right as to the reach of Related Permitted Liens which ranks second in priority in the waterfall, it would give Barclays priority over what it has subordinated in the Intercreditor Agreement. None of these priorities to Barclays in the third, fourth or sixth ranking in the waterfall would be required if Barclays is correct in its interpretation of the Devonshire Financial Contract provision.

478 Devonshire contends that the maxim *reddendo singular singulis* should be used in the interpretation of the definition of Devonshire Financial Contract in the Trust Indenture. The part relied on by Barclays at the end of the definition is:

> and the obligations of the Trust to the Bank under the Devonshire Financial Contract, including the security, lien and hypothec thereunder, shall be Related Obligations Secured and a Related Permitted Lien, (iii) but shall not be a Related Hedging Transaction.

479 Black's Law Dictionary, 8th edition, defines the maxim *reddendo singular singulis* as "Each must be put in each separate place. That is, the several terms or items apply distributively, or each to its proper object". In other legal dictionaries it is said to mean "by rendering each his own", or to "refer each to each". Of course, Latin maxims can be an aid to interpretation of contractual or statutory provisions, but they are to be applied with caution. In this case, I think the maxim is helpful.

480 I accept the interpretation of Devonshire. I interpret the provision to mean that obligations of Devonshire to Barclays under the ISDA Master Agreement and related agreements shall be Related Obligations Secured and any security or lien under those agreements shall be a Related Permitted Lien. I cannot accept that the intention of the agreement was by the few words at the end of the definition of Devonshire Financial Contract relied on by Barclays to make obligations owed to

Barclays to be a Related Permitted Lien to stand in second place in the waterfall. Had the parties intended what is contended by Barclays, they ought to have expressed it far more clearly. The tenor of the Trust Indenture as a whole is contrary to Barclays' interpretation, and contrary to the separate notions of an obligation being an obligation and a lien being a lien.

481 Both parties referred to evidence to assist an interpretation in the event the clause was held to be ambiguous, including evidence of negotiations and actions taken after the agreements were made. In my view, the provision can be interpreted without reference to such evidence and I have not considered it.

19. Conclusion

482 The parties have understandably asked me not to make any order directing payments of any kind, and I do not do so. Apart from anything else, there is still the issue of whether the issues that were bifurcated need to be dealt with. The parties may discuss this with me at a 9:30 a.m. appointment.

F.J.C. NEWBOULD J.

1 ISDA stands for International Swap Dealers Association, now the International Swaps and Derivatives Association. The form of the agreement was the 1992 form of the ISDA Master Agreement.

2 Why the word "synthetic" is used other than industry jargon is unclear. The concept is no different than one boy betting against another that the Toronto Maple Leafs will not end up worse than some agreed place in the standings, such as third from last, and no higher than some agreed place, such as fourth place, in the next NHL season. The reason why Barclays would have an interest in buying protections against a decline in value of assets it did not own was because Barclays was a "market maker", a swap dealer acting as an intermediary between sellers and buyers of credit protection and sought to profit by earning a spread between the cost of buying credit protection and selling credit protection. In this case, the evidence was that it was very difficult to find someone who would take the exact opposite view on a bespoke transaction with the exact portfolio of names and terms. A CDS is different from insurance in that the credit protection buyer is not required to own or have an economic interest in the underlying debt obligations against which it is buying protection.

3 Mark to market means that the swaps were valued daily based on Barclays model for doing so.

4 Although the underlying portfolio included asset and market backed securities, losses on them only became payable by Devonshire to Barclays if losses in the super senior tranche for the bond portfolio became payable.

5 Triple A rated corporation such as Volvo, Alcoa and Potash Corporation.

6 One of the trusts had been restructured in July, 2007.

7 This larger restructuring is referred to in these reasons as the large Crawford restructuring or the Montreal Accord restructuring.

8 These were not all small investors and included large institutions such as University of Alberta. They were referred to by all participants in the discussions as the "small noteholders".

9 Throughout this process internal and external legal advisors were heavily involved, and considered part of the deal team dealing with the issues. What legal advice was given is protected by privilege, and generally has not been waived.

10 If Barclays' calculations of loss were accepted, Barclays acknowledges this amount to be $1,061,916.48. If as the result of this decision the parties do not agree on the proper amount of the Unpaid Amounts, further written submissions may be made.

11 Barclays approached Ms. Rahl to retain her for this case, not knowing she had already been retained by Devonshire.

12 In his opening, Mr. Howard said that it is Barclays' contention that the parties were contractually required to value the trades at any point in time by using the Barclays model when determining if the market had moved to the point that collateral calls were triggered that would require Devonshire to post more collateral and that this contractual provision required the model to be used to value the trade on an early termination. This argument was not made in Barclays' written or oral submissions at the end of the case. The provision in question is contained in an annex to the ISDA Master Agreement called the Seller CSA, dealing with collateral calls, in which Exposure is defined as the amount that would be payable to Barclays as determined by Barclays in its sole discretion using its proprietary correlation model. My reading of the documents is that while Devonshire agreed to the use of Barclays' model for the purposes of determining whether collateral calls could be made, that provision did not purport to say that the model had to be used to value the swaps in the event of early termination. To have done so would have been inconsistent with the direction that Market Quotation was to be used if possible.

13 Barclays led evidence from Ms. Franke, a director in its product control group in London as to the accounting treatment of the Devonshire swaps in its books. Barclays acknowledges

that her evidence is not relevant to the calculation of the Settlement amount, and I do not take it into account. The accounting treatment cannot establish what the Barclays loss was.

TAB 15

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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if title passes in order to allow a range of duties to be discharged by the other, then a trust is created.

Difficulties have always stemmed from the loose employment of the word "trust". It was Blackstone who defined a bailment using the language of trust:[186] "the delivery of goods in trust upon a contract express or implied that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be answered." And this inspired later texts to adopt "trust" language. Nor have the authorities been free of a consequent legacy of confusion. But since the beginning of the century it has been clear that the word "trust" means in itself little, even when used in formal documents. Language must be construed in its context. As Riddell J. said in one context:

> The word "trust" has no technical meaning. "Goods held in trust" is a well-known expression in insurance matters, and means "goods held by the insured for which he is responsible to others" – and insurance in this form has always been considered to insure, first, the bailee insuring to the extent of his liens or advances, etc. (if any); and, second, the owner of the goods.[187]

Bailment is essentially "the custody and control" over a thing; "trust" is loosely used as when Blackstone says, "But there are other trusts which are cognizable in a court of law; as deposits and all manner of bailments."[188]

VI. TRUST AND DEBT

As we have seen in distinguishing agency and trusteeship, trust property is always identifiable, either as land, chattels or funds. Specific items must be set aside before it can be said that the trust is ready to take effect. It is the duty of the trustee to administer that specific property for the trust beneficiaries. Most trust property consists of funds, either at the bank or invested in bonds, stocks and shares. But, though it be thus invested, the bank deposit and the other investments are identifiable funds, and remain trust assets, even if they stand in the trustee's name without mention of trust. For this reason trust property is not affected in the event of the trustee's insolvency; the assets of the trust are beyond the reach of the trustee's personal creditors.[189] And if a trustee wrongfully mixes trust assets with his own

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[186] *Commentaries on the Laws of England*, vol. 2, chapter 30, s. 2.

[187] *Cole v. Merchants Fire Insurance Co.* (1921), 51 O.L.R. 340, 67 D.L.R. 300 (Ont. C.A.) at 348-49 [O.L.R.]. See also *Lesser v. Jones* (1920), 47 N.B.R. 318 (N.B. C.A.) at 322; *Martin v. Town N' Country Delicatessen Ltd.* (1963), 45 W.W.R. 413 (Man. C.A.) at 427.

[188] Quoted and criticized by Moss C.P.O. in *Elgin Loan & Savings Co. v. National Trust Co.*, *supra*, note 181, at 46-47.

[189] E.g., *Prytula v. Prytula* (1980), 30 O.R. (2d) 324, 116 D.L.R. (3d) 474 (Ont. H.C.). The issue of whether the relationship is one of trustee-beneficiary or debtor-creditor may also be significant where an amount is due to B from A but A claims a right to set off amounts owed by B to A. In *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115, [1994] 1 W.W.R. 750, (sub nom. *Principal Savings & Trust Co. (Liquidation) v. Associated Investors of Canada Ltd. (Receivership)*) 145 A.R. 177 (Alta. C.A.), the trust company,

funds, the trust property remains beyond the creditor's reach until it is no longer "identifiable".

This preference of trust beneficiaries over creditors makes it important to distinguish the trustee-beneficiary relationship from the creditor-debtor relationship. The distinction is clear enough when the trust arises from the intention, express or implied, of the settlor, but when does the law deem a person a constructive trustee of the funds or assets which he holds for another? The answer, as *Ontario Hydro-Electric Power Commission v. Brown*[190] and *Maralta Oil Co. v. Industrial Incomes Ltd.*[191] show, is when the duty of the holder of the funds or assets is to keep that property distinct from his own personal property.[192] For this reason the banker is a debtor *vis-à-vis* its customer; it mixes the customer's money with its own, and is under an

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being a trustee pursuant to a provision of the trust company legislation, and not a creditor, was not permitted to set off amounts owed to it by the beneficiary.

190 (1959), [1960] O.R. 91, 21 D.L.R. (2d) 551 (Ont. C.A.). For other cases involving the question of whether the relationship was that of trustee-beneficiary or creditor-debtor see, e.g., *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 CarswellBC 2476, 26 E.T.R. (3d) 197, 57 B.C.L.R. (4th) 212 (B.C. C.A.), reversing 2005 CarswellBC 596, 14 E.T.R. (3d) 214 (B.C. S.C.); *Giles v. Westminster Savings Credit Union*, 2006 CarswellBC 183, [2006] B.C.J. No. 159 (B.C. S.C.); *Re Kaczmarzyk*, 2006 CarswellOnt 8702 (Ont. S.C.J.); *Stoney Tribal Council v. PanCanadian Petroleum Ltd.* (1998), 218 A.R. 201 (Alta. Q.B.), varied (2000), [2001] 3 C.N.L.R. 347 (Alta. C.A.) at 217 [A.R.]; *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 87 A.R. 133, 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Salo v. Royal Bank* (1988), [1988] B.C.J. No. 999, 1988 CarswellBC 1396 (B.C. C.A.); *Outset Media Corp. v. Stewart House Publishing Inc.* (2003), 34 B.L.R. (3d) 241 (Ont. C.A.), additional reasons at (2003), 34 B.L.R. (3d) 244 (Ont. C.A.); and *Re Blue Range Resource Corp.* (1999), [1999] A.J. No. 929, 1999 CarswellAlta 742 (Alta. Q.B.).

191 (1964), 49 W.W.R. 175, 46 D.L.R. (2d) 511 (Alta. S.C. (App. Div.)), affirmed [1968] S.C.R. 822 (S.C.C.); *U.A., Local 488 v. J. Neilson & Sons (Mechanical) Ltd.*, [1982] 6 W.W.R. 763, 22 Alta. L.R. (2d) 303 (Alta. Q.B.). It is the obligation to keep the property separate which is important; that it is kept separate as a voluntary act is irrelevant: *Re H.B. Haina & Associates Inc.* (1978), 28 C.B.R. (N.S.) 113, 86 D.L.R. (3d) 262 (B.C. S.C.); *Re Points of Call Holidays Ltd.*, 1991 CarswellBC 471, 41 E.T.R. 56, 54 B.C.L.R. (2d) 384 (B.C. S.C.); and *Bullock v. Key Property Management Inc.*, 1992 CarswellOnt 541, 46 E.T.R. 275 (Ont. Gen. Div.). But *cf. Re Kayford Ltd.* (1974), [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Eng. Ch. Div.). In *Bank of Nova Scotia v. Société Générale (Canada)*, *supra*, note 190, the court noted that a right to commingle funds is a "feature which a court must consider in determining the true relationship created by the agreement between the parties." However, the court concluded that the right to commingle funds was just an "administrative aid" in the implementation of the agreement and did not permit the holder of the funds to put the funds to its own use. The court held the relationship to thus be that of trustee-beneficiary, rather than debtor-creditor, in spite of the right of the holder (trustee) of the funds to commingle the funds. See also *McEachren v. Royal Bank* (1990), 1990 CarswellAlta 234, [1991] 2 W.W.R. 702, 78 Alta. L.R. (2d) 158 (Alta. Q.B.).

192 *Steffanson v. Jaasma*, [1976] 4 W.W.R. 449 (B.C. S.C.): money was handed to the defendant for one purpose, but was wrongly used for another. There was no constructive trust, because (1) no fiduciary or quasi-fiduciary relationship was intended, i.e., no intention to create a continuing right of property recognized in equity, and (2) the defendant was under no duty to keep the money separate. *Sed quaere* whether after *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.), number (1), above, is replaced by the requirement of unjust enrichment. Indeed, Meiklem J. came to this conclusion in *Hink v. Saharchuk*, 1999 CarswellBC 2295, [1999] B.C.J. No. 2357 (B.C. S.C. [In Chambers]). For a bank as a constructive trustee, see *infra*, chapter 11.

obligation only to pay out an equivalent sum on demand.[193] The depositor, even if he be an express trustee depositing trust moneys, has only a personal action against the bank; that is the essence of a claim against a debtor. A trustee on the other hand must keep the assets subject to the trust separate, and be ready to hand over those assets when the time comes.[194]

The question which provides the most difficulty is whether the particular holder of title to assets who acknowledges another's interest is trustee or debtor. A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing specific is said about this. The duty to keep the assets distinct, if it exists, must be spelled out of the nature of the transaction, the environment in which the parties agree, the type of persons who are the holders of title and the transferor, and whether or not interest payments are to be made by the holder of the assets. If interest is to be paid, the relationship is nearly always that of creditor and debtor.[195]

A good example of the problem is provided by a series of real estate cases concerned with the right of the selling agent to his share of the commission which is held by the listing agent.[196] In *Re Century 21 Brenmore Real Estate Ltd.*, at first instance[197] Anderson J., in a judgment upheld on appeal, readily conceded that trust and contractual debt are not mutually exclusive.

The listing agent contracts with the would-be vendor to find a purchaser of the property, and that contract in its standard form entitles the agent to a commission

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[193] A term deposit is a debt owed by the bank, and is therefore subject to garnishment proceedings: *Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd.*, [1975] 6 W.W.R. 374, 62 D.L.R. (3d) 140 (B.C. S.C.); and *Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), 1996 CarswellSask 581, [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33 (Sask. C.A.). Certification of the drawer/debtor's cheque by the bank does not make the bank a trustee of that sum for the payee/creditor. The certification is equivalent to payment by the debtor, but the bank merely becomes the debtor of the creditor. See *Marrs' Marine Ltd. v. Rosetown Chrysler Plymouth Ltd.* (1975), 61 D.L.R. (3d) 497 (Sask. Q.B.).

If by consent the trustee retains the trust fund when the trust is terminated by the settlor, the trustee becomes instead a debtor *vis-à-vis* the settlor. However, if the former (express) trustee agrees to hold the fund in a separate account, does the law of trusts make him a resulting trustee for the former settlor? Obviously it depends upon the terms of the agreement the parties have made as to retention by the former express trustee. See, e.g., *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567, [1968] 3 All E.R. 651 (U.K. H.L.).

[194] The beneficiary has not only a right of action against the trustee personally, and the right to recover trust assets as against the general creditors of the trustee himself, but he can trace the assets into the hands of innocent third party donees, and recover from them.

[195] See further, *Restatement, Trusts 3d*, para. 5(k) and the commentary thereon. If interest is to be paid it is almost always a relationship of debtor and creditor, but, even if interest is to be paid, a trust relationship may be found to exist. See, e.g., *Bank of Nova Scotia v. Société Générale (Canada)*, *supra*, note 190; and *McEachren v. Royal Bank of Canada*, *supra*, note 191.

[196] *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.); *Manitoba (Securities Commission) v. Showcase Realty Ltd.* (1978), 28 C.B.R. (N.S.) 24, 84 D.L.R. (3d) 518 (Man. Q.B.), reversed in part (sub nom. *Manitoba (Securities Commission) v. Imperial Bank of Commerce*) [1979] 2 W.W.R. 526, (sub nom. *Re Showcase Realty Ltd.*) 96 D.L.R. (3d) 58 (Man. C.A.), varied on rehearing [1979] 6 W.W.R. 464, (sub nom. *Re Showcase Realty (No. 2)*) 106 D.L.R. (3d) 679 (Man. C.A.); *Re Allan Realty of Guelph Ltd.* (1979), 24 O.R. (2d) 21, 97 D.L.R. (3d) 95 (Ont. Bktcy.); *Re Century 21 Brenmore Real Estate Ltd.* (1979), 100 D.L.R. (3d) 150, 6 E.T.R. 1 (Ont. S.C.), affirmed (1980), 6 E.T.R. 205, 111 D.L.R. (3d) 280 (Ont. C.A.).

[197] *Re Century 21 Brenmore Real Estate Ltd.*, *supra*, note 196 (6 E.T.R. 1 at 8).

which he may take in the form of the purchaser's deposit pending completion, and the balance out of the sale price on completion. Under the rules of the various real estate boards that regulate, under statutory authority, the conduct of agents' transactions, the selling agent on completion is entitled to a share of the commission, and the listing agent must transfer that share to the selling agent.[198] But what happens, for instance, should the listing agent become insolvent or bankrupt before the transfer is made; is he a debtor of the selling agent or a trustee for that agent? The creditor will compete with the general creditors; the trust beneficiary recovers his beneficial interest ahead of anyone.[199]

Once again, if he is to be an express or implied trustee at all, evidence must exist showing that a trust was the intention of the parties. The listing agent may indeed be a trustee of the deposit in favour of the purchaser, or of the vendor if the purchaser fails to complete,[200] but the selling agent is claiming there is a second trust, namely, the listing agent in favour of the selling agent. It is this trust which the evidence must establish. The one trust does not imply the second, even if the purchaser's deposit is equal to the amount of the total commission. As to evidence, the listing agreement between the listing agent and the would-be vendor, and the ultimate agreement for purchase and sale between the vendor and purchaser are two documents of primary importance. If there is a trust, who is the "settlor"? – that is often the critical test.[201] The parties to the first or both of those transactions will have intended to make the listing agent a trustee for the selling agent, if trust there be, and they may have done so even if the listing agent is in law an agent, and the selling agent a sub-agent. Such an agency and trust is unlikely, but possible.

A second requirement is that the listing agent be obligated to transfer to the selling agent an earmarked, segregated fund, an amount earlier transferred by the would-be purchaser to the listing agent. The question will be whether, in fact, the listing agent was only obligated to pay a sum of money, from whichever of his accounts he took it. If he is merely obligated to pay money, he is certainly a debtor and only a debtor. Fundamentally, it is a matter of whether the parties to either contract have thought in terms of contractual obligations only, or instead or as well of property to be held on trust. The real estate transactions in the cases earlier cited were found, so far as the parties were concerned, to create contractual obligations only; no trust of property arose by way of their express or implied intention.[202] Nor was the selling agent's share held by the listing agent for the selling agent on a

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198 If the listing agent succeeds in finding a buyer himself, there will, of course, be no separate selling agent, i.e., an agent who has sold the property.

199 In *Carson v. M.E. Jones Ltd.* (1976), 12 O.R. (2d) 425, 69 D.L.R. (3d) 217 (Ont. H.C.) at 222 [D.L.R.], it appears to have been assumed by the court that the realtor is a trustee for the employee-salesman of the latter's share of the commission.

200 This is also a matter of construction of the documentation, or of statute. See, e.g., *Re Century 21 Brenmore Real Estate Ltd.*, *supra*, note 196 (6 E.T.R. 205 at 212-13).

201 See, e.g., *Re Allan Realty of Guelph Ltd.*, *supra*, note 196, at 106 [D.L.R.].

202 Anderson J., *ibid.*, at 106-08, concluded that there was no trust because *inter alia* the selling agents themselves were not sure whether the alleged trust property was the initial deposit made by the purchaser, the ultimate commission received by the listing agent from the vendor, or a combination of both, or the chose in action which the listing agent has against the vendor for the commission, should the sale be completed.

resulting trust. What would "result" back to the selling agent? It is the purchaser who hands over moneys; the selling agent hands over nothing in which he would retain an equitable interest.

Lacking an express, implied or resulting trust arising out of the parties' intention or their acts, a selling agent may only point to the listing agent as a trustee if the listing agent would be dubbed by the courts a constructive trustee, or statute makes him a trustee. In *Manitoba (Securities Commssion) v. Showcase Realty Ltd.*,[203] the regulations to the provincial *Real Estate Brokers Act*[204] were held to bring about a statutory trust in Manitoba. A contrary decision was made with regard to the *Real Estate and Business Brokers Act* in Ontario.[205] One wonders whether either provincial legislature has contemplated the priority which such a trust creates for the selling agent over the general creditors of an insolvent or bankrupt listing agent, and one suspects that the constructive trust, argued by the selling agents in *Re Allan Realty of Guelph Ltd.*, was given relatively short shrift by the learned judge because he had concluded that there were no preeminent equitable considerations in their favour over other unsecured trade creditors.[206]

The trust and debt are often to be found in the company of each other. If an investor transfers his moneys to an investment agency, for instance, the moneys may be received by way of a trust if that is what the parties intend. In this case, the recipient as trustee holds the resultant investment of the moneys on trust for the investor.[207] However, it is more likely in practice that the investor will merely hand over his moneys by way of a loan, and he will seek security from the borrower in addition to his investment. Security is usually provided by way of a mortgage or charge; the creditor will obtain the transfer of title over the security asset, or the imposition upon the asset of a right in his favour to call for the asset, ahead of other claimants, to meet the loan, if it is not repaid.

In a loan situation, security may also be provided by the creation of a trust. The debtor declares himself a trustee of the security asset for the creditor, or he transfers the security to another on trust for the creditor. It is, of course, essential that the trust shall have been validly created, and this cannot take place if the security (that is, the trust property) does not exist when the trust is purportedly created. Nevertheless, even if the security does so exist, and is effectively made the subject-matter of a trust, it is clear that in these circumstances the debt and the trust are distinct. First,

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[203] *Manitoba (Securities Commission) v. Showcase Realty Ltd.*, *supra*, note 196.

[204] R.S.M. 1970, c. R20, Reg. 43/72, ss. 8(1) - (3) and 9.

[205] See *Re Century 21 Brenmore Real Estate Ltd.*, *supra*, note 196, referring to the *Real Estate and Business Brokers Act*, R.S.O. 1970, c. 401, ss. 30, 31 [now S.O. 2002, c. 30, s. 27].

[206] *Re Allan Realty of Guelph Ltd.*, *supra*, note 196, at 108 and 110 [D.L.R.].

[207] In *Manitoba Securities Commission v. Winnipeg Mortgage Exchange Ltd.* (1980), 113 D.L.R. (3d) 257, 7 E.T.R. 239 (Man. C.A.), additional reasons at (1980), 7 E.T.R. 247 (Man. C.A.), and *Winnipeg Mortgage Exchange Ltd. v. Mortgage Holdings Ltd.* (1982), 43 C.B.R. (N.S.) 119, [1983] 1 W.W.R. 213 (Man. C.A.), the investor — and there were a number in the same position — did not look to the mortgage-broking company as a commission agent to collect capital and interest on the investor's behalf, and it would be known to the investor that the mortgage-broking company made its profit by taking directly a percentage of the interest rate paid by the underlying mortgagor. It was established, then, that the investor lent his moneys to the broker, and the next question was whether security by way of a valid trust had been provided.

there is a debt, and second, a trust is created to provide security for the debtor. A lends $100 to B, and B supplies his car as security for the loan repayment.

A different situation exists when A transfers $100 to B and the money is to become a loan to B on the occurrence of an agreed future event. It is part of the deal that B will hold the $100 separately and on trust for A until the agreed upon event occurs. When the event takes place, the trust terminates; A is thereafter a creditor without security. The House of Lords accepted in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*[208] that, if the event fails to occur, e.g., B becomes bankrupt before the purpose arises upon which the borrower is to expend the moneys, A can recover its $100 as a trust beneficiary. A is not a creditor among B's unsecured creditors. The difference from the situation in the previous paragraph is that in these circumstances the trust holding precedes the loan; it is not coterminous with the loan. Of course, the deal concerns a loan, and it could therefore be said in the alternative that the trust provides security for the lender until the loaned moneys are applied by the borrower to the purpose agreed upon by the lender and borrower.[209] However, the so-called "*Quistclose* trust" has consistently been accepted in Canada, as in England, as a valid trust.[210]

Nevertheless, questions arise as to whether an otherwise valid trust is invalid for another reason. Regardless of whether the trust is or is not coterminous with the loan, and though the loan is not of "goods", the trust could be said to violate the apparent purpose or principle of the *Personal Property Security Acts*. This legislation is to be found in each of Canada's common law jurisdictions, and its purpose is to protect the vulnerable party.[211] Would, or should, the courts invalidate the express

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[208] *Supra*, note 193.

[209] That the loan period extends from the date when the moneys are transferred by the lender, and the trust is superimposed upon the first period, i.e., prior to the agreed mode of use of the moneys by the borrower, appears to have been the analysis of the House of Lords in *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (U.K. H.L.), where this trust was discussed in detail. See further W.J. Swadling, ed., *The Quistclose Trust: Critical Essays* (Hart Publishing, 2004).

[210] E.g., *Re Westar Mining Ltd.*, 9 B.C.L.R. (4th) 61, [2003] 3 W.W.R. 244 (B.C. C.A.), was a bankruptcy situation, and it was held that all the required elements of a trust were there satisfied. The court described the *Quistclose* trust as "a purpose trust"; *Giles v. Westminster Savings Credit Union*, 2007 CarswellBC 2071, [2007] 12 W.W.R. 579, 35 B.L.R. (4th) 163 (B.C. C.A.), appearing to accept, at para. 31, the potential argument for a "*Quistclose*, or purpose trust" but accepting the trial judge's finding that "the evidence did not establish a mutual intention that the monies could be used for other purposes"; *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 CarswellBC 883, 67 E.T.R. (3d) 1, 17 B.C.L.R. (5th) 60 (B.C. C.A.); *Verizon Information Services Canada Inc. v. Bubble Boy's Powerwashing Ltd.*, 2005 CarswellBC 2511, 16 C.B.R. (5th) 298 (B.C. S.C.); *Ling v. Chinavision Canada Corp.*, 1992 CarswellOnt 704, 10 O.R. (3d) 79 (Ont. Gen. Div.); *Del Grande v. McCleery*, 1998 CarswellOnt 2962, 40 B.L.R. (2d) 202 (Ont. Gen. Div.), affirmed 2000 CarswellOnt 57, 127 O.A.C. 394 (Ont. C.A.); and *Re Li*, 2000 ABQB 719, [2000] A.J. No. 1606 (Alta. Q.B.). The *Quistclose* trust was approved in *Re Jameson House Properties Ltd.*, 2011 CarswellBC 1863, 80 C.B.R. (5th) 52 (B.C. S.C.), and discussed more extensively in *Carevest Capital Inc. v. 1262459 Alberta Ltd.*, 2011 CarswellAlta 391, 45 Alta. L.R. (5th) 79 (Alta. Master).

[211] The title is always the *Personal Property Security Act*, R.S.B.C. 1996, c. 359; R.S.A. 2000, c. P-7; S.S.1993, c. P-6.2; C.C.S.M., c. P35; R.S.O. 1990, c. P.10; S.N.B. 1993, c. P-7.1; S.N.S. 1995-96, c. 13; R.S.P.E.I. 1988, c. P-3.1; S.N.L. 1998, c. P-7.1; R.S.Y. 2002, c. 169; S.N.W.T. 1994, c. 8; and (Nunavut) R.S.N.W.T. 1994, c. 8. See s. 1 in each instance for interpretation of "commercial consignment" ("consignment" in the Yukon legislation), "goods", "security" and "security interest".

or implied trust for this reason? The matter remains an open issue. The *Quistclose* trust is not within the letter of the Act in any province, and other than the trust debenture no reference is made in these statutes to a trust. If violation of principle is not enough, that may be an end of the matter. However, it is arguable in jurisdictions other than Ontario that some such trusts require registration; in these jurisdictions registration of a *commercial* transfer ("consignment") may be required though the consignment does not constitute security. Yet on the other hand such instances are specified in the legislation; there is no generalized "catch all" section for situations in general that may be characterized as providing protection to the transferor prior to the transferee's application of the sum to the authorized purpose.

So much for trusts that arise from the express or implied intent of the parties. What about trusts that arise by operation of law? Whatever is the position in relation to intended trusts, do these resulting and constructive trusts survive the PPSA legislation? What is being assumed now is a holding by B of the $100, that $100 being subject to the pre-existing ownership or the circumstantial exclusive entitlement of A. While so holding the $100, B applies it to his own affairs as a loan from A. If the attack on intended trusts is on the broad basis that they violate the purpose of this legislation, that argument cannot be directed against the constructive trust or the resulting trust that the law directs, even though the particular situation concerns a commercial relationship. The very object of these case law trusts, like the PPSA itself, is to protect the vulnerable party. The Acts and the case law trusts have the same *raison d'être*. And *Rawluk v. Rawluk*[212] suggests that express statutory language alone can deprive a party of constructive trust (or case law) protection, whatever protection of A's interests the otherwise silent Act provides.[213]

For an instance where the transaction was held not to have been completed, so that the PPSA was not applicable, and a constructive trust could therefore be imposed to bring about the return of goods to the dealer (vendor) as against the would-be purchaser's trustee in bankruptcy, see *Re Ellingsen* (2000), (sub nom. *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*) 190 D.L.R. (4th) 47, 7 B.L.R. (3d) 12 (B.C. C.A.). In the *Cliffs Over Maple Bay* case, *supra*, note 210, the court took the view that a *Quistclose* trust is properly described as a resulting trust and not a constructive trust and expressed doubt as to whether such a trust would take precedence over a security interest previously registered under the *PPSA*. See also, *infra*, chapter 11, "Constructive Trusts". The relationship between the New Zealand *Personal Property Security Act 1999* and the *Quistclose* Trust is discussed in Jonathan Orpin, "The Personal Property Securities Act 1999 and Trusts – When is an Interest under a Trust a Security Interest?" (2008) 14 N.Z. Bus. L. Q. 109.

[212] [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161, 36 E.T.R. 1 (S.C.C.).

[213] The nature of the trust, who is the beneficiary, and in what doctrinal manner on failure of the event to occur the transferor recovers the trust property, are highly controversial subjects in Commonwealth literature. The argument is also made that the *Quistclose* trust is functionally a security device, if not doctrinally so; Michael Bridge, "The *Quistclose* Trust in a World of Secured Transactions" (1992) 12 Ox.J. Leg. Stud. 333. See further D.R. Klinck, "The *Quistclose* Trust in Canada" (1994) 23 Can. Bar Rev. 45, at 63 *et seq.* For a New Zealand position, see C.E.F. Rickett, "Trusts and Insolvency: The Nature and Place of the *Quistclose* Trust", Donovan W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993), at 325. See also William Swadling, ed., *The Quistclose Trust – Critical Essays* (Oxford: Hart, 2004).

TAB 16

OOSTERHOFF ON TRUSTS:

TEXT, COMMENTARY AND MATERIALS

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6. The court disapproved of *Jackson* in *Woodar Investment Development Ltd. v. Wimpey Construction.*[127] *Woodar* held that vendors under a contract for the sale of land which requires the purchaser to pay part of the purchase price to a third party cannot recover damages for non-payment of that amount unless they can show that they themselves have suffered a loss or were agents or trustees for the third party.

7. The problem of third party beneficiaries suing on a contract also arises under performance bonds entered into for the protection of suppliers of labour and material on construction projects. In these cases the rule that such third parties cannot succeed in the absence of a trust in their favour is maintained.[128]

However, in *Johns-Manville Canada Inc. v. John Carlo Ltd.*[129] a labour and material bond entitled a claimant to sue on it "as a beneficiary of the trust herein provided for." The court held that this showed a sufficient intention to create a trust in favour of unpaid claimants.

Similarly, in *Truro v. McCulloch*[130] the third party was successful under a construction performance bond because the owner had expressly contracted with the surety as a trustee. This judgment was reversed by the Nova Scotia Court of Appeal[131] but reinstated by the Supreme Court of Canada.[132]

8. In *Re Miller's Agreement*; *Uniacke v. A.-G.*[133] the court held that, in the absence of a trust, an annuitant has no right to sue a party to a contract who has undertaken to pay him periodic annuities.

9. X sold his share in a partnership to his two partners, who covenanted to pay X's daughter an annuity each year after X's death. X died and the partners refused to pay. The daughter sued. What is her cause of action? Will she succeed?

10. Z made a gift of $10,000 to the Society for the Prevention of Cruelty to Cats. Does the Society get the funds in trust or as an accretion to its existing funds and subject to the contractual obligations of its members?[134]

11. The third party beneficiary rule has been abolished in New Brunswick.[135]

5. TRUST AND DEBT

It is often difficult to determine whether a trust or a debt exists in any given situation, but once again they differ conceptually and the consequences of finding one or the other are significant. The test to determine whether a trust or debt was created is simply: what did the parties intend? *Air Canada v. M & L Travel,*[136] below, illustrates the difficulties in applying this test.

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127 [1980] 1 W.L.R. 277, [1980] 1 All E.R. 571 (H.L.).

128 See *R. v. Canadian Indemnity* (1963), 43 W.W.R. 641, 5 C.B.R. (N.S.) 293, 41 D.L.R. (2d) 617 (Man. Q.B.) and *Tobin Tractor (1957) Ltd. v. Western Surety Co.* (1963), 42 W.W.R. 532, 40 D.L.R. (2d) 231 (Sask. Q.B.).

129 (1980), 29 O.R. (2d) 592, 12 B.L.R. 80, 113 D.L.R. (3d) 686 (H.C.).

130 (1971), 4 N.S.R. (2d) 480, 22 D.L.R. (3d) 293, [1972] I.L.R. 1 457 (S.C.).

131 (1973), 4 N.S.R. (2d) 459, 30 D.L.R. (2d) 242, [1973] I.L.R. 1-522 (C.A.).

132 (sub nom. *Truro v. Toronto Gen. Ins. Co.*), [1974] S.C.R. 1129, 6 N.S.R. (2d) 163, 38 D.L.R. (3d) 1, [1973] I.L.R. 1-556.

133 [1947] Ch. 615, [1947] 2 All E.R. 78.

134 A full discussion of the ways in which unincorporated associations are treated in law as having received funds is undertaken in Chapter 15, part 4, *infra.*

135 See *Law Reform Act*, S.N.B. 1993, c. L-1.2, s. 4 (proclaimed and in force on June 1, 1994).

136 [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592, 50 E.T.R. 225, 159 N.R. 1.

There are five major distinctions between the role of a debtor and that of a trustee. First, the debtor is not a fiduciary whereas the trustee is a fiduciary in the highest sense.

Second, a creditor has no interest, legal or equitable, in the property of the debtor. There is simply a personal obligation upon the debtor to repay the debt when it is due. The trust beneficiary, on the other hand, has a beneficial proprietary interest in the trust property.

Third, a debt is created by agreement and the parties may compromise, alter, or extinguish the debt by further agreement. In contrast, there need be no agreement to create a trust. Further, there can be no bargaining between the trustee and the beneficiaries as the trustee must act strictly in the interest of the beneficiaries and not permit his or her own interest to conflict.

Fourth, the debtor always remains liable to the creditor until the debt is paid. The trustee, however, is not personally obligated to compensate the beneficiaries if the trust property is lost other than through the trustee's own fault.[137]

Fifth, the debtor has no duty to invest or deal with the subject property in any particular manner, while the trustee must administer the trust property in accordance with his or her trust duties, which ordinarily include a duty to invest.

The consequences that follow a finding of debt or a trust can be critical in cases of lost or stolen property and in cases of insolvency. If the subject property is lost or stolen, a debtor remains liable to the creditor until the debt is paid, even if the property is lost through no fault of the debtor's own. The trustee, however, does not bear the loss of the trust property unless he or she is at fault.

If the debtor is insolvent, the creditor has no special interest in the subject property and will rank as a general creditor. The trust beneficiary, however, has a proprietary right to the trust property which entitles him or her to rank above all creditors *vis-à-vis* the trust property. It is, therefore, an advantage to be a trust beneficiary rather than a creditor in cases of insolvency.

AIR CANADA v. M & L TRAVEL LTD.

[1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592, 50 E.T.R. 225, 159 N.R. 1
Supreme Court of Canada

M & L Travel Ltd. and Air Canada entered into an agreement providing that all moneys, less commissions, collected by the travel agency on the sale of the airline's travel tickets would be held in trust for the airline. The agency set up trust accounts but never used them. It deposited sale proceeds into its general operating account. When the agency failed to repay a demand loan due to its bank, the bank withdrew the amount outstanding from the agency's general operating account. The airline sued the agency and its two directors personally for breach of trust, claiming as damages the amount it was owed for ticket sales.

137 *Ontario Hydro-Electric Power Commission of Ontario v. Brown* (1959), 21 D.L.R. (2d) 551, [1960] O.R. 91 (C.A.).

The trial judge awarded judgment against the agency but not against the two directors. The Ontario Court of Appeal upheld the agency's liability and also imposed personal liability on the directors. An appeal to the Supreme Court of Canada was unsuccessful.

IACOBUCCI J.:

. . .

1. The nature of the relationship between M & L and Air Canada

In this court, the appellant initially argued that the relationship between M & L and the respondent airline was one of debtor and creditor, rather than one of trust. However, at the hearing, the appellant properly conceded that the relationship was one of trust. Given this concession, I will consider this question only briefly.

The appellant relied on the fact that the agreement between the airline and M & L did not require it to keep the proceeds of Air Canada tickets in a separate account or trust fund, or to remit the funds forthwith. Rather, M & L was permitted to keep such funds for a period of up to 15 days, and then for a further seven-day grace period. Furthermore, M & L was liable for the total sale price of all tickets sold, less its commission, regardless of whether it had actually collected the full amount from its customers. That is, M & L was free to sell Air Canada tickets on credit to its customers. Prior to his concession on this point, the appellant submitted that, in these circumstances, M & L was not a trustee of the sale proceeds of the Air Canada tickets.

In concluding that the relationship between M & L and the airline was one of trust, the Court of Appeal relied on *Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce*.[138] Although the Court of Appeal's decision in that case[139] was brief, the reasons of the trial judge went into greater depth:[140]

> In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object. The agreement . . . is certain in its intent to create a trust. The subject-matter is to be the funds collected for ticket sales. The object, or beneficiary, of the trust is also clear; it is to be the airline. The necessary elements for the creation of a trust relationship are all present. I find that such a relationship did exist between CP and the two travel agencies.

This analysis is clearly applicable to the facts of the present case. That the intent of the agreement is to create a trust is evident from the following wording:

> All moneys, less applicable commissions to which the agent is entitled hereunder, collected by the agent for air passenger transportation (and for which the Agent has issued tickets or exchange

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138 (1987), 42 D.L.R. (4th) 375, 71 C.B.R. (N.S.) 40, 61 O.R. (2d) 233, 27 E.T.R. 281 (H.C.), affirmed (1990), 71 O.R. (2d) 63, 37 E.T.R. 1, 4 C.B.R. (3d) 196 (C.A.).

139 *Ibid.*, (C.A.).

140 *Ibid.*, at 379 (H.C.).

IN THE MATTER OF The Cash Store Financial Services Inc., *et al.*

Applicants

Court of Appeal File No: M44123
M44124

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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